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Tuesday
May 8, 1984

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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 354

Overtime Services Relating to Imports and Exports; Correction

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule; correction.

SUMMARY: This document corrects a legal citation contained in final regulations establishing charges for reimbursable overtime work performed by Plant protection and Quarantine Officers at ports of entry, which were published March 29, 1984 (49 FR 12185).

FOR FURTHER INFORMATION CONTACT: John C. Frey, Classification, Employment and Executive Resources Program, Human Resources Division, Animal and Plant Health Inspection Service, USDA, Room 221 Federal Bldg., 6505 Belcrest Road, Hyattsville, MD 20782 (301–436–6466).

EFFECTIVE DATE: May 5, 1984.

SUPPLEMENTARY INFORMATION: In FR Doc. 84–8465, on page 12186, third column, "See Part 97.2" in Footnote 2 appearing below the table of § 354.1 is corrected to read "See Part 354.2".

Dated: April 27, 1984.

Bert W. Hawkins,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 84–12237 Filed 5–7–84; 8:45 am]
BILLING CODE 3410–34–M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1262

Implementation of the Equal Access to Justice Act in Agency Proceedings

AGENCY: National Aeronautics and Space Administration.

ACTION: Final rule.

SUMMARY: The National Aeronautics and Space Administration (NASA) is issuing its final rules governing the implementation of the Equal Access to Justice Act (Title 2 of Pub. L. 96–481, 94 Stat. 2325) in Agency proceedings. These rules establish procedures for the submission and consideration of applications for awards of attorney fees and other expenses in adversary adjudication which may be conducted by NASA under 5 U.S.C. 554.

EFFECTIVE DATE: May 8, 1984.

ADDRESS: Office of General Counsel, Code GS, National Aeronautics and Space Administration, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Sara Najjar, Telephone (202) 453–2432.

SUPPLEMENTARY INFORMATION: In response to NASA's interim rule published on January 27, 1982, in 47 FR 3758, NASA received two comments. The first commenter argued that cases before the NASA Board of Contract Appeals (BCA) should be covered by the rules; and the second commenter suggested that it may not be necessary for NASA to issue a rule.

BCA Awards

While the position of NASA in this matter has received some publicity and been cited before many public forums, we continue to believe that the Equal Access to Justice Act (EAJA) does not give the BCA jurisdiction to award attorney fees or authorize such fees for claims before the BCA. Accordingly, extending this rule to cover BCA cases would be in derogation of the EAJA. *Fidelity Construction Co.* v. *U.S.*, 700 F. 2d. 1379 (CAFC, 1983), *cert. denied*, —— U.S. —— (October 3, 1983) (52 U.S.L.W. 3263).

Rule Issuance

While NASA does not currently have any adversary adjudications within the EAJA coverage, we interpret the EAJA as requiring implementation inasmuch as we have no other regulations that would adequately govern such proceedings.

Other Comments

NASA has modified the interim rule by adding at the end of § 1262.102 the phrase "unless specifically consented to in such agreement," and by including the statutory definitions of "adversary adjudication" and "adjudicative officer;" and by deleting the "subject to the availability of funds" language from § 1262.310(b).

Miscellaneous

This regulation does not constitute a major rule for the purposes of Executive Order 12291 (46 FR 13193, February 19, 1981).

Finally, this regulation will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (Pub. L. 96–354, September 19, 1980; 5 U.S.C. 601 et seq.).

List of Subjects in 14 CFR Part 1262

Administrative practice & procedure, Adversary adjudication, Attorney fees, Claims, Equal access to justice act, Lawyers.

14 CFR is amended by adding a new Part 1262 which reads as follows:

PART 1262—EQUAL ACCESS TO JUSTICE ACT IN AGENCY PROCEEDINGS

Subpart 1262.1—General provisions

Sec.

Subpart 1262.2—Information Required from Applicants

Subpart 1262.3—Procedures for Considering Applications

Sec.
1262.302 Answer to application.
1262.303 Reply.
1262.304 Comments by other parties.
1262.305 Settlement.
1262.306 Further proceedings.
1262.307 Decision.
1262.308 Agency review.
1262.309 Judicial review.
1262.310 Pay of award.

Authority: Sec. 203(a)(1), Pub. L. 96-481, 94 Stat. 2325 (Oct. 21, 1980)—5 U.S.C. 504; Sec. 203(c)(1) of the National Aeronautics and Space Act of 1958, as amended—42 U.S.C. 2473(c)(1).

Subpart 1262.1—General Provisions

§ 1262.101 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504 (hereinafter "the Act") provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called "adversary adjudications"). An eligible party may receive an award when it prevails, unless the Agency's position in the proceeding was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards that the National Aeronautics and Space Administration (NASA) will use in determining awards.

§ 1262.102 When the Act applies.

(a) The Act applies to any adversary adjudication pending before NASA (hereinafter "Agency") at any time between October 1, 1981, and September 30, 1984. This includes proceedings begun before October 1, 1981, if final Agency action has not been taken before that date, and proceedings pending on September 30, 1984, regardless of when they were initiated or when final Agency action occurs. It does not include proceedings which are covered by a compomise or settlement agreement, unless specifically consented to in such agreement.

(b) As used in this Part: (1) "Adversary adjudication" means an adjudication under 5 U.S.C. 554 in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license; and (2) "adjudicative officer" means the deciding official, without regard to whether the official is designated an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication.

§ 1262.103 Proceedings covered.

(a) The Act applies to adversary adjudications conducted by the Agency. These are adjudications under 5 U.S.C. 554 in which the position of NASA or any other agency of the United States, or any component of an agency, is presented by an attorney or other representative who enters an appearance and participates in the proceeding. Any proceeding in which this Agency may prescribe a lawful present or future rate is not covered by the Act. Proceedings to grant or renew licenses are also excluded, but proceedings to modify, suspend, or revoke licenses are covered if they are otherwise adversary adjudications. At this time, the Agency has no proceeding within the Act's ambit. A 30-day notice in the **Federal Register** will be issued for any prospective proceeding to be governed by this part.

(b) NASA may also designate a proceeding as an adversary adjudication for purposes of the Act by so stating in an order initiating the proceeding or designating the matter for hearing. The Agency's failure to designate a proceeding as an adversary adjudication shall not preclude the filing of an application by a party who believes the proceeding is covered by the Act; whether the proceeding is covered will then be an issue for resolution in proceedings on the application.

(c) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

§ 1262.104 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses the applicant must be a party to the adversary adjudication for which an award is sought. The term "party" is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart and in subpart 1262.2.

(b) The types of eligible applicants are as follows:

(1) An individual with a net worth of not more than $1 million;

(2) The sole owner of an unincorporated business who has a net worth of not more than $5 million, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees; and

(5) Any other partnership, corporation, association, or public or private organization with a net worth of not more than $5 million and not more than 500 employees.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(d) An applicant who owns an unincorporated business will be considered as an "individual" rather than a "sole owner of an unincorporated business" if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the adjudicative officer determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the adjudicative officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

§ 1262.105 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the agency over which the applicant has prevailed was substantially justified. No presumption arises that the agency's position was not substantially justified simply because

the agency did not prevail. The burden of proof that an award should not be made to an eligible prevailing applicant is on the agency, which may avoid an award by showing that its position was reasonable in law and fact.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

§ 1262.106 Allowable fees and expenses.

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b) No award for the fee of an attorney or agent under these rules may exceed $75.00 per hour. No award to compensate an expert witness may exceed the highest rate at which this Agency pays expert witnesses, which is $20 an hour (3 hours maximum) or maximum daily rate of $100.00 (3 days maximum). However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the adjudicative officer shall consider the following:

(1) If the attorney, agent or witness is in private practice, his or her customary fee for similar service, or, if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

(3) The time actually spent in the representation of the application;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.

§ 1262.107 Rulemaking on maximum rates for attorney fees.

(a) If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), the Agency may adopt regulations providing that attorney fees may be awarded as a rate higher than $75 per hour in some or all of the types of proceedings covered by this part. This Agency will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act (5 U.S.C. 553).

(b) Any person may file with the Agency a petition for rulemaking to increase the maximum rate for attorney fees. The petition should be addressed to the General Counsel, NASA Headquarters, Washington, D.C. 20546; should identify the rate the petitioner believes the Agency should establish and the types of proceedings in which the rate should be used; and should also explain fully the reasons why the higher rate is warranted. The Agency will respond to the petition within 60 days after it is filed, by initiating a rulemaking proceeding or denying the petition, or taking other appropriate action.

§ 1262.108 Awards against other agencies.

If an applicant is entitled to an award because it prevails over another agency of the United States that participates in a proceeding before NASA, the award or an appropriate portion of the award shall be made against that agency if it had taken a position that is not substantially justified.

§ 1262.109 Delegations of authority.

(a) The NASA Administrator hereby delegates authority to the General Counsel or his/her designee to take final action on matters pertaining to the Act.

(b) The NASA Administrator may, in particularly specified matters under the Act, delegate authority to officials other than those listed in paragraph (a) of this section.

Subpart 1262.2—Information Required From Applicants

§ 1262.201 Contents of application.

(a) An application for an award of fees and expenses under the Act shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of an agency or agencies in the proceeding that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(b) The application shall also include a statement that the applicant's net worth does not exceed $1 million (if an individual) or $5 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if the applicant:

(1) Attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)), or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section; or

(2) States that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) The application shall state the amount of fees and expense for which an award is sought.

(d) The application may also include any other matters that the applicant wishes this Agency to consider in determining whether and in what amount an award should be made.

(e) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.

§ 1262.202 Net worth exhibit.

(a) Each applicant except a qualified tax-exempt organization or cooperative association must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in § 1262.104(f) of this part) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The adjudicative officer may require an applicant to file additional information to determine its eligibility for an award.

(b) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that portion of the exhibit directly to the adjudicative officer in a sealed envelope labeled "Confidential Financial Information," accompanied by a motion to withhold the information

from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b) (1)–(9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The materials in question shall be served on counsel representing the agency against which the applicant seeks an award, but need not be served on any other party to the proceeding. If adjudicative officer finds that the information should not be withheld from discloure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with the Agency's regulations under the Freedom of Information Act, at 14 CFR Part 1206.

§ 1262.203 Documentation of fees and expenses

The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. A separate itemized statement, accompanied by an oath or affirmation under penalty of perjury (28 U.S.C. 1746), shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount paid or payable by the applicant or by any other person or entity for the services provided. The adjudicative officer may, in addition, require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

§ 1262.204 When an application may be filed.

(a) An application may be filed whenever the applicant has prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding, but in no case later than 30 days after the Agency's final disposition of the proceeding.

(b) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

(c) For purposes of this rule, final disposition means the latter of: (1) The date on which the adjudicative officer's initial decision or other recommended disposition of the merits of the proceeding is issued; (2) the date on which an order is issued disposing of any petitions for reconsideration; (3) if no petition for reconsideration is filed, the last date on which such a petition could have been filed; or (4) the date of a final order or any other final resolution of the proceeding, such as a settlement or a voluntary dismissal, which is not subject to a petition for reconsideration.

Subpart 1262.3—Procedures for Considering Applications

§ 1262.301 Filing and service of documents.

Any application for an award or other pleading or document related to an application shall be filed and served on all parties to the proceeding in the same manner as other pleadings in the proceeding, except as provided in § 1262.202(b) for confidential financial information.

§ 1262.302 Answer to application.

(a) Within 30 calendar days after service of an application, counsel representing the agency against which an award is sought may file an answer to the application. Unless agency counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(b) If agency counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 calendar days, and further extensions may be granted by the adjudicative officer upon request by agency counsel and the applicant.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of agency counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, agency counsel shall include with the answer either supporting affidavits or a request for further proceedings under § 1262.306.

§ 1262.303 Reply.

Within 15 calendar days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under § 1262.306.

§ 1262.304 Comments by other parties.

Any party to a proceeding other than the applicant and agency counsel may file comments about an application within 30 calendar days after it is served, or about an answer within 15 calendar days after it is served. A commenting party may not participate further in proceedings on the application unless the adjudicative officer determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

§ 1262.305 Settlement.

The applicant and agency counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding, or after the underlying proceeding has been concluded. If a prevailing party and agency counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

§ 1262.306 Further proceedings.

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or agency counsel, or on his or her own initiative, the adjudicative officer may order further proceedings, such as an informal conference, oral argument, additional written submissions or an evidentiary hearing. Such further proceedings shall be held only when necessary to full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible.

(b) A request that the adjudicative officer order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

§ 1262.307 Decision.

The adjudicative officer shall issue an initial decision on the application within 90 calendar days after completion of proceedings on the application. The decision shall include written findings and conclusions on such of the following as are relevant to the decision: (a) The applicant's eligibility and status as a prevailing party; (b) whether the Agency's position was substantially

justified; (c) whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust; and (d) the amounts, if any, awarded for fees and expenses with an explanation of the reasons for any difference between the amount requested and the amount awarded. Further, if the applicant has sought an award against more than one agency, the decision shall allocate responsibility for payment of any award made among the agencies, and shall explain the reasons for the allocation made.

§ 1262.308 Agency review.

(a) Within 30 calendar days of the receipt of the adjudicative officer's initial decision on the fee application, either the applicant or agency counsel may seek reconsideration of the decision; or, the NASA Administrator, upon the recommendation of the General Counsel, may decide to review the decision based on the record. Whether to review a decision is solely a matter within the discretion of the NASA Administrator. A 15-day notice of such review will be given the applicant and agency counsel, and a determination made not later than 45 days from the date of notice. The Administrator may make a final determination concerning the application or remand the application to the adjudicative officer for further proceedings.

(b) If neither the applicant nor agency counsel seek reconsideration, and the NASA Administrator does not on his/her own initiative take a review, the adjudicative officer's initial decision on the fee application shall become a final decision of the Agency 45 days after it is issued.

§ 1262.309 Judicial review.

Judicial review of final Agency decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

§ 1262.310 Payment of award.

(a) An applicant seeking payment of an award shall submit to the paying agency a copy of the Agency's final decision granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. The submission to NASA should be addressed as follows:

Director, Financial Management Division, NASA Headquarters, Washington, DC 20546

(b) The Agency will pay the amount awarded to the applicant within 60 days, if feasible, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

James M. Beggs,

Administrator.

[FR Doc. 84-12159 Filed 5-7-84; 8:45 am]

BILLING CODE 7510-01-M

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 12

Statement of Interpretation Concerning Persons Subject to Reparation Proceedings; Principals of Registrants

AGENCY: Commodity Futures Trading Commission.

ACTION: Statement of Interpretation.

SUMMARY: On January 11, 1983, Congress amended section 14(a) of the Commodity Exchange Act (the "Act"), 7 U.S.C. 18(a) (1982), effective May 11, 1983. Among other things, the amendment narrowed the class of respondents against whom reparations actions may be brought to include only a "person who is registered under this Act." On February 14, 1984, the Commission promulgated new final rules relating to reparations (49 FR 6602). In § 12.2(y) of the new rules, the Commission has adopted the term "registrant" to identify the class of persons subject to claims filed in reparations under new section 14(a). The Commission is interpreting the words "person who is registered under this Act" as used in section 14(a) of the Act, and the term "registrant" as defined in § 12.2(y) of the Commission's Reparation Rules to include principals of registrants. Although this statement of interpretation of section 14(a) of the Act and of Commission Regulation § 12.2(y), becomes effective on May 8, 1984, the Commission nevertheless invites public comment concerning the matters addressed in the statement, as well as any other possible classes of commodity professionals or entities which, although not registered under the Act, were intended by Congress to be subject to reparations actions.

DATE: Statement of Interpretation is effective on May 8, 1984; comments must be received on or before July 9, 1984.

FOR FURTHER INFORMATION CONTACT: Edward S. Geldermann, Attorney, Office of General Counsel, Commodity Futures Trading Commission, 2033 K Street, NW., Washington, D.C. 20581. Telephone 202-254-9880.

SUPPLEMENTARY INFORMATION: On January 11, 1983, Congress amended section 14(a) of the Commodity Exchange Act (the "Act"), effective May 11, 1983, to narrow the class of respondents who are subject to claims filed in the Commission's reparations forum. Under the amendment, reparation claims may be asserted against respondents who are registered under the Act.[1] This statutory change eliminated a provision which authorized customers to seek reparations against persons who, although not registered, had engaged in activities requiring them to be registered.[2] On February 14, 1984, the Commission promulgated new reparation rules of procedure.[3] In § 12.2(y) of those rules, the Commission adopted the term "registrant" to describe the class of respondents subject to reparation proceedings after the 1982 amendments to section 14(a) became effective.[4] The Commission is interpreting the words "person who is registered under this Act" as used in amended section 14(a), and the term "registrant" as used in Commission Regulation § 12.2(y), 17 FR 12.2(y) (1984), to include any person who, although not registered with the Commission in a distinct capacity, is a principal of a registrant as defined in Commission Regulation § 3.1(a), 17 CFR 3.1(a).[5]

Although a principal of a registrant is not, by that status alone, required to apply for registration or become registered in his or her own name, the Commission has reserved for principals a special regulated status within its

[1] Section 14(a) of the Act, 7 U.S.C. 18(a) (1982), currently reads: Any person complaining of any violation of any provision of this Act or any rule, regulation, or order issued pursuant to this Act *by any person who is registered under this Act* may, at any time within two years after the cause of action accrues, apply to the Commission for an order awarding damages proximately caused by such violation. (Emphasis added.)

Futures Trading Act of 1982, Pub. L. No. 97-444, 96 Stat. 2294 (1983).

[2] Prior to the 1982 amendments, Section 14(a) provided, as relevant here: Any person complaining of any violation of any provision of this Act or any rule, regulation, or order thereunder *by any person who is registered or required to be registered* under * * * this Act may, at any time within two years after the cause of action accrues, apply to the Commission * * *.

[3] *See* 49 FR 6602 (1984).

[4] Section 12.2(y) of the Commission's Reparation Rules, effective April 23, 1984, defines the term "registrant" as: any person who (1) was registered under the Act at the time of the alleged violation; (2) is subject to reparation proceedings by virtue of Section 4m of the Commodity Exchange Act, regardless of whether such person was ever registered under the Act; or (3) is otherwise subject to reparation proceedings under the Act.

[5] The Commission wishes to emphasize that principals of registrants are required under Section 4k of the Act to be registered as associated persons to the extent that they engage in solicitation activities, or supervision thereof, on behalf of the registrant.

regulatory scheme for registration. Commission Regulation § 3.1(a), *inter alia*, defines a principal of a registrant as:

(1) Any person including, but not limited to, a sole proprietor, general partner, officer, director, branch office manager or designated supervisor, or person occupying a similar status or performing similar functions, having the power, directly or indirectly, through agreement or otherwise, to exercise a controlling influence over its activities of that person which are subject to regulation by the Commission; (2) any holder or beneficial owner of ten percent or more of the outstanding shares of any class of stock; or (3) any person who has contributed ten percent or more of the capital.[6]

Under Commission Regulations §§ 3.10, 3.13, 3.14 and 3.15, principals of a futures commission merchant, commodity trading advisor, commodity pool operator, and an introducing broker, who are natural persons are required to fill out and file with the Commission a Form 8–R. That form requires the principal to provide the Commission the same background information (*e.g.*, personal history, employment history, and business information) that actual registrants such as associated persons are required to disclose in the course of applying for registration.[7] Moreover, those principals are also required to be fingerprinted and submit a fingerprint card to the Commission for recordkeeping purposes. This fingerprinting requirement is the same as that imposed upon applicants for registration such as associated persons. Thus, principals of a registrant, while not required to apply for registration or otherwise become registered, are subject to some of the same registration-related duties as are imposed upon actual registrants.

In amending section 14(a) of the Act, Congress' main concern was to spare the Commission from having to continue to expend time, money, and effort fruitlessly in processing and adjudicating reparation claims against unregistered firms or individuals from whom there was little or no prospect of a recovery through reparations. Many such "outlaw" firms or individuals, Congress observed, could not be located by the Commission and were likely to default in a reparation proceeding, and cases decided against such firms or individuals were likely to result in uncollectible judgments.[8] Thus, Congress' overriding purpose in amending the Commission's reparations jurisdiction was to relieve the Commission from having to accept reparation claims filed against previously unknown firms or individuals "on whom the Commission has had no opportunity to impose sound business practices or conduct meaningful surveillance * * *."[9]

Our regarding principals of registrants as persons registered under the Act for the purposes of section 14(a) is consistent with Congress' rationale for repealing the Commission's reparation jurisdiction against firms and individuals required to be registered but who were not registered. Unlike "outlaw" firms and individuals whose existence was generally unknown to the Commission, the Commission is fully aware of the existence and identities of principals of registrants who, as discussed earlier, must file informational forms and fingerprint cards.

If a principal were to violate the Commodity Exchange Act while acting as an agent of the registrant, the registrant would be liable in reparations for such violative conduct by virtue of 2(a)(1) of the Act, 7 U.S.C. 4.[10] Moreover, it is not unusual in commodity-related businesses for a principal of a firm that is registered under the Act to be a major shareholder of such firm. Depending upon the context of a particular case, such a principal may be regarded as merely the "alter ago" of the corporate registrant, subjecting the principal to personal liability for conduct committed in the corporate name.[11] In the foregoing cases, it would be anomalous and inconsistent with Congress' purposes of making reparations a more efficient and expeditious remedy[12] to exclude principals of registrants from the jurisdictional reach of section 14(a) in cases where they are alleged personally to have engaged in conduct violative of the Act or of any regulation or order issued thereunder. *Cf. Damiani* v. *Futures Investment Co., et al.* (1980–1982 Transfer Binder), Comm. Fut. L. Rep. (CCH) ¶21,097 (September 3, 1980).[13]

Finally, we are also cognizant that in restricting the Commission's reparations jurisdiction to a class of persons who are registered under the Act, Congress did not prescribe any specific, rigid meaning to that class. For example, in section 4m of the Act, certain commodity trading advisors, although not subject to any registration requirements under the Act, have been made subject to claims filed against them in reparations. Moreover, the legislative history of the 1982 amendments to section 14(a) of the Act indicates that willful aiders and abetters of registrants would be subject to reparations even though they were not themselves registered. S. Rep. No. 384, at 48, 97th Cong., 2d Sess. (1982). Congress has thus shown that the concept of a "person who is registered under this Act" for the purposes of section 14(a) is a flexible one, and should be construed to effectuate the remedial purposes of section 14 of the Act.

For the reasons discussed above, we have determined to interpret the "person who is registered under this Act" language of amended section 14(a) of the Act, as well as the term "registrant" defined in Commission Regulation 12.2(y), to include any person who is a principal of a registrant within the meaning of Commission Regulation §§ 3.1(a), 17 CFR 3.1(a). Although this statement of interpretation becomes effective on May 8, 1984, the Commission nevertheless invites public

[6] 49 FR 8208, 8217–18 (1984). Commission Regulation § 3.1(a) applies as well to principals of persons "required to be registered" even if not registered. This statement of interpretation, however, applies only to principals of persons who are actually registered or, as temporary licensees, are considered registered even if only technically in an applicant status.

[7] *See* Commission Regulations §§ 3.12, 3.16, 48 FR 35248, 35292, 35295 (1983).

[8] H.R. Rep. No. 565, Pt. 1 at 105, 97th Cong., 2d Sess. (1982); *See* S. Rep. No. 384, at 48, 97th Cong., 2d Sess. (1982).

[9] H.R. Rep. No. 565, Pt. 1 at 105, 97th Cong., 2d Sess. (1982); S. Rep. No. 384, at 48, 97th Cong., 2d Sess. (1982).

[10] For example, a principal could act as an agent of a registrant by issuing a false report on behalf of the registrant intended to benefit the registrant's business and which violated section 4b(B) of the Act. In addition, the principal could act as an agent of the registrant by soliciting orders for futures contracts even though he failed to register as an associated person, and by making fraudulent misrepresentations in connection with such solicitations.

[11] This statement of interpretation, however, applies to all principals of registrants who personally violate the Act, see note 6, *supra*, not just principals who are the major shareholders of a corporate registrant or who, for any other reasons, may be regarded as the "alter ego" of such registrant.

[12] *See* H.R. Rep. No. 565, Pt. 2, at 32, 97th Cong., 2d Sess. (1983).

[13] In a case where a corporate registrant had insufficient assets to satisfy a reparation award, a complainant's ability to sue a principal in reparations for violations committed personally by the principal would become especially meaningful. Had the complainant filed the same claims in a private action in federal district court, he would most likely be entitled to include the principal as a co-defendant, and to obtain a judgment against both the principal and the registrant, for which both parties would be liable jointly and severally. An anomaly would be created by interpreting section 14(a) to exclude principals from reparation proceedings and to require a complainant who has obtained a reparation award against a registrant to file another, entirely separate action in court to obtain a judgment against the principal.

comment concerning any matter discussed herein as well as any other possible classes of commodity professionals or entities which, although not registered under the Act, were intended by Congress to be subject to reparations actions.

Issued in Washington, D.C. on May 2, 1984.

Jane K. Stuckey,

Secretary of the Commission.

[FR Doc. 84-12386 Filed 5-7-84; 8:45 am]

BILLING CODE 6351-01-M

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Parts 6 and 10

[T.D. 84-109]

Customs Regulations Amendments Relating to Civil Aircraft

AGENCY: U.S. Customs Service, Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to reflect the changes made by the civil aircraft provisions, Title VI, of the Trade Agreements Act of 1979. The amendments eliminate Customs duties on (1) civil aircraft, parts for civil aircraft certified for use in civil aircraft, flight simulators, and parts for flight simulators, and (2) equipment or any part thereof purchased, or repair parts or materials used, or expenses of repairs made in a foreign country upon a United States civil aircraft.

EFFECTIVE DATE: June 7, 1984.

FOR FURTHER INFORMATION CONTACT: The following listed individuals located at Headquarters, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229, may be contacted for further information on the identified subject matter:

Aircraft Repair Matters:
- Legal Aspects—Edward B. Gable, Carriers, Drawback and Bonds Division (202-566-5706);
- Operational Aspects—Joseph E. O'Gorman, Cargo Enforcement and Facilitation Division (202-566-8151);

Classification Matters:
- Legal Aspects—James Seal, Classification and Value Division (202-566-8181); Operational Aspects—Herbert Geller, Duty Assessment Division (202-566-5307);

Certification and Entry Matters:
- Legal Aspects—Jerry Laderberg, Entry Procedures and Penalties Division (202-566-5765); Operational Aspects—Joseph E. O'Gorman, Cargo Enforcement and Facilitation Division (202-566-8151).

SUPPLEMENTARY INFORMATION:

Background

Title VI, "Civil Aircraft Agreement" of the Trade Agreements Act of 1979 (the "Act"), implemented the Agreement on Trade in Civil Aircraft (the Agreement), which entered into force with respect to the United States on January 1, 1980.

The Agreement established a framework of rules governing trade in civil aircraft and parts for civil aircraft. The Agreement addresses both tariff and non-tariff measures; focusing on problems peculiar to the civil aircraft sector of the aerospace industry.

In the tariff area, the Agreement requires the elimination of customs duties and similar charges on, or in connection with, the importation of products, classified for Customs purposes under specific tariff items enumerated in the Annex to the Agreement, if the products are for use in a civil aircraft and incorporated therein, in the course of its manufacture, repair, maintenance, rebuilding, modification or conversion. The Agreement also requires the elimination of customs duties and similar charges on repairs to civil aircraft.

Title VI of the Act implemented those parts of the Agreement relating to duty-free treatment by the United States of (1) specified civil aircraft and aircraft parts certified for use in civil aircraft and admitted into the United States from a nation entitled to most favored nation (Column 1, Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202)), tariff treatment; and (2) the cost of repair parts, materials, or expenses of repairs made in a foreign country upon a United States civil aircraft under section 466, Tariff Act of 1930, as amended (19 U.S.C. 1466).

Aircraft and aircraft parts imported prior to the Act were subject to a column 1 rate of duty of 5 percent ad valorem. General Headnote 10(ij), TSUS, (setting forth interpretative rules pertaining to the tariff schedules), limited the application of former TSUS item 694.60 to aircraft parts solely or chiefly used as parts of aircraft if those parts were not specifically provided for elsewhere in the TSUS. Numerous aircraft parts were more specifically provided for elsewhere in the TSUS. Certain aircraft and aircraft parts could be admitted duty-free under the Generalized System of Preferences (General Headnote 3(c), TSUS), if they were produced in a beneficiary developing country.

Section 601(a)(1) of the Act created a new headnote 3 under subpart C, part 6, schedule 6, TSUS, defining the term "certified for use in civil aircraft". That term means that the imported article:

1. Has been imported for use in civil aircraft;

2. Will be so used in civil aircraft; and

3. Has been approved for such use by the Federal Aviation Administration (FAA), or that an application for approval has been submitted to and accepted by that agency, or that the article has been approved by the airworthiness authority in the country of exportation if such authority is recognized by the FAA as an acceptable substitute for FAA certification.

In order to obtain duty-free treatment under this headnote, the importer is required to file a written certification with Customs stating that the merchandise to be imported meets these three criteria.

The new headnote also defined the term "civil aircraft" to mean "all aircraft other than aircraft purchased for use by the Department of Defense or the United States Coast Guard."

On January 8, 1980, a notice of proposed rulemaking (NPRM) was published in the **Federal Register** (45 FR 1633) which proposed amendments to Parts 6 and 10, Customs Regulations (19 CFR Parts 6, 10), to implement Title VI of the Act. The NPRM was published even though it was recognized that several substantive problems existed with the Act. The need for certain technical amendments was, in fact, identified in the NPRM. The problems requiring technical amendments occurred in several sections of the Act.

Section 601(a)(3) of the Act amended section 466, Tariff Act of 1930, as amended (19 U.S.C. 1466), by adding a new subsection (f). This provision eliminated the duty on the cost of repair parts, materials, or expenses of repairs made in a foreign country upon a United States civil aircraft. However, in reviewing the unamended provisions of section 466 and the amendment, it became clear that foreign equipment purchases for use in United States-registered civil aircraft would remain dutiable. This was not in accord with the Agreement which required that duty be eliminated on equipment purchases. Because of this omission, legislative action was taken to amend section 466. On October 17, 1980, Pub. L. 96-467, titled "Tariff Treatment of Certain Articles", 94 Stat. 2225, expanded the scope of the Act to exempt equipment from the requirement of duty payment under section 466.

Another problem arose with section 601(a)(1) of the Act which created the new headnote 3 under subpart C, part 6, schedule 6, TSUS, defining the term "certified for use in civil aircraft". As indicated above, the importer is required to file a written statement with Customs to the effect that the article meets the definition if the acticle is to be imported duty-free. Section 601(a)(2) of the Act listed those tariff item numbers for which certification was required. Those tariff item numbers included flight simulators and aircraft. Accordingly, a certification for use in civil aircraft was required for those articles even though it is impossible to use an aircraft in an aircraft or a flight simulator in an aircraft. Pub. L. 96–467 corrected this problem by amending section 601(a)(2) to exclude "flight simulating machines classified in item 678.50 and civil aircraft classified in item 694.15, 694.20, or 694.40" from the certification requirement.

Appropriate changes have been made in this document to incorporate the statutory changes. However, while Pub. L. 96–467 modified both section 601(a)(2) and section 466 to correct the problems discussed above, the amendment was made effective on January 1, 1980, only as to section 466. January 1, 1980, was the date of enactment of the Act. Since no effective date was listed in Pub. L. 96–467 as to the section 601(a)(2) amendment, under generally accepted rules of statutory construction, it was effective as to that section on the date of enactment (October 17, 1980). Accordingly, there was no legal authority to dispense with the certification requirement of the headnote for articles entered, or withdrawn for consumption under items 678.50, 694.15, 694.20, and 694.40, TSUS, between January 1, 1980, and October 17, 1980. Appropriate legislation to correct the effective date provisions was subsequently passed on December 28, 1980, by Pub. L. 96–609, 94 Stat. 3558.

In response to the NPRM, several comments were received from a wide variety of sources representing the full spectrum of the aerospace industry. A discussion of the comments follows:

Discussion of Comments

One commenter, a major international air carrier, vigorously opposed the continuation of the reporting requirement for foreign aircraft repairs and part purchases contained in proposed and existing § 6.7, Customs Regulations (19 CFR 6.7). The commenter believed the reporting requirement was burdensome and unnecessary in view of the elimination of duties by the Act. In the alternative the commenter suggested that if the reporting requirement is continued that it be accomplished by means of a periodic report rather than the present and proposed entry by entry basis for reporting. The commenter further stated that if Customs continued the present entry procedures that it is unreasonable to require the entry at the first U.S. entry point for the aircraft.

The above comments were also made by an organization which represents many segments of the civil aircraft industry. A union representing a segment of the aerospace industry indicated that the entry requirement should be retained but did not object to a periodic entry requirement.

The requirement to report foreign aircraft repairs and part purchases at the time of arrival of each United States-registered aircraft is not specifically required by statute. The provisions of 19 U.S.C. 1466 are only applied to aircraft under 19 U.S.C. 1644 and 49 U.S.C. 1509 "upon such conditions" as Customs "deems necessary." The application of the reporting requirements to duty-free aircraft purchases and costs for each United States-registered aircraft is not deemed necessary by Customs. In fact, under Customs present regulations such purchases and costs need not be reported at the time of arrival of United States-registered aircraft under certain circumstances (see 19 CFR 6.7(e)). In light of the foregoing, paragraphs (d) and (e) of § 6.7 have been deleted by the final rule.

One commenter suggested that the requirement in proposed § 6.7(d) that the aircraft commander or an authorized person exhibit the journey log book to the Customs officer at the place of arrival, be modified to require presentation only when requested by Customs. Another commenter noted that proposed § 6.7(d) would require a notation of any foreign equipment purchases or repair work to be made in the "aircraft journey log book." The commenters stated that this reference appears to be an adoption of maritime terminology and suggested it be changed to reflect terminology used by air carriers. In light of the elimination of paragraphs (d) and (e) there is no need to respond to these comments.

Part 10 Comments

Civil aircraft is defined in the Act and proposed § 10.180(a) to mean "all aircraft other than aircraft purchased for use by the Department of Defense or the U.S. Coast Guard." (In this document the civil aircraft provisions have been redesignated as section 10.183 because (1) the provisions of Title V of the Act relating to importation of certain fresh, chilled, or frozen beef, were implemented by T.D. 82–8, published in the **Federal Register** on January 8, 1982 (47 FR 944), and appear in § 10.180, Customs Regulations (19 CFR 10.180), (2) procedures designed to stimulate watch assembly activity in the U.S. insular possessions were implemented by T.D. 84–16, published in the **Federal Register** on January 12, 1984 (49 FR 1480), and appear in § 10.181, Customs Regulations (19 CFR 10.181), and (3) procedure to provide for the duty-free treatment of imported articles specially designed or adapted for the use or benefit of physically or mentally handicapped persons were implemented by T.D. 84–17, published in the **Federal Register** on January 12, 1984 (49 FR 1482), and appear in § 10.182, Customs Regulations (19 CFR 10.182)). The commenter indicates that a strict interpretation of this definition implies that foreign military aircraft are civil aircraft under the Act. The commenter suggests that to insure consistent interpretation and enforcement that the definition be modified to include foreign military aircraft.

Customs agrees that the definition in the Act of civil aircraft includes foreign military aircraft. Customs does not agree that the definition should be modified to specifically identify foreign military aircraft as being within the scope of coverage. While the Act includes foreign military aircraft, the Agreement specifically excluded all military aircraft from its coverage. Thus the Act, by excluding from its coverage aircraft purchased for use by the Department of Defense and the Coast Guard, rather than all military aircraft (both foreign and domestic), has gone beyond the coverage of the Agreement to allow aircraft purchased for military use by foreign governments to be treated as civil aircraft for U.S. tariff purposes. Customs is considering whether a request should be made to Congress to amend the Act to conform it to the Agreement. In any event, the FAA certification criteria for duty-free treatment cannot be met by many military aircraft as they are not subject to FAA certification.

The commenter also addressed the problem of Foreign Military Sales (FMS) contracts and stated that to completely clarify the status of foreign military aircraft and articles imported for their manufacture, Customs must address the meaning of the phrase "use by the Department of Defense". The commenter stated that, in its opinion, sales of military aircraft to the Department of Defense under FMS contracts do not constitute "use" by that

agency as the aircraft are immediately delivered to a foreign government and are not used by the U.S. Armed Forces.

Customs does not agree. The question of "use" depends upon all the facts, circumstances, and the FMS contract provisions. Accordingly, each case must be considered separately. These questions are more appropriately handled by individual requests to Customs for ruling letters under Part 177, Customs Regulations (19 CFR Part 177).

The commenter also notes that while foreign military aircraft fall within the definition of civil aircraft, military aircraft manufactured in the United States do not fall under the jurisdiction of the FAA but are certified by the U.S. Government military agency concerned. The commenter believes the Customs Regulations should recognize the independent authority of the military to approve imported parts for use in aircraft.

Customs does not agree. Recognizing an independent authority of the military to approve aircraft for purposes of the Act would be beyond the scope of the Act. Only the FAA, or the airworthiness authority in the foreign country recognized by the FAA as an acceptable substitute for the FAA, can approve aircraft and aircraft parts under the Act. If Congress had intended U.S. military departments to approve parts for aircraft for purposes of the Act, it would have so stated.

Another commenter, in discussing the definition of civil aircraft, questioned whether an aircraft purchased initially for use by the Department of Defense and subsequently sold to an air carrier would prevent the aircraft from being classified as a civil aircraft under the provisions of the Act and implementing regulations. Customs does not believe that the fact an aircraft is purchased for use by DOD or the Coast Guard would, in and of itself, preclude subsequent classification as a civil aircraft for U.S. tariff purposes.

Several commenters were concerned with the provisions of proposed § 10.180(c) which indicated that the certification required by proposed § 10.180(d) may not be treated as a missing document for which a bond may be posted. Customs believes that the certification should not be treated as a missing document, for which a bond may be posted. However, after publication of the NPRM, Customs issued instructions to its field offices which authorized the acceptance of a blanket certification. Virtually all entries under the Act are now made by blanket certification. This action has removed most concerns in this area.

Another commenter was concerned with the provisions of proposed § 10.180(c) which required a copy of the written order, contract, or any additional documentation Customs may require to verify the duty-free entry claim, to be filed with the entry summary. The commenter indicated that the provision is so open ended that importers could be denied free entry for almost any reason

Customs does not agree. The proposed section also included a provision which authorized the posting of a bond for the missing document. The requirement was implemented by means of instructions to field offices. Importers have been complying with this provision for over three years without complaint or problem. Customs is unaware of any instance in which an importer has been denied duty-free treatment because of the requirement. Accordingly, we see no reason to modify the requirement.

Several commenters raised questions regarding the certification format set forth in proposed section 10.180(d). Most offered alternative language to the certification form and several suggested that a blanket certification be authorized. As noted, based upon the concerns expressed, the use of a blanket certification has been authorized and used for over three years without any significant problem. Accordingly, a blanket certification form is set forth in § 10.183(d)(2). The entry-by-entry certification form has been retained in § 10.183(d)(1) for use by the one time or occasional importer.

Proposed § 10.180(e) covered conditionally-free entry of articles under item 2(c) of the certification form. Item 2(c) related to submission of an application for approval for use in civil aircraft to the Administrator of the FAA and acceptance by the Administrator. One commenter indicated that in its opinion the conditionally-free entry provision would be unwieldy and seldom used. The commenter further indicated importations falling under the provisions of item 2(c) should be subjected to the same test as all other civil aircraft parts.

Customs agrees and has deleted paragraph (e) from the final rule.

One commenter questions whether Customs has authority under the Act to promulgate the regulations proposed in § 10.180(f) relating to diversions.

Upon further consideration Customs is of the opinion that it lacks statutory authority to require parties to report diversions or tender duties. Accordingly, proposed paragraph (f) is deleted from the final rule.

Another commenter objected to the inclusion of proposed § 10.180(h) relating to penalties. The commenter opined it was unnecessary since the importing community is aware that filing a false or fraudulent document is subject to the provisions of section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592).

Customs agrees and has not included the section in the final rule.

In light of the elimination of § 6.7 (d) and (e), proposed § 10.180(i) which cross-referenced those provisions has been deleted from the final rule.

Miscellaneous Comments

Several commenters raised questions which went beyond the scope of the proposed regulations. Many of these questions have been the subject of specific rulings issued by Customs and published in the Customs Bulletin as Customs Service Decisions (CSD's). For the benefit of the importing community, the issues raised and the holdings in each ruling are set forth below. A complete discussion of the facts, law, and analysis is contained in each ruling. These rulings, while of general interest to the importing community, are limited in their application to the unique factual situations presented by the party requesting the ruling. Accordingly, importers and other interested parties, should not assume that these CSD's are dispositive of other, but related issues or questions they might have regarding the application of the Agreement, Act, TSUS, or Customs Regulations to their particular situation. If there is any doubt, an importer or other interested party should request a ruling from Customs under the provisions of Part 177, Customs Regulations (19 CFR Part 177), relating to administrative rulings.

CSD 80–225

Issue: Can the required Customs certification statement be given on the invoice?

Holding: The Customs certification statement required in connection with the importation of aircraft parts under the Agreement may be given on the invoice submitted with the entry summary.

Issue: Does the term "certified for use in civil aircraft" as used in the Agreement require that the aircraft part be imported for use in civil aircraft in the United States?

Holding: The certification for use in civil aircraft does not require that such part be used in civil aircraft in the United States.

CSD 80–242

Issue: Do aircraft subassemblies and aircraft parts, which have not been

tested by an airworthiness authority, imported from Canada for assembly in the United States as a "knock-down" aircraft, which will be assembled in Japan, meet the certification requirements of the Agreement, if the aircraft model involved has been approved by the FAA?

Holding: The fact that the aircraft subassemblies and aircraft parts were not examined by an airworthiness authority would not preclude them from being certified under the Agreement, since the aircraft model involved has been approved by FAA.

CSD 80-249

Issue: Are aircraft tires imported for retreading and subsequent use on a civil aircraft entitled to duty-free entry under the Agreement?

Holding: Aircraft tires imported for retreading and subsequent use on a civil aircraft are entitled to duty-free entry.

CSD 81-28

Issue: Does the fact that drawback was previously paid on a civil aircraft preclude it from being entered duty-free under the Agreement?

Holding: The fact that drawback was previously paid would not preclude a civil aircraft from being entered duty-free.

CSD 83-44

Issue: Are certain subassemblies used in the passenger service/entertainment system on an aircraft properly classifiable under the provision for parts of aircraft, certified for use in civil aircraft, in item 694.62, TSUS, or under the provisions for electrical articles and parts of articles, not specially provided for, in item 688.45, TSUS?

Holding: The aircraft passenger service/entertainment system is properly classifiable under the provision for other parts of aircraft, in item 694.61, TSUS, dutiable at the rate of 3.8 percent ad valorem, or in item 694.62, TSUS, entitled to entry free of duty, if certified for use in civil aircraft.

Paperwork Reduction Act

This document is subject to the Paperwork Reduction Act of 1980, Pub. L. 96-511. Applicable sections of the document have been cleared by the Office of Management and Budget.

Executive Order 12291

These amendments do not meet the criteria for a major rule as defined in section 1(b) of E.O. 12291. Accordingly, a regulatory impact analysis is not required.

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act (RFA) relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to this document because the NPRM on this matter was published before the effective date of the RFA.

Drafting Information

The principal author of this document was John E. Elkins, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

List of Subjects

19 CFR Part 6

Air carriers, Air transportation, Aircraft, Customs duties and inspection, Imports.

19 CFR Part 10

Aircraft, Customs duties and inspection, Imports.

Amendments to the Regulations

Parts 6 and 10, Customs Regulations (19 CFR Parts 6, 10), are amended as set forth below.

Alfred R. De Angelus,
Acting Commissioner of Customs.

Approved: April 6, 1984.

John M. Walker, Jr.,
Assistant Secretary of the Treasury.

PART 6—AIR COMMERCE REGULATIONS

§ 6.7 [Amended]

1. Section 6.7 is amended by removing paragraphs (d) and (e) and reserving them.

(R.S. 251, as amended, secs. 466, 624, 46 Stat. 718, as amended, 759 (19 U.S.C. 66, 1466, 1624))

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. Section 10.41(c) is amended by revising it to read as follows:

§ 10.41 Instruments; exceptions.

* * * * *

(c) Foreign-owned aircraft arriving in the United States shall be subject to the treatment provided for in Part 6 of this chapter, unless entered under the provisions of §§ 10.31, 10.183, or paragraph (d) of this section.

* * * * *

2. Part 10 is amended by adding a new center heading and section 10.183 to read as follows:

Civil Aircraft

§ 10.183 Civil aircraft, flight simulators, parts for civil aircraft, and parts for flight simulators.

(a) *Definition.* "Civil aircraft", when used in this section, means all aircraft other than aircraft purchased for use by the Department of Defense or the United States Coast Guard.

(b) *Admission free of duty.* Civil aircraft parts for civil aircraft certified for use in accordance with the provisions of headnote 3, subpart C, part 6, schedule 6, Tariff Schedules of the United States (19 U.S.C. 1202), flight simulators, and parts for flight simulators, may be admitted free of duty upon compliance with the provisions of this section.

(c) *Documentation*—(1) *Generally.* Each entry summary for civil aircraft, flight simulators, civil aircraft parts, or flight simulator parts shall be filed with a copy of the written order, contract, or any additional documentation Customs shall require, to verify the claim for admission free of duty unless the district director is satisfied that the documents will be available for inspection for five years from the time of entry, as provided by Part 162 of this chapter. "Time of entry" is defined in section 141.68 of this chapter. Proof of end use of the civil aircraft, flight simulators, civil aircraft parts, or flight simulator parts need not be furnished. If the district director determines that documentation necessary to verify the claim for entry free of duty is not available at the time of filing the entry summary, the importer may enter the civil aircraft, flight simulator, civil aircraft part, or flight simulator part and post a bond for the missing document in accordance with §§ 141.66 and 141.91 of this chapter. The fact that a civil aircraft, flight simulator, civil aircraft part, or flight simulator part has previously been exported with benefit of drawback does not preclude free entry under this section and subpart C, part 6, schedule 6, Tariff Schedules of the United States.

(2) *Civil aircraft parts.* At the time of filing the entry summary, the importer of civil aircraft parts shall submit a certificate in substantially the form described in paragraph (d)(1) of this section. As an alternative, an importer who expects to file more than one entry for civil aircraft parts during any 12 month period may submit a blanket certification in substantially the form described in paragraph (d)(2) of this section with the district director at each district where civil aircraft parts are to be entered under the provisions of headnote 3, subpart C, part 6, schedule

6, Tariff Schedules of the United States. Upon approval by the district director, the blanket certification shall be valid for a period of one year from the date of approval. The blanket certification may be renewed for additional one year periods upon written request to each concerned district director. The certification may not be treated as a missing document for which a bond may be posted. Failure to provide the certification at the time of filing the entry summary or to have an approved blanket certification on file with the district director in the district where the entry summary is filed shall result in a dutiable entry.

(d) *Certification*—(1) *Entry-by-entry certification.* If the certification is to be filed with each entry summary, it shall be substantially in the following form and may be stamped, typed, or printed on the entry summary or submitted as a separate document:

ENTRY-BY-ENTRY CERTIFICATION FOR CIVIL AIRCRAFT PARTS

I certify that:

(1) The aircraft part(s) specifically identified in the entry summary has (have) been imported for use in civil aircraft and, to the best of my knowledge and belief, will be so used.

(2) (Check the appropriate box(es))

[ ] (a) The article(s) specifically identified in the entry summary has (have) been approved for use in civil aircraft by the Administrator of the Federal Aviation Administration ("FAA").

Approved part number(s) may be shown here or reference the appropriate attached invoice(s) ————.

[ ] (b) The article(s) specifically identified in the entry summary has (have) been approved for use in civil aircraft by ————, the airworthiness authority in the country of exportation. This approval is recognized by the FAA as an acceptable substitute for FAA approval.

Approved part number(s) may be shown here or reference the appropriate attached invoice(s) ————.

[ ] (c) An application for approval for use in civil aircraft for the article(s) specifically identified in the entry summary has been submitted to, and accepted by, the Administrator of the FAA.

————

Importer's Signature and Date

(2) *Blanket certification.* The certification may be in the form of a blanket certification which shall be valid for a period of one year from the date of approval by the district director in the district where the civil aircraft parts will be entered. The blanket certification may be renewed for additional one-year periods upon written request to each concerned district director. If a blanket certification is used it shall be substantially in the following form.

BLANKET CERTIFICATION FOR CIVIL AIRCRAFT PARTS

I Importer's name, address, IRS number————————, certify that the use by me or my authorized agent on an entry summary, or other entry documentation of a TSUS item number for civil aircraft parts, the item number description of which requires certification for use in civil aircraft, means that the articles identified on the entry summary or entry documentation are imported for use in civil aircraft within the meaning of subpart C, part 6, schedule 6, TSUS, and section 10.183, Customs Regulations (19 U.S.C. 10.183), that the articles will be so used and that the articles have been approved for such use by the Administrator of the Federal Aviation Administration (FAA) or by the airworthiness authority in the country of exportation, if such approval is recognized by the FAA as an acceptable substitute for FAA certification, or that an application for approval for such use has been submitted to, and accepted by, the Administrator of the FAA.

I agree (1) that documentation will be maintained to support the above certification, and (2) to inform the district director of any change which would affect the validity of this certification.

I understand that this certification will be valid for a period of one year from the date of approval by the district director and will cover entries made only in the district where filed.

Signature ————————————
Title ————————————
District Director ————————————
Approval date ————————————

(e) *Verification.* The district director shall monitor and periodically audit selected entries made under this section.

(R.S. 251, as amended, secs. 466,-624, 601, 46 Stat. 718, as amended, 759, 93 Stat. 267 (19 U.S.C. 66, 1202, 1466, 1624))

[FR Doc. 84-12336 Filed 5-7-84; 8:45 am]
BILLING CODE 4820-02-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Housing—Federal Housing Commissioner

24 CFR Parts 200, 203, 234 and 235

[Docket No. R-84-1084; FR-1573]

Insurance of Growing Equity Mortgages

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Final rule.

SUMMARY: This final rule provides for the insurance of Growing Equity Mortgages (GEMs) covering certain one-to four-family dwellings under section 203 of the National Housing Act and one-family condominium units under section 234(c) of the Act. The GEM described in this rule is a type of graduated payment mortgage in which, during the first year or such other initial period approved by HUD, the monthly payments for principal and interest cover full debt service based on a 30-year level payment schedule. After the initial period the monthly payments increase either annually, biennially, or at such other interval as may be approved by HUD, over the life of the mortgage or for a shorter period approved by HUD, with the amount of the increase applied to reduce the outstanding principal obligation of the loan. The rate of increase in the mortgage payment is a fixed percentage, not exceeding 5 percent of the preceding period's payment.

Demand for alternatives to the level payment, fixed-rate mortgage has risen in recent years. This rule provides one alternative which will increase homeownership affordability for consumers and also encourage continued investment in housing.

The rule also makes a number of technical amendments to clarify the scope and applicability of the Graduated Payment Mortgage Program under section 245(a) of the National Housing Act and the Modified Graduated Payment Mortgage Program under section 245(b) of the Act.

EFFECTIVE DATE: June 13, 1984.

FOR FURTHER INFORMATION CONTACT: John J. Coonts, Director, Single Family Development Division, Room 9270, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, D.C. 20410, (202) 755-6720. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION:

I. Growing Equity Mortgage Insurance Program

Since the introduction by HUD of the Graduated Payment Mortagage (GPM) in 1976 and the Federal Home Loan Bank Board's introduction of the variable rate mortgage in 1979, the shift by lenders and investors away from the level payment, fixed-rate mortgage has increased. While these alternative mortgages have facilitated the financing of homes for many purchasers, the instruments have characteristics which discourage complete acceptance by both consumers and lenders. The GPM, for example, provides the consumer the advantages of a fixed-rate mortgage for 30 years with a predetermined payment schedule. Yet these same features, the fixed-rate and long term, discourage lenders and investors from committing

their funds to this type of mortgage during times when frequent interest rate changes could present more attractive investments. The variable rate mortgage, on the other hand, provides the lender and the investor, with a return which can vary over the full term of the mortgage in accordance with various cost of money indices, assuring competitive rates of return to the lender. The variable rate mortgage, however, presents the consumer with unanticipated changes in mortgage payment after the initial adjustment period. Furthermore, should the particular index change result in an interest rate adjustment greater than the payment adjustment, the mortgage may negatively amortize.

In order to promote financing which would increase homeownership affordability for consumers and also encourage continued investment in housing, this rule provides insurance for a mortgage instrument—the Growing Equity Mortgage (GEM)—which combines features that are favorable to borrowers, as well as attractive to lenders. To be insurable, the GEM must provide for initial monthly payments each equal to the amount of the monthly mortgage payment that would be required to fully amortize the mortgage under a 30-year level payment amortization schedule. The GEM may provide for either annual or biennial increases in the monthly payments after the initial period, with the additional payment increments applied to reduce the outstanding principal balance of the loan. The mortgage could provide for increases over the term of the mortgage or for a limited number of years.

This faster repayment of principal will considerably shorten the effective life of the mortgage, making the GEM more attractive to lenders and investors than other fixed-rate investments in an uncertain financial climate. Because the amount of annual or biennial increases is predetermined and can be factored into the underwriting analysis, the risk of default for lenders and investors should be less than that on other types of mortgages subject to unpredictable increases. These features—shorter term and lower default probability—should increase the yield and the safety of the investment, enabling lenders to offer the GEM at rates below those on level payment fixed-rate mortgages. Potential homebuyers should also benefit from the lower overall interest costs and accelerated equity build-up from the GEM's faster repayment of principal.

II. Amendments to the Graduated Payment Mortgage and Modified Graduated Payment Mortgage Programs

This final rule makes several amendments to the GPM and Modified Graduated Payment Mortgage (MGPM) programs that are primarily clarifications. First, §§ 203.45(c)(1), 203.46(d)(1), 234.75(c)(1) and 234.76(c)(1) are revised to make it clear that the high-cost limits for Alaska, Guam and Hawaii apply to these programs. Second, §§ 203.45(g) and 234.76(i) are revised to clarify that the special provisions concerning nonoccupant mortgagors (§§ 203.18(c), 234.27(d)), mortgagors in outlying areas (§ 203.18(d)), and disaster victims (§ 203.18(e)) do not apply to these programs. Third, §§ 234.75(g) and 234.76(i) are revised to clarify that nonoccupant mortgagors of one family condominium units are not eligible for these programs. Fourth, these last two sections are also revised to conform to the comparable § 203 restriction against using GPMs and MGPMs in older declining neighborhoods.

In addition, this rule amends § 203.43(c) to eliminate reference to § 203.45. This revision makes mortgagors acquiring membership in a cooperative housing development eligible for GPM mortgages. Such mortgagors are eligible for insurance under current MGPM regulations and under the proposed GEM regulations.

III. Public Comments

The Department received five comments on the proposed rule, published on August 3, 1983 (48 FR 35140).

The proposed rule had provided for a one-year initial payment period during which the monthly payment for principal and interest would equal the monthly payment that would be required if the mortgage had a 30-year level payment amortization schedule. The proposed rule also provided for annual increases after the first year. One commenter suggested that the rule should permit the initial payment increase to be delayed up to three years, to accommodate first time homebuyers who frequently have additional costs (e.g., furniture and appliances). This commenter also recommended that the rule should be made more flexible to allow the increases to the monthly payment to occur once every two years, instead of limiting increases to once each year.

The Department agrees that these recommendations are beneficial and has revised §§ 203.47(c) and 234.77(c) to provide that (1) the initial period, during which monthly payments are based on a 30-year level payment amortization schedule, may, with the approval of HUD, be longer than one year and (2) subsequent increases may be made annually, biennially or at such other interval as the Commissioner may approve. It should be noted, however, that to be eligible for inclusion in the Governmental National Mortgage Association's securitization program, loans would have to provide for annual increases after the first year.

Three commenters recommended that GEMs be available with negotiated interest rate mortgages. When the proposed rule was published, as noted in its preamble, section 3(a)(2)(C) of Pub. L. 90–301 prohibited the use of negotiated interest rates with mortgages that are subject to section 245 of the National Housing Act. Section 404 of the Housing and Rural-Recovery Act of 1983, Pub. L. 98–181, approved November 30, 1983, repealed sections 3 and 4 of Pub. L. 90–301. Section 404 eliminated the Department's interest rate setting authority for most mortgage insurance programs and removed the prohibition against the use of negotiated interest rates with mortgages that are subject to section 245 of the National Housing Act. The Department has eliminated from this final rule references in §§ 203.45(g), 203.46(i) and 203.47(g) that prohibited the use of GPMs, MGPMs, and GEMs in conjunction with negotiated interest rate mortgages and has by separate rulemaking published elsewhere in this issue conformed the interest rate requirements of all of its affected mortgage insurance regulations to the requirements of Section 404.

One commenter recommended that GEMs be eligible for the Direct Endorsement Program. A final rule implementing that program was published in the **Federal Register** on March 27, 1983 (48 FR 11928) and became effective May 3, 1983. Under the Direct Endorsement Program an eligible mortgagee may underwrite and close a mortgage loan and submit the mortgage loan to HUD for insurance endorsement, without obtaining a prior HUD commitment. A GEM may be processed under the Direct Endorsement Program regulations since 24 CFR 200.163 provides that mortgage insurance loans defined under section 245 (and other sections) of the National Housing Act are eligible for processing. This final rule adds a new paragraph (c)(6) to § 200.163 to make it clear that GEMs are eligible for the Direct Endorsement Program.

One commenter wanted to know if GEMs would be subject to the one-time Mortgage Insurance Premium (MIP) and,

if so, whether the MIP factor would be based on a 30-year term or on the actual term of the GEM. On June 23, 1983, the Department published a final rule in the Federal Register (48 FR 28794), effective September 1, 1983. The rule established a new system for collecting MIP, applicable to certain Mutual Mortgage Insurance Fund programs. Under the new system, the borrower pays a single premium at the mortgage loan closing rather than making monthly payments during the life of the mortgage insurance contract. A GEM, that is also an obligation of the Department's Mutual Mortgage Insurance Fund (i.e. a GEM insured under sections 203(b), 203(h), 203(i) and 203(n) of the National Housing Act) will be subject to this one-time premium requirement. (See 24 CFR 203.259a, as added by 48 FR 28805, June 23, 1983.) The MIP factor would be based on the actual mortgage term of the GEM.

One commenter recommended that GEMs be available in outlying areas, to disaster victims, and to investors buying condominium units. The commenter apparently misread the proposed rule, because GEMs are available for these transactions. These transactions are excluded only from the Graduated Payment Mortgage Program and the Modified Graduated Payment Mortgage Program.

Finally, a commenter suggested that GEMs should have higher mortgage limits than other HUD insured mortgages. Mortgage limits are currently at the statutory maximums. Where high cost area mortgage limits have been authorized for a particular area in accordance with section 203 or 234 of the National Housing Act, these higher limits will be available for GEMs.

IV. Findings and Other Matters

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations in 24 CFR Part 50 which implement Section 102(2)(C) of the National Environmental Policy Act of 1969. The Finding of No Significant Impact is available for public inspection during regular business hours at the Office of the Rules Docket Clerk, Office of the General Counsel, Room 10278, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, D.C. 20410.

This rule does not constitute a "major rule" as that term is defined in § 1(b) of the Executive Order on Federal Regulation issued by the President on February 17, 1981. Analysis of the rule indicates that it does not: (1) Have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Under 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the Undersigned hereby certifies that this rule does not have a significant economic impact on a substantial number of small entities. This rule merely expands the types of mortgages eligible for HUD mortgage insurance to include Growing Equity Mortgages.

This rule is listed at 48 FR 18063 as item H–85–82 in the Department's Semiannual Agenda of Regulations, published on April 25, 1983 (48 FR 47432) under Executive Order 12291 and the Regulatory Flexiblity Act.

The Catalog of Federal Domestic Assistance program numbers are 14.159 and 14.172.

List of Subjects

24 CFR Part 200

Administrative practice and procedure, Fair housing, Housing standards, Loan programs—housing and community development, Mortgage insurance, Incorporation by reference.

24 CFR Part 203

Home improvement loan, Loan programs—housing and community development, Mortgage insurance, Solar energy.

24 CFR Part 234

Condominiums, Mortgage insurance, Homeownership, Projects, Units.

24 CFR Part 235

Condominiums, Cooperatives, Low- and moderate-income housing, Mortgage insurance, Homeownership, Grant programs, Housing and community development.

Accordingly, the Department amends 24 CFR Parts 203, 234 and 235 as follows:

PART 203—MUTUAL MORTGAGE INSURANCE AND REHABILITATION LOANS

1. In § 203.43c, paragraph (a) is revised to read as follows:

§ 203.43c Eligibility of mortgages involving a dwelling unit in a cooperative housing development.

* * * * *

(a) The provisions of §§ 203.16a, 203.17, 203.18, 203.18a, 203.18b, 203.23, 203.24, 203.26, 203.37, 203.38, 203.43b, 203.44 and 203.50 of this part shall not apply to mortgages insured under Section 203(n) of the National Housing Act.

* * * * *

2. In § 203.45, paragraph (g) is redesignated as paragraph (h), paragraphs (c) (l) and (f) are revised, and a new paragraph (g) is added, to read as follows:

§ 203.45 Eligibility of graduated payment mortgages.

* * * * *

(c) * * *

(l) The limits prescribed by §§ 203.18, 203.18a, 203.18b and 203.29 or,

* * * * *

(f) Sections 203.21 and 203.44 shall not apply to this section.

(g) This section shall not apply to a mortgage that meets the requirements of §§ 203.18 (c), (d), (e) or (f), 203.43, 203.43a, or 203.43b.

* * * * *

3. In § 203.46, paragraphs (i), (j) and (k) are redesignated as paragraphs (j), (k) and (l), respectively, paragraphs (d) (1) and (h) are revised, and a new paragraph (i) is added, to read as follows:

§ 203.46 Eligibility of modified graduated payment mortgages.

* * * * *

(d) * * *

(1) The limits prescribed in §§ 203.18 203.18a, 203.18b and 203.29: *Provided*, That the appraised value shall not exceed 110 percent of the median prototype housing cost limits as established by the Commissioner for the market area in which the property is located, or

* * * * *

(h) Sections 203.21 and 203.44 shall not apply to this section.

(i) This section shall not apply to a mortgage that meets the requirements of §§ 203.18 (c), (d), (e) or (f), 203.43, 203.43a, 203.43b, 203.47, or 203.50.

* * * * *

4. A new § 203.47 is added, to read as follows:

§ 203.47 Eligibility of growing equity mortgages.

A mortgage containing provisions for accelerated amortization corresponding to anticipated variations in family income shall be eligible for insurance under this subpart, subject to compliance with the additional requirements of this section.

(a) The mortgage must contain complete amortization provisions, satisfactory to the Secretary, requiring monthly payments by the mortgagor not in excess of the mortgagor's reasonable ability to pay, as determined by the Secretary.

(b) The mortgage must contain a provision setting forth the payments required for principal and interest in each year of the mortgage.

(c) The monthly payments for principal and interest for the initial year, or such other initial period as the commissioner may approve, shall be determined on the basis of a 30-year level payment amortization schedule. Subsequent monthly payments for principal and interest may increase annually, biennially or at such other interval that is greater than one year, as the Commissioner may approve. The subsequent periodic increases may be up to five percent above the payments for principal and interest for the previous period.

(d) No later than at the time that a loan application is offered to a prospective mortgagor, the mortgagee shall explain fully to the mortgagor the nature of the obligation undertaken and the mortgagor shall certify that he or she fully understands the obligation.

(e) The mortgage amount shall not exceed the limits prescribed by §§ 203.18, 203.18a. 203.18b or 203.29.

(f) Sections 203.21 and 203.44 shall not apply to this section.

(g) This section shall not apply to a mortgage which meets the requirements of §§ 203.43, 203.43a, or 203.43b.

(h) Mortgages complying with the requirements of this section shall be insured under this subpart pursuant to Section 245(a) of the National Housing Act.

PART 234—CONDOMINIUM OWNERSHIP MORTGAGE INSURANCE

5. In § 234.75, paragraph (g) is redesignated as paragraph (h), paragraph (c)(1) is revised, and a new paragraph (g) is added, to read as follows:

§ 234.75 Eligibility of graduated payment mortgages.

* * * * *

(c) * * *

(1) The limits prescribed in §§ 234.27 and 234.49,

* * * * *

(g) This section shall not apply to a mortgage that meets the requirements of §§ 234.27(d) or 234.68.

6. In § 234.76, paragraphs (i), (j) and (k) are redesignated as paragraphs (j), (k) and (l), respectively, paragraph (d)(1) is revised, and a new paragraph (i) is added, to read as follows:

§ 234.76 Eligibility of modified graduated payment mortgages.

* * * * *

(d) * * *

(1) The limits prescribed in §§ 234.27 and 234.49: *Provided,* That the appraised value shall not exceed 110 percent of the median prototype housing cost limits as established by the Commissioner for the market area in which the property is located.

* * * * *

(i) This section shall not apply to a mortgage that meets the requirements of §§ 234.27(d), 234.68 and 234.77.

* * * * *

7. A new § 234.77 is added, to read as follows:

§ 234.77 Eligiblity of growing equity mortgages.

A mortgage containing provisions for accelerated amortization corresponding to anticipated variations in family income shall be eligible for insurance under this subpart, subject to compliance with the additional requirements of this section.

(a) The mortgage must contain complete amortization provisions satisfactory to the Secretary, requiring monthly payments by the mortgagor not in excess of the mortgagor's reasonable ability to pay, as determined by the Secretary.

(b) The mortgage must contain a provision setting forth the payments required for principal and interest in each year of the mortgage.

(c) The monthly payments for principal and interest for the initial year or such other initial period as the Commissioner may approve shall be determined on the basis of a 30-year level payment amortization schedule. Subsequent monthly payments for principal and interest may increase annually, biennially or at such other interval, that is greater than one year, as the Commissioner may approve. The subsequent periodic increases may be up to five percent above the payments for principal and interest for the previous period.

(d) No later than at the time that a loan application is offered to a prospective mortgagor, the mortgagee shall fully explain to the mortgagor the nature of the obligation undertaken. The mortgagor shall certify that he or she fully understands the obligation.

(e) The mortgage amount shall not exceed the limits prescribed by §§ 234.27 or 234.49.

(f) Sections 234.36 and 234.70 shall not apply to this section.

(g) This section shall not apply to a mortgage that meets the requirements of § 234.68.

(h) Mortgages complying with the requirements of this section shall be insured under this subpart pursuant to Section 245(a) of the National Housing Act.

PART 235—MORTGAGE INSURANCE AND ASSISTANCE PAYMENTS FOR HOME OWNERSHIP AND PROJECT REHABILITATION

8. In § 235.1, by inserting in the cross-reference table, between "203.46 Eligibility of modified graduated payment mortgages." and "203.50 Eligibility of rehabilitation loans.", the following:

203.47 Eligiblity of growing equity mortgages.

PART 200—INTRODUCTION

9. In § 200.163(c), by redesignating paragraphs (6) through (23) as paragraphs (7) through (24), respectively, and by adding a new paragraph (6) to read as follows:

§ 200.163 Direct endorsements.

* * * * *

(c) * * *

(6) That the growing equity mortgage meets the requirements of the Secretary as established under 24 CFR 203.47 or 234.77.

* * * * *

(Sec. 245, National Housing Act, as amended (12 U.S.C. 1715z–10); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)))

Dated: April 30, 1984.

Janet Hale,

Acting Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 84–12349 Filed 5–7–84; 8:45 am]

BILLING CODE 4210–27–M

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24 CFR Parts 201, 203, 204, 205, 207, 213, 220, 221, 232, 234, 235, 241, 242, 244, 250, and 255

[Docket No. R84–1159; FR–1937]

Mortgage and Loan Insurance Programs Under the National Housing Act; Deregulation of FHA Maximum Interest Rates

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Final rule.

SUMMARY: This final rule implements a recent statutory amendment removing the Department's authority to set maximum interest rates for FHA-insured mortgages and loans. Henceforth, any obligation submitted for FHA insurance will bear interest at a rate agreed upon by the mortgagor and mortgagee. Existing regulations fixing the maximum interest rate in the programs affected by this amendment are no longer enforceable with respect to applications submitted for mortgage insurance on or after November 30, 1983. Additionally, an existing regulation authorizing a limited negotiated interest rate program is removed.

EFFECTIVE DATE: Under section 7(o) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(o)), this rule cannot take effect until the expiration of thirty congressional session days following its publication in the **Federal Register**. When this period has expired on June 13, 1984, the rule's effective date will be retroactive to November 30, 1983.

FOR FURTHER INFORMATION CONTACT: Alan Kappeler, Office of Single Family Housing, (202) 755–3406; James Hamernick, Office of Insured Multifamily Housing Development, (202) 755–5720; or William Halpern, Title I Insurance Division, (202) 755–6680; Department of Housing and Urban Development, 451 Seventh St., SW., Washington, D.C. 20410. These are not toll-free telephone numbers.

SUPPLEMENTARY INFORMATION:

I. Background

Section 404(a) of the Housing and Urban-Rural Recovery Act of 1983, Pub. L. 98–181, approved November 30, 1983 (1983 Act), repealed sections 3 and 4 of Pub. L. 90–301, approved May 7, 1968. Section 3 of Pub. L. 90–301 (12 U.S.C. 1709–1 (1980)) authorized the Secretary of Housing and Urban Development to set maximum interest rates for certain mortgage insurance programs under the National Housing Act (NHA) (notwithstanding the maximum rates established by other statutes for these programs).

In exercise of this authority, the Department's regulations regarding these insurance programs contain maximum interest rates fixed by the Secretary. However, with the repeal of section 3 by the 1983 Act (thereby eliminating the Secretary's authority to set maximum interest rates), there is no legal basis for the maximum interest rate provisions set out in the affected program regulations. Instead, as provided under section 404(b) of the 1983 Act, a mortgage to be insured will "bear interest at such rate as may be agreed upon by the mortgagor and mortgagee."

In an earlier Notice (48 FR 56746, December 23, 1983) the Department informed the public that the Secretary's authority to set the FHA maximum interest rates had been repealed. That Notice, along with a Mortgagee Letter forwarded to all HUD-approved lenders and to HUD Field Offices, announced the programs affected. It also informed participants of the procedures the Department would follow in insuring loans, and of regulatory provisions that were still operative, or, in some cases, no longer enforceable, in light of the passage of the 1983 Act. This rule thus conforms the affected regulations to the statutorily-mandated changes in HUD policy and procedure that were previously announced in the December 23, 1983 Notice.

One provision in the 1983 Act continues the Secretary's authority to set the interest rate. Section 404(b)(12)(C) provides that a mortgage to be insured under section 235 of the NHA (which authorizes a program of homeownership for lower-income families) shall "bear interest at a rate not to exceed such percent per annum * * * as the Secretary finds necessary to meet the mortgage market, * * *" As a consequence, the Secretary will continue to set the maximum interest rate for mortgages insured under this program.

Accordingly, a new section to provide for this authority has been added at 24 CFR 235.9 (See 49 FR 11624, March 27, 1984). Section 203.20, which was incorporated by reference in Part 235, is no longer included in that Part because the interest rate under 24 CFR 203.20 is now agreed upon by the mortgagor and mortgagee, and not set by the Secretary.

Section 332(3) of the Housing and Community Development Act of 1980, Pub. L. 96–399, approved October 8, 1980, added a provision to the now repealed section 3 of Pub. L. 90–301 authorizing the Secretary to insure a limited number of mortgages in which the interest rate was "negotiated between the mortgagor and mortgagee." The Department implemented this authority by publishing regulations at 24 CFR 203.51. In view of the repeal of section 3 by the 1983 Act, these regulations are being removed as part of this rule making. Also, 24 CFR 204.6, which provided for a negotiated interest rate in the coinsurance program in accordance with § 203.51, is removed as a result of the removal of the latter section.

In the December 23, 1983 Notice, it was inadvertently stated that 24 CFR 232.560(a) was superseded by section 404 of the 1983 Act, and would no longer be enforced. In fact, section 232.560(a) was not affected by the 1983 Act and remains enforceable under its current terms (i.e., the interest rate will continue to be determined by the Secretary).

Before the Secretary's authority to set maximum interest rates was eliminated by statute, the Department, by regulation, limited lender's freedom to charge points to participating mortgagors in the Title I and Title II programs (with some exceptions) of the National Housing Act. This limitation ensured that the maximum interest rate fixed by the Secretary was not effectively exceeded by the imposition of points. However, in consonance with the legislative intent of section 404 of the 1983 Act that artificial restrictions on the FHA maximum interest rates be removed by allowing lender and borrower freely to negotiate a rate acceptable to them (and that is otherwise legally acceptable). Departmental regulations prohibiting the assessment of points in these programs (except for loans under 24 CFR Part 235) are being removed in this rule making.

II. Transition

One other matter of significance remains to be addressed—the orderly transition from the pre-1983 Act period of interest rate regulation and the post-Act regime of negotiated interest rates and discount point charges. Because issues associated with commitments received by HUD before the effective date of the statute are of only temporary concern, they are not addressed in the accompanying final rule. Instead, the policies set out in the December 23, 1983 **Federal Register** Notice (48 FR 56746) and in Mortgagee Letter 83–27, dated December 9, 1983, will be observed. A summary of the transition policies set out in the December 23 Notice is quoted below for the reader's ready reference:

Single-Family Mortgages

Applications for firm commitments received prior to November 30, 1983, will be processed and evaluated at the interest rate stated in the application or at the FHA ceiling rate in effect when the application was received, whichever is lower.

Applications for firm commitments received on or after November 30, 1983, will be processed and evaluated on the basis of the interest rate and discount points, if any, to be paid by the borrower which are stated in the application.

The interest rate and borrower-paid points, if any, stated in the firm

commitment will establish the terms under which the Department will insure the mortgage. This applies to firm commitments issued before or after November 30, 1983, whether issued on an application received before or after that date. Any decrease in interest rate or discount points will not require reprocessing. Reprocessing requires submission of a new HUD 92900.1, completed to show the new interest rate and/or discount points and such other charges as may be necessary to accomplish the reprocessing, with the Borrowers Certification signed by the borrower.

For cases being processed under HUD's Direct Endorsement Program and co-insurance program, HUD will insure a mortgage with an interest rate and borrower-paid discount points as stated in the application for insurance required by the borrower before mortgage credit processing.

In the December 23, 1983 **Federal Register** Notice, the Department had advised that applications for firm commitments "must be reprocessed in all cases if the interest rate or discount points to be paid by the borrower are increased above those shown on the firm commitment." And, with respect to applications submitted under the Direct Endorsement Program and coinsurance program "Any increase in the interest rate or discount points to be paid by the borrower after approval by the lender's underwriter will require reprocessing by the lender's underwriter."

In the interest of ensuring the continued efficiency of the insuring process, the Department has determined that reprocessing is not necessary in the case of an increase of up to one percent above the interest rate shown on the firm commitment. Increases of more than one percent will require reprocessing of the application. (However, because the previous disclosure statement signed by the borrower provided for reprocessing in all instances of interest rate increases, reprocessing is still required for any increase of up to one percent unless the borrower executes a statement agreeing not to have the case reprocessed.) Reprocessing is still required, however, when the discount points to be paid by the borrower are increased over that set forth in the firm commitment or approved by the Direct Endorsement underwriter.

Multifamily Programs

Applications for conditional or firm commitment received prior to November 30, 1983, will be processed at the interest rate stated in the application or the maximum rate permitted under current regulations, whichever is lower. Applications received on or after November 30, 1983, will be processed at the interest rate stated in the application. Applicants having outstanding commitments or applications in processing who wish to change the interest rate should submit an amended application.

Any change in interest rate requested before initial endorsement (or, in the case of Section 223(f) or insurance upon completion, initial/final endorsement) from the rate stated in a firm commitment requires reprocessing. This applies to either an increase or a decrease in the interest rate.

Title I

Under the Title I Property Improvement and Manufactured Home Loan Programs, HUD does not issue commitments. Lenders participating in these programs are free (within otherwise acceptable legal limits) to negotiate the interest rate on mortgages and loans in process, subject to any agreement with the borrower and applicable underwriting and other eligibility standards. However, any increase in the financing requirements on the borrower desired after lender loan approval but before disbursement will require lender reprocessing.

III. Other Matters

As a matter of policy, the Department submits most of its rulemaking to public comment, either before or after effectiveness of the action. In this instance, however, the Secretary has determined that good cause exists for publishing this document as a final rule. Public procedure is believed to be unnecessary because the revisions to existing HUD regulations included in this document are being adopted in order to conform to mandatory and self-executing statutory direction from the Congress. Since the statute clearly permits the mortgagor and mortgagee to agree upon the interest rate payable on a FHA insured mortgage loan, there is no discretion within the Department for regulatory qualification or interpretation of the statutory provision. Under these circumstances, immediate implementation of these several amendments would best serve the public interest.

This rule does not constitute a "major rule" as that term is defined in section 1(b) of the Executive Order of Federal Regulations issued by the President on February 17, 1981. Analysis of the rule indicates that it does not (1) have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations in 24 CFR Part 50 that implement Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332. The Finding of No Significant Impact is available for public inspection and copying during regular business hours in the Office of the Rules Docket Clerk, Room 10278, 451 Seventh Street, SW., Washington, D.C. 20410.

In accordance with 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the Undersigned hereby certifies that this rule does not have a significant impact on a substantial number of small entities. The rule merely conforms regulatory provisions to new statutory amendments, without imposing any new administrative or economic burdens on small entities.

This rule was not listed in the Department's Semiannual Agenda of Regulations published on October 17, 1983 (48 FR 47422) under Executive Order 12291 and the Regulatory Flexibility Act.

The Catalog of Federal Domestic Assistance program numbers are 14.110, 14.117, 14.132, 14.133, 14.134.

List of Subjects

24 CFR Part 201

Health facilities, Historic preservation, Home improvement, Manufactured homes, Manufactured homes and lots.

24 CFR Part 203

Home improvement, Loan programs: housing and community development, Mortgage insurance, Solar energy.

24 CFR Part 204

Mortgage insurance.

24 CFR Part 205

Community facilities, Mortgage insurance, Land development.

24 CFR Part 207

Mortgage insurance, Rental housing, Manufactured home parks.

24 CFR Part 213

Mortgage insurance, Cooperatives.

24 CFR Part 220

Home improvement, Mortgage insurance, Urban renewal, Rental housing, Loan programs: housing and community development, Projects.

24 CFR Part 221

Condominiums, Low and moderate income housing, Mortgage insurance, Displaced families, Single family housing, Projects, Cooperatives.

24 CFR Part 232

Fire prevention, Health facilities, Loan programs: health, Loan programs: housing and community development, Mortgage insurance, Nursing homes, Intermediate care facilities.

24 CFR Part 234

Condominiums, Mortgage insurance, Homeownership, Projects, Units.

24 CFR Part 235

Condominiums, Cooperatives, Low and moderate income housing, Mortgage insurance, Homeownership, Grant programs: housing and community development.

24 CFR Part 241

Energy conservation, Mortgage insurance, Solar energy, Projects.

24 CFR Part 242

Hospitals, Mortgage insurance.

24 CFR Part 244

Health facilities, Mortgage insurance.

24 CFR Part 250

Intergovernmental relations, Low and moderate income housing, Mortgage insurance.

24 CFR Part 255

Mortgage insurance.

Accordingly, the Department amends 24 CFR Parts 201, 203, 204, 205, 207, 213, 220, 221, 232, 234, 235, 241, 242, 244, 250 and 255 as follows:

PART 201—PROPERTY IMPROVEMENT AND MANUFACTURED HOME LOANS

1. In § 201.4, Paragraphs (a) and (b) are revised to read as follows:

§ 201.4 Financing charges.

(a) *Agreed financing charges.* The borrower and the insured shall agree to the financing charge that may be directly or indirectly paid to, or collected by, the insured in connection with the loan transaction.

(b) *Permissible additional charges.* If the insured takes security in the nature of a real estate mortgage, deed of trust, conditional sales contract, chattel mortgage, mechanic's lien, or other security device for the purpose of securing the payment of eligible loans, the insured may collect from the borrower, in addition to the financing charge agreed upon under paragraph (a) of this section, the following expenses actually incurred by the insured in connection with the transaction: Recording or filing fees, documentary stamp taxes, title examination charges and hazard insurance premiums, provided that such costs or expenses are not paid from the proceeds of the loan or included in the face amount of the note. Such costs or expenses shall not be included by the insured as a portion of a claim under the Contract of Insurance and if such costs or expenses are assessed against the borrower, proper evidence thereof shall be in the file.

* * * * *

2. In § 201.9, paragraph (a) is revised to read as follows:

§ 201.9 Refinancing.

(a) *General requirements.* New obligations to liquidate loans previously reported for insurance under Title I of the Act, which may or may not include an additional amount advanced, to the extent permitted by § 201.3, and which may include the agreed finance charge permissible under § 201.4, will be covered by insurance if the new obligations meet the requirements of all applicable regulations in this part and the special provisions of this section.

* * * * *

3. In § 201.540, paragraph (a) is revised to read as follows:

§ 201.540 Financing charges.

(a) *Agreed financing charges.* The borrower and the insured shall agree to the financing charge that may be directly or indirectly paid to, or collected by, the insured in connection with the loan transaction. A one percent origination fee may be collected from the borrower. If assessed, this fee must be included in the financing charge.

* * * * *

4. In § 201.1130, the section heading and paragraph (a) are revised to read as follows:

§ 201.1130 Agreed financing charges.

(a) The loan shall bear interest at the rate agreed upon by the borrower and lender.

* * * * *

5. In § 201.1511, paragraph (a) is revised to read as follows:

§ 201.1511 Financing charges.

(a) *Agreed financing charges.* The borrower and the insured shall agree to the financing charge that may be directly or indirectly paid to, or collected by, the insured in connection with a combination manufactured home and lot loan or manufactured home lot loan transaction. A one percent origination fee may be collected from the borrower. If assessed, this fee must be included in the financing charge.

* * * * *

6. In § 201.1625, paragraphs (a) and (b) are revised to read as follows:

§ 201.1625 Financing charges.

(a) *Agreed financing charges.* The borrower and the insured shall agree to the financing charge, exclusive of fees and charges as provided by paragraph (b) of this section, that may be directly or indirectly paid to, or collected by, the insured in connection with the loan transaction.

(b) *Permissible additional charges.* If the insured takes security in the nature of a real estate mortgage, deed of trust, or other security device for the purpose of securing the payment of eligible loans, the insured may collect from the borrower, in addition to the financing charge agreed upon under paragraph (a) of this section, the following expenses actually incurred by the insured in connection with the transaction: Recording or filing fees, documentary tax stamps, title examination charges and hazard insurance premiums. These costs or expenses shall not be paid from the proceeds of the loan or included in the face amount of the note and shall not be included by the insured as a portion of a claim under the Contract of Insurance. If such costs or expenses are assessed against the borrower, proper evidence thereof shall be in the file.

* * * * *

PART 203—MUTUAL MORTGAGE INSURANCE AND REHABILITATION LOANS

7. § 203.20, the section heading and paragraph (a) are revised to read as follows:

§ 203.20 Agreed interest rate.

(a) The mortgage shall bear interest at the rate agreed upon by the mortgagee and the mortgagor.

* * * * *

8. In § 203.27, the section heading and paragraphs (a) (4) and (d) are revised to read as follows:

§ 203.27 Charges, fees or discounts.

(a) * * *

(4) Reasonable and customary charges in the nature of discounts.

* * * * *

(d) Before the insurance of any mortgage, the mortgagee shall furnish to the Commissioner a signed statement in a form satisfactory to the Commissioner listing any charge, fee or discount collected by the mortgagee from the mortgagor. The Commissioner's endorsement of the mortgage for insurance shall constitute approval of the listed charges, fees or discounts.

* * * * *

9. In § 203.45, paragraph (b) is revised to read as follows:

§ 203.45 Eligibility of graduated payment mortgages.

* * * * *

(b) The mortgage shall bear interest at the rate agreed upon by the mortgagee and the mortgagor.

* * * * *

10. In § 203.46, paragraph (c) is revised to read as follows:

§ 203.46 Eligibility of modified graduated payment mortgages.

* * * * *

(c) The mortgage shall bear interest at the rate agreed upon by the mortgagee and the mortgagor.

* * * * *

§ 203.51 [Removed]

11. Section 203.51 is removed.

PART 204—COINSURANCE

§ 204.6 [Removed and reserved]

12. Section 204.6 is removed and reserved.

PART 205—MORTGAGE INSURANCE FOR LAND DEVELOPMENT [TITLE X]

13. Section 205.50 is revised to read as follows:

§ 205.50 Agreed interest rate.

The mortgage shall bear interest at the rate agreed upon by the mortgagee and the mortgagor.

PART 207—MULTIFAMILY HOUSING MORTGAGE INSURANCE

14. In § 207.7, the section heading and paragraphs (a) and (c) are revised to read as follows:

§ 207.7 Agreed interest rate.

(a) The mortgage shall bear interest at the rate agreed upon by the mortgagee and the mortgagor.

* * * * *

(c) The amount of any increase approved by the Commissioner in the mortgage amount between initial and final endorsement in excess of the amount that the Commissioner had committed to insure at initial endorsement shall bear interest at the rate agreed upon by the mortgagee and the mortgagor.

PART 213—COOPERATIVE HOUSING AND MORTGAGE INSURANCE

15. In § 213.10, the section heading and paragraphs (a) and (c) are revised to read as follows:

§ 213.10 Agreed interest rate.

(a) The mortgage shall bear interest at the rate agreed upon by the mortgagee and the mortgagor.

* * * * *

(c) The amount of any increase approved by the Commissioner in the mortgage amount between initial and final endorsement in excess of the amount that the Commissioner had committed to insure at initial endorsement shall bear interest at the rate agreed upon by the mortgagee and the mortgagor.

16. In § 213.511, the section heading and paragraph (a) are revised to read as follows:

§ 213.511 Agreed interest rate.

(a) The mortgage shall bear interest at the rate agreed upon by the mortgagee and the mortgagor.

* * * * *

17. In § 213.518, the section heading is revised, a new paragraph (a)(3) is added, and paragraph (c) is revised, to read as follows:

§ 213.518 Charges, fees or discounts.

(a) * * *

(3) Reasonable and customary charges in the nature of discounts.

* * * * *

(c) Before the insurance of any mortgage, the mortgagee shall furnish to the Commissioner a signed statement in a form satisfactory to the Commissioner listing any charge, fee or discount collected by the mortgagee from the mortgagor. The Commissioner's endorsement of the mortgage for insurance shall constitute approval of the listed charges, fees or discounts.

* * * * *

PART 220—URBAN RENEWAL MORTGAGE INSURANCE AND INSURED IMPROVEMENT LOANS

18. In § 220.507, paragraph (e)(3) is revised to read as follows:

§ 220.507 Maximum mortgage amounts.

* * * * *

(e) * * *

(3) *Interest rate.* The loan may bear interest at such rate as may be agreed upon by the mortgagee and the mortgagor. Interest shall be payable in monthly installments on the principal then outstanding.

* * * * *

19. In § 220.576, the section heading and paragraphs (a) and (c) are revised to read as follows:

§ 220.576 Agreed interest rate.

(a) The mortgage shall bear interest at the rate agreed upon by the mortgagee and the mortgagor.

* * * * *

(c) The amount of any increase approved by the Commissioner in the mortgage amount between initial and final endorsement in excess of the amount that the Commissioner had committed to insure at initial endorsement shall bear interest at the rate agreed upon by the mortgagee and the mortgagor.

PART 221—LOW COST AND MODERATE INCOME MORTGAGE INSURANCE

20. Section 221.518 is revised to read as follows:

§ 221.518 Agreed interest rate.

(a) The mortgage shall bear interest at the rate agreed upon by the mortgagee and the mortgagor.

(b) In the case of a mortgage executed by other than a general mortgagor, as defined in § 221.510, the mortgage shall bear interest at a rate not exceeding that agreed to under paragraph (a) of this section up to and including the date of final endorsement by the Commissioner at which time the rate of interest may (with the approval of the Commissioner) be lowered to 3 percent per annum.

(c) The amount of any increase approved by the Commissioner in the mortgage amount between initial and final endorsement in excess of the amount that the Commissioner had committed to insure at initial endorsement shall bear interest at the rate agreed upon by the mortgagee and the mortgagor.

PART 232—NURSING HOMES AND INTERMEDIATE CARE FACILITIES MORTGAGE INSURANCE

21. In § 232.29, the section heading and paragraphs (a) and (c) are revised to read as follows:

§ 232.29 Agreed interest rate.

(a) The mortgage shall bear interest at the rate agreed upon by the mortgagee and the mortgagor.

* * * * *

(c) The amount of any increase approved by the Commissioner in the mortgage amount between initial and

final endorsement in excess of the amount that the Commissioner had committed to insure at initial endorsement shall bear interest at the rate agreed upon by the mortgagee and the mortgagor.

PART 234—CONDOMINIUM OWNERSHIP MORTGAGE INSURANCE

22. In § 234.29, the section heading and paragraph (a) are revised to read as follows:

§ 234.29 Agreed interest rate.

(a) the mortgage shall bear interest at the rate agreed upon by the mortgagee and the mortgagor.

* * * * *

23. In § 234.48, the section heading is revised, a new paragraph (a)(3) is added, and paragraph (b) is revised, to read as follows:

§ 234.48 Charges, fees or discounts.

(a) * * *

(3) Reasonable and customary charges in the nature of discounts.

(b) Before the insurance of any mortgage, the mortgagee shall furnish to the Commissioner a signed statement in a form satisfactory to the Commissioner listing any charge, fee or discount collected by the mortgagee from the mortgagor. The Commissioner's endorsement of the mortgage for insurance shall constitute approval of the listed charges, fees or discounts.

* * * * *

24. In § 234.75, paragraph (b) is revised to read as follows:

§ 234.75 Eligibility of graduated payment mortgages.

* * * * *

(b) The mortgage shall bear interest at the rate agreed upon by the mortgagee and the mortgagor.

* * * * *

25. In § 234.76, paragraph (c) is revised to read as follows:

§ 234.76 Eligibility of modified graduated payment mortgages.

* * * * *

(c) The mortgage shall bear interest at the rate agreed upon by the mortgagee and the mortgagor.

* * * * *

PART 235—MORTGAGE INSURANCE AND ASSISTANCE PAYMENTS FOR HOME OWNERSHIP AND PROJECT REHABILITATION

26. Section 235.1 is amended by adding the following entry in numerical order in the list following paragraph (a).

§ 235.1 Cross-reference.

(a) * * *

§ 203.20 Agreed interest rate.

* * * * *

PART 241—SUPPLEMENTARY FINANCING FOR INSURED PROJECT MORTGAGES

27. Section 241.75 is revised to read as follows:

§ 241.75 Agreed interest rate.

The mortgage shall bear interest at the rate agreed upon by the mortgagee and the mortgagor.

28. In § 241.560, the section heading and paragraph (a) are revised to read as follows:

§ 241.560 Agreed interest rate.

(a) The mortgage shall bear interest at the rate agreed upon by the lender and the borrower.

* * * * *

PART 242—MORTGAGE INSURANCE FOR HOSPITALS

29. Section 242.33 is revised to read as follows:

§ 242.33 Agreed interest rate.

(a) The mortgage shall bear interest at the rate agreed upon by the mortgagee and the mortgagor.

(b) The amount of any increase approved by the Commissioner in the mortgage amount between initial and final endorsement in excess of the amount that the Commissioner had committed to insure at initial endorsement shall bear interest at the rate agreed upon by the mortgagee and the mortgagor.

PART 244—MORTGAGE INSURANCE FOR GROUP PRACTICE FACILITIES [TITLE XI]

30. In § 244.45, the section heading and paragraphs (a) and (c) are revised to read as follows:

§ 244.45 Agreed interest rate.

(a) The mortgage shall bear interest at the rate agreed upon by the mortgagee and the mortgagor.

* * * * *

(c) The amount of any increase approved by the Commissioner in the mortgage amount between initial and final endorsement in excess of the amount that the Commissioner had committed to insure at initial endorsement shall bear interest at the rate agreed upon by the mortgagee and the mortgagor.

PART 250—COINSURANCE FOR STATE HOUSING FINANCING AGENCIES

31. In § 250.123, the section heading and paragraphs (a) and (c) are revised to read as follows:

§250.123 Agreed interest rate.

(a) The mortgage shall bear interest at the rate agreed upon by the mortgagee and the mortgagor. Interest shall be payable in monthly installments on the principal amount of the mortgage outstanding on the due date of each installment.

* * * * *

(c) The amount of any increase approved by the agency and the Commissioner in the mortgage amount between the start of construction and final closing in excess of the amount that the agency and the Commissioner had committed to insure at the start of construction shall bear interest at the rate agreed upon by the mortgagor and the agency.

PART 255—COINSURANCE FOR PRIVATE MORTGAGE LENDERS

32. Section 255.214 is revised to read as follows:

§ 255.214 Agreed interest rate.

The mortgage shall bear interest at a rate agreed upon by the mortgagor and the coinsuring lender. Such rate shall not exceed the rate agreed upon in the commitment to coinsure. The interest rate may be increased or decreased after commitment only after reprocessing and issuance of an amended commitment. In cases where a mortgage increase is requested, processed and approved, a higher rate may be applied to the amount of the increase only.

Authority: Sec. 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d); sec. 404 of the Housing and Urban-Rural Recovery Act of 1983, Pub. L. 98-181, 97 Stat. 1153, approved November 30, 1983.

Dated: April 30, 1984.

Maurice L. Barksdale,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR. Doc. 84-12348 Filed 5-7-84; 8:45 am]

BILLING CODE 4210-27-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 7 and 301

[T.D. 7954]

Ruling Requests Relating to Certain Transfers by United States Persons to Foreign Corporations

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the requirement that a ruling be obtained in order for a foreign corporation to be treated as a corporation for purposes of determining the amount of gain to be recognized on certain transfers by United States persons to foreign corporations. This Treasury decision conforms the present regulations under sections 367(a)(1) and 7477 to section 1042 of the Tax Reform Act of 1976. The regulations provide the public with the guidance needed to obtain a ruling and affect United States persons transferring property to foreign corporations in exchanges, reorganizations, and certain liquidations and distributions. These final regulations supersede a portion of the temporary regulations published on December 30, 1977 (42 FR 65152).

DATES: This document is effective June 7, 1984 and applies to transfers of property made after June 7, 1984.

FOR FURTHER INFORMATION CONTACT: Mary Elizabeth Dean of the Legislation and Regulations Division of the Office of the Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, D.C. 20224, Attention: CC:LR:T, 202–566–3289, not a toll-free call.

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Income Tax Regulations (26 CFR Part 1) and the Temporary Income Tax Regulations under the Tax Reform Act of 1976 (26 CFR Part 7) under section 367(a)(1), and the Regulations on Procedure and Administration (26 CFR Part 301) under section 7477, both of the Internal Revenue Code of 1954.

These amendments conform the regulations to section 1042 of the Tax Reform Act of 1976 (90 Stat. 1634) and are issued under the authority contained in sections 367(a)(1) (90 Stat. 1634; 26 U.S.C. 367(a)(1)) and 7805 (68A Stat. 917; 26 U.S.C. 7805) of the Internal Revenue Code of 1954.

A notice of proposed rulemaking on these matters was published in the Federal Register on December 27, 1982 (47 FR 57503). The comments received have been considered and taken into account as appropriate in the preparation of the final regulations contained in this document.

The portions of the temporary regulations published on December 30, 1977, relating to section 367(a)(1) are deleted on the date these final regulations become effective.

Discussion

Statutory Provisions

Section 367(a)(1), as added by section 1042 of the Tax Reform Act of 1976, relates to transfers of property by United States persons to foreign corporations in connection with an exchange described in section 332, 351, 354, 355, 356 or 361. The foreign corporation will not be considered to be a corporation for purposes of determining the amount of gain to be recognized on such a transfer unless it is established to the satisfaction of the Secretary or his delegate that the exchange is not pursuant to a plan having the avoidance of Federal income taxes as one of its principal purposes. A determination is made pursuant to a ruling request filed not later than the close of the 183rd day after the beginning of the transfer. Transfers by a United States person of stock in a foreign corporation that is a party to the exchange or a party to the reorganization are subject to section 367 (b) and the regulations issued pursuant to that section. To the extent exchanges and transfers are exempt from the section 367(a)(1) ruling requirement by regulations that may be issued under section 367(a)(2), the ruling requirement will not apply.

Comments on Proposed Regulations

These final regulations reflect the significant comments received with respect to the proposed regulations.

Three comments concerned the definition of transfers described in section 367(a)(1). One comment requested clarification of the effect of paragraph (b)(2) of § 1.367(a)–1, relating to certain triangular reorganizations involving indirect outbound transfers. The final regulations include language indicating the special rules in paragraph (b)(2) do not limit the application of the general rule in paragraph (b)(1). Thus, a direct transfer of property by a United States person to a foreign corporation in connection with a reorganization is a transfer described in section 367(a)(1).

Paragraph (c)(3) of § 1.367(a)–1 describes the minimum standards that must be satisifed in order for a ruling request to be filed. In response to the comment that some of the minimum standards appeared to be more stringent than current practice, the final regulations state that a general description of the types of property exchanged is sufficient and that the submission must satisfy the requirements in any revenue procedures applicable to the type of ruling requested.

A comment suggested that a request for a ruling under section 1492(2) should be treated as a request for a section 367(a)(1) ruling if the IRS subsequently determines that the transferee is an association taxable as a corporation. Paragraph (c)(3)(i) of the final regulations contain the rule that, if a taxpayer requests a ruling that a transfer to a foreign partnership is not pursuant to a plan having as one of its principal purposes the avoidance of Federal income taxes under section 1492(2) and subsequently the IRS determines that the transferee is an association taxable as a corporation, then a later request for a section 367(a)(1) ruling may be filed and will be considered timely if filed before the close of the 60th day after the final administrative determination of the Internal Revenue Service that the entity is an association taxable as a corporation.

Two issues were raised concerning the time a transfer is considered to begin. Paragraph (c)(4)(ii) of the proposed regulations stated that a section 367(a)(1) transfer by an alien individual electing to be treated as a resident under section 6013 (g) or (h) begins on the later of the date a timely section 6013 (g) or (h) election is filed or the date the transfer is otherwise considered to begin. The final regulations clarify that this rule applies only for purposes of determining the timeliness of the request for a section 367(a)(1) ruling and does not affect the time the transfer is considered to occur under other income tax provisions. A comment pointed out that the rule in paragraph (c)(4)(v) for determining the date a conditional transfer begins would be clarified if the description of the relevant condition did not incorporate a special definition of a "favorable ruling" but instead referred to a ruling satisfactory to the parties to the transfer. The final regulations adopt this suggestion.

Paragraph (d)(3) of § 1.367(a)–1 contains requirements regarding information to be attached to the transferor's income tax return. In response to a comment, the final regulations do not apply the penalty of

voiding a favorable ruling for a failure to satisfy the requirements of paragraph (d)(3). However, the Internal Revenue Service intends to initiate a procedure whereby the district office having jurisdiction over the return of the taxpayer will be notified of any pending section 367 ruling request of the taxpayer and will be notified of the ultimate disposition of such request.

Paragraph (g)(1) of § 1.367(a)–1 contains a definition of the term "United States person" for purposes of section 367(a)(1). The proposed regulations stated that a nonresident alien individual or a foreign corporation would not be considered a United States person merely because it carried on a U.S. trade or business. One comment questioned whether the use of the word "merely" implied that the IRS could consider a nonresident alien individual or foreign corporation to be a United States person for section 367(a)(1) purposes in some other circumstances. The word " merely" has been omitted in the final regulations to clarify that, other than in the case of an election under section 6013 (g) or (h) or under section 1504(d), a nonresident alien individual or foreign corporation will never be considered a United States person under section 367(a)(1).

Certain comments received were considered but rejected. For example, one comment requested additional examples of specific variances that would be material. Paragraph (e)(3) contains a description of a material variance from the facts included in the ruling request. However, the facts and circumstances surrounding section 367 (a)(1) transfers are so diverse that more specific examples could be misleading. Therefore, no examples were added.

The collection of information requirements contained in this regulation have been submitted to the Office of Management and Budget (OMB) in accordance with the requirements of the Paperwork Reduction Act of 1980. These requirements have been approved by OMB.

Regulatory Flexibility Act and Executive Order 12291

The Secretary of the Treasury has certified that these regulations do not have a significant impact on a substantial number of small entities. Accordingly, these regulations do not constitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. chapter 6). The Commissioner of Internal Revenue has determined that the regulations are not subject to Executive Order 12291.

Drafting Information

The principal author of these regulations is Mary Elizabeth Dean of the Legislation and Regulations Division of the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing these regulations both on matters of substance and style.

List of Subjects

26 CFR §§ 1.301–1 through 1.385–6

Income taxes, Corporation, Corporate distributions, Corporate adjustments, Reorganizations.

26 CFR Part 7

Income taxes, Tax Reform Act of 1976.

26 CFR Part 301

Administrative practice and procedure, Bankruptcy, Courts, Crime, Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Investigations, Law enforcement, Penalties, Pensions, Statistics, Taxes, Disclosure of information, Filing requirements.

Adoption of Amendments to the Regulations

The following amendments to 26 CFR Part 1, 7, and 301 are hereby adopted as set forth below:

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Paragraph 1. A new § 1.367(a)–1 is added, immediately after § 1.362–2, to read as follows:

§ 1.367(a)–1 Ruling requests under section 367(a)(1) relating to certain transfers to a foreign corporation.

(a) *Introduction*—(1) *General rule.* For purposes of determining the amount of gain to be recognized on a transfer of property by a United States person to a foreign corporation in connection with an exchange described in section 332, 351, 354, 355, 356, or 361, the foreign corporation shall not be considered a corporation unless, pursuant to a request for a ruling filed not later than 183 days after the beginning of the transfer, it is established to the satisfaction of the Commissioner that the exchange is not pursuant to a plan having the avoidance of Federal income taxes as one of its principal purposes. Transfers subject to this section are described in paragraph (b) of this section. The time and manner for filing ruling requests is set forth in paragraph (c) of this section. Persons who are to request rulings are described in paragraph (d) of this section. The consequences of failure to comply with this section are described in paragraph (e) of this section. The procedure for the protest and appeal of a ruling is described in paragraph (f) of this section. Terms used in this section are defined in paragraph (g) of this section.

(2) *Section 367(a)(2) exception.* This section shall not apply to exchanges and transfers described in regulations that may be issued under section 367(a)(2) to the extent such regulations except the exchanges and transfers from the requirements of this section.

(b) *Transfers described in section 367(a)(1)*—(1) *General rule.* A transfer described in section 367(a)(1) is a transfer of property, other than stock or securities of a foreign corporation that is a party to the exchange or a party to the reorganization (as defined in section 368(b)), made directly, indirectly, or constructively by a United States person (as defined in paragraph (g)(1) of this section) to a foreign corporation in connection with an exchange described in section 332, 351, 354, 355, 356, or 361. Thus, a transfer of stock of a foreign corporation by a United States person to another foreign corporation pursuant to a reorganization described in section 368(a)(1)(B) is not a transfer described in section 367(a)(1) because the foreign corporation whose stock is transferred is a party to the reorganization, even though that foreign corporation may not be a party to other types of reorganizations or exchanges for which the transaction also qualifies. Such transfer is subject to the rules of § 7.367(b)–4(b). The following special rules apply in determining whether certain transfers of property are transfers described in section 367(a)(1).

(2) *Reorganization involving indirect transfers—(i) Mergers.* A transfer in connection with a reorganization described in section 368(a)(1)(A) to which either section 368(a)(2)(D) or (E) applies may be a transfer described in section 367(a)(1) if the reorganization involves the merger of two domestic corporations and if stock of a foreign corporation which controls one of such domestic corporations is exchanged in such reorganization. The transfers in connection with such a reorganization that are described in section 367(a)(1) are as follows—

(A) *Reorganizations described in section 368(a)(1)(A) to which section 368(a)(2)(D) applies.* A domestic corporation is considered to make a transfer of property described in section 367(a)(1) if it transfers substantially all its properties to another domestic

corporation in connection with a reorganization described in section 368(a)(1)(A) to which section 368(a)(2)(D) applies and if the controlling corporation (within the meaning of section 368(a)(2)(D) is a foreign corporation. The rule of this paragraph (b)(2)(i)(A) is illustrated by the following examples.

Example. F, a foreign corporation, owns all the stock of S, a domestic corporation. In a reorganization described in section 368(a)(1)(A) to which section 368(a)(2)(D) applies, S acquires substantially all the properties of W, a domestic corporation in a merger of W into S. The stock of F is used as consideration. The reorganization includes an indirect asset transfer described in section 367(a)(1) by W.

(B) *Reorganizations described in section 368(a)(1)(A) to which section 368(a)(2)(E) applies.* [Reserved].

(ii) *Reorganizations described in section 368(a)(1)(B).* An exchanging shareholder who is a United States person is considered to make a transfer described in section 367(a)(1) if, in connection with a reorganization described in section 368(a)(1)(B), such shareholder exchanges his stock in a domestic corporation for a voting stock of a foreign corporation that is in control (as defined in section 368(c)) of the domestic acquiring corporation. The rule of this paragraph (b)(2)(ii) is illustrated by the following example.

Example. F, a foreign corporation owns all the stock of S, a domestic corporation. In a reorganization described in section 368(a)(1(B), S acquires all the stock of domestic corporation Y, and the shareholders of Y receive voting stock of F. The reorganization includes an indirect stock transfer described in section 367(a)(1) by those shareholders of Y who are United States persons.

(iii) *Reorganizations described in section 368(a)(1)(C).* A domestic corporation is considered to make a transfer described in section 367(a)(1) if it transfers substantially all of its properties to another domestic corporation in connection with a reorganization described in section 368(a)(1(C) and if it receives voting stock in a foreign corporation that is in control (as defined in section 368(c)) of the acquiring corporation. The rule of this paragraph (b)(2)(iii) is illustrated by the following example.

Example ,. a foreign corporation owns all the stock of S, a domestic corporation. In a reorganization described in section 368(a)(1)(C), S acquires substantially all the properties of Z, a domestic corporation, and Z receives voting stock of F. The reorganization includes an indirect asset transfer described in section 367(a)(1) by Z, whether Z retains the stock of F or distributes the stock to its shareholders and whether the shareholders of Z are United States persons or foreign persons.

(3) *Transfers by partnerships.* A transfer of property by a United States person indirectly to a foreign corporation results from a transfer of property by a partnership (whether foreign or domestic) to a foreign corporation in an exchange described in section 367(a)(1), to the extent that the partnership property transferred to the foreign corporation is attributable to partnership interests held by one or more United States persons. Attribution of partnership assets to interests held by United States persons shall be determined under the rules and principles of sections 701 through 761 of the Internal Revenue Code and the regulations thereunder. The rule of this paragraph (b)(3) is illustrated by the following example.

Example. P is a partnership having five equal general partners, two of whom are United States persons. P transfers property to F, a foreign corporation, in connection with an exchange described in section 351. The exchange includes an indirect transfer of property by the partner to F. The transfers of property attributable to those partners who are United States persons, that is, 40 percent of each asset transferred to F, are transfers described in section 367(a)(1). The gain (if any) recognized on the transfer of 40 percent of each asset to F is attributable to the two partners who are United States persons.

(4) *Transfers by trusts and estates.* Except as otherwise provided in paragraph (b)(5) of this section, a transfer of property by a trust or an estate to a foreign corporation in an exchange described in section 367(a)(1) is considered a direct, indirect, or constructive transfer by a United States person only if the trust or estate is a domestic trust or a domestic estate. Except as otherwise provided in paragraph (b)(5) of this section, a transfer by a foreign trust or foreign estate (as defined in section 7701(a)(31)) is not a transfer described in section 367(a)(1). These rules apply irrespective of whether the beneficiaries of the trust or estate are United States persons or foreign persons.

(5) *Transfers by grantor trusts.* A transfer of a portion or all of the assets of a foreign or domestic trust to a foreign corporation in an exchange described in section 367(a)(1) is considered a transfer by any United States person who is treated as the owner of any such portion or all of the assets of the trust under section 671 through 679.

(6) *Termination of election under section 1504(d).* The termination of an election under section 1504(d), relating to treatment of certain contiguous country corporations as domestic corporations, shall be considered to be a transfer of property by a domestic corporation to a foreign corporation. The characterization of the transfer for purposes of section 367(a)(1) depends on the facts and circumstances. The rule of this paragraph (b)(6) is illustrated by the following examples.

Example 1. Domestic corporation Y previously made a valid election under section 1504(d) to have its wholly owned Canadian subsidiary, C treated as a domestic corporation. On July 1, 1983, C fails to continue to qualify for the election under section 1504(d). A construction reorganization described in section 368(a)(1)(D) occurs, and the constructive transfer of assets by "domestic" corporation C to Canadian corporation C included in that reorganization is a transfer described in section 367(a)(1).

Example 2. Domestic corporation Z previously made a valid election under section 1504(d) to have its wholly owned Canadian subsidiary, S, treated as a domestic corporation. On August 1, 1983, Z sells all the stock of S to an unrelated United States person. Because S is no longer directly or indirectly wholly owned or controlled by Z, it is no longer subject to the section 1504(d) election. No direct, indirect, or constructive transfer described in section 367(a)(1) has occurred.

(7) *Changes in classification of an entity.* If a foreign entity is classified as an entity other than an association taxable as a corporation for United States tax purposes, and subsequently a change is made in the governing documents, articles, or agreements of the entity so that the entity is thereafter classified as an association taxable as a corporation, the change in classification is considered a transfer of property to a foreign corporation in connection with an exchange described in section 351. For purposes of section 367(a)(1), the transfer of property is considered as made by the persons determined under the rules set forth in paragraph (b)(3) of this section, with respect to partnerships, and paragraph (b) (4) or (5), with respect to trusts and estates, and the rules of such paragraphs apply in determining whether a transfer described in section 367(a)(1) has been made.

(8) *Contributions to capital.* For rules with respect to treating a contribution to the capital of a foreign corporation as a transfer described in section 367(a)(1), see section 367(c)(2) and the regulations thereunder.

(c) *Time and manner of filing a request for a section 367(a)(1) ruling—* (1) *In general.* A request for a ruling that a transfer of property in connection with an exchange described in section 367(a)(1) is not a transfer pursuant to a plan (as defined in paragraph (c)(5) of

this section) having than avoidance of Federal income taxes as one of its principal purposes must be filed no later than the close of the 183d day after the beginning of the transfer (as defined in paragraph (c)(4) of this section). A favorable ruling (as defined in paragraph (g)(2) of this section) will not be issued with respect to a ruling request that does not meet the requirements of this paragraph (c).

(2) *Delivery and filing.* A request for a ruling under this section shall be delivered during regular business hours to the Commissioner of Internal Revenue, Attn: CC:IND:S, 1111 Constitution Avenue, NW., Washington, D.C. 20224. If the ruling request is delivered by United States mail, the provisions of section 7502 and the regulations thereunder shall apply in determining the date of delivery. A request for a ruling under this section is considered to be filed on the date that the documents which satisfy the minimum standards described in paragraph (c)(3) of this section are delivered to the Commissioner

(3) *Minimum standards*—(i) *Requirements.* A request for a ruling under section 367(a)(1) must—

(A) Set forth all the facts and circumstances relating to the plan in sufficient detail to apprise the Commissioner of the nature of the plan and the purpose for which the request is submitted.

(B) Set forth a general description of all types of property (other than U.S. currency if its transfer does not affect the type of exchange or reorganization that occurs) to be transferred,

(C) Be accompanied by a written copy (if any) of the plan of recorganization or exchange.

(D) Be submitted in accordance with the procedural rules set forth in 26 CFR 601.201(e) (Statement of Procedural Rules) and in substantial compliance with each revenue procedure relating to one or more of the requests in the ruling request submitted, and

(E) Be executed by the person filing the request or the corporation or partnership described in paragraph (d) of this section, under penalties of perjury. If, however, the classification of an entity which is a transferee is determined to be an association taxable as a corporation and the transferor first learns of this determination after filing an otherwise timely and proper request for ruling under section 1492(2), then a later request for a ruling under section 376(a)(1), supplementing or amending the earlier request under section 1492(2), will be considered timely if filed no later than the close of the 60th day after the administrative determination of the Internal Revenue Service that the entity is an association taxable as a corporation has become final (without regard to the pendency or likely pendency of this determination before a court). The later request must satisfy the minimum standards of paragraph (c)(3)(i). The filing of a later request will not be considered an admission of association status.

(ii) *Failure to satisfy minimum standards.* A request for a ruling that (*A*) does meet substantially, but not fully, the minimum standards of paragraph (c)(3)(i) (A) and (B) of this section (without regard to whether the standards of paragraph (c)(3)(i) (C), (D) and (E) are met), or (*B*) fully meets the minimum standards of paragraph (c)(3)(i) (A) and (B) but does not meet the minimum standards of paragraph (c)(3)(i) (C),(D), or (E) of this section will be acknowledged and the person submitting the request will be notified in writing of the minimum standards that have not been satisfied. If the information or materials necessary to satisfy the minimum standards are then delivered to the Internal Revenue Service within 60 days of the date of the letter notifying the taxpayer of the failure, that information or materials will be treated as if received with the orignial submission of the request for a ruling. If the information or materials necessary to satisfy the minimum standards are not delivered within the 60-day period, the ruling request will not be treated as filed on the date the original ruling was delivered. Such additional information or materials delivered after the 60-day period will instead be treated (together with the original submission) as a new request for a ruling delivered and filed on the date the additional information or materials are received, but only if the minimum standards of paragraph (c)(3)(i) of this section are satisfied by all the information and materials submitted. The date on which the additional information or materials required by this paragraph (c)(3)(ii) are considered to be delivered shall be determined by the same rules as those set forth in paragraph (c)(2) of this section, which apply to the delivery and filing of ruling requests.

(iii) *Requests for additional information.* If the minimum standards described in paragraph (c)(3)(i) of this section are satisfied but additional information or materials are required to make a determination under this section, the Internal Revenue Service will request the additional information or materials. The person requesting the ruling shall deliver the information or materials to the Internal Revenue Service within 30 days of the date of the request for such information or materials, or shall deliver within such 30-day period a written statement explaining why the information or materials are unavailable. The request for additional information or materials will not alter the date the ruling request is considered as filed. However, unless the taxpayer establishes reasonable cause for not timely providing the information or materials, the Commissioner may decline to make a determination until the requested information or materials are provided or, as in any case, may issue an unfavorable ruling under the ruling guidelines. In determining whether reasonable cause exists for failure to provide the additional information or materials, the significance of such information or materials to the determination of the Commissioner as to whether a favorable ruling should be issued shall be taken into account. The date on which the additional information or materials or statement required by this paragraph (c)(3)(iii) are considered to be delivered shall be determined pursuant to the same rules as those set forth in paragraph (c)(2) of this section, which apply to the delivery and filing of ruling requests.

(4) *Beginning of a transfer*— (i) *In general.* A transfer described in section 367(a)(1) will be considered to begin on the earliest date on which title, possession of, or right to the use of stock, securities, or other property passes pursuant to the plan for purposes of subtitle A of the Internal Revenue Code. A transfer will not be considered to begin with a decision of a board of directors or similar action unless the transaction otherwise takes effect for purposes of subtitle A of the Internal Revenue Code on that date.

(ii) *U.S. resident under section 6013 (g) or (h).* For purposes of determining the timeliness of a request for a ruling under this section, A transfer made by an alien individual who is considered to be a United States resident by reason of a timely election made under section 6013 (g) or (h) will be considered to begin—

(A) On the date such election under section 6013 (g) or (h) is made, if such date is later than the date the transfer otherwise would be considered to begin under this section, or

(B) On the date the transfer otherwise would be considered to begin under this section, if such date is later than the date the election under section 6013 (g) or (h) is made.

The rule of this paragraph (c)(4)(ii) is illustrated by the following example.

Example. D is a nonresident alien individual who is married to a United States citizen. On March 1, 1983, D transfers property to a foreign corporation in an exchange described in section 351. On April 15, 1984. D and the spouse timely file an election under section 6013(g) with their tax return for the taxable year ended December 31, 1983, for D to be treated as a United States resident. The election is effective on January 1, 1983. For purposes of determining the timeliness of a request for a ruling, the transfer described in section 367(a)(1) made by D in connection with the section 351 exchange is considered to begin on April 15, 1984, the date on which the timely election was made under section 6013(g).

(iii) *Termination of section 1504(d) election.* A transfer deemed to occur as a result of the termination of an election under section 1504(d) will be considered to begin on the date the contiguous country corporation first fails to continue to qualify for the election under section 1504(d). The rule of this paragraph (c)(4)(iii) is illustrated by the following example.

Example. Domestic corporation W previously made a valid election under section 1504(d) to have its Mexican subsidiary, S, treated as a domestic corporation. On August 1, 1984, W disposes of it right, title, and interest in 10 percent of the stock of S by selling such stock to an unrelated United States person who is not a director of S. S first fails to continue to qualify for the election under section 1504(d) on August 1, 1984, since on such date it ceases to be directly or indirectly wholly owned or controlled by W. The constructive transfer of assets from "domestic" corporation S to Mexican corporation S is considered to begin on that date.

(iv) *Change in classification.* A transfer deemed to occur as a result of a change in classification of an entity caused by a change in the governing documents, articles, or agreements of the entity (as described in paragraph (b)(7) of this section) will be considered to begin on the date such changes take effect for purposes of subtitle A of the Internal Revenue Code.

(v) *Conditional transfers.* A transfer will be considered to begin on the date otherwise determined under paragraph (c)(4) (i) through (iv) of this section even though it is made subject to a condition that if there is a failure to obtain a ruling from the Commissioner that is satisfactory to the parties to the transaction, the transaction will not be consummated and to the extent possible the assets transferred will be returned. The rule of this paragraph (c)(4)(v) relates only to determining the date on which a transfer is considered to begin for purposes of section 367(a)(1) and does not have any substantive effect on the tax consequences arising from the rescission of or failure to consummate a transaction.

(5) *Transfers pursuant to a plan.* For purposes of this section, transfers pursuant to a plan are direct, indirect, and constructive transfers of property in connection with an exchange described in section 332, 351, 354, 355, 356, or 361. A transfer may be pursuant to a plan even though it is not described in any document relating to the plan, and a transfer described in a document relating to a plan is not necessarily made pursuant to the plan. The rule of this paragraph (c)(5) is illustrated by the following example.

Example. X, a domestic corporation, exchanges stock of Y corporation for voting stock of F, a foreign corporation, in a reorganization described in section 368(a)(1)(B). The documents describing the exchange also describe a lease of Blackacre by X to F for a five-year term at a fair market rental value. The exchange of Y stock for F voting stock is pursuant to the plan of reorganization. The transfer of the leasehold interest in Blackacre to F is not pursuant to the plan of reorganization.

(d) *Persons who must request rulings*—(1) *In general.* Any United States person who makes a direct, indirect, or constructive transfer of property to which this section applies must request a ruling as provided in paragraph (c) of this section, receive a favorable ruling, and comply with paragraph (d)(3) of this section for the foreign corporation to be considered to be a corporation, within the meaning of sections 332, 351, 354, 355, 356, or 361, for purposes of determining the amount of gain to be recognized by the United States person.

(2) *Special rules for shareholders and partners*—(i) *Shareholders.* A corporation may request a ruling on behalf of its shareholders who are transferors of its stock with respect to a single plan and for whom the tax consequences of the transfers will be determined in the same manner. Each such shareholder who satisfies the requirements of paragraph (d)(3) of this section will be considered to be a person who requested the ruling, except that any shareholder who requested a separate ruling cannot be so considered. The rule of this subdivision (i) is illustrated by the following example.

Example. All the shareholders of domestic corporation X transfer their stock of X to foreign corporation F solely in exchange for voting stock of F in a reorganization described in section 368(a)(i)(B). X may request a ruling with respect to the plan on behalf of all of its shareholders who are United States persons, since the gain or loss realized by each such shareholder on the exchange of stock and the basis in the stock of F received is determined in the same manner, even though each such shareholder may have a different basis and holding period with respect to stock of X. Each such shareholder who satisfies the requirements of paragraph (d)(3) of this section will be treated as a person who requested the ruling. Each such shareholder also has the opportunity to request a separate ruling that will have effect only for that shareholder, but if a separate request is made, the shareholder cannot be treated as requesting the ruling obtained by the corporation on behalf of its shareholders. If neither a shareholder nor the corporation on behalf of the shareholder timely requests a ruling and receives a favorable ruling, the shareholder will not be entitled to nonrecognition of gain under section 354.

(ii) *Partners.* A partnership may request a ruling on behalf of its partners who are considered transferors either of property of the partnership or of interests in the partnership pursuant to a single plan and for whom the tax consequences of the transfers will be determined in the same manner. Each such partner who satisfies the requirements of paragraph (d)(3) of this section will be considered to be a person who requested the ruling, except that any partner who requested a separate ruling cannot be so considered.

(3) *Attachments to tax return.* Any taxpayer to whom this section applies shall file with its income tax return for any period during which one or more transfers subject to section 367(a)(1) and this section begins either—

(i) A copy of any ruling relating to the transfer that is received by or on behalf of the taxpayer prior to filing the return,

(ii) If a ruling has been requested but has not been received prior to filing the return, a written summary of any ruling request relating to the transfer that has been filed by or on behalf of the taxpayer, indicating the date it was filed, or

(iii) If no ruling request relating to the transfer has been filed, a written statement disclosing—

(A) That the transfer is subject to section 367(a)(1),

(B) That no ruling relating to the transfer has been requested by or on behalf of the taxpayer,

(C) The date of the beginning of the transfer (as defined in paragraph (c)(4) of this section), and

(D) Whether the taxpayer intends to file a request for a ruling relating to the transfer within the time limit specified in paragraph (c)(1) of this section.

A copy of any ruling received after the return is filed or a statement that the ruling request has been withdrawn shall be forwarded by the person who requested the ruling to the district director or the service center where the

return was filed within 60 days of the receipt or withdrawal, together with an identification of the return to which the ruling or statement relates. Any amended return that is required due to the ruling or the withdrawal of the ruling request must also be submitted with the ruling or statement.

(e) *Failure to comply with section 367(a)(1)*—(1) *Action or inaction constituting a failure to comply.* A taxpayer fails to comply with section 367(a)(1) and this section if, with respect to a transfer described in section 367(a)(1) to which this section applies, either—

(i) The taxpayer fails to obtain a favorable ruling (as defined in paragraph (g)(2) of this section) with respect to the transfer.

(ii) The taxpayer fails to comply with all of the terms and conditions imposed as part of a favorable ruling, or

(iii) The plan is carried out in a manner that constitutes a material variance (as defined in paragraph (e)(3) of this section) from the plan as described in the ruling request.

(2) *Consequences of failure to comply.* Except as provided in paragraph (e)(4) of this section, if a taxpayer fails to comply with section 367(a)(1) and this section with respect to a transfer described section 367(a)(1) a foreign corporation shall not be considered to be a corporation for purposes of determining the amount of gain to be recognized on the transfer and of determining the basis of property transferred or received. For all other purposes, including the determination of whether a loss shall be recognized and whether corporate attributes shall be carried over pursuant to section 381, the foreign corporation shall be considered to be a corporation. Any loss realized but not recognized on a transfer described in section 367(a)(1) does not reduce the amount of gain realized or recognized on any other transfer described in section 367(a)(1), regardless of whether both transfers are made pursuant to the same plan.

(3) *Material variance*—(i) *In general.* Whether a variance is a material variance is a determination within the discretion of the Commissioner and will be made on a case-by-case basis. In general, a material variance is a variance to which the Commissioner would reasonably attach importance in determining whether the transfer was pursuant to a plan having the avoidance of Federal income taxes as one of its principal purposes. A variance is material if, had it been known by the Commissioner, it would have had an influence or bearing on his determination. The variance need not directly control the determination contained in the ruling to be material. Examples of a variance that is not material may include a relatively insignificant overstatement or understatement of the value of assets transferred if such overstatement or understatement does not affect the type of exchange or reorganization that occurs.

(ii) *Taxable transfers disclosed in a ruling request.* If a transfer is disclosed in a ruling request that is filed more than 183 days after the transfer began, such transfer (although taxable) will not constitute a variance from the plan as described in the ruling request. A favorable ruling may be issued with respect to other transfers pursuant to the same plan which begin no more than 183 days before the ruling request is filed.

(iii) *Transfers covered by separate or amended ruling request.* If a material variance would result from the execution of a particular transfer pursuant to a plan, which transfer is not described in a ruling request that is filed timely with respect to other transfers pursuant to the same plan, a favorable ruling may nevertheless be obtained with respect to all transfers pursuant to the plan—

(A) If a separate ruling request is timely filed with respect to the omitted transfer and if all other transfers described in the initial ruling request are also described in such separate ruling request, or

(B) If the initial ruling request is still pending, an amendment to the initial ruling request describing the omitted transfer is filed timely with respect to such transfer. The rules of this subdivision (iii) apply only if the omitted transfer is described in accordance with the minimum standards set forth in paragraph (c)(3) of this section.

(iv) *Cash transfers.* No ruling under section 367(a)(1) is required with respect to the transfer of solely U.S. currency to a foreign corporation. The undisclosed transfer of U.S. currency to a foreign corporation in connection with an exchange described in section 367(a)(1) generally will not constitute a material variance from the plan as described in the ruling request unless such transfer affects the type of exchange or reorganization that occurs.

(4) *Exception.* The failure to comply with section 367(a)(1) and this section may not be used by the taxpayer to its advantage. In those situations the Commissioner deems appropriate, a foreign corporation will be treated as a corporation even if the taxpayer fails to comply with section 367(a)(1).

(f) *Protests and appeals*—(1) *Administrative remedies.* A person requesting a ruling under this section (including a corporation or partnership that requests a ruling on behalf of its shareholders or partners under paragraph (d) of this section) may file an administrative protest of a ruling not later than the 45th day after the date of the ruling letter. The protest must include a copy of the ruling letter, the reason for the protest (including the grounds of the protest and arguments in support thereof), a statement as to whether a conference is requested, and the names of the persons expected to attend the conference if one is requested. A protest that meets the requirements of this paragraph (f)(1) is considered to be filed upon delivery to the Commissioner pursuant to the rules of paragraph (c)(2) of this section, which apply to the delivery and filing of ruling requests.

(2) *Judicial appeals.* Provisions for petitioning the United States Tax Court with respect to a transfer subject to section 367(a)(1) and this section are set forth in section 7477 and the regulations thereunder. Such a proceeding is the exclusive means for obtaining judicial review of the determination of the Commissioner.

(g) *Definitions.* The following definitions apply for purposes of this section.

(1) *United States person.* The term "United States person" includes those persons described in section 7701(a)(30). Such term includes a citizen or resident of the United States, a domestic partnership, a domestic corporation, and any estate or trust other than an estate or trust described in section 7701(a)(31) as a foreign estate or foreign trust. For purposes of this section, an individual with respect to whom an election has been made under section 6013 (g) or (h) is considered to be a resident of the United States while such election is in effect. A nonresident alien or a foreign corporation will not be considered a United States person because of its actual or deemed conduct of a trade or business within the United States during a taxable year. Nor will a nonresident alien individual be considered to be a United States person solely on the basis that such individual has been present in the United States for 183 days or more during the taxable year.

(2) *Favorable ruling.* A favorable ruling is a ruling that a transfer described in section 367(a)(1) is not in connection with an exchange pursuant to a plan having the avoidance of Federal income taxes as one of its principal purposes, including such a ruling that is subject to terms and conditions.

PART 7—TEMPORARY INCOME TAX REGULATIONS UNDER THE TAX REFORM ACT OF 1976

§§ 7.367(a)-1 and 7.367-2 [Removed]

Par. 2. Sections 7.367(a)-1 and 7.367-2 are removed.

PART 301—PROCEDURE AND ADMINISTRATION

Par. 3. Section 301.7477-1 is amended by revising paragraph (a)(3) and the last sentence of paragraph (b)(2) to read as follows:

§ 301.7477-1 Declaratory judgments relating to transfers of property from the United States.

(a) *Petition*—* * *

(3) *Beginning of exchange.* An exchange generally shall be considered to begin upon the beginning of the first transfer of property pursuant to the plan under which the exchange is to be made. For rules determining the beginning of a transfer, see § 1.367(a)-1(c)(4).

* * * * *

(b) *Judgment*—* * *

(2) *Exhaustion of administrative remedies.* * * * In no event shall the Internal Revenue Service be deemed to have had a reasonable time to act if a failure to act has occurred because the petitioner did not proceed with due diligence or because the petitioner has not provided all available information or materials reasonably requested by the Internal Revenue Service.

* * * * *

This Treasury decision is issued under the authority contained in sections 367(a)(1) (90 Stat. 1634, 26 U.S.C. 367(a)(1)) and 7805 (68A Stat. 917, 26 U.S.C. 7805) of the Internal Revenue Code of 1954. Approved by the Office of Management and Budget under control number 1545-0719.

Roscoe L. Egger, Jr.,

Commissioner of Internal Revenue.

Approved: April 20, 1984.

John E. Chapoton,

Assistant Secretary of the Treasury.

[FR Doc. 84-12374 Filed 5-7-84; 8:45 am]

BILLING CODE 4830-01-M

Bureau of Alcohol, Tobacco and Firearms

27 CFR Part 9

[T.D. ATF-174 RE: Notice No. 490]

Clear Lake Viticultural Area

AGENCY: Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury.

ACTION: Final rule, Treasury decision.

SUMMARY: This final rule establishes a viticultural area located within southwest Lake County, California, known as "Clear Lake." The Bureau of Alcohol, Tobacco and Firearms (ATF) believes the establishment of "Clear Lake" as a viticultural area and subsequent use as an appellation of origin on wine labels and advertisements will allow wineries to better designate the specific grape-growing areas where their wines come from and will enable wine consumers to better identify the wine they purchase.

EFFECTIVE DATE: June 7, 1984.

FOR FURTHER INFORMATION CONTACT: Edward A. Reisman, Specialist, FAA, Wine and Beer Branch, Bureau of Alcohol, Tobacco and Firearms, Washington, DC, (202-566-7626).

SUPPLEMENTARY INFORMATION:

Background

On August 23, 1978, ATF published Treasury decision ATF-53 (43 FR 37672, 54624) revising regulations in 27 CFR Part 4. These regulations allow for the establishment of definite viticultural areas. The regulations also allow the name of an approved viticultural area to be used as an appellation of origin on wine labels and in wine advertisements.

On October 2, 1979, ATF published Treasury decision ATF-60 (44 FR 56692) which added a new Part 9 to 27 CFR providing for the listing of approved American viticultural areas, the names of which may be used as appellations of origin.

Section 4.25a(e)(1), Title 27, CFR, defines an American viticultural area as a delimited grape-growing region distinguishable by geographical features. Section 4.25a(e)(2) outlines the procedures for proposing an American viticultural area. Any interested person may petition ATF to establish a grape-growing region as a viticultural area.

Petition for Clear Lake

ATF was petitioned by three of the grape-growers and winery owners located in an area surrounding the watershed of Clear Lake in southwestern Lake County, California. The viticultural area is known as "Clear Lake."

The viticultural area is located entirely within Lake County between the Mayacamas Mountains to the southwest and the Mendocino National Forest to the northeast. It extends to the southeast to just north of the "Guenoc Valley" viticultural area which is also located in Lake County. The "Clear Lake" viticultural area is located entirely within the boundaries of a larger viticultural area known as "North Coast."

The area encompassed by the boundaries consists of 168,960 acres or 264 square miles of valley and upland terrain surrounding Clear Lake. Prominent among the growing areas contiguous to Clear Lake, and which fall within the viticultural area designation, are Big Valley, Scotts Valley, Upper Lake, Clearlake Oaks and Lower Lake.

Evidence provided by the petitioners states that there are over 3,000 acres planted to vines, and the viticultural area now has three commercial wineries, two located in the Big Valley area, a third in Lower Lake, and others being planned.

In response to this petition ATF published a notice of proposed rulemaking, No. 490 in the **Federal Register** on October 20, 1983, (48 FR 48685) proposing the establishment of the "Clear Lake" viticultural area.

Historical or Current Evidence of Boundaries

The boundaries of the "Clear Lake" viticultural area are historically defined as those valley and upland terrain areas that surround Clear Lake. Clear Lake is a large natural fresh water lake that is centrally located in the viticultural area. The "Clear Lake" viticultural area is rimmed by steep surrounding mountains ranging in elevation to over 4,000 feet above sea level. The Clear Lake region has been known as a popular resort area and agricultural center since it was first settled in the Nineteenth Century. In recent years there has been a significant return of vineyard development found within the boundaries of the "Clear Lake" viticultural area.

The boundaries of the viticultural area may be found on four (4) U.S.G.S. quadrangle (Topographic) maps, 15 minute series, scale 1:62,500—Lower Lake, Clearlake Oaks, Lakeport and Kelseyville. The specific boundaries for the viticultural area are detailed in the regulation portion of this document at 27 CFR 9.99(c) which immediately follows in the preamble to this final rule.

After carefully considering the boundaries and supporting evidence submitted, ATF is adopting the "Clear Lake" viticultural area boundaries stated in the notice of proposed rulemaking and found in this final rule.

Geographical Features

The petitioner claimed and ATF agrees that the "Clear Lake" viticultural area is distinguished from the surrounding areas on the basis of elevation, watershed and climate. The

petitioner based these claims on the following evidence that has been verified by ATF:

(a) *Elevation.* The Mendocino National Forest on the northeastern boundary and the Mayacamas Mountain Range on the southwestern boundary geographically isolate the Clear Lake area from surrounding areas. Both of these mountain areas have heavily forested rugged terrains. In addition, because it is Federally controlled land, the Mendocino National Forest is unavailable for cultivation. The viticultural area is rimmed by steep surrounding mountains ranging in heights to over 4,000 feet. The prominent inactive volcanic mountain, Mt. Konocti (elevation 4,300 feet) rises from the western edge of Clear Lake and dominates the countryside. The lake itself, which is centrally located within the viticultural area is 1,300 feet above sea level and the largest natural body of fresh water in California (70.5 square miles). Because of its size and location, Clear Lake has a demonstrable influence on the grape-growing areas immediately surrounding it.

The 3,000 acres currently planted around the lake are located at altitudes of 1,300 to 1,800 feet. In comparison, the vineyard areas of Mendocino County located to the west of Clear Lake have average altitudes of less than 700 feet. The vineyard areas of Napa and Sonoma Counties located to the south of Clear Lake are less than 100 feet in altitude.

(b) *Climate and Watershed.* The Clear Lake viticultural area is close enough to the Pacific Ocean to be influenced by the maritime coastal air that flows through the gaps in the mountains located to the west. The coastal air flows gently across Clear Lake, cooling the area surrounding it in the summer. This coastal air does not penetrate the high mountains to the east of Clear Lake. On the east side of that mountain area the climate is much warmer, with little air flow.

The Clear Lake viticultural area has a unique climate pattern, different than the other north coastal areas. The feature distinguishing Clear Lake from the surrounding areas is the unique influence of the Clear Lake watershed. Clear Lake serves to moderate the temperatures in the viticultural area throughout the year by creating both a favorable warming temperature influence in the winter and a cooling influence in the summer.

Clear Lake's cold nights offset the daytime heat which makes the viticultural area uniformly cooler than anywhere else in the surrounding north coastal counties. Also, the absence of wind and fog conditions makes the Clear Lake viticultural area different from the surrounding areas.

According to the publication entitled "Climatography of the United States No. 81–4, Decennial Census of U.S. Climate," the growing season in Clear Lake is 223 days which is shorter than the surrounding areas.

The average rainfall per year for the Clear Lake area is about 37 inches. The average rainfall at the Middletown area of Lake County located to the south of the proposed viticultural area is about 62 inches per year. The adjacent counties of Sonoma and Mendocino have rainfalls averaging 32 and 39 inches per year, respectively.

Viticultural Area Name

The petitioner claimed and ATF agrees that the viticultural area is locally and nationally known by the name "Clear Lake." The petitioner based this claim on the following evidence that has been verified by ATF:

(a) Clear Lake, the largest natural fresh water lake located entirely within the boundaries of California, identifies the principal inhabited region of Lake County. For over a century the Clear Lake region has been a popular resort and agricultural center.

(b) Mr. Ernest P. Penninov the author of "A History of the Lake County Early Grape and Wine Industry," documented events about the people that first settled around the Clear Lake area and their relationship to the development of the local wine industry. He said, that in 1865 a group of San Francisco entrepreneurs organized the Clear Lake Water Company with the purpose of impounding water from Clear Lake for use in San Francisco.

(c) By the turn of the century newspaper stories of the period told of groups of people ferrying around Clear Lake stopping at various wineries for drinks.

(d) Several wineries that have been selling wines on a local and national level have used the name Clear Lake on their bottle labels to further identify their products.

(e) Some localities within the viticultural area that use the name Clear Lake in their heritage are Clearlake Oaks, Clearlake Park, Clearlake Highlands and Clear Lake State Park. United States Geographical Survey maps document this information.

No Comments Received

The notice of proposed rulemaking, Notice No. 490, contained a 45 day comment period. In it, ATF invited comments from interested parties regarding two issues.

The first issue dealt with historical or current evidence as to whether the viticultural area boundaries are as specified in the petition.

The second issue that ATF requested comments from the public on, dealt with alternative boundaries. Comments were invited on data concerning the geographical and viticultural characteristics which distinguish the viticultural area from the surrounding areas.

No comments were received during the comment period regarding either of these two issues.

Having analyzed and evaluated all of the information submitted, ATF is adopting the "Clear Lake" viticultural area as proposed.

Miscellaneous

ATF does not wish to give the impression by approving "Clear Lake" as a viticultural area that it is approving or endorsing the quality of the wine from this area. ATF is approving this area as being distinct and not better than other areas. By approving this area, "Clear Lake" wine producers are allowed to claim a distinction on labels and advertisements as to the origin of the grapes. Any commercial advantage gained can only come from consumer acceptance of "Clear Lake" wines.

Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1980, Pub. L. 96–511, 44 U.S.C. Chapter 35, and its implementing regulations, 5 CFR Part 1320, do not apply to this final rule because no requirement to collect information is proposed.

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to this final rule because it will not have a significant economic impact on a substantial number of small entities. This final rule will allow the petitioners and other persons to use an appellation of origin, "Clear Lake," on wine labels and in wine advertising. ATF has determined that this final rule neither imposes new requirements on the public nor removes privileges available to the public. This final rule is not expected to have significant secondary or incidental effects on a substantial number of small entities, or impose, or otherwise cause, a significant increase in the reporting, recordkeeping, or other compliance burdens on a substantial number of small entities.

Accordingly, it is hereby certified under the provisions of Section 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)), that this final rule will not have a significant economic impact on a substantial number of small entities.

Compliance With Executive Order 12291

In compliance with Executive Order 12291, ATF has determined that this final rule is not a "major rule" since it will not result in—

(a) An annual effect on the economy of $100 million or more;

(b) A major increase in costs of prices for consumers, individual industries, Federal, State, or local government agencies, or geographical regions; or

(c) Significant adverse effects on competition, employment, investment, productivity, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Disclosure

A copy of the petition and supporting documents are available for inspection during normal business hours at the following location: ATF Reading Room, Room 4407, Office of Public Affairs and Disclosure, 12th and Pennsylvania Ave., NW, Washington, DC 20226.

Drafting Information

The principal author of this document is Edward A. Reisman, Specialist, FAA, Wine and Beer Branch, Bureau of Alcohol, Tobacco and Firearms.

List of Subjects in 27 CFR Part 9

Administrative practice and procedure, Consumer protection, Viticultural areas, Wine.

Authority

Accordingly, under the authority in 27 U.S.C. 205 (49 Stat. 981, as amended), the Director is amending 27 CFR Part 9 as follows:

PART 9—AMERICAN VITICULTURAL AREAS

Paragraph 1. The table of sections in 27 CFR Part 9, Subpart C, is amended to add the title of § 9.99 to read as follows:

Subpart C—Approved American Viticultural Areas

Sec.

* * * * *

9.99 Clear Lake

* * * * *

Par. 2. Subpart C is amended by adding § 9.99 to read as follows:

Subpart C—Approved American Viticultural Areas

* * * * *

§ 9.99 Clear Lake.

(a) *Name.* The name of the viticultural area described in this section is "Clear Lake."

(b) *Approved Maps.* The appropriate maps for determining the boundaries of the Clear Lake viticultural area are four U.S.G.S. maps. The maps are titled as follows:

(1) "Lower Lake Quadrangle, California," 15 minute series, 1958;

(2) "Clearlake Oaks Quadrangle, California," 15 minute series, 1960;

(3) "Lakeport Quadrangle, California," 15 minute series, 1958;

(4) "Kelseyville Quadrangle, California," 15 minute series, 1959.

(c) *Boundaries.* The Clear Lake viticultural area is located in southwestern Lake County, California. The descriptive boundaries of the viticultural area, using landmarks and points of reference on the applicable U.S.G.S. maps, are as follows:

Lower Lake Quadrangle Map (15 minute series); From the beginning point on Mt. Hannah in Section 16, Township 12 North (T12N), Range 8 West (R8W), identified as having an elevation of 3,978 feet, the boundary runs—

(1) East-southeasterly in a straight line to the point on Seigler Mountain in Section 23, T12N/R8W, identified as having an elevation of 3,692 feet;

(2) Then east-southeasterly in a straight line to the point on Childers Peak in Section 34, T12N/R7W, identified as having an elevation of 2,188 feet;

(3) Then east-northeasterly in a straight line to the point on the southeast corner of Section 25, T12N/R7W;

(4) Then northeasterly in a straight line to the point in Section 16, T12N/R6W, identified as being the "Baker Mine;"

(5) Then northwesterly in a straight line to the point at the southeast corner of Section 23, T13N/R7W;

(6) Then northerly along the east line of Sections 23, 14, 11, and 2, to the point at the northeast corner of Section 2, T13N/R7W, on the Clearlake Oaks Quadrangle map;

Clearlake Oaks Quadrangle Map (15 minute series); Continuing from the northeast corner of Section 2, T13N/R7W—

(7) Then northwesterly in a straight line to the point in Section 21, T14N/R7W, at the top of Round Mountain

(8) Then northwesterly in a straight line to the southeast corner of Section 4, T14N/R8W;

Lakeport Quadrangle Map (15 minute series); Continuing from the southeast corner of Section 4, T14N/R8W, on the Clearlake Oaks Quadrangle Map—

(9) Then northwesterly on the Lakeport Quadrangle in a straight line to a point on Charlie Alley Peak in Section 28, T16N/R9W, identified as having an elevation of 3,482 feet;

(10) Then westerly in a straight line to a point on Hells Peak in Section 29, T16N/R10W, identified as having an elevation of 2,325 feet;

(11) The southeasterly in a straight line to a point on Griner Peak in Section 23, T15N/R10W, identified as having an elevation of 2,132 feet;

(12) Then southwesterly in a straight line to a point on Scotts Mountain in Section 8, T14N/R10W, identified as having an elevation of 2,380 feet;

(13) Then southeasterly in a straight line to a point on Lakeport Peak in Section 35, T14N/R10W, identified as having an elevation of 2,180 feet;

Kelseyville Quadrangle Map (15 minute series); Continuing from Lakeport Peak in Section 35, T14N/R10W, on the Lakeport Quadrangle Map—

(14) Then southeasterly in a straight line to the point at the southwest corner of Section 1, T13N/R10W;

(15) Then south by southeast in a straight line to the point at the southeast corner of Section 36, T13N/R10W;

(16) Then south by southeasterly in a straight line to the point at the southwest corner of Section 18, T12N/R8W;

(17) Then east by northeast in a straight line to the beginning point at Mount Hannah, Section 16, T12N/R8W, on the Lower Lake Quadrangle Map.

Signed: April 11, 1984.

Stephen E. Higgins,

Director.

Approved: April 30, 1984.

Edward T. Stevenson,

Deputy Assistant Secretary (Operations).

[FR Doc. 84-12337 Filed 5-7-84; 8:45 am]

BILLING CODE 4810-31-M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 925

Approval of Permanent Program Amendments From the State of Missouri Under the Surface Mining Control and Reclamation Act of 1977

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

ACTION: Final rule.

SUMMARY: OSM is announcing the approval of certain amendments to the Missouri permanent regulatory program (hereinafter referred to as the Missouri program) under the provisions of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). On April 13, 1983, the State of Missouri submitted to OSM revised statutory and regulatory performance bond and enforcement provisions as program amendments.

After providing opportunity for public comment and conducting a thorough review of the program amendments, the Director of OSM has determined that the amendments meet the requirements of SMCRA and the Federal regulations, with the exception of several provisions discussed below.

Accordingly, the Director is approving those amendments which are consistent and has notified Missouri, pursuant to 30 CFR 732.17, of additional program amendments which are required. Missouri must, pursuant to 30 CFR 732.17(f), respond to this notification within 60 days.

The Federal rules at 30 CFR Part 925 which codify decisions concerning the Missouri program are being amended to implement these actions.

EFFECTIVE DATE: May 8, 1984.

ADDRESSES: Copies of the Missouri program and the Administrative Record on the Missouri program are available for pubic inspection and copying during business hours at:

Office of Surface Mining, Kansas City Field Office, Scarritt Building, 818 Grand Avenue, Kansas City, Missouri 64106; Telephone: (816) 374–3920.

Office of Surface Mining, Room 5124, 1100 L Street, NW., Washington, D.C. 20240; Telephone: (202) 343–7896.

Missouri Department of Natural Resources, Land Reclamation Commission, P.O. Box 1368, 1026D Northeast Drive, Jefferson City, Missouri 65102; Telephone: (314) 751–3241.

FOR FURTHER INFORMATION CONTACT: Mr. Richard Rieke, Field Office Director, Kansas City Field Office, Office of Surface Mining, Scarritt Building, 818 Grand Avenue, Kansas City, Missouri 64106; Telephone: (816) 374–3920.

SUPPLEMENTARY INFORMATION:

I. Background

The Missouri program was approved on November 21, 1980 (45 FR 77017–77028). The approval was conditioned on the correction of 23 minor deficiencies, which were included in three conditions, (a), (b), and (c). Condition (a) consisted of (a)(1) through (a)(21). The Secretary removed the first six elements of condition (a)(1), conditions (a)(2) through (a)(21), and conditions (b) and (c) on May 11, 1982 (47 FR 20116–20119). The Secretary removed the last element of condition (a)(1) on January 17, 1983 (48 FR 1956). Information pertinent to the general background, revisions, modifications, and amendments to the permanent program submission, as well as the Secretary's findings, the disposition of comments, and a detailed explanation of the conditions of approval of the Missouri program can be found in the November 21, 1980 Federal Register (45 FR 77017).

On April 13, 1983, Missouri submitted a proposed program amendment (Administrative Record No. MO–253), consisting of enacted legislation (Senate Bill 737) and promulgated regulations to amend the performance bond and enforcement provisions of the Missouri program. Senate Bill 737 revises the Missouri statute by repealing sections 444.805 and 444.830, and adding new sections 444.805, 444.830, 444.950, 444.955, 444.960, 444.965 and 444.970. The Missouri revised regulations amend 10 CSR 40–3.120, 40–3.270, 40–4.030 and 40–8.030, rescind 40–7.010, 40–7.020, 40–7.030 and 40–7.040, and add new sections 40–7.011, 40–7.021, 40–7.031, 40–7.041, and 40–7.050.

The program amendments create and implement a coal mine land reclamation fund to be used to complete reclamation after the proceeds from any applicable performance bond have been exhausted. All permittees are required to pay an assessment to the fund based on the tonnage of coal sold, shipped or otherwise disposed of. The amendments also revise the related standards for revegetation success and the associated enforcement provisions.

OSM published a notice in the Federal Register on May 9, 1983, announcing receipt of the amendments, and procedures for the public comment period and for requesting a public hearing on the adequacy of the amendment (48 FR 20764). The public comment period ended June 8, 1983. The Federal Register stated that a public hearing would be held only if requested. No one requested a public hearing, so none was held.

During this period, OSM's review of Missouri's proposed amendments identified several concerns. On November 17, 1983, OSM met with the State to discuss the amendment. Those discussions were continued during a conference call on November 18, 1983. Minutes of the discussions held on November 17 and 18 were placed in the Administrative Record (MO–258), as was a December 22, 1983 letter from the State commenting on the minutes of the meeting (MO–259).

On January 19, 1984, OSM published a notice in the Federal Register reopening and extending the public comment period on Missouri's proposed amendments in light of the meeting notes and the State's response (49 FR 2268). That comment period ended on Febuary 3, 1984.

II. Director's Findings

A. General Findings

The Director finds, in accordance with SMCRA and 30 CFR 732.17, that the amendments submitted by Missouri on April 13, 1983, meet the requirements of SMCRA and the Federal regulations with the exception of several provisions discussed below. Only those provisions of particular interest or concern are discussed in the specific findings which follow. Unless specifically stated, the Director approves the revisions to the Missouri law and regulations. Discussion of only those provisions for which specific findings are made does not imply any deficiency in any provision not discussed. The provisions are not specifically discussed are found to be consistent with the Act and no less effective than the Federal regulations. All of the provisions involved in the amendment are cited at the end of this notice in the amendatory language for Sections 925.15 and 925.16. Missouri has also made numerous non-substantive, primarily typographical, changes to its statute and regulations. The Director finds the corrections consistent with SMCRA and the Federal regulations.

The amendment submitted by Missouri establishes an alternative bonding system under section 509(c) of the Act. Section 509(c) allows the Secretary (through OSM) to approve as part of a State program "an alternative system that will achieve the objectives and purposes of the bonding program pursuant to this section." Section 509 requires that a bond be posted sufficient to cover the cost of reclamation if it had to be performed by the regulatory authority in the event of forfeiture. The revised Federal bonding regulations, 30 CFR 800.11(e) (48 FR 62932, July 19, 1983), require an alternative bonding system to: (1) assure that sufficient funds will be available to cover reclamation costs and (2) provide substantial economic incentive for the permittee to comply with reclamation requirements. Missouri's alternative bonding system meets these criteria by: (1) Requiring operators to supply a reclamation bond and pay fees based on the tonnage of coal produced, and (2) imposing 25 cents per ton penalties, in addition to normal civil penalties, for delinquent payment of fees and for delinquent reclamation. These requirements should provide sufficient funds and a strong economic incentive to reclaim.

The alternative system proposed by Missouri establishes a coal mine land reclamation fund (the fund) to underwrite bonding of surface mining and reclamation operations in the State. Operators are required to supply a surety or other bond of up to $500 per acre and are assessed a fee of 30 cents per ton or the first 50,000 tons of coal sold in a calendar year and 20 cents per ton for the next 50,000 tons sold from the permittee's Missouri operations. This fee, plus certain other fees, go into the fund. In case of operator default on reclamation, and after bond amounts are exhausted, the fund will be used to complete any remaining reclamation on the defaulted areas. This fund differs slightly from most other State reclamation funds presently in use because the operator's per acre bond can be fully released after "pit reclamation", that is, after backfilling, regrading, placement of topsoil and initial seeding of the pit area. Operator liability is maintained on the areas during phase II and phase III reclamation periods (revegetation and extended liability period). However, in lieu of the operator bond, the fund serves as the bond on the areas for these phases. The operator is required to go through formal release procedures, including public participation, before liability is released.

As with other such alternative bonding systems, the Director requires, as part of the approval of the program amendment and as part of OSM's oversight of the Missouri program, that the State provide to OSM a periodic report, not less than annually, with the first report due May 1, 1985, evaluating the adequacy of the fund. This report must incude, at a minimum, the following items: (1) How the fund is continually sufficient to cover any reclamation costs on forfeited acres which are not covered by bond forfeiture amounts; (2) the rate of fund replenishment following use of the fund for reclamation purposes; (3) how the fund is replenished in a timely manner so as not to delay necessary reclamation; (4) frequency of default; (5) the dollar amounts of the fund available at a given time; and (6) the amount of permittee bond versus fund money used in reclamation. In conjunction with the above, the Director encourages and expects Missouri, pursuant to RSMo 444.830 and 10 CSR 40–7.010(8), to review the program frequently and make any adjustments as necessary to assure adequacy of the fund.

B. Findings on Statutory Amendments—Missouri Surface Coal Mining Law, 444.800—444.970 RSMo 1978 (Cum. Supp. 1982)

1. 444.950—Performance bond for pit reclamation

Missouri has added a new section to its statute to provide that in lieu of the other bonding provisions of the statute, the permit applicant may file a bond conditioned on completion of pit reclamation. The statue specifies that the bond shall not be more than $500 per permitted acre but not less that $10,000 per permit. In addition, liability under the bond continues until the LRC determines that pit reclamation has been completed. In the event of forfeiture, the face amount of the bond shall be available for the completion of pit reclamation. The Director finds that the alternative bond provision, when taken with the provisions discussed below, is consistent with section 509 of SMCRA.

2. 444.960—Establishment of coal mine land reclamation fund

Missouri has added a new section to its statute establishing a coal mine land reclamation fund in the State treasury. Assessments from coal mine operators under 444.965 and any penalties assessed under 444.970 (see discussion below) are to be placed in the fund. Monies from the fund are to be used by the LRC to complete reclamation after any applicable performance bond has been exhausted. The Director finds that this provision is consistent with section 509 of SMCRA.

3. 444.965—Assessments

Missouri has added a new provision requiring each permittee to pay an assessment monthly based on the amount of coal sold, shipped or otherwise disposed of. The assessment shall be paid at the rate of 30 cents per ton for the first 50,000 tons sold in a calendar year, and 20 cents per ton for the next 50,000 tons. The Director finds this provision is consistent with section 509 of the Act.

444.970—Penalties for delinquent payment of assessment

Missouri has added a new provision authorizing the LRC to impose a penalty of 25 cents per ton on any permittee who is more than 30 days delinquent in paying the assessment due. The penalty shall remain in effect until the delinquency is eliminated. This provision also authorizes the LRC to impose a penalty of 25 cents per ton if the permittee becomes substantially delinquent in completing his reclamation plan. The penalty shall remain in force until the delinquency is corrected, and the LRC also may require additional bonding to fully ensure reclamation.

The Director understands that the LRC has the authority to impose these penalties in addition to, rather than in lieu of, ordinary civil penalties under 444.870. Therefore, the Director finds that these penalties are at least as stringent as those in section 518 of SMCRA. See Findings C.4.c. and C.5.b. below for further discussion of this issue.

However, should the penalties for delinquent payment of an assessment be used in lieu of other enforcement measures the Director will require a modification in the program to ensure that such penalties are imposed only in addition to the others.

C. Findings on Regulatory Amendments—Missouri Code of State Regulations (CSR), Title 10, Division 40

1. Revegetation

a. *10 CSR 40–3.120(7)(A)2A—Tree and shrub stocking.* This provision requires that trees or shrubs used for reclamation be in place only one growing season before qualifying to meet the revegetation standard. This requirement is not as effective as 30 CFR 816.116(b)(3)(ii) which requires two growing seasons. The Director is requiring a program amendment to provide for a revegetation standard no less effective than the Federal regulations.

b. *10 CRS 40–3.120(8) (C) and (D) (Surface mining) and 10 CSR 40–3.270(8) (C) and (D) (Underground mining)—Variances from reclamation schedule.* This provision allows the LRC to approve variances from the reclamation timing requirements of 10 CSR 40–3.120(8)(A) if one of three tests is met:

(1) The permittee can demonstrate that unusual circumstances which are beyond his control have made him temporarily unable to conform to the requirements;

(2) The variance requested is for the purpose of improving efficiency of the management of the reclaimed land, and the Director determines that the variance will not unreasonably delay reclamation and the release of phase III liability; or

(3) The variance is requested for the purpose of allowing the permittee to perform reclamation that significantly exceeds the requirements of the law.

The standards for the variances have no direct Federal parallels. Subparagraph (D) treats requests for variances under this rule as the

equivalent of an application for a permit revision that proposes significant alterations in the original permit, subject to the public participation requirements of 10 CSR 40–6.070 and 10 CSR 40–6.080.

At the November 17 meeting, OSM discussed this issue with Missouri. OSM expressed concern that the variances might be too broad to be consistent with SMCRA. Missouri pointed out that the rule is a schedule only for reclamation after backfilling and grading is accomplished under the action-forcing schedule of 10 CSR 40–3.110(1)(A). The preamble to the Federal rules at 30 CFR 816.100 and 816.101 (48 FR 24638, June 1, 1983 and 48 FR 23356, May 24, 1983) indicate that States may develop flexible schedules for contemporaneous reclamation, in keeping with site-specific conditions within the State, as long as the requirements of Section 515(b)(16) of SMCRA are met. The Director therefore finds that the variance provisions are no less effective than the Federal regulations in meeting the requirements of the Act. The Director expects that OSM will monitor these provisions closely during oversight and will take appropriate action to see that they are implemented properly.

c. *10 CSR 40–4.030—Operations on prime farmland.* This provision requires that a vegetative cover of approved perennial species be established following soil replacement, and contains a variance from the requirement for perennial vegetation "if the permittee can provide sufficient evidence that an alternative erosion control practice will be equally effective." The Director finds that this provision is no less effective than 30 CFR 823.15 because the Federal regulation requires only that a vegetative cover be used to stabilize the soil surface and does not specify that perennial vegetation must be used.

2. General Bond Requirements

a. *10 CSR 40–7.011(1) (A) and (B)—Definitions.* The revised Missouri regulations amend the definitions of "surety bond" and "personal bond" to fit the limited role for bonds under the Missouri system. Both kinds of bonds now relate only to "pit reclamation." A surety bond means:

> A joint undertaking by the permittee, as principal, and his surety whereby the principal is obligated to successfully complete pit reclamation according to commission regulations, and the surety is obligated to pay the state of Missouri a sum of money if pit reclamation is not completed or if the permit is revoked prior to completion of pit reclamation.

A personal bond means:

> An undertaking by the permittee to successfully complete pit reclamation according to commission regulations, supported by negotiable certificates of deposit or irrevocable letters of credit which may be drawn upon by the commission if pit reclamation is not completed or if the permit is revoked prior to completion of pit reclamation.

These definitions are not less effective than the corresponding Federal definitions at 30 CFR 800.5

b. *10 CSR 40–7.011(1) (C) and (D)—Definitions.* Pit reclamation is defined as follows:

> Pit reclamation means the filling and grading of the pit area to the requirements of the permit and plan, and includes the replacement of topsoil and initial seeding.

Pit area is defined as follows:

> Pit area means coal preparation areas, coal waste disposal areas, areas from which coal has been removed, and all portions of the permit area for whose reclamation replacement of topsoil is required by the regulations, permit, or plan.

The mining and reclamation plan regulations at 10 CSR 40–6.050(8), governing issuance of permits, require backfilling and grading to approximate original contour and proper control of drainage. Thus, pit reclamation will be essentially equivalent to phase I liability under OSM's regulations.

However, pit reclamation and pit area are defined in such a way as to exclude operator liability for undisturbed areas and possibly for some disturbed areas, such as any roads which will not require replacement of topsoil, and any impoundments which will not be removed. The problem arises because at 10 CSR 40–7.011(2)(A) bond liability of the operator is only established for pit reclamation, and is not specified for any other disturbances to the land.

The Federal rules at 30 CFR 800.11(b)(1) require a bond for the permit area of increment. Bond is required on all affected (disturbed) areas of the permit area, and any alternative program must also establish such protection. Operator liability must also be established on unaffected (undisturbed) areas within the permit area so that any incidental effects of mining that affect these areas become the responsibility of the operator. The Missouri rules at 10 CSR 40–7.021(2)(E) discuss release of liability from undisturbed areas, so OSM interprets the rules to establish such liability. The fund would serve as the bond on the areas outside the pit area.

Therefore, the program amendment is approved because liability and bond requirements are established for all areas to be affected and within the permit area, operator liability is established for unaffected areas within the permit area, and the fund is available for any default in reclamation responsibility.

c. *10 CSR 40–7.011(2)(D)—Bond requirements.* This provision establishes a minimum operator bond of $10,000 per "mine" which can include one or more permit areas. Section 509(a) of SMCRA establishes a minimum of $10,000 for the area under one permit. However, since the Missouri bonding system consists of a combination of the operator's pit bond and the fund reserves, the Director finds that the provision is consistent with the minimum $10,000 per permit area required by the Act.

d. *10 CSR 40–7.011(3)(B)—Certificates of deposit.* This provision allows for collateral bonds secured by certificates of deposit, subject to certain conditions. The Missouri rule at 10 CSR 40–7.011(3)(B)2 states that the certificate shall be made payable to the State of Missouri or the operator and shall be automatically renewable at the end of the term of the certificate.

The Federal rule at 30 CFR 800.21 requires that certificates of deposit be made payable to or assigned to the regulatory authority, both in writing and upon the records of the bank issuing the certificates. In addition, if the certificates are assigned, the Federal rule requires the bank issuing the certificates to waive all rights of setoff or liens against those certificates. At the November 17 meeting, OSM discussed this issue with Missouri. Missouri explained that under its rules, certificates of deposit must be made payable to the State of Missouri as well as the operator, but that the State takes physical possession of the certificate until bond release. Because only the holder may present the certificate for payment, Missouri contended that assignment on the books of the bank is not necessary. Based on this explanation, the Director finds that the phrase "payable to the State of Missouri or the operator" shall be interpreted to mean "as well as the operator" and therefore is no less effective than the Federal rule. However, the Missouri rule does not contain the requirement for the bank to waive rights of setoff or liens and therefore is not as effective as 30 CFR 800.21(a)(3). This requirement is necessary to guarantee that the amount of the bond will cover pit reclamation to the maximum extent possible with the face amount of the bond. The Director is requiring a program amendment to include the waiver provisions for setoff or liens identified above.

e. *10 CSR 40–7.011(3)(C)—Letters of credit.* This provision states that letters of credit shall be issued by a bank or

trust company "located in" the United States rather than "organized or authorized to do business in the United States" as required by 30 CFR 800.21(b)(1). If a bank is located in the United States, the Director presumes that it is at least authorized to do business in the State in which it is located.

Therefore, this provision is no less effective than the Federal requirement. At the November 17 meeting, Missouri confirmed this presumption, explaining that the phrase was used to prevent the LRC from accepting a letter of credit from any bank physically located outside the United States, even if authorized by the government to do business there. The purpose is to ensure that bank assets are available in the United States for attachment if payment is refused after a forfeiture and the State if forced to litigate. The State assumes that no bank can be "located in" the United States without being duly authorized by some State of the United States.

f. *10 CSR 40-7.011—Bank insolvency.* The Missouri rules do not contain any requirement comparable to 30 CFR 800.16(e), regarding notification to the regulatory authority and the permittee of the insolvency or bankruptcy of the bank issuing letters of credit or holding certificates of deposit, and the subsequent chain of required events. The Missouri rules do contain such provisions for surety companies. Therefore, the Director is requiring a program amendment to provide for notification and action on bank insolvency.

g. *10 CSR 40-7.011—Collateral bonds.* The Missouri rules do not contain a provision comparable to 30 CFR 800.21(a)(2), which requires the regulatory authority to value collateral at its current market value, rather than at face value. Such a provision is necessary to ensure that the maturity date and liquidity are considered in setting the value of the collateral. Missouri explained that it will only accept as collateral letters of credit and certificates of deposit less than $100,000 per document and per bank, which means the State's interest in the collateral is insured by the Federal Deposit Insurance Corporation.

Further, because they are not subject to market fluctuations, the certificates of deposit or letters of credit will always be worth the face amount of the bond. Therefore, Missouri stated that it does not need a provision comparable to 30 CFR 800.21(a)(2). The Director agrees with the Missouri explanation and therefore finds that the Missouri provision is no less effective than the Federal regulation.

3. Duration and Release of Liability

a. *10 CSR 40-7.021(1)—Duration of liability.* This provision sets forth the period of liability applicable to a permit and specifies that it shall continue until all reclamation, restoration and abatement work required of the permittee under the regulatory program, permit and reclamation plan has been completed and the permittee has been released from liability in accordance with the procedures contained elsewhere in the rules. The rule also provides that the minimum period of phase III liability shall continue for not less than five years and shall begin again whenever augmented seeding, fertilization, irrigation or other work is required or authorized on the site. This provision is no less effective than 30 CFR 800.13(a) which specifies that liability shall be for the duration of the operation and for a period coincident with the operator's period of extended liability or until achievement of the reclamation requirements of the Act, regulatory program and permit, whichever is later.

In subparagraph (1) (B)(4), there is a provision allowing separation from the original area, for liability release purposes, of portions of the permit area requiring augmentation, upon approval of the Commission or Director.

The Federal rule at 30 CFR 800.13(b) provides that isolated and clearly defined portions of the permit area requiring extended liability may be separated from the original area with the approval of the regulatory authority, provided that such areas shall be limited in extent and not constitute a scattered, intermittent, or checkerboard pattern of failure. Under the Missouri system, by the time phase III liability release is being considered, there is no operator bond and liability is on the fund. The Director presumes that the LRC and the Director will use their discretion wisely to approve such liability separations in a manner consistent with the Federal rule to minimize liability to the fund. Therefore, the Director finds this provision to be no less effective than the Federal rule.

b. *10 CSR 40-7.021(2) (A), (B) and (C)—Phase I and II liability releases.* Missouri's rule at 10 CSR 40-7.021(2)(A) allows release of phase I liability on certain areas for which phase I reclamation has not been completed. These areas include roads, sediment ponds, diversions and small stockpiles of soil and overburden associated with such areas.

This rule is inconsistent with the intent and purpose of sections 509 and 519 of the Act. Bond and operator liability are established to ensure completion of reclamation. To allow release of such bond and/or liability before reclamation or the appropriate phase of reclamation is complete defeats the purpose of the establishment of bond and/or liability.

Subparagraph (B) sets forth the standards for phase II liability release, including establishment of a permanent vegetative cover sufficient to control erosion, tree and shrub stocking requirements for woodland and wildlife areas, and a requirement that the lands not be contributing suspended solids to streamflow or runoff outside the permit area in excess of applicable requirements. This provision is no less effective than 30 CFR 800.40(c)(2) which specifies the phase II standards under the Federal rules.

Subparagraph (C) allows a phase II liability release on sediment ponds or diversions even though not removed and reclaimed, if:

(1) The postmining land use of the sediment ponds or diversions is not woodland or wildlife habitat;

(2) All of the drainage area serviced by the sediment ponds or diversions has received a phase II liability release, or it qualifies for release of phase II liability and is included in a request for release of phase II, liability; and

(3) Such a release of phase II liability will significantly facilitate demonstration of revegetation success by allowing vegetative measurements on the areas of the sediment ponds or diversions to be made in conjunction with vegetative measurements on adjacent areas.

This exception, similar to the phase I exceptions for roads, ponds and diversions, allows the structures to be exempt from reclamation criteria through the time of two complete phases of liability, even though they must be reclaimed eventually. This rule is not consistent with section 509 of SMCRA.

OSM discussed this issue with Missouri at the November 17, meeting. Missouri stated that although OSM is accurate that certain features will be released from phase I and phase II liability without actually being reclaimed, they are *de minimus* features on the mining landscape. As a result, it is administratively burdensome to keep track of them and even more burdensome to identify where they are on the landscape after they are partly reclaimed and the surrounding areas are farther along in the five-year reclamation responsibility period.

Missouri pointed out that the phase II exemption does not apply to roads, which must be reclaimed to the point of stabilization by vegetation before qualifying for phase II release. Missouri stated that although exempting ponds from phase I and II release criteria will slightly increase the risk of the fund, the risk is *de minimus*. Missouri also noted that if an operator defaulted only by leaving ponds and diversions, the fund would not be severely reduced. Moreover, an operator who is able to reclaim the larger mine area will not default only on ponds because a default would bar him from future Missouri permits. Finally, Missouri urged OSM to consider that final (phase III) release will not occur until entire units of the landscape to are reclaimed to phase III standards. However, as Missouri conceded, the result of the Missouri rule is that an entire permit area may be phase III-released after five years of revegetation responsibility on the larger areas, even though reclaimed pond, diversion and road areas are or may be two or three years behind the larger areas in vegetation maturity and therefore short of the required five-year period.

The Federal rules on reclamation of roads and siltation structures (30 CFR 816.150, 48 FR 22110, May 16, 1983, and 30 CFR 816.46, 48 FR 44032, September 26, 1983) require reclamation according to 30 CFR 816.111–.116. Section 816.116(c)(1) (48 FR 40140, September 2, 1983) requires revegetation of regraded and other disturbed areas to certain standards and requires the statutory responsibility period to begin "after the last year of augmented seeding, fertilizing, irrigation or other work." There are no exceptions for small areas. The preamble to the rule (48 FR 40156) states that "OSM is constrained by Section 515(b)(20) of the Act to require the responsibility period to restart if augmented planting occurs." Thus, it would be inconsistent with the Act to allow areas as discrete as sediment ponds and roads to be considered part of larger areas for purposes of the liability period although the initial seeding, fertilization and irrigation of those areas will be delayed as much as three years. The Federal rules do not allow the use of augmented seeding, fertilization, irrigation or other work is not allowed during the responsibility period without causing it to be restarted. Therefore, the Director finds that the Missouri rules are less effective than the Federal regulations and is requiring a program amendment to delete these phase I and II exemptions from Missouri's rules.

c. *10 CSR 40–7.021(2)(D)—Phase III liability release.* The criteria for phase III liability release are equivalent to the phase III bond release criteria and OSM's regulations. Thus, the Missouri system ultimately arrives at the same point as a traditional bonding system under the Federal regulations except as noted in Finding 3.b. above.

d. *10 CSR 40–7.021 (3) and (4)—Procedures for liability release.* Subparagraph (3) provides procedures for liability release that are similar to the bond release procedures of 30 CFR 800.40(a), with one difference. Subparagraph (3)(A) would allow the operator to apply for release of portions of the permit area at the operator's discretion and does not restrict bond release requests to entire permit areas or predefined increments. The Federal rules at 30 CFR 800.40(c) contemplate releases only on the permit area (as a whole) or on an entire incremental area. OSM discussed this issue with Missouri at the November 17 meeting. Missouri stated that OSM's concern that operators will apply for releases on a piecemeal basis will not materialize as the LRC will not look kindly on operators trying to inundate it with frequent release requests for small units and because, in practice, operators reclaim large units on common schedules because it is more cost-effective to do so. Based on this explanation, the Director finds that the Missouri rule is no less effective than the Federal regulation. The Director expects that OSM will monitor this area closely during oversight.

Subparagraph (4) sets forth procedures for written objections, inspection, review, decision and public hearings on liability release. These provisions are consistent with 30 CFR 800.40(b)–(h), which specify the Federal requirements for these aspects of bond release proceedings.

4. Permit Revocation, Bond Forfeiture, and Administration of the Coal Mine Land Reclamation Fund

a. *10 CSR 40–7.031 (1) and (2)—Procedures for permit revocation.* Missouri has amended 10 CSR 40–8.030(8) to provide that permits shall be revoked as stated in 10 CSR 40–7.031. The section essentially combines the permit revocation provisions of section 521(a)(4) of SMCRA and section 444.885 of the Missouri statute, and the bond forfeiture provisions of section 509(a) of SMCRA and section 444.830 of the Missouri statute. Because the operator's bond may be released after phase I reclamation, this section focuses on permit revocation as an enforcement mechanism rather than bond forfeiture because permit revocation triggers both bond forfeiture and authorization for the Commission to ultilize reclamation fund money to complete the reclamation plan, 10 CSR 40–7.031(4). The Federal rules specify only one basis for permit revocation—the determination that a pattern of violations exists and that such violations are the result of the permittee's unwarranted failure to comply with permit conditions or requirements or are caused willfully by the permittee. This section of the Missouri rules provides six bases or criteria under which a permit shall be subject to revocation, including the pattern of violations criterion. Therefore, as permit revocation procedures, the Missouri rules are more comprehensive than the Federal requirements.

One of the criteria for permit revocation is if the permittee has failed to abate a notice of delinquent reclamation (See Finding C.5.b. below) within the time established. Under subparagraph (2)(A) of this rule, the LRC, as an alternative to permit revocation, in the case of failure to abate a notice of delinquent reclamation, may extend the abatement period for up to a full year from the abatement date established pursuant to 10 CSR 40–8.030(18) (B) or (C). The extension is allowed only where it is found that the failure to abate is not due to a lack of diligence by the permittee and requires the permittee to submit a bond for the additional liability the extension represents to the coal mine land reclamation fund, in an amount which is 125% of the amount the Commission finds would be needed to complete the reclamation plan on the area to which the extension applies. However, subparagraph (2)(D) allows another 2½ months delay for determination of the bond amount and actual receipt of the bond after the extension is granted. The Missouri rule presupposes a situation where there has been a notice of delinquent reclamation for failure to reclaim in a timely manner followed by a failure to abate the notice of delinquent reclamation. Thus, this rule would allow up to a year of additional time to meet the reclamation schedules established by law, prior to revocation of a permit.

However, the Federal rule at 30 CFR 800.50 allows the regulatory authority, in lieu of bond forfeiture, to reach an agreement with the permittee or another party to perform reclamation operations in accordance with a compliance schedule. Also, the Director is requiring changes to Missouri's enforcement provisions to require sanctions no less

stringent than those required by SMCRA. (See Finding C.5.b. below). Therefore, the Director finds that the permit revocation criteria of 10 CSR 40–7.031(1) in cases of failure to abate a notice of delinquent reclamation are consistent with SMCRA and the Federal regulations.

Paragraph (2) of 10 CSR 40–7.031 sets forth the procedures to be followed for permit revocation. The rule provides that if the LRC Director determines that a permit should be revoked (based on the criteria in paragraph (1)), he shall file with the Commission a complaint for revocation. The Commission must act on the complaint within 45 days by rejecting or accepting the complaint, or alternatively entering into a consent order with the permittee, or if the cause of the complaint is a failure to abate a notice of delinquent reclamation, extending the abatement period. It is not clear how the Commission shall act on the complaint. Furthermore, the Federal rules do not allow for a complaint to be "rejected" once the determination has been made that a permit should be subject to revocation. In order for this procedure to be acceptable, Missouri must clarify the procedures that will be followed by specifying whether the opportunity for an adjudicatory hearing will be afforded and whether the Commission will make written findings of fact and conclusions of law to support its decision to revoke or not revoke the permit. Accordingly, the Director is requiring a program amendment to specify satisfactorily the procedures to be used to act on a complaint for permit revocation.

b. *10 CSR 40–7.031(3)—Bond forfeiture.* This provision allows the LRC Director to enter into an agreement with the surety, issuer of letter of credit, or former permittee to allow such person to complete pit reclamation in lieu of bond forfeiture where the Director determines that the surety, issuer of a letter of credit, or former permittee desires to and is capable of completing pit reclamation. In the event forfeiture is required, the Director shall take action to collect the forfeited bond and any instruments securing the bond. The provision is similar to and no less effective than 30 CFR 800.50.

c. *10 CSR 40–7.041(3)(B)—Penalties for delinquent payment of fees to the reclamation fund.* This provision requires each permittee to pay the required assessment within 45 days after the month for which the assessment is applicable or else the permittee shall be considered delinquent. Such a violation must lead to sanctions and penalties no less stringent than those in sections 518 and 521 of SMCRA.

Subparagraph (A) requires the Director to issue a notice of violation (NOV) to a delinquent permittee with a non-extendable abatement date of 10 days. However, subparagraph (B) requires a penalty of 25 cents per ton on coal disposed of during the month for which payments are delinquent in lieu of ordinary civil penalties under 10 CSR 40–8.040. Although they could be significant, these penalties are potentially much smaller than the penalties possible under 10 CSR 40–8.040. In addition, it is not expressly stated that a cessation order will issue on the eleventh day after the NOV is issued if payment is not received.

This provision is not consistent with sections 518 and 521 of the Act and 30 CFR Part 845. Section 518(i) requires that the penalty provisions of a State program be no less stringent than those set forth in section 518. However, if the penalty authorized by 10 CSR 40–7.041(3)(B) is assessed in addition to, rather than in place of, the civil penalties under 10 CSR 40–8.040, such a penalty would provide an additional economic incentive to ensure prompt payment of fees to the fund. Similarly, section 521(d) of SMCRA requires that the enforcement provisions of a State incorporate sanctions no less stringent than those set forth in section 521. Accordingly, the Director is requiring a program amendment to provide that the 25 cents per ton penalty may be assessed in addition to, but not in lieu of, the civil penalty provisions of 10 CSR 40–8.040. Furthermore, Missouri must amend its rules to mandate the issuance of a cessation order if the violation (delinquent payment) is not abated within the time set.

5. Inspection and Enforcement

a. *10 CSR 40–8.030(6)(B)2—Enforcement of cessation orders.* This provision has been amended to require issuance of a cessation order (CO) if a permittee fails to abate a notice of delinquent reclamation (see Finding C.5.b. below) within the period established for abatement and the LRC Director determines that a cessation of operations is necessary to prevent a further increase in liability to the fund.

This rule treats CO's for failure to abate a notice of delinquent reclamation differently from CO's for failure to abate other violations by adding the extra requirement that the Director determine it is necessary to prevent an increase in liability to the fund. Since the status of being delinquent in reclamation is a violation, failure to abate that violation should lead to a cessation order and the penalties prescribed by SMCRA. Therefore, this provision is not consistent with section 521 of SMCRA. The Director is requiring a program amendment to provide the same standards for issuance of a cessation order for failure to abate a notice of delinquent reclamation as for failure to abate other violations.

b. *10 CSR 40–8.030(18)—Delinquency in reclamation.* Subparagraph (A) of this provision requires the LRC Director, in lieu of a normal notice of violation under 10 CSR 40–8.030(7), to issue a notice of delinquent reclamation (NDR) when he determines that a permittee has failed to complete reclamation within the time limits specified in 10 CSR 40–3.120(8) or 3.270(8). Thus, a NDR is a special kind of notice of violation. To be acceptable, this notice of violation must lead to sanctions no less stringent than the requirements of sections 518 and 521 of SMCRA, and must have the same or similar procedural requirements. See sections 518(i) and 521(d).

Subparagraph (C) of this rule allows the Commission or Director to extend the time for abatement if the permittee shows that failure to meet the deadline was caused by "circumstances beyond the control of the permittee and not lack of diligence on the part of the permittee or its agents or employees." This is much broader than the standards for exceptions to the 90-day abatement rule in 30 CFR 843.12 (c) and (f)–(j) and contains none of the restrictions designed to prevent abuse. The rule provides for a possible extension of one year without any standards at all; an additional six-month extension for failure to abate violations dealing with topsoil replacement, erosion control, sediment ponds and diversions; and up to a one-year extension for delay in meeting either phase II or phase III reclamation time schedules. The only additional requirement is that where the NDR is for failure to comply with the topsoil, erosion control, pond and diversion standards, the Director must file monthly status reports with the Commission. This is not consistent with 30 CFR 843.12, which allows extensions of only 90 days based on certain limited criteria. Therefore, the Director is requiring a program amendment to provide standards for extensions of the 90-day abatement period consistent with 30 CFR 843.12.

Subparagraph (E) allows a person issued an NDR, or any person with an interest adversely affected by it, to request a formal hearing before the Commission within 30 days after receiving notice of action. This hearing need not be held for 4 months after the

request unless the application specifically requests that it be held within 30 days. The Commission has 45 days after the hearing to make a decision. During the proceedings, the notice or any modification, termination or vacation thereof shall not be stayed. The rule is silent on whether this hearing is a contested case under the Missouri Administrative Procedures Act, and whether it is subject to 10 CSR 40–8.030(10) and (14)-(16), which govern procedures for formal reviews of NOV's and CO's. OSM discussed this issue with Missouri at the November 17 meeting. Missouri stated that the hearing is a contested case under the Missouri Administrative Procedures Act which is already included in the Missouri program, and that the APA applies whether or not it is explicitly stated in a rule. The Director agrees with this explanation and finds that the hearing procedure is similar to the procedures in 30 CFR 843.16, and thus acceptable under the requirements of sections 521(d) and 525 of SMCRA.

Subparagraph (G) repeats the statutory provision that a penalty of 25 cents per ton of coal sold, shipped, or otherwise disposed of during the delinquency period "may" be imposed, but only if the Director determines that the delinquency was caused by a lack of diligence by the permittee. Even if a penalty is imposed, the rule states that the delinquency period shall end when the remedial action is completed or when the time set for abatement of the delinquent reclamation expires, whichever comes first. The second possibility could mean that the delinquency would be deemed ended if abatement is not completed. Also, the rule implies that the only civil penalty possible for an NDR is the 25 cents per ton maximum. Since these penalties depend on the amount of coal mined during a delinquency period, they are potentially far smaller than the maximum $5,000 per day civil penalty possible for other notices of violation. The only additional burden placed on the delinquent permittee is in paragraph (H), which states that the Commission "may" require a permittee having an NDR to submit additional bonding in an amount sufficient to cover the extra liability to the fund represented by the delinquency, with the bond to remain in effect for a minimum of 1 year. There are no standards for computing this bond, no procedures governing its release, and no procedures for public participation.

Therefore, the Director finds that 10 CSR 40–8.030(18), except for subparagraph (E), violates the standard of section 521(d) of SMCRA which states—

> As a condition of approval of any State program * * * the enforcement provisions thereof shall, at a minimum, incorporate sanctions no less stringent than those set forth in this section and shall contain the same or similar procedural requirements relating thereto.

Although the procedural requirements of 10 CSR 40–8.030(18) are superficially similar to those of section 521(a) of SMCRA, the sanctions available for an operator who is delinquent in reclamation are potentially much weaker because of the generous extensions of time possible for an NDR and the improbability that an operator will be forced to stop mining coal while the delinquency is corrected.

The Missouri rule also violates the standards of section 518(i) of SMCRA which states—

> As a condition of approval of any State program * * * the civil and criminal penalty provisions thereof shall, at a minimum, imcorporate penalties no less stringent than those set forth in this section, and shall contain the same or similar procedural requirements relating thereto.

The civil penalty provisions of section 518 are almost completely avoided by the Missouri regulations in the case of operators delinquent in reclamation. Accordingly, the Director is requiring a program amendment to Missouri rule 10 CSR 40–8.030(18) to add express language clarifying that the penalty of 25 cents per ton may be imposed only in addition to, but not in place of, the approved civil penalty provisions of 10 CSR 40–8.040.

III. Public Comments

Pursuant to section 503(b) of SMCRA and 30 CFR 732.17(h)(10)(i), of those Federal agencies invited to comment, acknowledgments were received from the Environmental Protection Agency and the Soil Conservation Service. The comments were limited and did not identify any deficiencies in the proposed program amendments.

IV. Director's Decision

The Director, based on the above findings, is approving the Missouri statute and performance bond regulations submitted as an amendment to the approved Missouri program under the provisions of 30 CFR 732.17. As indicated above, there are a number of provisions which are inconsistent with SMCRA and the Federal regulations. By separate letter, the Director has notified Missouri, pursuant to 30 CFR 732.17, that certain required program amendments will be necessary. The State must reply within 60 days after notification by submitting either the text of a proposed amendment or a description of an amendment to be proposed and a timetable for enactment which is consistent with established administrative procedures in the State.

The Federal rules at 30 CFR Part 925 are being amended to implement this decision. Also, Part 925 is being reorganized to reflect all final actions pertaining to State program amendments submitted by Missouri. This reorganization should afford the reader a clearer indication of the approval of amendments to the Missouri program.

Upon receipt of the State's response to the Director's notification, Part 925 will be amended further to establish the dates by which Missouri will submit the required program amendments.

V. Procedural Matters

1. *Compliance with the National Environmental Policy Act:* The Secretary has determined that, pursuant to Section 702(d) of SMCRA, 30 U.S.C. 1292(d), no environmental impact statement need be prepared for this rulemaking.

2. *Executive Order No. 12291 and the Regulatory Flexibility Act:* On August 28, 1981, the Office of Management and Budget (OMB) granted OSM an exemption from Sections 3, 4, 7 and 8 of Executive Order 12291 for actions directly related to approval or conditional approval of State regulatory programs. Therefore, for this action OSM is exempt from the requirement to prepare a Regulatory Impact Analysis and this action does not require regulatory review by OMB.

The Department of the Interior has determined that this rule 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 rule will not impose any new requirements; rather, it will ensure that existing requirements established by SMCRA and the Federal rules will be met by the State.

3. *Paperwork Reduction Act.* This rule does not contain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3507.

List of Subjects in 30 CFR Part 925

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Accordingly, 30 CFR Part 925 is amended as set forth herein.

Dated: May 3, 1984.

J. Lisle Reed,

Director, Office of Surface Mining.

PART 925—MISSOURI

1. 30 CFR 925.10 is amended by revising paragraph (a) to read:

§ 925.10 State program approval.

(a) The Missouri State program submitted on February 1, 1980, and as amended and clarified on May 14, 1980, was conditionally approved effective November 21, 1980. Copies of the approved program, as amended, are available for review at:

(1) Missouri Land Reclamation Commission, 1026–D Northeast Drive, Jefferson City, Missouri 65101.

(2) Office of Surface Mining, Kansas City Field Office, Scarritt Building, 818 Grand Avenue, Kansas City, Missouri 64106.

(3) Office of Surface Mining, Administrative Record, Room 5124, 1100 L Street, NW., Washington, D.C. 20240.

* * * * *

2. 30 CFR 925.15 is amended by adding a new paragraph (c) as follows:

§ 925.15 Approval of regulatory program amendments.

* * * * *

(c) The following amendments were approved effective May 8, 1984.

(1) Revisions to the Missouri statute submitted April 13, 1983, contained in Senate Bill 737, enacted April 7, 1982, repealing sections 444.805 and 444.830, and adding sections 444.805, 444.830, 444.950, 444.955, 444.960, 444.965 and 444.970.

(2) Missouri revised regulations submitted April 13, 1983, adopted April 11, 1983, amending 10 CSR 40–3.120, 40–3.270, 40–4.030, and 40–8.030; rescinding 40–7.010, 40–7.020, 40–7.030, and 40–7.040; and adding 40–7.011, 40–7.021, 40–7.031, 40–7.041 and 40–7.050; with the exception of those provisions identified in section 925.16 which require further amendment.

3. Part 925 is amended by adding a new § 925.16 as follows:

§ 925.16 Required program amendments.

Pursuant to 30 CFR 732.17, Missouri is required to make the following program amendments:

(a) Amend its program at 10 CSR 40–3.120(7)(A)2A, consistent with 30 CFR 816.116(b)(3)(ii), to require two growing seasons before qualifying to meet the revegetation standard for trees and shrubs.

(b) Amend its program at 10 CSR 40–7.011(3)(B)(2), consistent with 30 CFR 800.21, to require that the bank issuing the certificates must waive all rights of setoff or liens against those certificates.

(c) Amend its program at 10 CSR 40–7.011(3)(B) and 40–7.011(3)(C), consistent with 30 CFR 800.16(e), to require notification to the regulatory authority and the permittee of the insolvency or bankruptcy of the bank issuing letters of credit or holding certificates of deposit, and to initiate the subsequent chain of required events.

(d) Amend its program to delete the provisions at 10 CSR 40–7.021(2)(A) and 10 CSR 40–7.021(2)(C) allowing release of liability on certain areas where phase I or II reclamation has not been completed.

(e) Amend its program at 10 CSR 40–7.031(2), consistent with 30 CFR 843.13, to specify the procedures used to act on a complaint for permit revocation.

(f) Amend its program to: (1) Specify that the 25 cents per ton penalty in 10 CSR 40–7.041(3)(B) may be assessed in addition to, but not in lieu of, the civil penalty provisions of 10 CSR 40–8.040, and (2) mandate the issuance of a cessation order if the violation (delinquent payment) is not abated within the time set.

(g) Amend its program at 10 CSR 40–8.030(6)(B)2 to require the same standards for issuance of cessation orders for failure to abate a notice of delinquent reclamation as for failure to abate other violations.

(h) Amend its program at 10 CSR 40–8.030(18) to provide: (1) Standards for extension of the 90-day abatement period for notices of delinquent reclamation consistent with 30 CFR 843.12; and (2) express language clarifying that the penalty of 25 cents per ton may be imposed only in addition to, but not in place of, the approved civil penalty provisions of 10 CSR 40–8.040.

Authority: Pub. L. 95–87, 30 U.S.C. 1201 *et seq.*

[FR Doc. 84–12339 Filed 5–7–84; 8:45 am]

BILLING CODE 4310–05–M

30 CFR Part 936

Oklahoma Permanent State Regulatory Program—Correction

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

ACTION: Final rule; correction.

SUMMARY: This document corrects a date contained in final regulations substituting direct Federal enforcement of certain portions of Oklahoma's Permanent Regulatory Program which were published April 12, 1984 (49 FR 14674).

EFFECTIVE DATE: April 30, 1984.

FOR FURTHER INFORMATION CONTACT: Carl C. Close, Special Assistant to the Assistant Director, Program Operations and Inspection, Office of Surface Mining, 1951 Constitution Avenue, NW., Washington, D.C. 20240; Telephone: (202) 343–4225.

(Pub. L. 95–87, Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 *et seq.*).

Dated: May 1, 1984.

Arthur W. Abbs,

Acting Assistant Director, Program Operations and Inspection.

PART 936—[AMENDED]

Accordingly, the Office of Surface Mining is correcting 30 CFR 936.18(d)(2) (49 FR 14689) by revising it to read as follows:

* * * * *

§ 936.18 Remedial actions.

(d) * * *

(2) Reevaluating bond release actions since July 20, 1981;

* * * * *

[FR Doc. 84–12248 Filed 5–7–84; 8:45 am]

BILLING CODE 4310–05–M

30 CFR Part 946

Virginia Permanent Regulatory Program

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

ACTION: Final rule.

SUMMARY: This document amends 30 CFR Part 946 to remove a condition of approval imposed by the Secretary of the Interior on the Virginia permanent regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The condition being removed concerns the authority of the State to deny an application for a permit unless the permit applicant submits proofs that all required Federal reclamation fees have been paid.

After providing opportunity for public comment and conducting a thorough review of the program amendment submitted by Virginia on February 10, 1984, to satisfy the condition, the Secretary, in accordance with 30 CFR 732.17, has decided to remove the condition of approval.

EFFECTIVE DATE: May 8, 1984.

FOR FURTHER INFORMATION CONTACT: Ralph Cox, Director, Big Stone Gap Field Office, Office of Surface Mining, P.O.

Box 626, Big Stone Gap, Virginia 24219, Telephone: (703) 523–4303.

SUPPLEMENTARY INFORMATION: The Virginia program was conditionally approved by the Secretary of the Interior on December 15, 1981 (46 FR 61088–61115). Information pertinent to the general background, revisions, modifications, and amendments to the proposed permanent program submission, as well as the Secretary's findings, the disposition of comments and a detailed explanation of the conditions of approval of the Virginia program can be found in the December 15, 1981 **Federal Register.**

Background

Section 510(b) and 510(c) of SMCRA limit the issuance of new permits and permit renewals to those applicants who are in compliance with the requirements of SMCRA. As specified in section 402 of SMCRA and Subchapter R of 30 CFR, the operators of coal surface mines are to pay reclamation fees to the Secretary of the Interior. Further, section 402(f) of SMCRA specifically mandates full cooperation with the Secretary by all Federal and State agencies in the enforcement of this provision.

It was brought to the Secretary's attention that the Virginia program does not contain regulatory language consistent with 30 CFR 786.19(h) which requires the State to deny permit applications and permit revision applications unless the applicant has submitted proof that all Federal reclamation fees required under 30 CFR Subchapter R have been paid. To resolve this issue, on January 4, 1983, the Director, OSM, sent a letter to Virginia to request that Virginia either voluntarily amend its program to add a regulation consistent with 30 CFR 786.19(h), or revise its permitting procedures to ascertain such information prior to approving a permit application. Virginia did not formally respond to the January 4 letter. Therefore, on June 9, 1983, the Secretary proposed to add a new condition to the Virginia program requiring the State to amend its program by a specified date to incorporate requirements no less effective than 30 CFR 786.19(h). See 48 FR 26624.

Pursuant to 30 CFR 732.17(e), the Secretary notified Virginia by letter of June 1, 1983, that a State program amendment was required because conditions or events indicate that the approved State program no longer meets the requirements of SMCRA and the Federal regulations. Therefore, pursuant to 30 CFR 732.17(f)(1), Virginia was required to submit to the Secretary within 60 days of receipt of notification either a proposed written amendment or a description of an amendment to be proposed that meets the requirements of SMCRA and the Federal regulations, and a timetable for enactment which is consistent with established administrative or legislative procedures.

On August 1, 1983, Virginia responded to OSM's June 1, 1983 letter. The State's letter indicated that it would propose to amend the Virginia permanent program regulations at V786.19 to add a new Subsection (o) stating "the applicant has submitted proof that all reclamation fees lawfully required under Title IV of the Federal Act have been paid." The letter indicated that the amendment would be subject to the State's administrative procedures, thus a completion date of March 1, 1984, to satisfy the condition was requested. Inasmuch as Virginia agreed to submit such an amendment within the State's established administrative procedures, the Secretary granted a date of March 1, 1984, to Virginia to submit an amendment to the State's regulations to satisfy the condition (48 FR 39223, August 30, 1983).

Submission of Amendment to Satisfy Condition and Revision of Federal Regulations

On February 10, 1984, Virginia formally submitted a State program amendment to satisfy condition (t). The amendment consists of a proposed revision to the State's regulations which adds to section V786.19, Criteria for Permit Approval or Denial, a new part (o) stating that "the applicant has submitted proof that all reclamation fees lawfully required under Title IV of the Federal Act have been paid." Virginia indicated that the amendment would become effective upon approval by the Secretary.

On February 29, 1984, OSM announced receipt of the amendment and procedures for a public comment period and a public hearing on the substantive adequacy of the program amendment (49 FR 7408). A public hearing was held on March 26, 1984, and the public comment period closed on March 30, 1984.

On September 28, 1983, OSM amended its regulations pertaining to surface coal mining and reclamation operations (48 FR 44344). The requirements of 30 CFR 786.19(h) providing that the regulatory authority determine that the applicant has paid all required reclamation fees prior to issuance of a permit or significant permit revision remain basically the same and are now contained in 30 CFR 773.15(c)(7).

Disposition of Public Comment

One commenter stated that she was glad to see that Virginia had inserted the word "lawfully" concerning the requirement that all reclamation fees required under Title IV of SMCRA have been paid. Therefore, exempted two-acre operations are not subject to the requirement. The Secretary concurs that operations exempted under section 528 of SMCRA are not subject to payment of Federal reclamation fees under Title IV.

Secretary's Findings

Pursuant to 30 CFR 732.15 and 732.17, the Secretary finds that the program modification to the Virginia regulations at V786.19(o) is no less effective than the revised Federal regulations at 30 CFR 773.15(c)(7) and therefore satisfies condition (t) of this approval.

Additional Determinations

1. *Compliance with the National Environmental Policy Act:* The Secretary has determined that, pursuant to Section 702(d) of SMCRA, 30 U.S.C. 1292(d), no environmental impact statement need be prepared for this rulemaking.

2. *Executive Order No. 12291 and the Regulatory Flexibility Act:* On August 28, 1981, the Office of Management and Budget (OMB) granted OSM an exemption from Sections 3, 4, 7 and 8 of Executive Order 12291 for actions directly related to approval or conditional approval of State regulatory programs. Therefore, this action OSM is exempt from the requirement to prepare a Regulatory Impact Analysis and this action does not require regulatory review by OMB.

The Department of the Interior has determined that this rule 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 rule will not impose any new requirements; rather, it will ensure that existing requirements established by SMCRA and the Federal rules will be met by the State.

3. *Paperwork Reduction Act.* This rule does not contain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3507.

List of Subjects in 30 CFR Part 946

Coal Mining Intergovernmental relations, Surface mining, Underground mining.

Authority: Pub. L. 95–87, Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 *et seq.*).

Dated: April 27, 1984.

Leona A. Power,

Acting Assistant Secretary for Land and Minerals Management.

PART 946—VIRGINIA

30 CFR Part 946 is revised to read as follows:

1. 30 CFR Part 946.11 is amended by removing and reserving paragraph (t).

§ 946.11 Conditions of State regulatory approval.

(t) [Reserved].

2. 30 CFR 946.15 is amended by adding paragraph (l) as follows:

§ 946.15 Approval of regulatory program amendments.

* * * * *

(l) The following amendment was approved effective [Insert publication date]. Revised Virginia regulations, Section V786.19 to add a new part (o), submitted by Virginia on February 10, 1984.

[FR Doc. 84-12338 Filed 5-7-84; 8:45 am]

BILLING CODE 4310-05-M

DEPARTMENT OF DEFENSE

Department of the Air Force

32 CFR Part 825a

Gifts to the Department of the Air Force

AGENCY: Department of the Air Force, Department of Defense.

ACTION: Final rule.

SUMMARY: The Department of the Air Force is amending its regulations by removing Part 825a—Gifts to the Department of the Air Force, of Chapter VII, Title 32. The source document, Air Force Regulation (AFR) 11-26, has been revised. It is intended for internal guidance and has no applicability to the general public. This action is a result of departmental review in an effort to insure that only regulations which affect the public are maintained in the Air Force portion of the Code of Federal Regulations.

EFFECTIVE DATE: May 8, 1984.

FOR FURTHER INFORMATION CONTACT: Mr. Peterson, HQ USAF/JACM, Washington D.C. 20330, Telephone (202) 694-4075.

SUPPLEMENTARY INFORMATION: Accordingly, 32 CFR is amended by removing Part 825a.

List of Subjects in 32 CFR Part 825a

Government property.

PART 825a—[REMOVED]

Authority: 10 U.S.C. 8012.

Winnibel F. Holmes,

Air Force Federal Register Liaison Officer.

[FR Doc. 84-12319 Filed 5-7-84; 8:45 am]

BILLING CODE 3910-01-M

POSTAL SERVICE

39 CFR Part 912

Rules of Procedure on Timely Filing of Requests for Reconsideration

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: This rule makes two amendments to postal procedures concerning the reconsideration of a final denial of a personal injury or property damage claim against the Postal Service. The first amendment clarifies that only receipt by the Postal Service, not mailing by a claimant, determines whether a request for reconsideration of a final denial is timely under the statute of limitations. The second amendment prevents claimants from keeping a claim alive for purposes of delay by filing a successive series of such requests.

EFFECTIVE DATE: June 7, 1984.

FOR FURTHER INFORMATION CONTACT: Clinton I. Newman, (202) 245-4581.

SUPPLEMENTARY INFORMATION: The Federal Tort Claims Act provides in pertinent part that a "tort claim against the United States shall be forever barred * * * unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. 2401(b). The term "agency" as used in the section includes the Postal Service. 39 U.S.C. § 409(c). In *Anderberg* v. *United States*, 718 F.2d 976 (C.A. 10, 1983) the court held that receipt by the agency, not mailing by the claimant, determines whether the filing of a request for reconsideration is timely under the statute of limitations. The Postal Service is accordingly amending its rules of procedure to advise claimants specifically what is required under the law.

We are also amending our rules to clarify that a claimant may file only one request for reconsideration of a final denial. This is intended to end the rather rare situation where a claimant files repeated requests for reconsideration in order to keep the claim active and prevent a final resolution.

List of Subjects in 39 CFR Part 912

Administrative practice and procedure, Tort claims.

PART 912—PROCEDURES TO ADJUDICATE CLAIMS FOR PERSONAL INJURY OR PROPERTY DAMAGE ARISING OUT OF THE OPERATION OF THE U.S. POSTAL SERVICE

Accordingly, 39 CFR is amended by adding paragraphs (c) and (d), to § 912.9 as follows:

§ 912.9 Final Denial of Claim.

* * * * *

(c) For purposes of this section, a request for reconsideration of a final denial of a claim shall be deemed to have been filed when received in the office of the official who issued the final denial or in the office of the Assistant General Counsel, Claims Division, U.S. Postal Service, Washington, D.C. 20260-1111.

(d) Only one request for reconsideration of a final denial may be filed. A claimant shall have no right to file a request for reconsideration of a final denial issued in response to a request for reconsideration.

(28 U.S.C. 2671-2680; 28 CFR 14.1-14.11; 39 U.S.C. 401, 409, 2008)

W. Allen Sanders,

Associate General Counsel, Office of General Law and Administration.

[FR Doc. 84-12296 Filed 5-7-84; 8:45 am]

BILLING CODE 7710-12-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[EPA Action IA 1207; A-7-FRL 2583-6]

Designation of Areas for Air Quality Planning Purposes; State of Iowa

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rulemaking.

SUMMARY: Section 107(d) of the Clean Air Act, as amended, provides for the designation of areas as either attainment, nonattainment, or unclassified with respect to the National Ambient Air Quality Standards (NAAQS). EPA today takes final action redesignating Ankeny, Cedar Rapids, Davenport, a portion of Des Moines, and West Des Moines from nonattainment to attainment with respect to the primary NAAQS for total suspended particulates (TSP). These redesignations are based on a request from the Iowa Department

of Environmental Quality; supportive data were included.

DATE: These designations are effective May 8, 1984.

ADDRESSES: The State submission is available for inspection during normal business hours at the following addresses:

Environmental Protection Agency, 324 East 11th Street, Kansas City, Missouri 64106

Iowa Department of Water, Air, and Waste Management, 900 East Grand, Des Moines, Iowa 50319

FOR FURTHER INFORMATION CONTACT: Larry A. Hacker at (816) 374–3791, or FTS 758–3791.

SUPPLEMENTARY INFORMATION: In response to Section 107(d) of the Clean Air Act, as amended, EPA and the State of Iowa have designated all areas of the State as attaining the NAAQS, not attaining the NAAQS, or having insufficient data to make a determination. An attainment area is one in which the air quality does not exceed the standards. A nonattainment area is one in which the air quality is worse than the standards. An unclassified area is one for which there are insufficient data to determine whether the area is attainment or nonattainment. At 40 CFR Part 81, Subpart C, the areas of the State which are nonattainment for one or more pollutants are identified.

On March 14, 1983, the Iowa Department of Environmental Quality submitted a request to redesignate the attainment status of Ankeny, Cedar Rapids, Davenport, a portion of Des Moines and West Des Moines. The State requested only that the primary nonattainment designations be removed for the above areas. The secondary nonattainment designations would remain.

The current Section 107 redesignation policy is summarized in a memo from EPA's Office of Air Quality Planning and Standards, dated April 21, 1983.

EPA has determined that these redesignation requests comply with agency policy. The public comment period for the proposed rulemaking ended on November 14, 1983. No public comments were received.

Action: EPA takes final action to remove the primary nonattainment designations and retain the secondary nonattainment designations for the Ankeny, Cedar Rapids, Davenport, and West Des Moines TSP nonattainment areas.

In Des Moines, the state requested to subdivide the designated primary nonattainment area along U.S. Highway 65 and 69 (East 14th Street). The western portion will be redesignated to secondary nonattainment, while the eastern portion will retain its primary nonattainment designation.

Action: EPA takes final action to remove the primary nonattainment designation and retain the secondary nonattainment designation for the western portion of the Des Moines TSP nonattainment area.

The March 14 submittal also included a carbon monoxide attainment redesignation request for Des Moines, and a TSP secondary nonattainment redesignation request for Mason City. These redesignation proposals were published in the **Federal Register** on October 12, 1983 (48 FR 46393).

Subsequent to the proposal, the state discovered violations of the CO standards in Des Moines. On November 14, 1983, the state requested that EPA withdraw the proposed CO attainment redesignation action for Des Moines. Therefore, EPA will retain the nonattainment designation for CO in Des Moines. On February 28, 1984, the state requested to retain a portion of the primary TSP nonattainment area in Mason City, and to redesignate the remainder of the area to secondary nonattainment. EPA will re-propose the Mason City TSP redesignation in a future notice.

The Office of Management and Budget has exempted this rule from the requirements of Section 3 of Executive Order 12291.

Under Section 307(b)(1) of the Act, as amended, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit within 60 days of today. This action may not be challenged later in proceedings to enforce its requirements. (See 307(b)(2)).

This notice of final rulemaking is issued under the authority of Sections 107 and 301 of the Clean Air Act, as amended (42 U.S.C. 7407 and 7601).

List of Subjects in 40 CFR Part 81

Intergovernmental relations, Air pollution control, National parks, Wilderness areas.

Dated: May 1, 1984.

William D. Ruckelshaus,

Administrator.

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

Part 81 of Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

Subpart C—Section 107 Attainment Status Designations

§ 81.316 [Amended]

1. In § 81.316, revise the table "Iowa—TSP" to read as follows:

IOWA TSP

Designated area	Does not meet primary standards	Does not meet secondary standards	Cannot be classified	Better than national standards
Central portion of Waterloo		×[1]		
Cedar Falls Township			×	
East Waterloo Township			×	
Remainder of Black Hawk County				×
Northern portion of Mason City, including an area about one mile north of the city limits.	×	×		
Central portion of Mason City, including about one mile around the above area in the city and about 2 miles northwest of the above area.		×[1]		
Falls Township			×	
Lake Township			×	
Lincoln Township			×	
Remainder of Cerro Gordo County				×
An area around downtown Clinton		×[1]		
Comanche Township			×	
Remainder of Clinton County				×
Burlington Township			×	
Remainder of Des Moines County				×
Iowa City Township			×	
Remainder of Johnson County				×
An area in and near Keokuk			×	
Jackson Township			×	
Jefferson Township			×	
Madison Township			×	
Remainder of Lee County				×
Cedar Rapids—a portion of Linn County contained entirely within T 82 N., R 7 W.; and T 83 N., R 7 W.		×[1]		
Bertram Township			×	
Clinton Township			×	
College Township			×	
Fairfax Township			×	
Marion Township			×	
Monroe Township			×	

IOWA TSP—Continued

Designated area	Does not meet primary standards	Does not meet secondary standards	Cannot be classified	Better than national standards
Putnam Township			×	
Remainder of Linn County				×
The central portion of Marshalltown		×[1]		
Remainder of Marshall County				×
The central and southern portions of Muscatine		×[1]		
Fruitland Township			×	
Sweetland Township			×	
Montpelier Township			×	
Remainder of Muscatine County				×
An area of central Des Moines east of U.S. Highway 65 & 69 (E. 14th Street).	×	×		
Portions of Polk County contained entirely within T 78 N. R 23 W.; T 78 N. R 24 W.; T 78 N. R 25 W.; T 80 R 24 W.; T 79 N. R 23 W.; T 79 N. R 24 W.; and T 79 R 25 W..		×[1]		
Clay Township			×	
Douglas Township			×	
Jefferson Township			×	
Remainder of Polk County				×
The western portion of Council Bluffs and Carter Lake		×[1]		
Lake Township			×	
Lewis Township			×	
Remainder of Pottawatomie County				×
Portions of Buffalo, Davenport, Bettendorf and Riverdale		×[1]		
Remainder of Scott County				×
Center Township			×	
Remainder of Wapello County				×
The central portion Ft. Dodge		×[1]		
Otho Township			×	
Remainder of Webster County				×
The central and southern portions of Sioux City		×[1]		
Liberty Township			×	
Woodbury Township			×	
Remainder of Woodbury County				×
Remainder of State				×

[1] EPA designation replaces State designation.

[FR Doc. 84-12308 Filed 5-7-84; 8:45 am]

BILLING CODE 6560-50-M

40 CFR Part 300

[SWH-FRL 2555-5]

Amendment to National Oil and Hazardous Substances Contingency Plan; National Priorities List

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency ("EPA") is amending the National Priorities List ("NPL") which was promulgated on September 8, 1983, as Appendix B of the National Oil and Hazardous Substances Contingency Plan ("NCP"), pursuant to section 105 of the Comprehensive Environmental Response. Compensation, and Liability Act of 1980 ("CERCLA") and Executive Order 12316. CERCLA requires that the NPL be revised at least annually, and on September 8, 1983, the first update to the NPL ("proposed NPL") was proposed concurrent with the promulgation of the final rule. Today's rule amends the NPL to include San Gabriel Areas 1, 2, 3, and 4. These four sites were included in the September 8, 1983 proposed rule.

DATES: The promulgation date for this amendment to the NCP shall be May 8, 1984. Under section 305 of CERCLA, amendments to the NCP cannot take effect until Congress has had at least 60 "calendar days of continuous session" from the date of promulgation in which to review the amended Plan. Since the actual length of this review period may be affected by Congressional action, it is not possible at this time to specify a date on which this amendment to the NPL will become effective. Therefore, EPA will publish a **Federal Register** notice at the end of the review period announcing the effective date of this NPL amendment. EPA notes, however, that the legal effect of a Congressional veto pursuant to section 305 has been placed in question by the recent decision, *Immigration and Naturalization Service* v. *Chadha*, 103 S. Ct. 2764 (1983). Nonetheless, the Agency has decided, as a matter of policy, to submit NPL amendments for Congressional review.

FOR FURTHER INFORMATION CONTACT: Stephen M. Caldwell, Hazardous Site Control Division, Office of Emergency and Remedial Response (WH-548-E), Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460, (Phone (800) 424-9346 or 382-3000 in the Washington, D.C., metropolitan area).

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background of NPL

Pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601-9657 ("CERCLA" or "the Act"), and Executive Order 12316 (46 FR 42237, August 20, 1981), the Environmental Protection Agency ("EPA" or "the Agency") promulgated the revised National Contingency Plan ("NCP"), 40 CFR Part 300, on July 16, 1982 (47 FR 31180). The revised NCP implemented the new responsibilities and authorities created by CERCLA to respond to releases and threatened releases of hazardous substances, pollutants, and contaminants.

Section 105(8)(A) of CERCLA requires that the NCP include criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable taking into account the potential urgency of such action, for the purpose of taking removal action. Removal action involves cleanup or other actions that are taken in response to emergency conditions or on a short-term or temporary basis (CERCLA Section 101(23)). Remedial action tends to be long-term in nature and involves response actions which are consistent with permanent remedy for a release (CERCLA Section 101(24)). Criteria for determining priorities are included in the Hazard Ranking System ("HRS"), which EPA promulgated as Appendix A of the NCP (40 CFR Part 300, Appendix A).

Section 105(8)(B) of CERCLA requires that these criteria be used to prepare a list of national priorities among the known releases or threatened releases throughout the United States, and that to the extent practicable at least 400 sites be designated individually. EPA has included releases on the NPL where CERCLA authorizes Federal response to the release. Under section 104(a) of CERCLA, this response authority is quite broad and extends to releases or threatened releases not only of designated hazardous substances, but of any "pollutant or contaminant" which presents an imminent and substantial danger to the public health or welfare. CERCLA requires that this National Priorities List ("NPL") be included as part of the NCP. On September 8, 1983,

the Agency amended the NCP by adding the NPL as Appendix B. Additional discussion on the purpose and development of the NPL and on generic issues relating to the Hazard Ranking System (HRS) is included in the preamble to the NPL promulgated on September 8, 1983, (48 FR 40658).

Section 300.68(a) of the NCP reserves remedial actions for those releases on the NPL taken to prevent or mitigate the migration of hazardous substances into the environment. The NPL promulgated on September 8, 1983, contains 406 sites eligible for EPA remedial actions financed by the Hazardous Substance Response Trust Fund established by Section 221 of CERCLA. Inclusion of a site on the NPL is not necessary for other types of response actions such as removal actions or for enforcement actions.

CERCLA requires the NPL to be revised at least once per year. The first proposed update was published at the same time as the final rulemaking on the NPL and included 133 sites. The four San Gabriel sites that are now being added to the NPL were among the 133 sites proposed at that time.

II. Background of San Gabriel Area Sites

The four San Gabriel Area sites were included in the proposed rulemaking for the first update of the NPL (48 FR 40674, September 8, 1983). The four sites are located in Los Angeles County, California. Over 400 domestic and municipal water supply wells are located in the four areas. EPA has determined that a release of hazardous substances into the environment has occurred. Chlorinated organic hydrocarbon contamination has been detected in the ground water at all four sites. EPA and the State have identified levels of contamination that pose an actual or potential threat to public health and the environment. The Agency is evaluating the situation to determine the appropriate response action (e.g. removal or remedial response) and expects that remedial response will be appropriate given the nature, extent and concentrations of contamination at the sites.

EPA has conducted remedial planning activities consistent with § 300.68 of the NCP to determine if a remedial action is justified by the actual or potential threat posed by the hazardous substances. Based on these planning activities, EPA believes that an initial remedial measure may be appropriate and that EPA should consider proceeding immediately to limit exposure or threat of exposure to a significant public health or environmental hazard. The initial remedial measure which is under consideration would provide alternative drinking water supplies to mitigate the public health threat. In addition, EPA and the State expect to undertake additional remedial planning activities to determine if further remedial actions are needed to mitigate any continued public health or environmental effects.

III. Addition of San Gabriel Area Sites to NPL

This action being taking today will add San Gabriel Area sites 1, 2. 3, and 4 to the NPL. No public comments were received by EPA, either during or after the 60-day comment period following addition of the sites on the proposed NPL. EPA has reviewed the Hazard Ranking System (HRS) score for each site and has determined that no information has been presented during or after the comment period that would justify a change in the HRS scores. The final scores exceed 28.5, which is the minimum score required for a site to be included on the NPL.

The decision to add the San Gabriel sites to the NPL immediately rather than waiting until rulemaking on the other 129 sites included in the September 8, 1983, proposed rule, is based on the serious nature of the problem. Approximately 500,000 people are potentially affected by consumption of contaminated ground water. It may be necessary to take remedial action at the sites in the near future.

IV. Regulatory Impact

The addition of these four sites to the final rulemaking on the NPL does not meet the Executive Order 12291 definition of the term "major rule."

The purpose of the NPL is primarily to serve as an informational tool for use by EPA in identifying sites that appear to present a significant risk to public health or the environment. The initial identification of a site in the NPL is intended primarily to guide EPA in determining which sites warrant further investigation designed to assess the nature and extent of the public health and environmental risks associated with the site and to determine what response action, if any, may be appropriate. Inclusion of a site on the NPL does not establish that EPA necessarily will undertake response actions. Moreover, listing does not require any action of any private party, nor does it determine the liability of any party for the cost of cleanup at the site.

In addition, although the HRS scores used to placed sites on the NPL may be helpful to the Agency in determining priorities for cleanup and other response activities among sites on the NPL, EPA does not rely on the scores as the sole means of determining such priorities, as discussed below. Neither can the HRS itself determine the appropriate remedy for a site. The information collected to develop HRS scores to choose sites for the NPL is not sufficient in itself to determine the appropriate remedy for a particular site. After a site has been included on the NPL, EPA generally will rely on further, more detailed studies conducted at the site to determine what response, if any, is appropriate. Decisions on the type and extent of action to be taken at these sites are made in accordance with the criteria contained in Subpart F of the NCP. After conducting those additional studies, EPA may conclude that it is not feasible to conduct response action at some sites on the NPL because of more pressing needs at other sites. Given the limited resources available in the Hazardous Substance Response Fund, the Agency must carefully balance the relative needs for response at the numerous sites it has studied.

No accurate assessment of the cost of remedial action at these four sites has yet been developed by EPA. However, preliminary analyses indicate that EPA might expend approximately $600,000 at the sites. It is not expected that, even at its highest cost, remedial action could cause an annual effect on the economy of $100 million or more. Further, it is not expected that remedial action could cause a major increase in costs or prices, nor could it have significant adverse effects on competition, employment investment or any other criteria of Executive Order 12291. Rather, beneficial effects may be anticipated from any actions taken to supply alternative sources of clean drinking water.

V. Regulatory Flexibility Act Analysis

After reviewing the criteria for significant economic impact on a substantial number of small entities as defined by the Regulatory Flexibility Act, EPA has concluded that promulgation of this rule will not have a significant effect on a substantial number of small entities.

In defining the purpose of the NPL (48 FR 40659, September 8, 1983), EPA has determined that listing does not require any action of any private party for the

cost of cleanup at the site. Currently, EPA and the State of California expect to fund remedial activities at the four sites. A search for potentially responsible parties is underway, but thus far, none have been identified. Should any potentially responsible parties be identified, EPA may seek to recover any costs of remedial activities conducted at these four sites. However, the portion of costs that might be borne by any identifiable potentially responsible parties cannot be estimated at this time.

Of the businesses and organizations possibly involved with the San Gabriel Area sites, the fraction constituting small business entities, as defined by the Small Business Administration would not be substantial. It is therefore unlikely that any EPA remedial activities at these four sites would significantly affect small business entities.

List of Subjects in 40 CFR Part 300

Air pollution control, Chemicals, Hazardous materials, Intergovernmental relations, Natural resources, Oil pollution, Reporting and recordkeeping requirements, Superfund, Waste Treatment and disposal, Water pollution control, Water supply.

PART 300—[AMENDED]

Appendix B—[Amended]

The National Priorities List which is Appendix B of the National Oil and Hazardous Substance Contingency Plan (40 FR 40658) is hereby amended to add the following sites:

EPA region	State	Site name	City/county	Response status No.
		Group 5		
09	CA	San Gabriel Area 1.	El Monte	D.
09	CA	San Gabriel Area 2.	Baldwin Park Area.	D.
		Group 9		
09	CA	San Gabriel Area 3.	Alhambra	D.
09	CA	San Gabriel Area 4.	La Puente	D.

# V=Voluntary or Negotiated Response.
R=Federal and State Response.
E=Federal and State Enforcement.
D=Actions to be Determined.

Dated: May 1, 1984.

William D. Ruckelshaus,

Administrator.

[FR Doc. 84-12311 Filed 5-7-84; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 73 and 76

[Docket No. 20521; Docket No. 20548; BC Docket No. 78-239; MM Docket No. 83-46; RM-3653; RM-3695; RM-4045; FCC 84-115]

Multiple Ownership of AM, FM, TV, and Cable TV Stations

AGENCY: Federal Communications Commissions.

ACTION: Final rule.

SUMMARY: This action amends §§ 73.35, 73.240, 73.636, 73.3615, and 76.501 of the Commission's Rules and FCC Forms 301, 314, 315, 316, 323 and 325. This action is taken to revise and modernize the rules the Commission uses to attribute ownership interests in broadcast, cable television and newspaper entities for purposes of applying its multiple ownership rules, as well as the rules governing the reporting of such ownership information. This action will more accurately identify those persons and entities with whom the multiple ownership rules are concerned, greatly reduce the amount of ownership information the Commission will require of licensees, and greatly reduce any restrictive effects of those rules on investors.

EFFECTIVE DATE: June 6, 1984.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Bruce A. Romano, Mass Media Bureau, (202) 632-9356.

List of Subjects

47 CFR Part 73

Radio and television broadcasting.

47 CFR Part 76

Cable television.

Report and Order (Proceedings Terminated)

In the matter of corporate ownership reporting and disclosure by broadcast licensees (Docket No. 20521), Amendment of §§ 73.35, 73.240 and 73.636 of the Commission's rules relating to multiple ownership of standard, FM and television broadcast stations (Docket No. 20548), Amendment of §§ 73.35, 73.240, 73.636 and 76.501 of the Commission's rules relating to multiple ownership of AM, FM, and television stations and CATV systems (BC Docket No. 78-239), reexamination of the Commission's rules and policies regarding the attribution of ownership interests in broadcast, cable television and newspaper entities (MM Docket No. 83-46, RM-3653, RM-3695, RM-4045).

Adopted: March 29, 1984.
Released: April 30, 1984.

By the Commission: Commissioner Rivera abstaining and issuing a statement.

I. Introduction

1. The Commission has before it comments filed by numerous parties in response to its *Notice of Proposed Rule Making* in MM Docket No. 83-46 (*"Notice 83-46"*), FCC 83-46, released February 15, 1983, 48 Fed. Reg. 10082 (March 10, 1983), and comments and pleadings filed in related docketed proceedings and rule making petitions as captioned above.[1] This *Report and Order* concludes those proceedings, comprehensively reviewing and revising the standards for attributing interests in broadcast, cable television and newspaper properties insofar as application of the Commission's various multiple ownership rules is concerned and for reporting those interests to the Commission.[2] Briefly stated, the specific changes adopted herein include:

(1) Raising the basic ownership benchmark for attribution to 5% regardless of the size of the licensee (eliminating the distinction between "closely-held" and "widely-held" licensees);

(2) Raising the attribution benchmark for "passive" investors to 10%;

(3) Introduction of a "multiplier" in determining attribution in vertical ownership chains;

(4) Clarification of the status of non-voting stock and limited partnership interests as non-attributable interests;

(5) Clarification of the attribution of interests held in various kinds of trusts and other fiduciary capacities;

(6) Provisions for the relief from attribution of officers and directors whose duties are not related to any licensee or its operations; and,

[1] A list of the parties filing comments in each of these proceedings is contained in Appendix B. A general summary of those comments, all of which have been fully considered herein, is contained in Appendix A.

[2] It is important to reiterate at the outset that this *Report and Order* is not intended to affect in any respect the Commission's current multiple ownership rules themselves and does not prejudge any action regarding those rules which the Commission may consider; it simply determines how and to whom these rules should be applied. *Notice 83-46, supra* at n. 4. Review of the Commission's "seven station" rule, which limits the number of stations a single entity may own nationwide, is the subject of another current rule making proceeding. *Notice of Proposed Rule Making* in Gen. Docket No. 83-1009, FCC 83-440, released October 20, 1983, 48 FR 49438 (October 25, 1983), corrected 48 FR 50907 (November 4, 1983). Review of the Commission's regional concentration of control restriction, which limits the proximity of any three stations owned by a single entity, is also the subject of another rule making proceeding. *Notice of Proposed Rule Making* in MM Docket No. 84-19, FCC 84-10, released January 17, 1984, 49 FR 2478 (January 20, 1984).

(7) Modifications of existing ownership reporting requirements to reduce their burden and to conform them to the new attribution rules.

II. Historical Background

2. As pointed out in *Notice 83–46*, the attribution rules constitute "the mechanism by which the multiple ownership rules are given practical effect. That is, [they] define what constitutes a 'cognizable interest' for the purpose of applying the multiple ownership rules to specific situations." *Notice 83–46, supra* at para. 1. In that role, they represent the Commission's judgment regarding what ownership interest in or relation to a licensee will confer on its holder that degree of influence or control over the licensee and its facilities as should subject it to limitation by the multiple ownership rules.

3. The Commission's first efforts at limiting the multiple ownership of broadcast facilities consisted of local and national restrictions adopted in the early 1940's.[3] The current rule restricting ownership of broadcast entities on a national basis, the so-called "seven station" rule, was adopted in 1953. *Amendment of Multiple Ownership Rules* (Docket No. 8967), 18 FCC 288 (1953). In adopting this rule, the Commission stated that its fundamental purpose was "to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent undue concentration of economic power contrary to the public interest." *Id.* at 291–92. In this initial effort to achieve diversification of ownership, the Commission stated that it would make no distinction between a controlling interest and a non-controlling, minority interest for purposes of applying the rule, reasoning that minority shareholders can have considerable voice in the control and management of a corporate licensee. *Id.* at 292–93. It consequently determined that for a "widely-held" corporation (fifty or more stockholders), an interest constituting 1% or more of the outstanding voting stock would be cognizable, whereas for a "closely-held" corporation (less than fifty stockholders), any voting interest would be cognizable. *Id.* at 294.[4] It also recognized the position of the officers and directors of a licensee corporation and brought them within the purview of the rule. *Id.* The Court of Appeals ratified this use of a stockholding percentage benchmark for attributing ownership, while observing that ownership interests of one percent do not necessarily constitute control. *Storer Broadcasting Co. v. U.S.*, 240 F.2d 55 (D.C. Cir. 1956).

4. The need for adjustments in this basic attribution rule became apparent in subsequent years. Widespread noncompliance with the rules by investment companies (mutual funds) was revealed in the course of a 1963 case involving an application for the transfer of control of a station.[5] The Commission initially granted the application, conditioned on the involved parties' "strict compliance" with the rule, but upon reconsideration, it agreed to suspend any divestiture requirement pending further investigation of the extent of such violations. *Baltimore Broadcasting Corporation and Metromedia, Inc.*, 1 RR 2d 798 (1963). The Commission promptly instituted a rule making proceeding to study the extent of noncompliance with the multiple ownership rules, anticipating a return to strict compliance within a "reasonable period of time." *Notice of Inquiry and Notice of Proposed Rule Making* in Docket No. 15627, FCC 64–861, September 16, 1964, 29 FR 13211 (September 23, 1964). Instead, after considering the data submitted regarding stock ownership in the broadcasting industry, the Commission decided to amend its attribution standard to permit investment companies to own up to 3% of a licensee corporation before an ownership interest in the licensee would be attributed to them for purposes of the national and regional multiple ownership rules. An eligible entity utilizing this higher attribution benchmark, however, was required to file a disclaimer of any intent to control or influence the licensee.[6] *Report and Order* in Docket No. 15627, 13 FCC 2d 357 (1968). In the same order the Commission determined to attribute stock held by stockbrokers and bank nominees to the individuals for whose benefit the stock was held, rather than to the nominal holders, thereby effectively eliminating any limit on the stock such a nominee could hold in that capacity. No similar provision was made for bank trustees as the Commission believed that those trustees usually held the power to vote the stock they held. The Commission subsequently further amended its rule to permit bank trustees to hold up to five percent of a corporation before an ownership interest would be attributed to them, reasoning that such holdings were "passive" in nature, with no intent to control the licensee. Again, it required that a specific disclaimer of intent to control be filed by any party wishing to avail itself of this standard.[7] *Report and Order* in Docket No. 18751, 34 FCC 2d 889 (1972). Subsequently, in an effort to equalize treatment of apparently similar entities, the 5% benchmark provision was extended to investment companies and insurance companies. So extended, this "passive" investor attribution standard was also applied to the Commission's cable television ownership limitations. *Report and Order* in Docket No. 20520, 59 FCC 2d 970 (1976),[8] *recon. granted in part, Memorandum Opinion and Order* in Docket No. 20520, 65 FCC 2d 336 (1977), *aff'd sub non. National Citizens*

[3] Duopoly and national multiple ownership restrictions were adopted for FM and television in 1940 [5 FR 2384 (June 26, 1940)] and 1941 [6 FR 2284 (May 6, 1941)], respectively. The first one-to-a-market rule was adopted in 1941 as part of the *Report on Chain Broadcasting*. After the Supreme Court upheld these rules of general applicability in *National Broadcasting Co., Inc. v. U.S.*, 319 U.S. 190 (1943), the Commission adopted a duopoly rule for AM. 8 FR 16065 (November 27, 1943). A national multiple ownership restriction for AM was first applied in *Sherwood R. Brunton et al. (KQW)*, 11 FCC 407 (1946), where the Commission denied an application for the transfer of an AM station to Columbia Broadcasting System, Inc., because Columbia already owned several other AM stations. The Commission thereafter proposed the adoption of formal rules limiting overall AM station ownership in 1948. *Notice of Proposed Rule Making* in Docket No. 8967, 13 FR 5060 (August 31, 1948).

[4] The "owns, operates or controls" language of the duopoly and one-to-a-market rules has been construed by the Commission to render these provisions applicable only where a stockholder holds a majority voting interest in the licensee or otherwise exercises actual control over the licensee. As to stock ownership, therefore, the percentage attribution benchmarks advanced in connection with the national multiple ownership rules are not literally germane to these local rules. Recognition, however, of minority stock ownership interests, as well as non-ownership interests, in duopoly and "hybrid" one-to-a-market contexts came with the development of the Commission's "cross interest" policy. *See Minnesota Broadcasting Corp.*, 13 FCC 672 (1949) [duopoly]; *Lexington County Broadcasters, Inc.*, 42 FCC 2d 581 (Rev. Bd. 1973) [one-to-a-market]. *See also United Community Enterprises, Inc.*, 37 FCC 2d 953 (Rev. Bd. 1972) [evolution of the cross interest policy and its distinction from the multiple ownership rules]. Our action today does not affect the substantive aspects of this policy, which we shall continue to administer on a case-by-case basis. However, our decision herein will result in the application, as appropriate, of the duopoly and one-to-a-market rules themselves, in lieu of cross interest policy consideration, where voting ownership interests at or above the relevant benchmarks are involved. See para. 76, *infra*.

[5] *Baltimore Broadcasting Corporation and Metromedia, Inc.*, 1 RR 2d 795 (1963).

[6] The Commission rejected a proposal to use a 10% standard for investment companies, finding a 3% benchmark sufficient to minimize divestiture.

[7] The Commission noted that a 5% standard would necessitate significantly less divestiture than a 3% standard. A proposal to use a 10% attribution standard for bank trustees was rejected.

[8] The Commission also eliminated the requirement that eligible passive investors file disclaimers of intent to influence or control.

Committee for Broadcasting v. F.C.C., 559 F.2d 187 (D.C. Cir. 1977).

5. The Commission next proposed adoption of a 10% across-the-board attribution benchmark for the duopoly, one-to-a-market and regional ownership rules, in conjunction with its consideration of a regional concentration of control restriction.[9] When it subsequently adopted the regional rule, it noted that the 10% proposal received little attention,[10] and sought further comment on that issue in a *Further Notice of Proposed Rule Making* in Docket No. 20548 (*"Notice 20548"*), 63 FCC 2d 832 (1977). That rule making remains outstanding and has been incorporated into the present proceeding. The Commission has also initiated proceedings to consider various modifications of the reporting requirements for ownership interests, *Notice of Proposed Rule Making* in Docket No. 20521 (*"Notice 20521"*), FCC 75–710, released June 23, 1975, 40 FR 26543 (June 24, 1975), and to consider the propriety of attributing ownership to holders of various non-voting interests, as well as to examine the use of various insulating mechanisms to avoid attribution. *Notice of Inquiry and Notice of Proposed Rule Making* in BC Docket No. 78–239 (*"Notice 78–239"*), 68 FCC 2d 1302 (1978). These proceedings also remain outstanding and have been incorporated into the present proceeding. Finally, several requests for further rule changes and a request for waiver are outstanding at this time and will also be resolved herein.[11]

III. Discussion of the Issues

A. Attribution Benchmarks

6. Selection of an appropriate stockholding level at which to attribute ownership of a corporate licensee's facilites to the individual stockholder is the most significant aspect of this review of the attribution rules. As we stated in *Notice 83–46*, the industry and the investment community have evolved dramatically since the rules first began develping in the 1940's, and they may now be unnecessarily restrictive. We observed that a relaxation of the benchmark might serve the public interest by increasing investment in the industry and by promoting the entry of new participants, particularly minorities, by increasing the availability of start-up capital to these entities. We noted the existence of numerous other ownership regulations of several federal agencies, including our own, and suggested that conformity among these rules, and the consequent reduction of the reporting burden would be a desirable result. At the same time, however, we recognized that the underlying principles and concerns of our own rules may be unique and require distinct analysis and results. Comment was invited on all of the above concerns including their legal, economic, social, and policy implications. Specific empirical data bearing on these matters was particularly requested. *Notice 83–46, supra* at para, 46. The Commission also questioned whether a distinction should continue to be made for attribution purposes between widely-held and closely-held corporations and, if so, whether this distinction should be redefined. *Id.* at para. 33.

7. In approaching the benchmark issue, we have looked to the guidance of other regulatory and statutory ownership provisions, the suggestions and arguments of the commenting parties and our own experience in evaluating the evolving state of today's telecommunications marketplace. Additionally, we have conducted a survey of Commission ownership files to determine, to the extent possible the typical size and distribution of stockholdings among the Commission's licensees.[12] Information was compiled from the ownership files of most widely-held corporate licensees,[13] and from a sample of closely-held licensees.[14] The survey's data provides us a more deliberate means of evaluating appropriate attribution levels than the "intuitive balance" suggested by some commenters. We are fully aware, of course, that many factors besides the size of a stockholding contribute to the influence or control the stockholder can or does exercise. However, stockholding size does have a legitimate, if imprecise relationship to its holder's ability to exercise influence or control, and it represents a useful tool for making this determination. It is also important to recognize that the relationship itself between cognizable ownership and actual influence over programming is at best indirect. Therefore, in structuring attribution levels to reflect this inexact relationship, we are mindful of the need for balance between inhibiting legitimate business opportunities and promoting a "clash of divergent views."

(1) Benchmark for Non-Passive Investors

8. Comments were primarily directed to the choice of a benchmark for widely-held corporations, and many seemed confined to that consideration only for institutional investors. They variously supported benchmarks of 1%, 5%, 10%, and 20%, although some implicitly urged a 49.9% benchmark for some situations. Commenters universally approved this comprehensive review of all of the rules, and several strongly urged that the Commission take the opportunity to simplify its rules.

9. Parties urging the Commission to retain its current 1% benchmark cited the lack of any evidentiary support for a change. They argued that raising the benchmark would adversely affect the advancement of minority interests in broadcasting because of the inevitable increase in conglomerate ownership that such action would permit. Parties supporting a higher benchmark, on the other hand, argued that the current criterion was selected arbitrarily in the first place, and that an upward adjustment is warranted given the profound changes in the investment market and in the media marketplace since the existing standard was established. They concluded that raising the benchmark will advance the public interest by increasing the availability of resources to broadcasters which, in turn, should result in improved service.

10. Parties supporting 5%, 10%, and 20% each contend that the particular ownership level they support best identifies the level of stock ownership at which a shareholder will be able to affect the affairs of a licensee. Several parties also cite those rules and regulations of other federal agencies

[9] *Notice of Proposed Rule Making* in Docket No. 20548, 54 FCC 2d 331 (1975).

[10] *First Report and Order* in Docket No. 20548, 63 FCC 2d 824 (1977).

[11] The rule making requests are: RM–3653, filed April 21, 1980, by the First Manhattan Company, requesting a rule amendment to establish a 5% cognizable ownership benchmark for investment advisors; RM–3695, filed June 5, 1980, by the Investment Company Institute, requesting a rule amendment to increase the cognizable ownership benchmark to 10% for investment companies and investment advisors; and RM–4045, filed January 27, 1982, by the Centennial Fund, requesting a rule change to allow self-administered pension funds to utilize a 5% ownership benchmark. The Ford Foundation seeks a waiver to permit it to hold up to a 5% interest in both closely-held and widely-held corporate licensees without attribution consequences.

[12] Notice of the existence and availability of this study has been filed in the record of this proceeding.

[13] Widely-held licensees are those with fifty or more shaheholders. Several ownership reports were being updated with recent entries and were not in the files when the survey was conducted; others were rejected for various reasons, including being outdated. Some filing parties were holding companies or subsidiaries, whose ownership information was not useful or was duplicative of that filed by other licensees in the same owership chain. 172 ownership reports were included in the survey, out of approximately 200 widely-held linensees.

[14] There are approximately 5500 closely-held licensees. A sample of 375 ownership reports was randomly drawn from that universe. Relative to the size of the universe, this sample should provide an accurate profile of the stock ownership patterns of these licensees.

which use the same benchmark they advance as evidence of the appropriateness of their selection.

11. In establishing appropriate attribution levels for stock interests in corporate licensees, the Commission has historically taken a cautious approach. The underlying multiple ownership rules are premised on the principle that "a democratic society cannot function without the clash of divergent views." *Second Report and Order* in Docket 18110, 50 FCC 2d 1046, 1079 (1974), *recon. denied*, 53 FCC 2d 589 (1975), *remanded on other grounds, National Citizens Committee for Broadcasting v. F.C.C.*, 555 F.2d 938 (D.C. Cir. 1977), *aff'd*, 439 U.S. 775 (1978). *See also Associated Press v. U.S.*, 326 U.S. 1, 20 (1945). Indeed, this "idea of diversity of viewpoints from antagonistic sources is at the heart of the Commission's licensing responsibility." *Second Report and Order* in Docket 18110, *supra*. In this respect, "[t]he significance of ownership . . . lies in the fact that ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation, all of which are a critical aspect of the Commission's concern with the public interest." *Id.* at 1051. In light of the weight to be given these considerations, and in the absence of any empirical evidence to guide its deliberations, the Commission exercised its best judgment in attempting to attribute any stockholding interest which might impart even slight influence in a licensee. We now believe, however, that this approach may have been unnecessarily restrictive in frequently attributing ownership to inconsequential interests.

12. *Widely-Held Companies.* Two factors convince us that, under current market and industry conditions, a 1% stockholder is unlikely to be able to exert control or programming influence on the basis of that stockholder in virtually any widely-held broadcast corporation. First, in comprehensively reviewing our ownership report files, we find that among all broadcast corporations studied a 1% shareholder is one of more than twelve individual shareholders, on average, reported as holding 1% or greater interests. Moreover, in some corporations, there are actually tens of 1% or greater shareholders. In many corporations, there are also several institutional shareholders with larger holdings. The 1% shareholder is, obviously, the least of these shareholders, and his shareholding is only marginally greater than that of the host of lesser shareholders in the corporation. Consequently, a shareholder with 1% of a corporation's stock is not in a preeminent position among stockholders and is unlikely to have much influence among them on the basis of his stockholding, or to measurably affect the outcome of elective or discretionary corporate decisions. Second, with the increasing dispersion of stock into smaller holdings, the growing sophistication of company management methods and needs, and the rising participation in the stockmarket of individuals without management sophistication, stockholders have increasingly ignored failed to independently exercise their voting rights. In this environment, corporate management has emerged as an increasingly independent source of control in corporations. This heightened independence of management means that a significant amount of stock must reside in one place to influence the activities of the management of most large corporations.[15] These factors taken together suggest that the 1% benchmark is unnecessarily low for accomplishing the stated objectives of the multiple ownership rules under current or anticipated conditions.

13. Having concluded that the existing attribution benchmark can be safely raised, we must now determine what new standard should be selected in its place. Our objective in this undertaking is to establish a benchmark which avoids unnecessary and possibly costly regulatory intervention by minimizing the attribution of noninfluential interests, yet which also identifies with reliable accuracy those interests that convey to their holders a realistic potential to affect the programming decisions of licensees. Based upon our analysis of the record, we have concluded that a 5% benchmark represents the best choice in this regard.

14. Our stockholding survey reveals that, under current attribution, aggregation, and reporting methods, a 5% shareholder appears to be one of the largest two or three shareholders, on average, in a widely-held corporate licensee.[16] In only a few cases are there more than three such shareholders, and in several cases there is only one such shareholder. Furthermore, a 5% or greater holding is substantially larger than the holdings of the host of lesser stockholders. Such a position makes the great majority of 5% or greater shareholders the preeminent shareholders in their respective companies, with enough votes to potentially affect the outcome of elective or discretionary decisions and to command the attention of management. In view of these facts, it appears that a 5% benchmark is likely to identify nearly all shareholders possessed of a realistic potential for influencing or controlling the licensee, with a minimum of surplus attribution. In a corporation with no holders of 5% or more of its stock (approximately one fifth of widely-held licensees), it is probable that a holding of less than 5%, even though the largest holding in the corporation, is neither sufficiently greater than other holdings to accord it a distinct position nor significant enough to overcome the entrenched position of corporate management, particularly with respect to the day-to-day business judgments of the licensee, such as programming decisions.

15. In contrast, the adoption of a benchmark higher than 5% may result in many substantial and influential interests being overlooked. For example, the average occurrence of 10% or greater shareholders, under current attribution methods, is less than one for each corporation, and approximately half of the Commission's widely-held licensees have no stockholder with that large an interest. For over half of these corporations, however, there are one or two stockholders with an individual holding between 5% and 9.9%, a holding much larger than that of any other single stockholder, whose interest would not be attributed.

16. Beyond the statistical data from our ownership survey, we have examined ownership benchmarks utilized in other regulatory frameworks with a view to their applicability to our attribution determination. Our review reveals strong support for a 5% standard. Specifically, we note that none of the guidelines studied more closely parallels in purpose our own concerns than the stockholding disclosure requirements of the Securities and Exchange Commission (S.E.C.).[17]

[15] Over the years, numerous scholarly treatises have chronicled the increasing occurrence of management control in large corporations as sizable family holdings dissipate and stock becomes more widely dispersed. *See, e.g.*, A. A. Berle, Jr., and G. C. Means, *The Modern Corporation and Private Property* (New York: MacMillan Co. 1932), revised ed., 1968; R. A. Gordon, *Business Leadership in the Large Corporation* (Berkeley: University of California Press, 1961); M. L. Mace, *Directors: Myth and Reality* (Boston: Harvard Business School Division of Research, 1971).

[16] Although NBC's ownership survey lacks the necessary information regarding the methods and parameters it used to permit our reliance on it, we note that it basically confirms our own findings. *See* Appendix A, n.7.

[17] For a discussion of other benchmarks considered and our reasons for finding them less relevant than the S.E.C. reporting requirements, see *infra* at paras. 22–23.

These requirements provide for the collection and public availability of information on all entities holding 5% of the stock of large publicly-traded corporations. 15 U.S.C. 78m(d). In considering the significance of these requirements, we are mindful that our multiple ownership rules protect unique First Amendment concerns not within the S.E.C.'s jurisdiction. However, despite the different missions of the agencies and their respective regulations, to the extent that specific aspects of their rules are directed to the same purpose, they can be productively compared. In this regard, while the S.E.C.'s requirements are expressly intended for the protection of the shareholders in each company and of participants in the stockmarket generally,[18] they are directed to identifying interests with the potential for significant influence or control—the same interests at which our attribution rules are directed. Perhaps most telling, Congress reduced the S.E.C. reporting level from 10% to 5% in 1970, on the premise that "[acquisitions of more than 5% of a company's stock] may lead to important changes in the management or business of the company. . . ." *H. Rep. No. 91–1655*, 91st Cong., 2d Sess. (December 2, 1970).[19]

17. Importantly, nearly every demonstrable benefit to be derived from amendment of the attribution rules is achievable in large measure with a 5% benchmark, without incurring the risks involved in setting the benchmark higher. A 5% benchmark will eliminate attribution for over 80% of currently attributed stock interests; whereas a 10% benchmark would relieve only an additional 10% of interests, while adding a significant risk of overlooking influential or controlling stockholders for many corporations. The reporting burden is correspondingly lightened by an increase to 5%, whereas an increase to 10% will not afford appreciable additional relief for those with the greatest burden because the largest corporate licensees must report 5% or greater stockholders to the S.E.C. anyway under its disclosure requirements. 15 U.S.C. § 78m(d). Moreover, we are adopting several modifications to the rules unrelated to the basic attribution benchmark that will further increase capital availability and ease the burden and restrictions of the rules, without jeopardizing their basic integrity.

18. *Closely-Held Companies.* We agree with the parties promoting the elimination of the current distinction between widely-held and closely-held corporations for attribution purposes. Although the dynamics of the management of the affairs of a company may differ according to the dispersion of its stock, commenters have persuasively argued that this is as likely to decrease the relative importance of a given block of stock as it is to increase its importance. The holder of a small percentage of voting stock in a small company can be just as powerless and uninfluential as one in a large company, and often will be more so due to the greater occurrence of large shareholders. On the other hand, the mere size of the shareholder group and the usually personal nature of the relationships among the shareholders provides much more meaningful and frequent contact and reduces the anonymity of shareholders.

19. The ambivalence of these conjectures is resolved, however, by the ownership survey which indicates that a 5% benchmark seems the most appropriate for those corporations heretofore considered "closely-held." Approximately two fifths of small licensees are sole proprietorships or 50/50 partnerships, in which cases attribution to all parties is a straightforward matter. Another one third of small licensees have a single majority interest holder, where attribution to the minority stockholders, regardless of the size of their shareholdings, is inappropriate.[20] That leaves approximately one quarter of small licensees whose owners will be directly affected by the particular benchmark applied. In those companies with more than just a few stockholders, of which one or two have clearly dominant holdings, the average size of the lesser holdings is well under 5% and most shareholders will thus be relieved of attribution by a 5% benchmark. This is appropriate because the dominant shareholders are most likely to control the affairs of the corporation. In those companies with no clearly dominant holding, a larger number of shareholders are on a relatively more equal basis, and most of the largest holders, with relatively equal power, will have an interest attributed. However, when the distribution of shares becomes so wide that interests are less than 5%, no interests would be cognizable, as would be appropriate given the lack of power any single shareholder possesses. Moreover, in each of these cases, those parties who wield particular influence are reasonably certain to appear as officers and directors and to have an interest attributed on the basis. Thus, these rules will serve to eliminate attribution for most noncontrolling and uninfluential stock interests, by absolving all holdings less than 5% and most of those holdings greater than 5% which are meaningless in terms of influence or control because of the dominance of other shareholders. At the same time, few significant shareholders are likely to escape attribution.

20. This rule change will have the additional benefit of significantly simplifying the rules and eliminating any discriminatory effect the existing distinction between widely and closely-held corporations may have occasioned. It could also significantly enhance the financial alternatives available to many of those small operations which traditionally have had the most difficulty obtaining financing, without diluting the underlying multiple-ownership restrictions which may be in effect.

21. *Companies with Single Majority Stockholders.* In those instances where a corporate licensee, whether closely or widely-held, has a single majority voting stockholder, it appears neither necessary nor appropriate to attribute an interest to any other stockholder in the corporation. In these circumstances, the minority interest holders, even acting collaboratively, would be unable to direct the affairs or activities of the licensee on the basis of their shareholdings. These interests, therefore will not be deemed cognizable for purposes of our multiple ownership rules.[21] However, officers and directors of such licensee corporations will continue to have an attributable interest.

22. *Other Benchmark Options.* Several other federal agencies use various ownership percentage benchmarks, as set by Congress or the respective agencies, in their regulations. As we have noted, however, none of these benchmarks is so clearly directed as the S.E.C.'s reporting requirements to defining the same kind of ownership position involved in this Commission's multiple ownership rules. The benchmark most frequently cited as relevant guidance in amending our attribution rules is that restricting alien

[18] *See, e.g., Dan River, Inc. v. Unitex, Ltd.*, 624 F.2d 1216, 1225 (4th Cir. 1980); *Abbey v. Control Data Corp.*, 603 F.2d 724, 731–32 (8th Cir. 1979); *S.E.C. v. Savoy Industries, Inc.*, 587 F.2d 1149, 1166 (D.C. Cir. 1978); *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1276–77 (5th Cir. 1978).

[19] S.E.C. rules further require that every 5% holder report every additional 1% acquisition as a "significant change." 17 CFR 240.13d–2.

[20] *See* para. 21, *infra*.

[21] This exception plainly rests on the assumption that a simple majority vote is sufficient to affirmatively direct the affairs of a corporate licensee.

ownership of broadcast facilities.[22] The alien ownernship restriction, however, is unique in several respects. In its aim, it is primarily and uniquely fashioned to curb alien activities against the United States in time of war.[23] Since an alien shareholder would presumably face the united opposition of native shareholders in such circumstances, it was not unreasonable for Congress to establish a relatively high stockholding level at which further alien stock ownership would be prohibited. The alien ownership provision also differs significantly from our multiple ownership rules in its scope and effect. It absolutely prohibits direct ownership of any single broadcast facility by aliens, it refers to total, as opposed to individual, alien ownership interests in any one facility, and it applies equally to all financial interests in all business forms of licensees. The multiple ownership rules, on the other hand, are directed to the possible cumulative effects of interests in several stations, and only restrict ownership in more than a given number of stations. Consequently, they refer to any single individual's (or entity's) specific interests and are directed primarily to voting and management interests. Moreover, the 20% standard has not been considered a conclusive presumption regarding the existence of alien control.[24]

23. Various other federal statutes and regulations containing ownership benchmarks appear equally inapt as guidelines. For example, the "insider" restriction of the Securities and Exchange Act,[25] is concerned with an individual's access to inside information which can be used to manipulate a corporation's stock on the exchange for the personal gain of that individual. The regulations of the Federal Aviation Administration and the Civil Aeronautics Board, as well as other agencies regulating specific industries, are generally limited to precluding collusive or anticompetitive economic behavior, while our rules also encompass a fundamental concern with diversity of viewpoints.[26] The unifying characteristic of these rules is that they are intended to prevent intrinsically illegal or undesirable activities. The levels of stock ownership which these rules variously identify as carrying an appreciable risk of permitting such activities seem inappropriate models where, as here, the activity at issue—influencing a licensee's programming decisions—is not only legal but expected behavior by one with a legitimate investment interest in the licensee corporation.

24. Finally, the Commission will not return to the use of *ad hoc* determinations for attributing the ownership of facilities, as suggested in *Notice 83–46, supra* at para. 23. Such a procedure would be virtually impossible to administer, if only for the sheer volume of determinations that would have to be made. For reports required on a regular basis, the same determinations would have to be made repeatedly due to slightly changing circumstances from one report to the next. If reports were not required regularly, the Commission would be entirely dependent on the haphazard notification that would result only when it occurred to an outside party that certain multiple interests might violate the rules and that the Commission should be advised. Furthermore, such a procedure would inevitably lead to unpredictable and inconsistent results, even if specific criteria such as those advanced in *Notice 83–46* were employed,[27] with the significant adverse consequences for licensees cited by the commenting parties. Even under the existing, specific attribution criteria, the Commission is called on to make innumerable individual judgments in the context of waiver requests and situations not contemplated by the rules. The rules adopted herein are intended to be sufficiently definitive to eliminate the need for most such individual determinations, lending consistency and predictability to the results.

25. *Rebuttability of the Benchmark.* While a definite benchmark will therefore be employed to establish cognizable interests, the presumption it establishes will be rebuttable in extreme cases. If an ownership interest is above the benchmark, the holder can attempt to show that the interest should not be cognizable. Such a stockholder will have a heavy burden of proof. The primary factor in such a showing would be a demonstration that another person (or persons) is in indisputable control of the licensee.[28] Important elements of such a demonstration would include the size of the stockholding of the alleged controlling party and how that stockholding compares to the others in the corporation, the nature of active participation in the corporation by that person, and concrete examples of his ability to consistently control the activities of the licensee.[29] These provisions should provide relief in those cases which most clearly warrant exception from the rules, without jeopardizing the integrity of the rules or the order they will provide, as some commenters fear.

26. *Additional Considerations.* We are cognizant of the fact that there are many more broadcast and other media outlets operating today than when the current attribution rules were adopted. The Commission has responded to this change by investigating the need to amend our multiple ownership rules to reflect the apparent increase in inherent diversity represented by this growth and has proposed appropriate changes in those rules.[30] The substantial growth in media voices alone, however, while relevant to our attribution decision, is not of primary significance. As we noted earlier, the attribution rules are the mechanical process of determining what constitutes an interest sufficient to affect the operations of the licensee. This determination is distinct from the determination of the number of outlets one party should operate to achieve the optimum level of diversity and competition.

27. While several parties argue that these marketplace changes result in more competition for broadcasting capital, there has been no evidence presented in this proceeding to indicate that the availability of capital generally has not increased along with the demands upon it. In any event, we are convinced that the substantial relaxation of the attribution standards effected by our decision here should be more than adequate to remove any constraint which these rules impose on capital sources. We note, moreover, that any easing of the multiple ownership

[22] 47 U.S.C. 310. Among other things, this provision prohibits direct alien ownership of more than 20% of the stock of a broadcast licensee corporation.

[23] *See Noe v. F.C.C.*, 260 F.2d 769 (D.C. Cir. 1958); *Hearings on S. 2910*, 73d Cong., 2d Sess. at 170–171. *See also* Watkins, *Alien Ownership and the Communications Act*, 33 Fed. Comm. L.J. 1 (1981).

[24] *See Glaser & Fletcher*, FCC 75–312, March 13, 1975, 33 RR 2d 37, 38 (1975).

[25] 15 U.S.C. 78p.

[26] The C.A.B.'s regulations, for instance, are designed, in part, to prevent collusive fare structures, and presume a holder of 10% of a carrier's stock may be able to engage in such activities. 49 U.S.C. 1378(f). It is notable that, for all acquisitions, C.A.B. requires the reporting of all 5% or greater interests for its consideration.

[27] *Notice 83–46* included proposed criteria that could be used for determining whether interests below the benchmark should be attributed, in the event a relatively high benchmark were adopted. *Notice 83–46, supra* at paras. 23–24.

[28] Modifications in the rules adopted herein remove the need for such a showing by even substantial minority shareholders if there is a single majority shareholder in the corporation. *See* para. 21, *supra*.

[29] While the Commission will consider requiring a pledge of noninvolvement in any case for which an exception is granted pursuant to such a demonstration, the offer of such a pledge will not itself be dispositive.

[30] *See* n. 2, *supra*.

restrictions themselves, now under consideration by the Commission, will profoundly affect investor activity and the availability of capital for all broadcasters.

28. While there have been general claims that the current rules present a serious impediment to the entrance of new broadcasters and thereby actually reduce diversity, those concerns should and will be addressed to the extent they are not simply overstated and undersupported. Specifically, several provisions are outlined below which significantly enhance the ability of new and small broadcasters to employ their primary sources of capital without undermining the integrity of the rules or the premises upon which they are based.

29. *Conclusion.* We are convinced that the 5% attribution benchmark we are adopting today, together with the other modifications adopted herein, should increase potential capital availability to broadcasters, even beyond the extent to which any need has been demonstrated by commenters.[31] It will also render the rules more realistic and effective, reduce the reporting and compliance burden where feasible, and avoid unnecessary government intrusion where possible, all while maintaining the essential integrity of the underlying multiple ownership rules.

(2) "Passive" Investors

30. In *Notice 83–46,* the Commission also sought comment on whether there are any legal or policy reasons for maintaining the distinction and separate benchmark for "passive" investors such as bank trust departments, insurance companies, and mutual funds. The evolution of this distinction is outlined in paragraph 4, *supra.*

31. Several parties urge retention of the separate classification and benchmark for "passive" institutional investors, and propose various modifications of that classification to include additional institutions. In this regard, they reiterate the Commission's own rationale that such institutions invest for income only, are so bound by fiduciary responsibility, and are either prohibited by law or simply not in the practice of taking control or influencing the programming decisions of the companies in which they invest. Opposing parties argue that the distinction is unrealistic, as a given ownership position confers the same status, whether to an individual or an institution. Others add that a general raising of the benchmark eliminates the need for continuing the distinction.

32. The Commission has already recognized the somewhat different position of certain "passive" institutional investors as compared to other investors, and has determined that such status warrants separate consideration and treatment within our attribution rules. We have said in the past: "With rare exceptions, the banks are passive investors who manage the trusts for investment purposes for the beneficiaries and not to control the management or policies of a broadcast company;" [32] that "institutional investors [insurance companies, investment companies, bank trust departments] play passive investment roles;" [33] and that the benefits this exception will provide by "strengthening the economic foundation of the broadcasting and cable industries" outweighs the concern over the influence exerted by the voting and trading of the larger blocks of stock which the exception permits.[34] In our previous consideration of this subject we further found that "commenting parties have offered no actual cases of institutional investors using their minority interest in widely-held cable or broadcast companies to exert influence on the management of such companies." [35]

33. These reasons pertain no less today. Commenters have advanced no evidence, and we are aware of none, which would contradict the appropriateness of the passive status we have traditionally accorded to investment companies, bank trust departments and insurance companies. Moreover, based on our experience with the existing 5% benchmark and the comments of numerous parties to this proceeding, it appears that the benchmark for these "passive" institutional investors can be safely raised to 10%. This action should substantially increase the investment flexibility of these entities and, in so doing, expand the availability of capital to the broadcast and cable industries without significant risk of attribution errors. We do not believe, however, that an increase in the passive benchmark above 10% is similarly advisable. We have previously observed that merely voting or trading large blocks of stock can affect the management of a company,[36] and the S.E.C. has reached a similar conclusion.[37] Based on our stock distribution survey, it appears that a block of 10% or more of voting stock approximates the shareholding level in most broadcast corporations that could often result in this effect, even if inadvertent and unintended.

34. The application of this benchmark presumes, of course, that the party using it maintains a truly passive role in the affairs of the licensee. This would include refraining from contact or communication with the licensee on any matters pertaining to the operation of its stations and no representation on the board or among officers of the licensee corporation by persons professionally or otherwise associated with the institution. As a safeguard in this respect, each licensee will be required to certify that no such party has exerted or attempted to exert any influence or control over any of the affairs of the licensee. With inclusion of this certification provision, we find it unnecessary to require disclaimers of control by passive investors themselves, as has been required in the past.

35. While similar institutions should be treated similarly, several commenters correctly point out that all institutional investors do not operate in the same manner and that each should be accorded attribution status based on its specific function and nature. We agree. Accordingly, we will here consider individually each of the types of institutions which have been specifically proposed for inclusion as passive investors in this proceeding.[38] In doing

[31] One party submitted a study comparing the debt/equity ratios and retained earnings of selected Canadian and U.S. broadcast companies. While this information intends to suggest that the current 1% benchmark may be restricting capital, it is not sufficiently reliable to justify a dramatic change in the rules. In this regard, we note the profound differences in the size and fundamental nature of the two countries' industries and the conglomerate nature of several of the sample corporations. Moreover, information supplied by other parties concerning recent revenue levels and stock prices, while also not conclusive, indicates a generally healthy state for the industry.

[32] *Report and Order* in Docket No. 18751, *supra* at 892.

[33] *Report and Order* in Docket No. 20520, *supra* at 975; *Report and Order* in Docket No. 15627, *supra* at 369; *Report and Order* in Docket No. 20520, *supra.*

[34] *Id.*

[35] *Id.*

[36] *Report and Order* in Docket No. 15627, *supra* at 369; *Report and Order* in Docket No. 20520, *supra.*

[37] *Report and Order* in Docket No. 20520, *supra;* Securities and Exchange Release No. 14692, *On Beneficial Ownership Reporting Requirements: Report of S.E.C. to Senate Committee on Banking, Housing, and Urban Affairs,* July 1980, at n.67.

[38] The request for waiver by the Ford Foundation is moot in that it seeks 5% benchmark status, which will now be universally applied as a result of our action today. In its petition, Ford admits that it takes a somewhat active role in promoting certain social policies, both through its use of proxies and through direct contact with the management of the companies in its portfolio. Given this activity, it cannot be considered passive and should be and will be attributed with ownership at the 5% stockholding level. In any event, Ford indicates that its problems with the multiple ownership rules resulted from cross-directorships, rather than because of its stockholdings. In this regard, we note that our actions herein concerning the insulation

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so, by identifying qualifying and disqualifying characteristics, we will provide relevant guidance for future cases which may arise. Under the instant circumstances, we find this approach preferable to adopting criteria in a vacuum, the implications of which might not be apparent.

36. In RM–3653, First Manhattan Company requests that "investment advisors"[39] be accorded the same treatment as other passive investors since they resemble them in many respects and in some respects might be considered even more passive. In this connection, First Manhattan points out that investment advisors are generally divorced from the power to vote stock or to direct its disposition. In RM–3695, Investment Company Institute makes the same request, and proposes a 10% benchmark.[40] In those instances where an investment advisor does not have the power to vote the stock it holds or to direct its disposition, it should be and will be treated the same as any other custodial holder; that is, ownership will not be attributed to it even if its name is on the stock certificate. With this provision, there is no need to raise the benchmark further than the standard 5% for such entities. We are aware, however, that an investment advisor's services, under its contract, may include the voting of the stock it holds. Such stock will be subject to the standard 5% benchmark and attributed to the investment advisor as appropriate. While some justification may exist to warrant according investment advisors passive status, we are not fully confident, based on the record now before us, that we should do so at this time. In view of the substantial upward adjustment of the basic attribution benchmark accomplished by our action today and the ease with which investment advisors may avoid attribution by passing through voting rights to beneficial owners, we do not believe that declining to grant these entities passive status at this time will be prejudicial. To the extent necessary under the revised criteria, we will continue to consider waiver requests from investment advisors regarding the appropriate attribution of their voting interests.[41]

37. Centennial Fund, in its petition (RM–4045), seeks an extension of passive status to pension funds, arguing that such status was rejected in the *Report and Order* in Docket No. 20520, *supra*, only because of a lack of evidence and experience with these funds under the newly enacted Employee Retirement Income Security Act of 1974 ("ERISA"). It does acknowledge that pension funds are not entirely passive, but it contends that the same can be said for the recognized passive investors. Our own research, however, has disclosed testimony in a Senate hearing indicating the increasing extent to which pension funds particularly are managing their own investments and actively pursuing various social goals in their investment policies, consistent with their fiduciary responsibility under ERISA.[42] [43] There is no similar evidence regarding the activities of currently recognized passive investors. Furthermore, one of the major problems encountered by pension funds as recounted by Centennial—investment in two or more portfolio companies with investments in broadcasters—will be relieved in most instances by the multiplier provision adopted herein. Accordingly, we decline to accord passive status to pension fund investors.[44]

38. We also will not accord passive status to Small Business Investment Companies (SBICs), Minority Enterprise Small Business Investment Companies (MESBICs) and other venture capitalists at this time. While we recognize the critical role these entities play in the establishment and expansion of new and small broadcast companies, and particularly the entry and support of minority owned enterprises, we are convinced that the actions we have taken herein should satisfy the investment flexibility needs of these companies without extension to them of passive status under our attribution rules.[45] Specifically, it appears that the investment restrictions they typically face can be relieved by our provisions for non-voting stock (including preferred stock and non-voting stock with convertible voting rights), for various kinds of convertible securities and paper, and for limited partnership interests, as well as the substantial upward adjustment of the basic

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and nonattribution of directors and the use of a multiplier in certain situations may provide additional relief.

[39] An investment advisor is an entity or individual that advises others, for a fee, of the value of securities and the advisability of securities investments. 15 U.S.C. 80b–2(a)(11). An investment advisor, commonly a "broker dealer" (15 U.S.C. 78o), will often directly invest for its clients, using its own discretion within whatever guidelines the client may provide. In this respect, it differs from an investment company since the stocks that it purchases belong directly to its client (although they may be held custodially in the investment advisor's name), whereas an investment company purchases stock for itself and in turn sells stock in the investment company.

[40] RM–3695 also requests that investments companies be given a 10% benchmark. That issue has already been addressed. *See* para. 33, *supra*.

[41] We note that First Manhattan, an investment advisor, was granted exemption from the standard benchmark in *Stoner Broadcasting System, Inc.*, 74 FCC 2d 547 (1979). That ruling, which was limited to the particular stockholding and was prompted by a desire to avoid divestiture of stock already held, involved an amount of stock less than that permitted by the new standard benchmark, and specifically depended on First Manhattan's agreement not to vote the stock above the current 1% benchmark. Moreover, no further accumulation of stock was to be permitted, and no subsequent violation was to be permitted following any voluntary divestiture. Given these decisional factors, this case does not support a general characterization of investment advisors as passive entities for attribution purposes.

[42] *Pension Fund Investment Policies: Hearings before Subcommittee on Citizens and Shareholders Rights and Remedies of the Senate Committee on the Judiciary*, 95th Cong., 2d Sess. (November, 1978); *Beneficiary Participation in Private Pension Plans: Staff Report of the Subcommittee on Antitrust, Monopoly, and Business Rights of the Senate Committee on the Judiciary*, 96th Cong., 1st sess. (1979).

[43] For example, the Amalgamated Clothing and Textile Workers Union received support from several other labor unions in a campaign of "corporate isolation" in conjunction with its efforts to unionize J.P. Stevens. Manufacturers Hanover Trust Company was pressured into dropping two Stevens' officials from its Board of Directors to avoid the withdrawal of over $1 billion in union trust and pension funds. Two multi-million dollar union accounts were actually closed, and union pension fund organizations led groups in placing various labor-management issues on the 1979 Stevens' proxy for consideration by stockholders. This campaign by ACTWU was cited as a major factor in bringing about the settlement announced on October 17, 1980. "News for Investors," Volume VII, No. 10, November 1980, at 205.

[44] We are aware that we have previously permitted a pension fund to utilize the passive investor attribution benchmark on the grounds, *inter alia*, that it resembled a mutual fund. *College Retirement Equities Fund*, 35 FCC 2d 885 (1972); *Report and Order* in Docket No. 20520, *supra* at 979. This decision, however, was based on the facts of that particular case and did not reflect a judgment that pension funds generally should be deemed passive investors for attribution purposes. Indeed, in the Commission's subsequent reconsideration of its *Report and Order* in Docket No. 20520, it specifically rejected passive status for pension funds, stating that "we have not been shown any justification or need for an across-the-board rule." *Memorandum Opinion and Order* in Docket No. 20520, 65 FCC 2d 336, 339 (1977). In any event, our findings in this proceeding suggest that pension funds, as a class of investors, are not so consistently passive in nature as to warrant relaxed benchmark treatment under our attribution rules. Moreover, because of these findings and because no need for additional relief has been demonstrated, we will not extend the 10% benchmark now applicable to passive investors to the College Retirement Equities Fund ("CREF"). Our decision in this regard will not prejudice CREF since it is currently subject to a 5% benchmark and may continue to utilize that percentage criterion under the standard attribution benchmark.

[45] We note that, while generally prohibited from assuming control of the companies in which they invest, SBICs and MESBICs are authorized to exercise control over debtor companies for temporary periods under specified conditions. 13 CFR 107.901.

benchmark itself. In light of these alternatives, we find no compelling reason to alter the 5% benchmark for these entities.[46]

39. Some commenters have pointed out the problems encountered under our attribution and multiple ownership rules by certain institutions which may acquire stock involuntarily on a temporary basis. To relieve the specific difficulties in this regard of which we are aware, insurance companies henceforth will be permitted to exceed the 10% standard for a period of not more than one year in cases where they acquire stock as a result of a recapitalization of a company in which they have invested. If divestiture of the interest exceeding the benchmark is not achieved within one year of the date of acquisition of the interest, it will be attributed to the company concerned unless specific waiver of the rules is granted before that time. Identical provisions shall be applied to bank trust departments which acquire such interests involuntarily, *e.g.*, in the execution of an estate.

40. Finally, we note that the commission's primary focus in devising its attribution rules governing stock ownership in corporate licensees is to identify and account for those parties holding significant potential influence over these licensees by virtue of their shareholdings. In this endeavor, we have generally concentrated on those parties with the power to vote the stock concerned. Following this approach, we deem it appropriate to relieve from attribution any party, whether an institution or an individual, that holds stock in a custodial capacity and effectively passes through the right to vote that stock to the beneficial owner. This provision is particularly significant for brokerage houses, which commonly hold large amounts of stock in "street name" for other parties, and for investment advisors, that often buy stock in their own names on behalf of their clients. This clarification of our attribution rules, in conjunction with application of the multiplier to reduce the attribution of indirect interests in vertical ownership situations, should provide significant relief to many institutional investors without appreciable risk of attribution errors. We emphasize, however, that to the extent the power to vote the stock concerned is not effectively passed through, the multiple interests of custodial holders will continue to be aggregated for attribution purposes.

B. Use of a "Multiplier" in Vertical Ownership Situations

41. *Notice 83–46* also proposed multiplying successive interests in vertical ownership situations to determine the attributable status of a remote interest in the ultimate licensee. After reviewing the comments, we conclude that this use of a multiplier would more realistically reflect a party's attenuated interest in a licensee where there are intervening coporations, than does the present practice of fully attributing any interest above the benchmark through each intervening corporation. As an entity's interest becomes further removed from the actual licensee, there is participation by increasing numbers of intervening officers, directors and managers in any decision ultimately affecting the licensee. Even those interests which are effectively controlling through any one link in a vertical ownership chain will be diluted by these intervening layers of management. As a practical matter then, the actual involvement with the ultimate licensee of officers, directors and major stockholders of a corporation with a significant but remote interest in the licensee may be virtually nil where several intervening corporations exist. Multiplication of the interests is intended to account for this diminution of involvement in attributing ownership interests. We will, however, modify the "straight" multiplier as proposed in *Notice 83–46* in one significant respect. Where a link in the ownership chain represents a percentage interest exceeding 50%, that link will not be included in the successive multiplication used to determine the cognizable status of ownership interests in the vertical chain.[47] With this exception, then, any party's interest in a licensee which is held indirectly through a chain of companies will have the appropriate benchmark applied for determining attribution to the product of the percentage values of the successive stockholdings which lead to the licensee.[48]

42. We do not presume that the exercise of programming influence in these situations can be predicted with the mathematical exactitude this formula suggests.[49] However, it will provide a simple, workable and long overdue means of accounting for the real dilution of interest in these situations and thus end much inappropriate attribution which occurs under the present method. While perhaps inperfect, we do not believe that this approach entails a significant probability of attribution errors. To the extent, however, that such errors do occur, we are convinced that they will not be substantial, particularly in view of the relatively low basic benchmark we have adopted herein. On balance, we conclude that the benefits to be achieved by adopting a multiplier outweigh the limited risk involved.

C. Other Attributable Interests

43. In 1978 the Commission instituted a rule making to consider the appropriate attribution of stock held in voting trusts and of various other non-voting interests in licensees. *Notice BC 78–239, supra.*[50] The stated reason for

[46] Some commenters requested an exception to our rules to permit SBICs and MESBICs to own unlimited amounts of voting stock without attribution, arguing that their passive natures and worthy purposes warranted such exemption. For the reasons stated above concerning passive status for these investment entities, we do not consider this exception advisable.

[47] This pass through provision reflects the line of *de jure* control. While indicia of *de facto* control similarly could be used to restrict the multiplier, that would require this Commission to judge on an *ad hoc* basis when to apply the multiplier. More importantly, shareholders would be at risk of violating the multiple ownership rules at any time an intermediate entity in which they held an investment was "deemed" to be in *de facto* control or attributed with a cognizable ownership interest by virtue of the multiplier's effect on a remote subsidiary which was "deemed" to be in *de facto* control of the licensee. Such action injects uncertainty, complexity and great administrative burden on applicants, licensees and the Commission alike, while rendering the multiplier of little practical use. Noting the underlying inexact relationship between program influence and ownership interests in the first instance, on balance we conclude that the remote possibilities of attenuated influence over station programming are outweighed by the benefits of a simple, certain and administratively useful mechanism to reflect this attenuation.

[48] For example, assume that stockholder A owns 10% of company X, which owns 20% of company Y, which owns 60% of company Z, which owns 15% of company L, a broadcast licensee. Under the modified multiplier approach, Y's interest in L would be 15% (the same as Z's interest because Y's interest in Z exceeds 50%), X's interest would be 3% (0.2x0.15), and A's interest would be 0.3% (0.1x0.2x0.15). Using the modified multiplier and the existing 1% benchmark, A's interest in L would not be cognizable, while under the current rules governing vertical attribution it would be. If both the new 5% benchmark and the modified multiplier are used, neither A nor X would have an attributable interest in L.

[49] This lack of "mathematical exactitude" constituted the singular basis for our earlier rejection of the multiplier concept in the *Report and Order* in Docket N. 15627, *supra.* The more thorough analysis undertaken herein leads to the contrary conclusion for the reasons stated.

[50] The impetus for such a review of Commission policy derives from our consideration of two assignment of license cases which posed questions as to the propriety of using a voting trust and non-voting stock to facilitate station transfers which would not be allowed under the multiple ownership rules if the respective stocks were held outright. In both cases the Commission noted that precedent was ambiguous, that the propriety of such devices was not clear, but that there were other public interest considerations favoring grant of the transfers pending the institution of a rule making.

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this action was to consider the argument that attribution of ownership to these non-voting interests would reflect the potential for influence that such interests carry and might serve to maximize diversification of ownership of broadcast and cable television interests. *Notice BC 78–239, supra* at 1303. The Commission specifically questioned whether trustees of voting trusts are sufficiently insulated from the beneficial owners to independently exercise voting rights and whether significant influence resides with the power to dispose of the stock held in trust. It also sought information on the extent of such arrangements in broadcasting ownership provisions and the customary provisions they included. It further questioned whether a block of non-voting stock could carry influence if large enough, particularly when held in conjunction with some other business or familial relationship. With regard to both non-voting stock and voting trusts, the Commission sought comment on the likely effect that the attribution of such interests would have on monority ownership in broadcasting. At the same time the Commission asked whether an ownership interest should be attributed to other non-ownership interests such as least-back arrangements and debt holdings. The question of whether these non-ownership interests should be reported had already been raised in *Notice 20521, supra*. In *Notice 83–46* the Commission stated its intent to include these issues in this comprehensive review, requesting any comments that would contemporize or further elucidate those already filed in response to *Notice BC 78–239, supra. Notice 83–46, supra* at para. 27.

44. It appears from the comments in response to the subject rule makings that most non-voting interests in licensees should not be considered cognizable for purposes of applying the multiple ownership rules.[51] Contrary to some assertions, there is little "risk of influence" pertaining to these interests. Yet, they comprise a variety of important, effective vehicles by which a substantial amount of capital can be made available to the industry without jeopardizing the efficacy of the underlying multiple ownership provisions. Judging from the comments submitted, one area in which many of these mechanisms are most useful is in facilitating increased participation by new entrants and small licensees, and particularly minorities.

(1) *Non-Voting Stock*

45. As several parties suggest, non-voting stock by its specific nature precludes the means to influence or control the activities of the issuing corporation, and this relationship is knowingly and intentionally entered into by the corporation and by the stockholder. No party has proposed circumstances under which this stock could confer any appreciable power on its holder. Moreover, the availability of an unattributable non-voting stock investment mechanism provides significant benefits. This device, for example, appears to be an invaluable means by which existing and prospective licensees raise new capital without diluting their control over their companies. It can also contribute significantly to relieving the dilemma faced by venture capital companies. Through non-voting stock, these companies can obtain the equity deemed necessary to compensate their risk, while avoiding any implication of the control prohibited by our rules and other federal regulation.[52] Such vehicles are thus particularly significant in promoting the diversity of ownership at which the multiple ownership rules are directed.[53] Accordingly, we will continue to consider non-voting stock interests to be non-cognizable for purposes of the multiple ownership rules.

46. Non-voting stock which is convertible to voting stock will also not be considered a cognizable interest. If the contingency upon which the conversion right rests is beyond the control of the stockholder, attribution is clearly not appropriate, as no power to control or influence is even arguable. However, even if the contingency is within the stockholder's power to effect and its exercise may be imminent, until the stockholder actually has the power to vote, he should not be able to exercise influence or control subject to our rules. A "threat" to convert stock in order to vote is an empty gesture if such conversion would put the stockholder in violation of the multiple ownership rules.[54] If such a conversion would not violate the rules, reliance upon it to exert influence does not contravene the purpose of the multiple ownership rules.

47. A reservation the Commission has expressed concerning non-voting stock with convertible voting rights is that it may have a depressing effect on the value of common voting stock if "dumped" on the market, and therefore might confer some power on its holder. *See, e.g., Evening Star Broadcasting Co., supra.* No demonstration of this possible phenomenon has been advanced in response to that case or the subsequent rule making proceedings, and we are prepared now to disregard that reservation. Additionally, a power to compel dividends or financial distribution attached to a non-voting interest has not been shown to confer the power to influence or control a licensee in a manner contemplated by the multiple ownership rules, and we will not consider the existence of such a power to change the noncognizable nature of a non-voting stockholding.

(2) Other "Convertible" Interests

48. This same logic applies to warrants, debentures, and other convertible interests, many of which can be bought and sold for value without even being converted to stock. Like non-voting stock, they represent another important vehicle for financing because they exist outside the concerns and constraints of the multiple ownership rules.[55] We see no reason to alter this status or withdraw the clear benefits it confers.

(3) Debt and Lease-Back Agreements

49. We will not consider debts or lease-back agreements to confer a cognizable interest in the holder. There is no direct influence or control which pertains to them, and any indirect influence or control, if it occurred, would be too irregular and involve too many other factors for the Commission to oversee. Although there is no explicit information before us, it seems probable that the inclusion of debt in our rules

Bonneville International Corp., FCC 77–832, released December 8, 1977, 43 RR 2d 863; *Evening Star Broadcasting Co.* 68 FCC 2d 129 (1978), *reaff'd as mod. on other grounds*, 68 FCC 2d 158 (1978). Similar concerns were raised by the employment of trusts to avoid the proscriptions of the cross-ownership rules in *Rust Craft Broadcasting Co.*, FCC 77–829, released July 26, 1978, 43 RR 2d 947, and *Television Wisconsin, Inc.*, FCC 77–830, released July 26, 1978, 43 RR 2d 958.

[51] Bearing in mind the limited probity of the observation, we note that the attribution practices of other ferderal agencies studied unanimously accord non-cognizable status to non-voting interests.

[52] *See, e.g.*, n.45, *supra.*

[53] Despite the ability of two entrepreneurs cited by one party to finance their station acquisitions without surrendering equity to a financer, many parties are not in such a strong financial position. Those parties should not be denied the opportunity to enter the industry, even if they must begin operations in a demanding financial position.

[54] Our enforcement authority clearly extends to individuals whose actions precipitate a violation of our rules. *See* para. 77, *infra.*

[55] One party is concerned with the potential rule violations it faces when it accepts stock pledges or warrants as security for a loan. There seems little likelihood, however, of loan defaults precipitating stock conversions sufficient to pose a problem under our attribution and multiple ownership rules. In any event, in those cases where conversion is desired, the resulting stock presumably has some value which should permit its sale if its retention would otherwise violate the rules.

would create numerous rule violations and present extremely severe restrictions on capital sources for broadcasters large and small, particularly since the sources of debt financing are far fewer than for equity financing. Some sources of financing must obviously be available to broadcasters, and these sources seem by far the least likely to involve an interest with which the multiple ownership rules need be concerned.

(4) Partnerships and Associations

50. Traditionally, partnership interests have been attributed under our rules. With respect, at least, to all but limited partners, this appears both logical and consistent with our objectives since partners are characteristically endowed with the power and responsibility to collectively or singly conduct the affairs of the partnership.[56] Accordingly, we will continue to attribute these interests as we have in the past. Other proprietary and cooperative ownership arrangements will be considered on a case-by-case basis in view of their highly variable natures.

51. *Limited Partnership Interests.* Limited partnership interests, however, can be safely exempted from the effects and implications of the attribution rules. A typical limited partner is in a position similar to that of the holder of a debt or non-voting stock as far as involvement in the management of the company is concerned.[57] Such an interest, conferring no influence or control over the licensee, is thus not within the purview of the multiple ownership rules. Furthermore, the involvement of limited partners in certain enterprises provides another important source of capital for the industry,[58] without inherently affecting the distribution or concentration of control within the industry.

52. While we are convinced that limited partnership interests should be accorded non-cognizable status, we are also concerned, in view of the variable nature of the law in this area at the state level, that some means be provided to verify appropriate insulation of the general partner from any possibility of control or influence by the limited partners. As a means to this end, and in order to provide a measure of predictability as well as guidance for prospective limited partners, we will look to the provisions of the Uniform Limited Partnership Act of 1976 as a standard.[59] Limited partners of a limited partnership conforming in all significant respects to these provisions will be considered exempt from attribution upon certification by the licensee or applicant that the partnership so conforms. Limited partners taking their interest under a partnership agreement which differs in any material respect from these provisions will be accorded non-cognizable status only upon submission of the agreement to the Commission accompanied by an acceptable explanation of how it nonetheless satisfies our stated concerns. Any limited partner relieved of attribution by these provisions may not be involved in any material respect in the management or operation of the broadcast, cable television or newspaper entity concerned.

(5) Trusts

53. Voting trusts present a somewhat more complex problem. In many cases, trusts are established for personal and economic reasons unrelated to any Commission rule, such as estate planning and income for dependents. Such trusts, should be facilitated to the extent possible. Also, despite some banks' experience to the contrary, voting trusts are occasionally established specifically to effect compliance with the Commission's rules for holdings which would violate the rules if held outright. They are often used to execute a multi-phase transaction or one involving both broadcast and nonbroadcast properties which will ultimately result in holdings consistent with the rules, but entail temporary violations of the rules.[60] At other times, a trust may be used to indefinitely avoid divestiture of a valuable investment, often in conjunction with a new transaction.

54. The Commission has recognized the effective insulation such arrangements can provide, while maintaining a concern about their potential for abuse, depending on the particular provisions of each trust.[61] We will continue to accept trusts as legitimate insulation devices, judging their acceptability for our purposes on a case-by-case basis. We take this opportunity to clarify the criteria by which we evaluate these agreements in order to provide guidance for future use.

55. Any person (or entity) holding or sharing the power to vote the assets of a trust will have those assets attributed to him. If those assets are above the benchmark adopted herein, that person will be deemed to have a cognizable interest in the licensee's facilities. This is a straightforward application of the multiple ownership rules which are directed to the influence or control which the power to vote stock confers. Additionally, a grantor or beneficiary (or any other third party) who holds the unrestricted power to replace a trustee or to revoke a trust will also have the assets of that trust attributed to him, unless such power is contingent upon some event beyond that person's control. Such an arrangement clearly permits the holder of the replacement or revocation initiative to substitute his judgment for that of the trustee on issues involving the subject licensee.[62]

56. Where the power to sell voting stock is retained solely by the beneficiary or grantor, there is a potential for abuse which the Commission has recognized in past cases [63] and which has been reinforced by several parties to this proceeding. Retention of such a power will therefore constitute a cognizable interest if the trust assets exceed the benchmark established herein.[64] However, if power to sell the stock is held by the trustee or shared with the trustee, then only the trustee will have the interest attributed, as the trustee's fiduciary responsibility and independence of action should prevent the beneficiary from using the ability to sell stock to directly influence or control a licensee. In any case, if the beneficiary or grantor of a trust is to avoid attribution of the stock, the trustee must be an independent person with no familial or business relationship with the beneficiary or grantor. Moreover, the trust instrument must clearly state that there will be no communications with the trustee regarding the management or operation of the subject facilities. Also, in order to ensure noninvolvement by the beneficiary or grantor, their entire holding in the licensee must be in trust to avoid attribution of the interest.[65]

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[56] *See, e.g.*, Sections 7 and 9–10 of the Uniform Partnership Act. 6 U.L.A. §§ 7, 9–10.

[57] The inability of a limited partner to affect the management of a partnership has already been recognized by the Commission. *Anax Broadcasting, Inc.*, 87 FCC 2d 483 (1981).

[58] *See, e.g.*, "Limited Partnerships and Leveraged Buyouts," *Broadcasting*, November 14, 1983, p. 40.

[59] 6 U.L.A. § 101, *et seq.* We will be particularly interested in conformance with §§ 107–804, designed to ensure the independence of the general partner.

[60] *See, e.g., Metropolitan Theatres Corp.*, 85 FCC 2d 1004 (1981), *Westinghouse Broadcasting Co., Inc.*, 84 FCC 2d 938, 48 RR 2d 1377 (1981).

[61] *See* n.50, *supra.*

[62] *See, e.g., Farmville Broadcasting Co.*, 47 FCC 2d 463 (1974).

[63] *See, e.g., Television Wisconsin, Inc., supra.*

[64] The S.E.C. has also determined that the power to dispose of stocks, standing alone, gives its holder the ability to "change or influence control," in deciding to include that power in its disclosure regulations. Securities Exchange Act Release No. 14692; *On Beneficial Ownership Reporting Requirements: Report of S.E.C. to Senate Committee on Banking, Housing and Urban Affairs*, July, 1980, at n. 87.

[65] *Television Wisconsin, Inc., supra.*

D. Consideration of Officers and Directors

57. In *Notice 83–46* the Commission also stated its intention to explore the issue of attribution of officers and directors (and equivalent representatives of noncorporate entities). It specifically suggested that some prescribed insulating mechanism might be appropriate to relieve attribution to those officers and directors and other representatives of an entity with a cognizable interest in a licensee who individually have no meaningful relationship to the licensee of its operations. *Notice 83–46, supra* at para. 43.

58. After reviewing the comments addressing this issue, we continue to believe that a limited means of relieving certain corporate officers and directors of attribution consequences should be available. The scope of our intention in this regard is narrow, however, for we do not intend to permit officers or directors to disclaim their interests as a matter of course. The basic rationale for attributing interests to officers or directors of corporate licensees or those of the licensee's parent corporations remains valid. Generally, the potential influence over a licensee wielded by these individuals is significant and should be cognizable if the purposes of our multiple ownership rules are to be properly vindicated. We recognize, as various parties contend, that this approach may impose constraints on the availability to interested corporations of officers and directors with "media expertise" because it restricts the limited number of such individuals from serving in these capacities on behalf of multiple corporate licensees. It is, however, precisely the ability of an officer or director, particularly one with "media expertise," to influence multiple licensees that our ownership rules are intended to detect and limit, and properly so.[66]

59. On the other hand, we do find it appropriate to provide attribution relief for corporate officers or directors of multi-faceted parent corporations where these individuals' duties and responsibilities are neither directly nor indirectly related to the activities of any broadcast licensee in which their corporation has a cognizable interest.[67] By the premise of this exception, such officers or directors will not exercise authority or influence in areas that will affect the licensee or licensees involved, and we see no reason to attribute an interest to them "by association." Under this provision, eligible officers and directors will be accorded exemption from attribution upon submission by the licensee, in conjunction with its ownership report or in conjunction with a relevant application, of the individual's name, his full title, and a description of his duties and responsibilities, along with an explanation of why that person should not be attributed an interest. This should be an efficient way of handling the matter that will avoid the administrative burdens and delays that use of an individual waiver approach would entail. Moreover, these clear guidelines will permit companies to act with some certainty in this area. The simplicity of this process, however, should not be taken to connote a lack of concern on our part that licensees exercise care in ensuring the accuracy of their submissions. Statements not meeting the standards we have discribed will be rejected and the licensee will be expected to effect prompt compliance with our rules. The should discourage any inclination to claim this exception where it is not warranted.

E. Reporting of Interests

60. All licensees are currently required [68] to name in their Ownership Reports (FCC Form 323) all officers and directors of the licensee, specifying their stock interest, citizenship, and dates of election, and all partners or stockholders (if more than fifty stockholders, only those with 1% or more of the outstanding stock) and their stock interests and citizenship. The Report also requires information on any other broadcast interest of the licensee and its principal parties (officers, directors, stockholders, partners), and any family relationships or business associations among the principals. Further, the Report requires a listing of all stock transactions since the previous Report, including date, amount paid, and the before and after stockholdings and votes of the transferor and transferee. These reports are required of licensees upon the grant of a construction permit, for each renewal application, and in conjunction with any transfer of assignment application. Additionally widely-held licensees must file annually, while all other licensees are required to report, within 30 days, any change in their ownership information. A separate form is required for any other entity which directly or indirectly controls the licensee or which holds 25% of its stock.

61. An apparent flaw in this reporting system, recognized in *Notice 83–46, supra* at para. 36, is its inability to identify and properly attribute parties who hold interests in several separate accounts, each of which individually is below the reporting threshold, but which aggregately constitute a cognizable interest. This problem is exacerbated by the increasing occurrence of accounts held in "street name" by various custodial holders. The Commission sought comment on means to avoid this problem, as well as the frequency with which ownership reports should be required in the future, if at all, and whether the reporting requirements for cable should remain distinct. *Notice 83–46, supra* at paras. 35–36, 39.

62. Several other proposals regarding ownership reporting remain outstanding from *Notice 20521, supra*. Therein, the Commission also questioned the accuracy of its attribution methods insofar as the large amount of stock held in nominee, street name and custodial accounts was concerned. It addressed other specific problem areas with the reporting system as well, including the plethora of monthly reports on minor stock transactions generated by the existing filing requirements and the differences in reporting requirements on various Commission forms.[69] The Commission proposed the use of annual reports for widely-held licensees, which practice was subsequently adopted on an "interim" basis,[70] and a change in the definition of "widely-held" to include corporations with over 500 shareholders (instead of 50), which was subsequently rejected.[71] It also proposed to adopt those parts of the Model Corporate Disclosure Regulations it considered appropriate for FCC purposes to resolve the long-standing problem of incomplete ownership information.[72] These

[66] To the extent, of course, that these officers or directors are sufficiently removed from the ultimate licensee by intervening corporate entities, the multiplier provision adopted herein may afford them attribution relief. *See* paras. 41–42, *supra*.

[67] The officers and directors of licensees themselves may not utilize this provision, although they may continue to seek non-cognizable status, as in the past, by specific waiver request.

[68] 47 CFR 73.3615.

[69] The forms are: Application for Construction Permit for a Commercial Broadcast Station (Form 301), Application for Assignment of License (Form 314), Application for Transfer of Control of Corporation Holding Broadcast Station Construction Permit or License (Form 315), and Ownership Report (Form 323).

[70] *First Report and Order* In Docket No. 20521, FCC 76–541, released June 16, 1976, 41 FR 25002.

[71] *Id.*

[72] The Model Corporate Disclosure Regulations ("MCDR") were drafted by an interagency task force (including an FCC representative) assembled to study ways in which the reporting requirements of various federal agencies could be simplified, standardized, and made more effective to provide more meaningful information with less of a burden on the reporting parties and the agencies collecting the information. The task force was asembled in June, 1974 and released a set of model regulations in

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proposals were directed only to reporting requirements for widely-held licensees, and included: (1) A change to reporting the top thirty holders of voting shares, as aggregated,[73] of each licensee, and all other holders with 1% or more, (2) a separate annual chart for each parent or controlling company or other company with 10% of a licensee's stock, and (3) the filing of "intercorporate charts" graphically demonstrating the relationships between these entities. A listing of the past and present business interests of officers, directors, and shareholders was included. Also proposed was the reporting of long-term debt of $1 million or more and short-term debt of $10,000 or more, as well as financing lease arrangements. These proposals remain outstanding.[74]

63. The reporting requirements and reporting forms must obviously be changed to correspond to the new attribution standards and methods adopted herein. Futhermore, the Commission's various forms requiring ownership information will be standardized, to the extent practical. There is information, however, which is relevant in some situations and not in others, and therefore need not be collected on a routine basis. Accordingly, the revised Ownership Report (FCC Form 323) will be used for annual filing as required by the new rules, and will also compose the core of the ownership information section of the applications for construction and acquisition of stations, with the additional information required in those cases reserved to those respective forms. The differences between the information required from and the reporting periods of widely-held and closely-held corporations will be eliminated, consistent with the elimination of that distinction in the rules themselves.

64. With the adoption of a 5% benchmark, the reporting of any smaller interests appears unnecessary.[75] Although some parties have claimed that the reporting of 1% interests is essential to the Commission's enforcement of its rules and provides generally useful information, those parties have made no such demonstration. As explained above, the Commission has carefully devised an attribution standard which should identify those parties with interests that should be subject to the multiple ownership restraints. In so doing, the Commission has leaned toward a relatively conservative standard to ensure that its coverage is fully complete. We can perceive no legitimate regulatory purpose to be served by the routine submission of information beyond the scope of this attribution benchmark, and we shall require none. In this connection, we have decided not to amend our reporting requirements in an attempt to better account for multiple sub-bench-mark interests held through separate accounts by a single entity or individual which, when aggregated, exceed the relevant attribution levels. Short of requiring reporting of essentially all ownership interests, no feasible, comprehensive means appear to exist to reliably remedy this "horizontal" aggregation problem. We are simply not persuaded that the enormous burdens inherent in a total reporting obligation are justified by the limited number of additional cognizable interests which would be identified by such a system. However, we will require licensees to report aggregable interests exceeding the benchmark standard where these interests are known to the licensee. Since licensees are likely to become aware of such interests if their holder undertakes to exert the influence they collectively confer, intentional attempts to anonymously affect licensees' programming judgments through "horizontal" holding schemes will often be revealed by this simple requirement.

65. In adopting this provision, we are rejecting the proposal to require the reporting of the top thirty shareholders of each licensee, and the top ten accounts of any custodial holding among those top thirty. Such a requirement would put a tremendous burden on all licensees and deluge the Commission with information for which it has no legitimate regulatory need. For the reasons detailed above, we have determined that a 5% benchmark will best identify those stockholdings which should be subject to the multiple ownership rules. The information collected under a "top 30/top 10" system would bear little resemblance to that, as it would include information on tens of stockholders for each licensee, and on thousands overall, who have no influence or control over any licensee. The regulatory function of this ownership information collection is limited to administering the multiple ownership rules, and the costly and tedious collection of vast amounts of data not related to that function cannot be justified, despite any uniformity with other agencies that would be achieved.[76]

66. We will also reject the proposals from *Notice 20521* regarding the reporting of past broadcast interests of a licensee's principals. The collection of information on these parties' past broadcast interests was proposed to conform with the Commission's "long form" transfer application, which elicits information regarding past broadcast activities with a view to discovering conduct relevant to the transfer determination, such as "trafficking" in facilities by the respondent.[77] To the extent that information regarding an applicant's past broadcasting interests remains relevant to an application for facilities,[78] it appears both more appropriate and efficient to require its provision in the context of the application proceeding rather than in conjunction with the periodic ownership reports.

67. We will also reject the various proposals to require information regarding the other present business interests of the licensee's principals,[79]

January 1975. Those model regulations were the basis for many of the Commission's proposals in Docket No. 20521.

[73] This aggregation process would require that any custodial holder appearing among the licensee's top thirty shareholders also report the top ten beneficial owners in the licensee for whom it holds stock in its custodial capacity.

[74] In the interest of simplification and unformity, the Commission refrained from action on these proposals pending outcome of the S.E.C.'s "beneficial ownership proceeding" (40 FR 4212). *First Report and Order* in Docket No. 20521, *supra*, n.69.

[75] We emphasize that our action herein with respect to ownership reporting requirements in no way affects the continued obligation of licensees to reasonably determine and certify compliance with the alien ownership restrictions of Section 310 of the Communications Act of 1934, as amended. 47 U.S.C. 310. Such certification is now and will continue to be required in connection with the application.

[76] Most licensees would not otherwise be required to file such information for any other agency, so that any such requirement by this Commission would be an additional burden for them. In any case, only the FCC, Interstate Commerce Commission, Civil Aeronautics Board, Federal Power Commission (now the Federal Energy Regulatory Commission), and the Securities and Exchange Commission began formal rulemaking proceedings based to some extent upon the Model Corporate Disclosure Regulations. Only the I.C.C. adopted a report based on MCDR, which it abolished after three years.

[77] The Commission's rules formerly prohibited the resale of a broadcast facility within three years of its purchase. *Application for Voluntary Assignments for Transfer Control* (Docket No. 13864), 32 FCC 689 (1962).

[78] The three year holding period requirement was eliminated in 1982. *Report and Order* in BC Docket No. 81-897, 52 RR 2d 1081 (1982).

[79] In *Notice 20521* the Commission proposed to require information concerning the "broadcast-related" interests of all officers, directors and 1% or greater shareholders, and concerning all other business interests of "principal officers," directors and 3% or greater shareholders. "Broadcast-related" was not defined, but was described as including activities such as advertising representatives, recording companies, record promotion companies and programming and talent producers and suppliers.

and the other primary business interests and activities of the licensee. The proposal was advanced pursuant to MCDR's purpose of acquiring all information about relationships and interests which could have some effect on a company's activities. However, there are no rules restricting such interests and there is no Commission action which would be taken based on such information, and no other valid reason to collect such information has been advanced.

68. The reporting of all current broadcast interests of officers, directors and shareholders (or partners) will continue. This is the essence of enforcement of the multiple ownership rules. However, the instructions will be changed to specify reporting only for shareholders, officers and directors with attributable interests. We will require the reporting of only their interests in other broadcast and cable facilities and newspaper entities which meet our attribution standards, except for interests within the geographic limits of the cross interest policy, all of which will be reportable.

69. In compliance with the new attribution standards we are adopting, the submission of ownership reports by "holding companies" will be modified in a few respects. This proceeding has demonstrated the significance of 5% and greater voting interests, and has also clarified that our primary interest is in the voting of these interests. Therefore, information regarding any company which holds a 5% or greater voting interest in a licensee must be filed on a separate ownership report by the licensee. Consistent with our interest in the control of this holding, the separate form need include only the directors, "executive" officers,[80] any other officers with a relationship or responsibility to the licensee, and only those shareholders whose interest is cognizable after application of the "multiplier".[81] Information regarding other broadcast, cable and newspaper interests of all parties so reported will also be required.

70. The filing of intercorporate charts, showing the relationship between related corporations, will be required where appropriate. Many widely-held companies already follow this practice, and it has proved very useful in clarifying relationships in complex organizations. The relatively minor burden which this requirement imposes is, in our view, more than offset by the significant benefits which it produces for both the Commission and the licensee.

71. The various proposals regarding the filing of short-term and long-term debt instruments and sizable financing lease arrangements advanced in *Notice 20521* will also be rejected. Any such provision would elicit information about a wide range of debts and leases which have no trappings of influence, are not appropriate for attribution, and therefore do not warrant reporting. That limited class of debts and leases which does have such rights attached to it as might affect the operation of a station are currently required to be filed by § 73.3613, and will continue to be so under that rule.[82] To the extent that any creditor does exercise influence or control over a licensee's activities through its debtholding or other contract, the licensee is required to report that company or person in response to Question 6 on the Ownership Report. We presume that a licensee will be inclined to do so in the interest of maintaining its discretion to act freely.

72. The balance sheet and income statement data proposed for collection in *Notice 20521* was relevant for some purposes at the time the notice was adopted, in that such information could have assisted the Commission's practice of independently analyzing a broadcast applicant's financial qualifications. However, since such financial analysis is no longer performed by the Commission,[83] any need for this information has now dissipated. Accordingly, such a provision will not be adopted.

73. There is no legitimate regulatory need for the reporting of income beneficiaries of trusts who hold no power over the trust. Such interests are not cognizable as they are of no significance to the enforcement of the multiple ownership rules. Our multiple ownership rules are not concerned with diversity of profit-sharing, and no such provision will be adopted. Only one network claims that the income beneficiary of a trust has some influence, if the trust is very large, but it does not support this statement with analysis or illustration. In any event, if a beneficiary of a trust does exert influence in any manner, directly or indirectly, the trust will not provide effective insulation and the interest will be attributed directly to the beneficiary.

74. With the exception of sole proprietorships and 50/50 ownership arrangements, licensees will be required to file ownership reports on an annual basis. This merely continues the practice for formerly "widely-held" licensees. We see no need for collecting this information on a more frequent basis. Our information collection comprises primarily a monitoring function, which experience has proven to be sufficiently served by a yearly review. Annual reporting may overlook some cognizable and possible violative holdings which may occur for short periods of time. However, such short-lived holdings do not represent the influence or control over a station with which the multiple ownership rules are concerned. On the other hand, less frequent reporting would permit violations to persist and become established in a manner contrary to the purposes of the multiple ownership rules and obtain a position such that their elimination might adversely affect the licensee and the public, as well as the offending shareholder.

75. For those licensees whose ownership information changes infrequently, the additional burden of more frequent filing is very slight, and will be further reduced by a new provision that any such licensee can simply file a letter stating that the licensee has reviewed its last complete ownership report and that no changes have occurred in the intervening year. This small imposition, even considered cumulatively, is justified in our view by the cumulative benefit obtained for more active licensees under this provision. The date for filing the new ownership reports will be the anniversary date of the licensee's renewal application. If a licensee has multiple stations so situated that their renewal anniversaries do not coincide, the licensee may choose which anniversary to use for its first Report and shall continue to use that date thereafter. We shall continue to require that the report be based on information as of a date not more than 30 days prior to its filing.[84]

F. Uniform Application of the Attribution Benchmarks

76. A separate issue emerging from *Notice 83-46* (and implicitly raised in *Notice 20548, supra*) is whether the new

[80] "Executive" officers are the president, vice president, secretary, and treasurer (or their equivalents) and any other officer whose authority includes voting the company's stock in the licensee or otherwise extends to the business of the licensee/subsidiary. These officers, as well as the directors, may be able to avail themselves of the disclaimer provisions, as explained above in paragraph 59.

[81] If any such stockholder is yet another company, the same provisions will apply, requiring the reporting of its executive officers, directors, and cognizable shareholders.

[82] Section 73.3613 requires the filing of copies of any agreement affecting, directly or indirectly, the ownership or voting rights of a licensee's stock. 47 CFR 73.3613.

[83] *Financial Qualifications Standards*, 87 FCC 2d 200 (1981).

[84] 47 CFR 73.3615(a).

attribution rules should be universally applied. The attribution rules adopted herein will be applied to all of the Commission's multiple ownership rules. As has been explained, those rules are intended to promote diversity of broadcasting by ensuring diversity of ownership. They are designed to prevent any party from influencing the broadcasting practices of more than a predetermined number of outlets in various geographic configurations. The attribution rules, in turn, are designed to measure what ownership interests will confer that amount of influence or control which must be limited. The determination that a certain stock interest or other position might confer such influence or control is equally valid regardless of the particular context of rule in which it is applied.[85] This power does not change according to the holder's incentive to use it, as some commenters imply.

G. Enforcement of the Multiple Ownership Rules

77. In conjunction with this proceeding, several parties have urged the Commission to direct its future enforcement efforts against individual shareholders rather than against licensees. The Commission has long presumed the authority to order divestiture of stock to effect compliance with the multiple ownership rules, and has ordered individual stockholders to divest themselves of violative holdings on several occasions.[86] Sections 4(i) and 303(r) of the Act (47 U.S.C. 4(i), 303(r)) provide the Commission with the "authority reasonably ancillary to the effective performance of its responsibilities" thereunder,[87] and Section 312 specifically provides for the issuance of cease and desist orders to a "licensee, permittee, *or person involved* . . ." in a rule violation. 47 U.S.C. 312(c) (emphasis added).[88] However, while our authority to seek compliance with our rules and policies extends to individual shareholders, we do not believe it advisable to generalize as to the circumstances in which the exercise of this authority would be appropriate. Rather, we shall make this determination in the context of specific facts, as relevant cases arise.

H. Consolidation of the Multiple Ownership Rules

78. Finally, as an administrative matter, in conjunction with these modifications of the attribution sections of the multiple ownership rules, we will consolidate the multiple ownership rules themselves. These rules, which are currently contained in separate §§ 73.35, 73.240, and 73.636, primarily repeat the same provisions as they apply to each broadcast service. They can be readily consolidated without affecting the application or effects of the rules. While the multiple ownership rules themselves are not a subject of the instant rule making, this ministerial change is authorized pursuant to Section 553(b)(3)(A) of the Administrative Procedure Act. 5 U.S.C. 553(b)(3)(A). This change in no way affects the substance or scope of the multiple ownership rules.

79. Pursuant to the requirements of Section 603 of the Regulatory Flexibility Act, 5 U.S.C. 603, a final regulatory flexibility analysis has been performed and is attached hereto as Appendix F.

Accordingly, it is ordered, that Parts 73 and 76 of the Commission's Rules and Regulations are amended, effective June 6, 1984, as set forth in Appendices C, D and E.

It is further ordered, that FCC Forms, 301, 314, 315, 316, 323 and 325 will be amended by subsequent Commission action, in accordance with the provisions in this *Report and Order.*

It is further ordered, that all of the captioned proceedings included herein are terminated.[89]

It is further ordered, that the Petitions for Rule Making filed by First Manhattan Company (RM–3635) and by Centennial Fund (RM–4045) are dismissed.

It is further ordered, that the Petition for Rule Making filed by Investment Company Institute (RM–3695), is denied.

It is further ordered, that the Petition for Waiver filed by Ford Foundation IS DISMISSED.

It is further ordered, That the Secretary shall cause this *Report and Order* to be printed in the FCC Reports.

Authority for the actions taken herein is contained in Sections 4(i), 5(d), and 303 of the Communications Act of 1934, as amended.

For further information concerning this *Report and Order,* contact Bruce A. Romano, Mass Media Bureau, (202) 632–9356.

(Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303)

Federal Communications Commission.

William J. Tricarico,

Secretary.

Appendices A and B

Note.—Due to the continuing effort to minimize publishing costs, Appendices A and B, Summary of Comments and List of Commenters, will not be printed herein. However, they may be viewed in the FCC Dockets Branch, Rm. 239, and the FCC Library, Rm. 639, both located at 1919 M St., NW., Washington, D.C. 20554.

Appendix C

PART 73—[AMENDED]

§§ 73.35, 73.240 and 73.636 [Removed]

1. 47 CFR Part 73 is amended by removing § 73.35.

2. 47 CFR Part 73 is amended by removing § 73.240.

3. 47 CFR Part 73 is amended by removing § 73.636

4. Section 73.3555 is added to 47 CFR Part 73 to read as follows:

§ 73.3555 Multiple ownership.

(a) No license for an AM, FM, or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirecly owns, operates, or controls one or more broadcast stations in the same service and the grant of such license will result in:

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[85] While we have not performed a separate analysis of the stockholding distribution among cable and newspaper companies, we are reasonably certain that it is not sufficiently different from that in broadcasting to justify the adoption of a distinct benchmark.

[86] *Value Line Special Situations Fund, Inc.*, FCC 72–656, released July 19, 1972, 24 RR 2d 972, *recon. den.* FCC 72–790, released September 7, 1972, 25 RR 2d 265; *College Retirement Equities Fund*, FCC 72–527, released June 14, 1972, 24 RR 2d 841; *Keystone Custodian Funds, Inc.*, FCC 72–526, released June 14, 1972, 24 RR 2d 842.

[87] *U.S. v. Southwestern Cable Co. et al.*, 392 U.S. 157, 178 (1968).

[88] The forfeiture provisions of 503(b) of the Act (47 U.S.C. 503) were amended in 1978 to similarly extend the Commission's forfeiture authority over "*any person* who is determined by the Commission . . . to have . . . [violated the Commission's rules]." (emphasis added) That section previously restricted the Commission's authority to "any licensee or permittee of a broadcast station." Pub. L. 95–234, approved February 21, 1978, 92 Stat. 33 § 2.

[89] Several past Commission decisions have been conditioned on or made subject to the outcomes in various of the rule making proceedings concluded by this *Report and Order. See, e.g.*, n. 50, *supra.* Affected parties are reminded that they are now obliged either to comply with the new rules and requirements announced herein or to seek further relief from the Commission, as appropriate. In certain cases, the rule changes implemented by our actions today may render prior conditions moot. For example, in *WHYN Corp.*, 47 RR 2d 663 (1980), the Commission permitted Affiliated Broadcasting, Inc., to acquire a station in the same market as a station owned by the Washington Post Company, despite the fact that Berkshire Hathaway, Inc. indirectly owned 8.4% of API and 10.7% of Post. The subject assignment was explicitly conditioned on the outcome of the proceeding in Docket No. 20548. While the specific proposals initially advanced in that proceeding have not been adopted, under the amended rules, Berkshire would not be attributed with Affiliated's stations because the majority of Affiliated's stock was controlled by a single trustee. (Berkshire's interest may also have been relieved by the multiplier effect, depending on the sizes of the intervening interests.)

(1) Any overlap of the predicted or measured 1 mV/m groundwave contours of the existing and proposed AM stations, computed in accordance with § 73.183 or § 73.186; or

(2) Any overlap of the predicted 1 mV/m contours of the existing and proposed FM stations, computed in accordance with § 73.313; or

(3) Any overlap of the Grade B contours of the existing and proposed TV stations, computed in accordance with § 73.684.

(b) No license for an AM, FM, or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls one or more such broadcast stations and the grant of such license will result in:

(1) The predicted or measured 2 mV/m groundwave contour of a proposed AM station, computed in accordance with § 73.183 or § 73.186, encompassing the entire community of license of the TV broadcast station(s) or the Grade A contour(s) of the TV broadcast station(s), computed in accordance with § 73.684, encompassing the entire community of license of the proposed AM station; or

(2) The predicted 1 mV/m contour of a proposed FM station, computed in accordance with § 73.313, encompassing the entire community of license of the TV broadcast station(s) or the Grade A contour(s) of the TV broadcast station(s), computed in accordance with § 73.684, encompassing the entire community of license of the proposed station.

(c) No license for an AM, FM, or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls a daily newspaper and the grant of such license will result in:

(1) The predicted or measured 2 mV/m contour for an AM station, computed in accordance with § 73.183 or § 73.186, encompassing the entire community in which such newspaper is published; or

(2) The predicted 1 mV/m contour for an FM station, computed in accordance with § 73.313, encompassing the entire community in which such newspaper is published; or

(3) The Grade A contour for a TV station, computed in accordance with § 73.684, encompassing the entire community in which such newspaper is published.

(d) No license for an AM, FM, or TV broadcast station shall be granted to any party (including all parties under common control) if such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other broadcast station in the same service, if the grant of such license would result in a concentration of control of broadcasting in a manner inconsistent with the public interest, convenience, or necessity. The FCC, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven AM, seven FM, or seven TV broadcast stations (no more than five of which may be in the VHF band); or of three broadcast stations in one or several services, where any two are within 100 miles of the third (measured city to city), if there is primary service contour overlap of any of the stations.

(e) The reference points which shall be used for city-to-city measurements are those listed in the Index to the *National Atlas of the United States of America*, United States Department of Interior, Geological Survey, Washington, D.C., 1970. (Future editions will supersede.) In the case of any community of license which is not referenced by the National Atlas, such as a newly established community, the point of reference shall be the main post office until such town is referenced. The National Atlas is available for reference at most public libraries and at the FCC in Washington.

(f) No renewal of license shall be granted for a term extending beyond January 1, 1980, to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the only daily newspaper published in a community and also as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial aural station or stations encompassing the entire community with a city-grade signal during daytime hours (predicted or measured signal for AM, predicted for FM), or the only commercial TV station encompassing the entire community with a city-grade signal. The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980. Divestiture is not required for aural stations if there is a separately owned, operated or controlled TV broadcast station licensed to serve the community.

(g) This section is not applicable to noncommercial educational FM and noncommercial educational TV stations.

Note 1.—The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

Note 2.—In applying the provisions of this section, ownership and other interests in broadcast licensees, cable television systems and daily newspapers will be attributed to their holders and deemed cognizable pursuant to the following criteria:

(a) Except as otherwise provided herein, partnership and direct ownership interests and any voting stock interest amounting to 5% or more of the outstanding voting stock of a corporate broadcast licensee, cable television system or daily newspaper will be cognizable;

(b) No minority voting stock interest will be cognizable if there is a single holder of more than 50% of the outstanding voting stock of the corporate broadcast licensee, cable television system of daily newspaper in which the minority interest is held;

(c) Investment companies, as defined in 15 U.S.C. 80a–3, insurance companies and banks holding stock through their trust departments in trust accounts will be considered to have a cognizable interest only if they hold 10% or more of the outstanding voting stock of a corporate broadcast licensee, cable television system or daily newspaper, or if any of the officers or directors of the broadcast licensee, cable television system or daily newspaper are representatives of the investment company, insurance company or bank concerned. Holdings by a bank or insurance company will be aggregated if the bank or insurance company has any right to determine how the stock will be voted. Holdings by investment companies will be aggregated if under common management.

(d) Attribution of ownership interests in a broadcast licensee, cable television system or daily newspaper that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall not be included for purposes of this multiplication. [For example, if A owns 10% of company X, which owns 60% of company Y, which owns 25% of "Licensee", then X's interest in "Licensee" would be 25% (the same as Y's interest since X's interest in Y exceeds 50%), and A's interest in "Licensee" would be 2.5% (0.1 x 0.25). Under the 5% attribution benchmark, X's interest in "Licensee" would be cognizable, while A's interest would not be cognizable.]

(e) Voting stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in

trust. An otherwise qualified trust will be ineffective to insulate the grantor or beneficiary from attribution with the trust's assets unless all voting stock interests held by the grantor or beneficiary in the relevant broadcast licensee, cable television system or daily newspaper are subject to said trust.

(f) Holders of non-voting stock shall not be attributed an interest in the issuing entity. Holders of debt and instruments such as warrants, convertible debentures, options or other non-voting interests with rights of conversion to voting interests shall not be attributed unless and until conversion is effected.

(g) Limited partnership interests shall not be attributed to limited partners if the relevant partnership agreement complies in all significant respects with the provisions of the Model Limited Partnership Act of 1976 (6 U.L.A. § 101, *et seq.*) and the limited partners are not otherwise involved in any material respect in the management or operation of the licensee, cable television system or daily newspaper or its facilities, *provided* that the licensee or system concerned so certifies.

(h) Officers and directors of a broadcast licensee, cable television system or daily newspaper are considered to have a cognizable interest in the entity with which they are so associated. If any such entity engages in businesses in addition to its primary business of broadcasting, cable television service or newspaper publication, it may request the Commission to waive attribution for any officer or director whose duties and responsibilities are wholly unrelated to its primary business. The officers and directors of a parent company of a broadcast licensee, cable television system or daily newspaper, with an attributable interest in any such subsidiary entity, shall be deemed to have a cognizable interest in the subsidiary unless the duties and responsibilities of the officer or director involved are wholly unrelated to the broadcast licensee, cable television system or daily newspaper subsidiary, and a statement properly documenting this fact is submitted to the Commission. [This statement may be included on the appropriate Ownership Report]. The officers and directors of a sister corporation of a broadcast licensee, cable television system or daily newspaper shall not be attributed with ownership of these entities by virtue of such status.

Note 3.—In cases where record and beneficial ownership of voting stock is not identical (*e.g.*, bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street names for the benefit of customers, investment advisors holding stock in their own names for the benefit of clients, and insurance companies holding stock), the party having the right to determine how the stock will be voted will be considered to own it for purposes of these rules.

Note 4.—Paragraphs (a)–(d) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities, and will not apply to applications for increased power for Class IV stations, to applications for assignment of license or transfer of control filed in accordance with §§ 73.3540(d) or 73.3541(b) of this part, or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy if no new or increased overlap would be created between commonly owned, operated or controlled broadcast stations in the same service and if no new encompassment of communities proscribed in paragraphs (b) and (c) of this section as to commonly owned, operated, or controlled broadcast stations or daily newspapers would result. Said paragraphs will apply to all applications for new stations, to all other applications for assignment or transfer, and to all applications for major changes in existing stations except major changes that will result in overlap of contours of broadcast stations in the same service with each other no greater than already existing. (The resulting areas of overlap of contours of such broadcast stations with each other in such such major change cases may consist partly or entirely of new terrain. However, if the population in the resulting overlap areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience, or necessity.) This section will not apply to major changes in UHF television broadcast stations authorized as of September 30, 1964, which will result in Grade B overlap with another television station that was commonly owned, operated, or controlled as of September 30, 1964, or to any application by a party who directly or indirectly owns, operates, or controls a UHF television broadcast station where grant of such application would result in the Grade A contour of the UHF station encompassing the entire community of license of a commonly owned, operated, or controlled AM or FM broadcast station or would result in the entire community of license of such UHF station being encompassed by the 2 mV/m contour of such AM broadcast station or the 1 mV/m contour of such FM broadcast station. Such UHF overlap or community encompassment cases will be handled on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Commonly owned, operated, or controlled broadcast stations, with overlapping contours or with community-encompassing contours prohibited by this section may not be assigned or tansferred to a single person, group, or entity, except as provided above in this note. If a commonly owned, operated, or controlled broadcast station and daily newspaper fall within the encompassing proscription of this section, the station may not be assigned to a single person, group or entity if the newspaper is being simultaneously sold to such single person, group or entity.

Note 5.—Paragraphs (a)–(d) of this section will not be applied to cases involving television stations which are primarily "satellite" operations. Such cases will be considered on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Whether or not a particular television broadcast station which does not present a substantial amount of locally originated programming is primarily a "satellite" operation will be determined on the facts of the particular case. An authorized and operating "satellite" television station the Grade B contour of which overlaps that of a commonly owned, operated, or controlled "non-satellite" parent television broadcast station, or the Grade A contour of which completely encompasses the community of publication of a commonly owned, operated, or controlled daily newspaper, or the community of license of a commonly owned, operated, or controlled AM or FM broadcast station, or the community of license of which is completely encompassed by the 2 mV/m contour of such AM broadcast station or the 1 mV/m contour of such FM broadcast station may subsequently become a "non-satellite" station with local studios and locally originated programming. However, such commonly owned, operated, or controlled "non-satellite" television stations with Grade B overlap or such commonly owned, operated, or controlled "non-satellite" television stations and AM or FM stations with the aforementioned community encompassment, may not be transferred or assigned to a single person, group, or entity except as provided in Note 3. Nor shall any application for assignment or transfer concerning such "non-satellite" stations be granted if the assignment or transfer would be to the same person, group or entity to which the commonly owned, operated, or controlled newspaper is proposed to be transferred, except as provided in Note 3.

Note 6.—For the purposes of this section a daily newspaper is one which is published four or more days per week, which is in the English language and which is circulated generally in the community of publication. A college newspaper is not considered as being circulated generally.

Note 7.—For the purposes of the three station regional concentration provision of this section, (a) an application raising a regional concentration of control issue which involves overlap of or by one or more UHF television stations will be treated on a case-by-case basis, consistent with the precedents of UHF determinations made under the one-to-a-market proscriptions of this section, and (b) AM and FM broadcast stations licensed to communities which are within 15 miles (city reference point to reference point) and/or within the same urbanized area (as mapped by the U.S. Bureau of the Census), will be considered as a combination and counted as one station.

Appendix D

47 CFR 73.3615 is amended by revising paragraph (a), paragraphs (a)(2), (a)(3)(i), (a)(3)(iv), (a)(3)(iv) (A) and (B); by removing paragraph (a)(3)(iv)(C); by revising paragraph (c) in its entirety; and by removing paragraph (d) in its entirety and marking it [Reserved], as follows:

§ 73.3615 Ownership reports.

(a) Each licensee of a commercial AM, FM, or TV broadcast station which is not a sole proprietorship or 50/50 partnership shall file an Ownership

Report on FCC Form 323 once a year, on the anniversary of the date that its renewal application is required to be filed. [Sole proprietorships and 50/50 partnerships will file ownership information in connection with the application process]. Licensees owning multiple stations with different anniversary dates need file only one Report per year on the anniversary of their choice, provided that their Reports are not more than one year apart. A licensee with a current and unamended Report on file at the Commission may certify that it has reviewed its current Report and that it is accurate, in lieu of filing a new Report. Ownership Reports shall provide the following information as of a date not more than 30 days prior to the filing of the Report:

(1) * * *

(2) In the case of a partnership, the name of each partner and the interest of each partner. A limited partner need not be reported, regardless of the extent of its ownership, if the limited partnership conforms in all major respects with the Uniform Limited Partnership Act of 1976 (6 U.L.A. § 101 *et seq.*) and if the limited partner is not otherwise involved in any material respect in the business of the licensee or the operation of the station;

* * * * *

(3) * * *

(i) The name, residence, citizenship, and stockholding of every officer, director, trustee, executor, administrator, receiver, partner, member of an association, and any stockholder which holds stock accounting for 5% or more of the votes of the corporation, except that an investment company, insurance company, or bank trust department need be reported only if it holds stock amounting to 10% or more of the votes, and the licensee certifies that such entity has made no attempt to influence, directly or indirectly, the management or operations of the licensee, and that there is no representation on the licensee's board or among its officers by any person professionally or otherwise associated with the entity. A licensee shall report any separate interests known to be held ultimately by the same person or entity if those interests, when aggregated, exceed the ownership benchmarks herein, whether those interests are held in custodial accounts or by individual holding corporations. If the majority of the voting stock of a corporate licensee is held by any single person or entity, no other stockholding need be reported for that licensee;

* * * * *

(iv) Full information with respect to the interest and identity of any person having any direct, indirect, fiduciary, or beneficial interest in the licensee or in its stock accounting for 5% or more of its votes. For example:

(A) Where A is the trustee of stock held for beneficiary B, A shall be reported if A votes the stock or has the sole or shared power to dispose of the stock; B or any other party shall be reported if B or such party votes the stock or has sole power to dispose of the stock or has the power to revoke the trust or replace the trustee at will;

(B) Where X corporation (or association or partnership) controls the licensee or holds stock accounting for 5% or more of the votes, another Report shall be filed for X; that Report shall include the same information as required of a licensee, but with respect to owners or shareholders of X, only those whose voting interest in X multiplied by X's voting interest in the licensee accounts for 5% or more of licensee's votes (10% for investment companies, insurance companies, and bank trust departments) shall be reported, as well as officers and directors; for those officers and directors with responsibilities not involving the licensee who wish to be relieved of attribution in the licensee, report the name, title and duties, and an explanation of why their duties do not involve the licensee. If one of the reportable stockholders or owners is yet another corporation, Y, the same procedure shall be followed with respect to Y corporation.

* * * * *

(c) Before any change is made in the organization, capitalization, officers, directors, or stockholders of a corporation other than licensee or permittee, which results in a change in the control of the licensee or permittee, prior FCC consent must be received under § 73.3540. A transfer of control takes place when an individual or group in privity, gains or loses affirmative or negative (50%) control. See instructions on FCC Form 323 (Ownership Report).

(d) [Reserved]

* * * * *

Appendix E

PART 76—[AMENDED]

47 CFR 76.501 is amended by revising Notes 1, 2 and 3 which follow paragraph (a) to read as follows:

§ 76.501 [Amended]

* * * * *

Note 1.—The word "control" as used herein in not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

Note 2.—In applying the provisions of this section, ownership and other interests in broadcast licensees and cable television systems will be attributed to their holders and deemed cognizable pursuant to the following criteria:

(a) Except as otherwise provided herein, partnership and direct ownership interests and any voting stock interest amounting to 5% or more of the outstanding voting stock of a corporate broadcast licensee or cable television system will be cognizable;

(b) No minority voting stock interest will be cognizable if there is a single holder of more that 50% of the outstanding voting stock of the corporate broadcast licensee or cable television system in which the minority interest is held;

(c) Investment companies, as defined in 15 U.S.C. 80a–3, insurance companies and banks holding stock through their trust departments in trust accounts will be considered to have a cognizable interest only if they hold 10% or more of the outstanding voting stock of a corporate broadcast licensee or cable television system, or if any of the officers or directors of the broadcast licensee or cable television system are representatives of the investment company, insurance company or bank concerned. Holdings by a bank or insurance company will be aggregated if the bank or insurance company has any right to determine how the stock will be voted. Holdings by investment companies will be aggregated if under common management.

(d) Attribution of ownership interests in a broadcast licensee or cable television system that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall not be included for purposes of this multiplication. [For example, if A owns 10% of company X, which owns 60% of company Y, which owns 25% of "Licensee", then X's interest in "Licensee" would be 25% (the same as Y's interest since X's interest in Y exceeds 50%), and A's interest in "Licensee" would be 2.5% (0.1 × 0.25). Under the 5% attribution benchmark, X's interest in "Licensee" would be cognizable, while A's interest would not be cognizable.]

(e) Voting stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust. An otherwise qualified trust will be ineffective to insulate the grantor or beneficiary from attribution with the trust's assets unless all voting stock interests held by the grantor or beneficiary in the relevant broadcast licensee or cable television system are subject to said trust.

(f) Holders of non-voting stock shall not be attributed an interest in the issuing entity. Holders of debt and instruments such as warrants, convertible debentures, options or other non-voting interests with rights of conversion to voting interests shall not be attributed unless and until conversion is effected.

(g) Limited partnership interests shall not be attributed to limited partners if the relevant partnership agreement complies in all significant respects with the provisions of the Model Limited Partnership Act of 1976 (6 U.L.A. 101, *et seq.*) and the limited partners are not otherwise involved in any material respect in the management or operation of the licensee or cable television system or its facilities, *provided* that the licensee or system concerned so certifies.

(h) Officers and directors of a broadcast licensee or cable television system are considered to have a cognizable interest in the entity with which they are so associated. If any such entity engages in businesses in addition to its primary business of broadcasting or cable television service, it may request the Commission to waive attribution for any officer or director whose duties and responsibilities are wholly unrelated to its primary business. The officers and directors of a parent company of a broadcast licensee or cable television system, with an attributable interest in any such subsidiary entity, shall be deemed to have a cognizable interest in the subsidiary unless the duties and responsibilities of the officer or director involved are wholly unrelated to the broadcast licensee or cable television system subsidiary, and a statement properly documenting this fact is submitted to the Commission. [This statement may be included on the appropriate Ownership Report]. The officers and directors of a sister corporation of a broadcast licensee or cable television system shall not be attributed with ownership of these entities by virtue of such status.

Note 3.—In cases where record and beneficial ownership of voting stock is not identical (*e.g.*, bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street names for the benefit of customers, investment advisors holding stock in their own names for the benefit of clients, and insurance companies holding stock), the party having the right to determine how the stock will be voted will be considered to own it for purposes of these rules.

* * * * *

Appendix F

Regulatory Flexibility Analysis

I. *Need for and Objectives of the Rule.* This action was prompted by the Commission's desire to redefine and update its policies and rules that attribute broadcast, cable television and newspaper ownership interests to certain persons and entities for purposes of enforcing the Commission's multiple ownership rules. The current attribution rules were based on market and economic conditions of forty years ago, and had evolved individually in such a way as to be disjointed and inconsistent. The rules adopted herein are designed to be more relevant and effective in the current marketplace, to eliminate any unnecessary burden on licensees, and to make the rules clearer and more easily complied with, while still maintaining a viable attribution mechanism to support the multiple ownership rules.

II. *Issues Raised in Response to the Initial Regulatory Flexibility Analysis.* No issues were raised specifically in response to the initial regulatory flexibility analysis. Generally, commenters argued, and the Commission agreed, that the current rules restrict investment beyond the extent necessary to enforce the multiple ownership provisions, and in so doing, place an unwarranted and significant burden on licensees to report their ownership and to otherwise conform to attribution requirements. In response, the Commission increased the level of ownership interest necessary to confer on any party a cognizable interest in a licensee and specifically exempted certain kinds of non-voting ownership from attribution. Ownership reporting requirements were adjusted appropriately.

III. *Significant Alternatives Considered and Rejected.* The Commission considered maintaining the current 1% attribution benchmark, as well as adopting benchmarks higher than those adopted herein, such as 10% and 20%. These alternative benchmarks were determined to be less accurate than those adopted in identifying the interests of concern to the Commission in the context of its multiple ownership rules. Moreover, these alternative standards were found to provide no significant benefit sufficient to justify their use. The Commission also considered a variety of reporting requirements, including reporting of various non-attributable interests, but determined that information regarding these interests was not necessary because the interests themselves were found to be not significant for attribution purposes.

[FR Doc. 84-12231 Filed 5-7-84; 8:45 am]

BILLING CODE 6712-01-M

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 81

[Docket No. 84-041]

Lethal Avian Influenza; Certification Under the Regulatory Flexibility Act

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Certification under the Regulatory Flexibility Act.

SUMMARY: This document gives notice that the Administrator of the Animal and Plant Health Inspection Service (APHIS) has certified that the interim rule established to prevent the spread of lethal avian influenza does not have a significant economic impact on a substantial number of small entities.

EFFECTIVE DATE: May 4, 1984.

FOR FURTHER INFORMATION CONTACT: Thomas O. Gessel, Director, Regulatory Coordination Staff, Animal and Plant Health Inspection Service, United States Department of Agriculture, Room 728, Federal Building, 6505 Belcrest Road, Hyattsville, Md. 20782 (301) 436-5533.

SUPPLEMENTARY INFORMATION: The lethal avian influenza interim rule (set forth in 9 CFR Part 81 and referred to below as the interim rule) has been established to help prevent the spread of lethal avian influenza. Lethal avian influenza is defined in the interim rule as a disease of poultry caused by any form of H5 influenza virus that is determined by the Deputy Administrator to have spread from the 1983 outbreak in poultry in Pennsylvania.

The interim rule was initially established solely to help prevent the spread of highly pathogenic avian influenza but was subsequently changed to include all forms of avian influenza resulting from the 1983 outbreak. The interim rule has been otherwise changed on numerous occasions and is now significantly different from the provisions that were initially established. (48 FR 51422-51423, 51798, 52420-52427, 52885-52887, 53586, 53678-53679, 53679-53681, 53997, 54574-54575, 55402-55405, 55722, 57474-57475, 49 FR 368-369, 2742-2744, 3446-3448, 3494, 3839-3845, 5723-5724, 7978-7979, 8582-8583, 8412-8415, 8582-8583, 13863-13864). Implementation of the interim rule has helped to prevent potentially catastrophic losses to the poultry industry.

The interim rule contains general provisions, quarantined area provisions, and extraordinary emergency provisions. Almost all of the effect of the interim rule has resulted because of the quarantined area provisions and the extraordinary emergency provisions. Further, all of the activities under the extraordinary emergency provisions have occurred in areas designated as quarantined areas.

The interim rule affects poultry farms and businesses dealing with poultry farms, such as processing plants and suppliers of feed. Based on information collected by the Department, it has been determined that less than 2.2 percent of the poultry farms in the United States are located in areas designated as quarantined areas.

Quarantined Area Provisions

The interim rule currently designates as quarantined areas all or portions of Adams, Berks, Chester, Cumberland, Dauphin, Lancaster, Lebanon, Schuylkill, and York counties in Pennsylvania and all or portions of Albermarle, Augusta, Frederick, Greene, Madison, Page, Rappahannock, Rockingham, Shenandoah, and Warren counties in Virginia. The interim rule previously also quarantined a portion of Franklin County in Pennsylvania, a portion of Cecil County in Maryland, and portions of Atlantic, Cumberland, Gloucester, and Salem counties in New Jersey.

Initially, the interim rule prohibited the interstate movement of specified articles. However, shortly after the establishment of the interim rule, it was changed to allow some of the articles to move interstate in accordance with certain restrictions. These provisions have been changed further on several occasions.

With certain exceptions, the interim rule currently provides that the following articles designated as prohibited articles are prohibited from being moved interstate from a quarantined area:

(1) Live poultry,

(2) Manure from poultry, and

(3) Litter that has been used by poultry.

The interim rule also currently provides, with certain exceptions, that the following articles designated as restricted articles are allowed to be moved interstate from a quarantined area only in accordance with certain conditions:

(1) Poultry carcasses or parts thereof,

(2) Eggs from poultry, and

(3) Coops, containers, troughs or other accessories that have been used in the handling of poultry or poultry eggs.

Some of the live poultry from the quarantined area are customarily slaughtered within the quarantined areas. Because of the interim rule, some live poultry that had been moving interstate prior to slaughter are now being slaughtered within the quarantined area and the carcasses and parts thereof are then being moved interstate for wholesale and retail sale. Under the interim rule poultry carcasses and parts thereof are allowed to be moved interstate from the quarantined area if they are from a poultry flock inspected by a State or Federal inspector and not found to have been exposed to lethal avian influenza or to have clinical evidence of lethal avian influenza, and if from poultry slaughtered at a federally inspected slaughtering establishment within the quarantined area. Prior to the establishment of the interim rule such poultry were already being slaughtered at federally inspected establishments.

Manure from poultry and litter that has been used by poultry are usually used for fertilizer on open fields. These articles are not customarily moved interstate.

Most of the eggs that have been produced in the quarantined areas have been produced for use as table eggs. Under the interim rule, these eggs are allowed to be moved interstate if they come from poultry not found to be infected with or exposed to lethal avian influenza based on results of tests conducted as part of a surveillance program. Also, such eggs are required to be cleaned and sanitized prior to interstate movement whereas, if the interim rule were not in effect, they would be eligible to be moved interstate before being cleaned and sanitized.

Under the interim rule, hatching eggs are not allowed to be moved interstate from a quarantined area. A substantial portion of hatching eggs currently produced in the quarantined area are being used to repopulate poultry establishments that were depopulated because of lethal avian influenza.

Coops, containers, troughs, or other accessories that have been used in the handling of poultry or poultry eggs are allowed to be moved interstate from quarantined areas after being cleaned and disinfected.

Extraordinary Emergency Provisions

The extraordinary emergency provisions contain provisions for the depopulation of poultry with lethal avian influenza in States for which an extraordinary emergency has been declared because of lethal avian influenza. These provisions now only apply to activities in Pennsylvania since an extraordinary emergency because of lethal avian influenza is in effect only for Pennsylvania (48 FR 51798, 49 FR 3494). An extraordinary emergency was also declared for New Jersey on November 23, 1983 (48 FR 53586), but it is no longer in effect (49 FR 8582).

The extraordinary emergency provisions have been utilized for depopulating one flock of poultry in New Jersey and approximately three hundred flocks of poultry in Pennsylvania. This represents less than .5 percent of the poultry flocks in the United States. Indemnities are being paid to the owners of poultry, poultry products, and materials destroyed under these provisions. Further, many of the poultry depopulated under these provisions would have died from lethal avian influenza had they not be depopulated.

Certification

Under the circumstances explained above, Mr. Bert W. Hawkins, Administrator of the Animal and Plant Health Inspection Service, has determined pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that the lethal avian influenza interim rule does not have a significant economic impact on a substantial number of small entities.

Bert W. Hawkins,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 84-12494 Filed 5-4-84; 5:03 pm]

BILLING CODE 3410-34-M

Proposed Rules

Federal Register
Vol. 49, No. 90
Tuesday, May 8, 1984

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 1004

[Docket No. AO-160-A62-R01]

Milk in the Middle Atlantic Marketing Area; Notice of Hearing on Proposed Amendments to Tentative Marketing Agreement and Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice of public hearing on proposed rulemaking.

SUMMARY: The hearing is being held to consider proposals by a federation of cooperative associations and by a cooperative association to amend the Middle Atlantic milk marketing order. The proposals would increase the percent of producer milk that may be diverted to manufacturing plants and would relax the pooling requirements for distributing plants. It also has been requested that the proposals be adopted on an expedited basis so that the amendments can be made effective beginning September 1, 1984. Proponents contend that the proposals are necessary because of marketing problems that have developed due to the actual and potential change in pool status of certain plants.

DATE: The hearing will convene at 9:30 a.m., on May 23, 1984.

ADDRESS: The hearing will be held at the Holiday Inn, Independence Mall, 400 Arch St. (4th and Arch), Philadelphia, Pennsylvania 19106.

FOR FURTHER INFORMATION CONTACT: Maurice M. Martin, Marketing Specialist, Dairy Division, Agricultural Marketing Service, U.S. Department of Agriculture, Washington, D.C. 20250, (202) 447-7183.

SUPPLEMENTARY INFORMATION: 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 12291.

Notice is hereby given of a public hearing to be held at the Holiday Inn, Independence Mall, 400 Arch Street (4th and Arch), Philadelphia, Pennsylvania 19106, beginning at 9:30 a.m., on May 23, 1984, with respect to proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the Middle Atlantic marketing area.

The hearing is called 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 governing the formulation of marketing agreements and marketing orders (7 CFR Part 900).

The purpose of the hearing is to receive evidence with respect to the economic and marketing conditions which relate to the proposed amendments, hereinafter set forth, and any appropriate modifications thereof, to the tentative marketing agreement and to the order.

This hearing is a reopening of the hearing held July 19-October 26, 1983, which principally involved consideration of the expansion of the marketing area. The hearing is reopened for the limited purpose of receiving evidence with respect to the economic and marketing conditions which relate to the diversion limits on producer milk and the pooling requirements for distributing plants in the Middle Atlantic marketing area.

Evidence also will be taken to determine whether emergency marketing conditions exist that would warrant omission of a recommended decision under the rules of practice and procedure (7 CFR Part 900.12(d)) with respect to the proposals.

Actions under the Federal milk order program are subject to the "Regulatory Flexibility Act" (Pub. L. 96-354). This act seeks to ensure that, within the statutory authority of a program, the regulatory and information requirements are tailored to the size and nature of small businesses. For the purpose of the Federal order program, a small business will be considered as one which is independently owned and operated and which is not dominant in its field of operation. Most parties subject to a milk order are considered as a small business. Accordingly, interested parties are invited to present evidence on the probable regulatory and informational impact of the hearing proposals on small businesses. Also, parties may suggest modifications of these proposals for the purpose of tailoring their applicability to small businesses.

List of Subjects in 7 CFR Part 1004

Milk marketing orders, Milk, Dairy products.

PART 1004—[AMENDED]

The proposed amendments, as set forth below, have not received the approval of the Secretary of Agriculture.

Proposed by Atlantic Processing, Inc.

Proposal No. 1

Amend § 1004.12(d)(2)(I) to read as follows:

§ 1004.12 Producer.

* * * * *

(d) * * *

(2) * * *

(i) All of the diversions of milk of members of a cooperative association or a federation of cooperative associations to nonpool plants are for the account of such cooperative association or federation of cooperative associations and the amount of member milk so diverted does not exceed 50 percent of the volume of milk of all members of such cooperative association or federation of cooperative associations received at all pool plants during such month.

* * * * *

Proposed by Inter-State Milk Producers' Cooperative

Proposal No. 2

Amend § 1004.12(d)(2)(i) to read as follows:

§ 1004.12 Producer

* * * * *

(d) * * *

(2) * * *

(i) All of the diversions of milk of members of a cooperative association to nonpool plants are for the account of such cooperative association and the amount of member milk so diverted does not exceed 50 percent of the volume of milk of all members of such cooperative

association received at all pool plants during such month.

* * * * *

Proposal No. 3

Amend § 1004.7(a) (Pool plant) to provide that a pool distributing plant meeting the total Class I disposition requirement of this paragraph during one month shall retain its pool status during the immediately succeeding two months regardless of whether or not its total Class I disposition during such months is less than the minimum percentage specified in this paragraph.

Proposed by the Dairy Division, Agricultural Marketing Service

Proposal No. 4

Make such changes as may be necessary to make the entire marketing agreement and the order conform with any amendments thereto that may result from this hearing.

Copies of this notice of hearing and the order may be procured from the Market Administrator, Joseph D. Shine, P.O. Box 710, Alexandria, Virginia 22313, or from the Hearing Clerk, Room 1077, South Building, United States Department of Agriculture, Washington, D.C. 20250, or may be inspected there.

Copies of the transcript of testimony taken at the hearing will not be available for distribution through the Hearing Clerk's Office. If you wish to purchase a copy, arrangements may be made with the reporter at the hearing.

From the time that a hearing notice is issued and until the issuance of a final decision in a proceeding, Department employees involved in the decisional process are prohibited from discussing the merits of the hearing issues on an ex parte basis with any person having an interest in the proceeding. For this particular proceeding, the prohibition applies to employees in the following organizational units:

Office of the Secretary of Agriculture
Office of the Administrator, Agricultural Marketing Service
Office of the General Counsel
Dairy Division, Agricultural Marketing Service (Washington Office only)
Office of the Market Administrator, Middle Atlantic Marketing area

Procedural matters are not subject to the above prohibition and may be discussed at any time.

Signed at Washington, D.C., on: May 2, 1984.

William T. Manley,

Deputy Administrator, Marketing Program Operations.

[FR Doc. 84-12302 Filed 5-7-84; 8:45 am]
BILLING CODE 3410-02-M

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 103, 104, 105, 108, 109, 110, 112, 113, 115, 120, 122, 124, 132, and 134

Procedures for the Office of Hearings and Appeals for Deciding Cases Other Than Size Appeals

AGENCY: Small Business Administration.

ACTION: Proposed rule.

SUMMARY: SBA is proposing a single, comprehensive set of procedural rules for processing and deciding all cases within the jurisdiction of the Office of Hearings and Appeals other than appeals from size determinations and product or service classifications. Matters to be adjudicated in accordance with these procedural rules include proceedings concerning small business investment company licensees, Section 8(a) program participants, lender participants in SBA loan programs, debarments and suspensions, surety bond program participants, Section 501, 502 and 503 development companies, violations of Title VI of the Civil Rights Act of 1964 and employee grievances. The proposed rules cover pleading requirements, time limits, discovery, evidence and other procedural matters and will supplant procedural rules scattered throughout Title 13 that presently govern various types of cases.

DATE: Written comments must be submitted on or before June 7, 1984.

ADDRESS: Submit written comments to: Roger H. Jones, Assistant Administrator, Office of Hearings and Appeals, Small Business Administration, 1441 L Street, NW., Washington, D.C. 20416.

FOR FURTHER INFORMATION CONTACT: Roger H. Jones, Assistant Administrator, Office of Hearings and Appeals, (202) 653-6805.

SUPPLEMENTARY INFORMATION: On August 6, 1982 the Administrator of the Small Business Administration (SBA) implemented a decision by a predecessor to establish an SBA Office of Hearings & Appeals (OHA) for the purpose of consolidating the Agency's adjudicative decisionmaking functions in a forum that would provide maximum efficiency and fairness to participants. On June 27, 1983 the Administrator delegated to OHA authority to process and adjudicate a wide variety of cases ranging from internal SBA matters such as formal employee grievances, to cases required by law to be heard on the record in accordance with the Administrative Procedure Act (APA), the Small Business Act or the Small Business Investment Act of 1958. 48 FR 29646-29647. The matters delegated to OHA had previously been handled by SBA hearing examiners or other SBA decisional authorities, or had been assigned to Administrative Law Judges from other agencies.

On December 16, 1983, OHA published final procedural rules for considering and deciding appeals from size determinations and from product or service classifications. 48 FR 55832. Those rules are contained in Part 121 and differ significantly in some respects from those proposed in this notice because of the procedural history and nature of size cases and time constraints peculiar to the procurement process. The rules proposed in this notice constitute a single, comprehensive set of procedures for processing and deciding all cases within the jurisdiction of OHA, other than size cases. The proposed rules cover pleading requirements, time limits, representation of respondents before SBA, discovery, and other procedural aspects of cases to be adjudicated by OHA. When issued in final form they will supplant procedural rules scattered throughout Title 13 that presently govern the processing of various specific kinds of cases.

The proposed rules recognize the adjudicative nature of the decisionmaking process undertaken by OHA, and specific provisions have been incorporated into the rules to insure the reliability, comprehensiveness, and integrity of the record upon which decisions will be made. In order to insure that the record is reliable and complete, the OHA judge to whom a case is assigned has been granted broad judicial powers including the power to administer oaths, to order discovery and issue subpoenas, and to conduct oral hearings or telephone conferences when warranted because of a genuine dispute regarding a material fact of decisional significance that cannot be resolved except by confrontation of witnesses. In addition, all written submissions other than documentary or testimonial evidence must be affirmed and must be served upon all parties to the proceeding, including those granted intervenor status. This latter requirement will provide all parties the maximum feasible opportunity to participate in the development of the record. The regulations provide for the integrity of the record by requiring that the decision be based only on information contained in the record, such as the petition, all other pleadings and motions, the judge's orders and decisions, and any evidence admitted during the course of the proceeding. They also prohibit *ex parte*

communications between the judge and any person, party, or employee of SBA who performs any investigatory or prosecutorial function in connection with the proceeding, concerning any fact or question of law or SBA precedent at issue in the proceeding, except on notice and opportunity for all parties to participate.

Procedural rules presently applicable to the various types of cases assigned to OHA and scattered throughout Title 13 will be deleted or amended to conform to the procedural rules in Part 134. In some instances, application of the new rules will represent a substantial departure from previous practice. However, § 134.001, which articulates the policy to be followed in implementing the rules, emphasizes that not all types of cases handled by OHA will require use of the full panoply of formalities available under the proposed rules. Section 134.001 distinguishes three general categories of cases to be adjudicated under the proposed rules: cases required by law to be heard on the record; non-APA cases involving constituents or institutions cooperating with or regulated by SBA, and internal SBA matters. Whereas the full range of formalities will usually apply in APA cases, a lesser degree of formality will normally apply to non-APA external cases. A presumption in favor of informality will exist in cases involving internal SBA matters. Variations in the degree of formality provided are anticipated to occur most frequently regarding provision for oral hearings and discovery. The general policy set forth in § 134.001 is intended to provide guidance to the judge and to all parties while maintaining that measure of flexibility necessary to accommodating differences that will inevitably arise with respect to cases within the three identified categories.

The following discussion identifies and explains key provisions in the proposed rules of practice and procedure in Part 134. Sections 134.003 and 134.032, respectively, set forth the types of cases to which the procedures established in Part 134 are intended to apply and the nature of the decision to be rendered by the judge in each type of case. The decision of the judge will be final in arbitrations arising under labor agreements, in proceedings pertaining to MAC ratings and collection of debts owed to the Agency, and in formal employee grievances unless the deciding official seeks review by the Deputy Administrator. The judge will render an initial decision, which will be subject to review by the proper SBA reviewing official, in proceedings concerning small business investment company licensees, terminations of participants in the Section 8(a) program, violations of Title VI of the Civil Rights Act of 1964 and similar violations, debarments of applicants or agents appearing before SBA, post employment restrictions, bank or nonbank lenders involved in SBA loan programs, terminations of surety bond program participants, Sections 501, 502, and 503 development companies, and allowances of costs and fees under the Equal Access to Justice Act. In contract debarment and suspension proceedings, the judge will issue a recommended decision to the proper SBA reviewing official who will review it prior to issuing a final decision in the case.

Section 134.011 states that a proceeding may be commenced by either an order to show cause or notice filed by SBA or a petition filed by a party other than SBA. It also specifies the content of such filings and the applicable time limits, and permits a respondent to file a motion for a more definite statement upon showing that he or she cannot frame an answer based on the allegations contained in the petition, order to show cause or notice. Section 134.012 contains the rules for filing answers to petitions, orders to show cause or notices; § 134.013 provides for the filing of amended and supplemental pleadings; and § 134.021 contains general rules applicable to motions. All written submissions filed during the course of a proceeding, other than documents or testimonial evidence, must be affirmed by an authorized person in accordance with § 134.015, and an original and one copy must be filed with OHA within the time specified, pursuant to § 134.014(a). Pursuant to § 134.014 (b) and (c), all submissions must be accompanied by a signed certificate stating that copies have been served on all other parties to the proceeding, and the copies served may be excised of any confidential information. In most instances, the time period imposed for filing a responsive submission will commence with the registered or certified mailing or personal delivery of the filing to which it applies pursuant to § 134.014(b) and the applicable sections authorizing the filings, most of which compute time based on the date of service. However, the time period applicable to a submission concerning an order or decision issued by the judge and served on the parties by OHA will normally commence on the date of issuance. The timeliness of the filing in either situation will be determined by the date the filing, including the certificate of service, is received by OHA, pursuant to § 134.014(a).

Proceedings subject to the requirements of the APA will be conducted by an Administrative Law Judge in OHA, as required by § 134.018(a). All other proceedings covered by Part 134 may be conducted by an OHA Administrative Judge. Part 134 confers a broad range of judicial powers upon the judge, many of which are enumerated in § 134.018(b). They include authority to grant discovery and to provide for oral hearings, where appropriate, as well as authority to rule upon motions for intervention pursuant to § 134.017, motions for interlocutory appeals pursuant to § 134.023, and settlement agreements made pursuant to § 134.037. In order to assure a complete record, the judge will also have the authority, where appropriate, to issue subpoenas requiring the appearance of witnesses or the production of documents. These subpoenas may be enforced in the District Court or by the imposition of sanctions available to the judge under § 134.027. In exercising these powers, the judge will be governed by the implementation policy set forth in § 134.001. Although Part 134 establishes comprehensive procedures for the conduct of cases to be decided by OHA, some flexibility will be necessary, and § 134.004 permits the judge, upon his or her own initiative or upon motion of a party, to waive any rule contained in Part 134 in the exercise of discretion, for good cause shown, except those rules in § 134.011(a) specifying the time limits for filing a petition to commence a proceeding.

Section 134.028 contains evidentiary rules relating to objections, stipulations, exhibits, and offers of proof and provides that the Federal Rules of Evidence will be used as a general guide in all proceedings. As §§ 134.029(a) and 134.033 indicate, evidence considered in rendering a decision will be limited to that admitted during the course of the proceeding, and, once closed, the record will not be reopened unless a motion is made within 30 days of issuance of the judge's decision for the purpose of considering new and previously unavailable material evidence of decisional significance.

Sections 134.029 and 134.031 require that the decision isued by the judge be predicated only on the record, which will include all pleadings, judge's orders and decisions, evidence admitted during the proceeding, and the record of any oral hearing or telephone conference conducted during the proceeding. Where the decision is based on official notice of a material fact not appearing in the

record, any party will have the opportunity, upon a timely request, to show the contrary. In aid of a decision, the judge may request proposed findings of fact and conclusions of law, and, in the event of noncompliance with such an order, the defaulting party will be barred from objecting to the findings and conclusions adopted by the judge. Sections 134.018 (d) and (e) and 134.038 contemplate an independent and impartial decision in each case by assuring that the judge will be free from interference by the Agency or a party in rendering a decision, by prohibiting *ex parte* contacts on factual or legal issues, and by providing for recusal of a judge based on personal bias or disqualification. Section 134.034 establishes the rules for review of initial decisions, and § 134.035 governs final Agency decisions where the judge has issued a recommended decision in the proceeding.

Because the rules in Part 134 are intended to produce a reliable and complete record in all cases, it is essential that the parties have access to all submissions made during the course of the proceeding. Nevertheless, SBA is mindful that public access or even limited, party access to certain confidential or proprietary information may be detrimental to the party submitting it. Thus § 134.014(c) permits excision of such information prior to service of pleadings on other parties, if the information is adequately identified and described with sufficient particularity to permit another party to frame an adequate motion seeking its release, with or without a protective order. A protective order may also be sought if such information is introduced during the course of an oral hearing. Section 134.029(a) provides that public access will be granted to all information upon which a decision is based except information subject to a protective order issued pursuant to § 134.018(c) or any proprietary or confidential information properly excised under the standards established by the Freedom of Information or Privacy Acts by either a private party or SBA. The public will also be permitted to attend any oral hearings conducted by OHA except formal employee grievances, proceedings arising from MAC ratings or proceedings that are closed by the judge for good cause shown, pursuant to § 134.019(e).

Parts 103, 104, 105, 108, 109, 110, 112, 113, 115, 120, 122, 124 and 132 of Title 13 presently contain specific procedural regulations pertaining to certain of the above-enumerated types of cases, and amendments to these parts are also being proposed in this notice in order to conform them to the new procedures proposed in Part 134.

SBA hereby certifies that these regulations are procedural in nature, and do not constitute major regulations for the purpose of Executive Order 12291. In addition, for purposes of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, these regulations if promulgated in final form would not have a significant economic impact on a substantial number of small entities.

Hearings and related procedures are exempt from the requirements of the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

List of Subjects in 13 CFR Part 134

Administrative practice and procedure, organization and function (government agencies).

Accordingly, pursuant to 15 U.S.C. 634(b)(7), SBA hereby proposes to amend Chapter I of 13 CFR by adding Part 134, and by removing or revising various sections of Chapter I to conform the text to new Part 134, as follows:

1. These conforming amendments are made to the following sections of Chapter I of 13 CFR:

PART 103—[AMENDED]

A. Section 103.13–4 is amended by deleting the reference to "Part 104" and substituting "Part 134" in lieu thereof, and if further amended by adding the following at the end thereof: "The Assistant Administrator of the Office of Hearings and Appeals or an Administrative Law Judge of such office shall be the reviewing official for purposes of § 134.034."

PART 104—[REMOVED]

B. Part 104 is removed in its entirety and reserved.

PART 105—[AMENDED]

C. Section 105.407 is amended by adding the following at the end of paragraph (a): "SBA administrative proceedings for such prupose shall be conducted in accordance with the provisions of Part 134 of this chapter. The Assistant Administrator of the Office of Hearings and Appeals or an Administrative Law Judge of such office shall be the reviewing official for purposes of § 134.034." Section 105.407 is further amended by deleting paragraphs (d) through (j) in their entirety.

PART 108—[AMENDED]

D. Section 108.502–1 is amended in paragraph (k)(2) by inserting the following at the end of the first sentence: "and Part 134 of this Chapter. The Assistant Administrator of the Office of Hearings and Appeals or an Administrative Law Judge of such office shall be the reviewing oficial for purposes of §134.034."

E. Section 108.503–8 is amended by deleting paragraphs (b) through (i), by deleting the identifier "(a)", and by adding the following at the end of the text of former paragraph (a): "Proceedings for such purpose shall be conducted in accordance with the provisions of Part 134 of this Chapter. The Assistant Administrator of the Office of Hearings and Appeals or an Administrative Law Judge of such office shall be the reviewing official for purposes of § 134.034."

PART 109—[AMENDED]

F. Part 109 is removed in its entirety and reserved.

PART 110—[AMENDED]

G. Section 110.1 is amended by adding the following at the end of the first full sentence in paragraph (b): "Such proceedings shall be conducted in accordance with the provisions of Part 134 of this Chapter by an Administrative Law Judge of the Office of Hearings and Appeals, who shall issue an initial decision in the case. The Administrator shall be the reviewing official for purposes of § 134.034. The respondent's failure to file a timely motion in accordance with §§ 134.019 and 134.021, requesting that the matter be scheduled for an oral hearing, shall constitute waiver of the right to an oral hearing but shall not prevent the submission of written information and argument for the record in accordance with the provisions of Part 134."

H. Section 110.4 is amended by deleting the reference to "Part 104" and substituting "Part 134" in lieu thereof.

I. Section 110.6 is amended by deleting the reference to "§§ 109.16(c) and 109.26(a)" and substituting "§ 134.025(c)" in lieu thereof.

PART 112—[AMENDED]

J. Section 112.11 is amended by adding the following at the end of paragraph (b): "Such proceeding shall be conducted in accordance with the provisions of Part 134 of this Chapter by an Administrative Law Judge of the Office of Hearings and Appeals, who shall issue an initial decision in the case. The Administrator shall be the reviewing official for purposes of § 134.034. The applicant's failure to file a timely motion in accordance with §§ 134.019 and 134.021, requesting that

the matter be scheduled for an oral hearing, shall constitute waiver of the right to an oral hearing but shall not prevent the submission of written information and argument for the record in accordance with the provisions of Part 134." Section 112.11 is further amended in paragraph (c)(2) by inserting the words "an oral" between "for" and "hearing" and in paragraph (c)(3) by deleting the words "action has been approved by the Administrator of SBA pursuant to § 112.13" and substituting the following in lieu thereof: "initial decision has become final pursuant to § 134.032(b)."

K. Sections 112.12 through 112.14 are removed in their entirety, § 112.15 is redesignated as § 112.12, and the table of contents in Part 112 is amended accordingly.

PART 113—[AMENDED]

L. Section 113.7 is amended by adding the following at the end of paragraph (b): "Such proceedings shall be conducted in accordance with the provisions of Part 134 of this Chapter by an Administrative Law Judge of the Office of Hearings and Appeals, who shall issue an initial decision in the case. The Administrator shall be the reviewing official for purposes of § 134.034. The applicant's failure to file a timely motion in accordance with §§ 134.019 and 134.021, requesting that the matter be scheduled for an oral hearing, shall constitute waiver of the right to an oral hearing but shall not prevent the submission of written information and argument for the record in accordance with the provisions of Part 134." Section 113.7 is further amended in paragraph (c)(2) by inserting the words "an oral" between "for" and "hearing" and in paragraph (c)(3) by deleting the words "action has been approved by the Administrator of SBA pursuant to § 113.9" and substituting the following in lieu thereof: "initial decision has become final pursuant to § 134.032(b)."

M. Sections 113.8 and 113.9 are removed in their entirety, § 113.10 is redesignated as § 113.8, and the table of contents in Part 113 is amended accordingly.

PART 115—[AMENDED]

N. Section 115.13 is amended by deleting the last sentence and substituting the following in lieu thereof: "Any surety that has been penalized may file a petition in accordance with § 134.11(a) of this chapter. Proceedings concerning such petition shall be conducted in accordance with the provisions of Part 134. The Assistant Administrator of the Office of Hearings and Appeals or an Administrative Law Judge of such office shall be the reviewing official for purposes of § 134.034."

O. Section 115.14 is amended in paragraph (a) by deleting the words "appeal such action to SBA's Associate Administrator for Investment" and substituting the following in lieu thereof: "file a petition in accordance with § 134.011(a) of this Chapter. Proceedings concerning such appeal shall be conducted in accordance with the provisions of Part 134. The Assistant Administrator of the Office of Hearings and Appeals or an Administrative Law Judge of such office shall be the reviewing official for purposes of § 134.034."

PART 120—[AMENDED]

P. Section 120.4 is amended in paragraph (d) by deleting the words "suspension or revocation shall be accomplished in the manner set forth below:" and by deleting paragraphs (1) through (7) and substituting the following in lieu thereof: "Proceedings for such purpose shall be conducted in accordance with the provisions of Part 134 of this Chapter. The Assistant Administrator of the Office of Hearings and Appeals or an Administrative Law Judge of such office shall be the reviewing official for purposes of § 134.034." Section 120.4 is further amended by deleting paragraph (g).

PART 122—[AMENDED]

Q. Section 122.2 is amended by deleting the third sentence in paragraph (d)(3) and substituting the following in lieu thereof: "Proceedings concerning such allegations shall be conducted in accordance with the provisions of Part 134 of this Chapter. The Assistant Administrator of the Office of Hearings and Appeals or an Administrative Law Judge of such office shall be the reviewing official for purposes of § 134.034."

PART 124—[AMENDED]

R. Section 124.1–1 is amended by deleting the first sentence in paragraph (d)(4) and is amended in paragraph (d)(3) by inserting the word "oral" between "a" and "hearing", and by deleting the last sentence and substituting the following in lieu thereof: "Proceedings concerning program completion shall be conducted in accordance with the provisions of Part 134 of this Chapter by an Administrative Law Judge of the Office of Hearings and Appeals, who shall issue an initial decision in the case. The Associate Administrator of the Office of Minority Small Business and Capital Ownership Development shall be the reviewing official for purposes of § 134.034. The concern's failure to file a timely motion in accordance with §§ 134.019 and 134.021, requesting that the matter be scheduled for an oral hearing, shall constitute waiver of the right to an oral hearing but shall not prevent the submission of written information and argument for the record in accordance with the provisions of Part 134."

S. Section 124.1–1 is further amended by deleting paragraph (e)(3) and is amended in paragraph (e)(2) by inserting the word "oral" between "a" and "hearing", and by deleting the last sentence and substituting the following in lieu thereof: "Proceedings concerning program termination shall be conducted in accordance with the provisions of Part 134 of this Chapter by an Administrative Law Judge of the Office of Hearings and Appeals, who shall issue an initial decision in the case. The Associate Administrator of the Office of Minority Small Business and Capital Ownership Development shall be the reviewing official for purposes of § 134.034. The concern's failure to file a timely motion in accordance with §§ 134.019 and 134.021, requesting that the matter be scheduled for an oral hearing, shall constitute waiver of the right to an oral hearing but shall not prevent the submission of written information and argument for the record in accordance with the provisions of Part 134."

T. Section 124.10, incuding §§ 124.10–1 through 124.10–25, is removed in its entirety, and the table of contents in Part 124 is amended accordingly.

PART 132—[AMENDED]

U. Section 132.302 is amended in paragraph (c) by inserting the word "not" between "shall" and "be" and by adding the following at the end thereof: "and may be excised from pleadings required to be served on all other parties to the proceeding in accordance with § 134.014(b) of this Chapter."

V. Section 132.401 is revised to read as follows: "All applications for an award of fees shall be filed in accordance with § 134.011(a) of this Chapter. Service of such application shall commence the proceeding which shall thereafter be conducted in accordance with the provisions of Part 134 by the adjudicative officer (i.e. an Administrative Law Judge of the Office of Hearings and Appeals), who shall issue an initial decision in the case. The

Administrator shall be the reviewing official for purposes of § 134.034."

W. Section 132.402 is amended by deleting the second sentence of paragraph (a) and substituting the following in lieu thereof: "This Agency does not have the power to allow exceptions for later filings, and thus the applicant must serve and file the application no later than 30 days after the Agency decision becomes final in accordance with § 134.032 of this Chapter." Section 132.402 is further amended in paragraph (b) by deleting the words "of one of the types specified in paragraphs (a) (1) through (3) of this section."

X. Sections 132.403 through 132.407 and § 132.409 are deleted in their entirety, § 132.408 is redesignated as § 132.403, and § 132.410 is redesignated as § 132.404, and the table of contents in Part 132 is amended accordingly. Section 132.408 as redesignated is further amended by deleting the first two sentences therein.

2. Chapter I is amended by adding the following Part 134:

PART 134—OFFICE OF HEARINGS AND APPEALS

Subpart A—General

Sec.

Subpart B—Rules of Practice

Authority: 15 U.S.C. 634(b)(7).

Subpart A—General

§ 134.1 Authority and implementation policy.

(a) The Office of Hearings and Appeals is established pursuant to the authority set forth in the Small Business Act, 15 U.S.C. 631 *et seq.*, as implemented in § 101.2–8 of this Chapter. Delegations of Authority by the Administrator to the Assistant Administrator for the Office of Hearings and Appeals are set forth in 48 FR 29646 (June 27, 1983).

(b) The regulations in this Part represent a single, consolidated set of rules governing the conduct of all proceedings within the jurisdiction of the Office of Hearings and Appeals, except size determination and product or service classification appeals. The size determination and product or service classification appeals are governed by the rules set forth in § 121.11 of this Chapter. Because the rules in this Part govern the conduct of a wide range of proceedings extending from internal Agency matters involving Small Business Administration employees to external matters involving constituents of the Agency or organizations cooperating with or regulated by the Agency, they are necessarily comprehensive in scope. They provide for a range of practice extending from the informal to the formal. It is specifically recognized and contemplated that not all of these rules will be applied in all types of cases. The full panoply of formalities will be available, as appropriate, in individual cases required by law to be heard on the record in accordance with the Administrative Procedure Act (APA), the Small Business Act, as amended, the Small Business Investment Act of 1958, as amended, and any other applicable statutes. In these cases, the Administrative Law Judge will determine the extent of such formalities that is appropriate upon consideration of the issues and nature of the case and the attendant requirements of due process of law. Of course, the legitimate needs of the parties will also be considered in this respect.

(c) In cases involving external parties, but which are not required to be heard on the record in accordance with the APA and other applicable statutes a lesser degree of formality will normally be deemed to be appropriate. The Administrative Judge assigned will determine the extent of such formalities upon consideration of the issues and nature of the case, the due process requirements and the legitimate needs of the parties.

(d) In cases involving internal Agency matters, there is a presumption in favor of such informality as may best achieve essential fairness to all parties without undue resort to the formality that may be appropriate in certain of the external cases. The Administrative Judge assigned will determine which procedures in these cases will best meet the requirements of fairness, and will retain authority to resort to appropriate formality in cases in which the due process requirements, fairness, and the needs of the parties warrant such action.

(e) The principal areas where variation in practice is expected to occur are those relating to § 134.019, concerning oral hearings, and § 134.024, concerning discovery. The following general policies are, therefore, stated for the purpose of providing guidance to the judges and all parties, but this guidance retains a measure of flexibility due to the difference in types of cases and the circumstances attending each case.

(f) Section 134.019 authorizes the judge presiding to determine whether or not an oral hearing is appropriate in the circumstances of each case. This is a determination that, appropriately, is reserved to the judge to assure fairness and reasonable opportunity to be heard.

(g) In APA proceedings, the requirement of an opportunity for an oral hearing on the record raises a presumption in favor of an oral hearing, where requested, although resolution of APA cases on the basis of a written record is encouraged, where appropriate. In non-APA external cases involving sanctions imposed or proposed by the Agency, the judge shall have discretion to grant an oral hearing where there is a genuine dispute as to a material fact of decisional significance that cannot be resolved except by confrontation of witnesses. The presumption is that, while due process considerations may warrant oral hearings in many sanction-type non-APA cases, the fact that Congress has not required such cases to be heard on the record with full APA formality means that the requirements of due process of law may also be met in a decisional process not requiring an oral hearing but preserving the opportunity to be heard through written submissions. These sanction-type cases involving external parties, which are not required by law to be heard on the record and to conform to APA requirements, are those which are enumerated in paragraphs (a), (g)–(j), and (m) of § 134.003.

(h) In internal Agency cases, enumerated in § 134.003(e), (f) and (l), it is recognized that, as a matter of law, there is not a right to the same full array

of due process elements as may be appropriate in the external cases. Nevertheless, the same standard shall be applied in determining whether an oral hearing is necessary in any individual case. In making this determination, the judge may also assess the importance of the disputed fact of decisional significance in terms of the Agency's proper interest in resolving internal matters in ways consistent with sound budgetary and internal management practices. For example, it is not contemplated that grievances will ordinarily require oral hearings.

(i) It is emphasized that the standard stated in § 134.019(b) shall be applicable in all decisions respecting the grant of an oral hearing, irrespective of the type of case. No oral hearing shall be granted where there is no genuine dispute as to a material fact of decisional significance.

(j) Section 134.024 provides for discovery procedures to be available, in the judge's discretion and upon motion, including requests for admissions, interrogatories, depositions, and requests for production of documents. This section contemplates that, in the more formal proceedings, the individual circumstances of any case may warrant discovery. However, consistent with the three basic classes of cases recognized above (APA, non-APA external cases, and internal Agency cases), it is also contemplated that formal discovery will be granted sparingly in internal Agency cases. In these internal cases, the practice of holding pre-hearing conferences for purposes of identifying the issues and providing appropriate information to all parties, through exchange of documents or otherwise, shall be favored by the judge irrespective of whether an oral hearing is granted. It should be noted that under § 134.027 the judge has available effective measures for directing or ordering the parties to cooperate in a timely and efficient process of defining and resolving the issues.

(k) In the external cases, discovery beyond that which may result from pre-hearing conferences is more likely to be appropriate in some cases. This, again, is a matter that must remain within the discretion of the judge. The judge shall be guided by consideration of the extent and formality of the due process required by the circumstances of the case. In neither the APA nor non-APA external cases will discovery be a matter of right. It may be granted regarding any matter not privileged that is relevant to the subject matter of the proceeding. In the non-APA external cases, Agency policy more strongly favors the use of pre-hearing conferences and orders to achieve the basic purposes of discovery, but this policy also preserves the discretion of the judge to grant discovery where it is appropriate.

§ 134.2 Definitions and miscellaneous rules.

(a) *Definitions.* As used in this Part:

(1) "Act" means the Small Business Act, as amended, 15 U.S.C. 631 *et seq.*

(2) "Address" means the record address of a party, including the street location (in addition to a postal box number, where used), and postal zip code and the telephone number.

(3) "Administrator" means the Administrator of the Agency.

(4) "Agency" means the United States Small Business Administration.

(5) "Day" means a calendar day, unless otherwise indicated.

(6) "Determination" means only those appealable written Agency actions that are subject to the jurisdiction of the Office of Hearings and Appeals as enumerated in § 134.003 of this Part.

(7) "Judge" means an Administrative Law Judge or an Administrative Judge of the Office of Hearings and Appeals appointed by the Administrator, or a delegatee, to serve the Agency in that capacity.

(8) "Hearing" means the presentation of evidence, whether oral or written, for the record.

(9) "MAC" means Merit Appraisal and Compensation System.

(10) "Office" means the Office of Hearings and Appeals of the Small Business Administration.

(11) "Party" means the petitioner, grievant, complainant, respondent, intervenor, or Agency (when appropriate).

(12) "Petition," as used in § 134.011 of this Part, includes an appeal from any written Agency determination (other than a size determination or product or service classification), a grievance, a complaint, or a request for initiation of a proceeding authorized in this Chapter. Appeals from size determinations and product or service classifications are governed by Part 121 of this Chapter.

(13) "Petitioner" means the Agency or any person or legal entity entitled to initiate a proceeding under the statutes and regulations administered by the Agency.

(14) "Pleadings" includes all written submissions (other than documentary or testimonial evidence) that are intended to be included in, and considered a part of, the record in any proceeding held pursuant to this Part.

(15) "Respondent" means the Agency or any person or legal entity against whom a proceeding has been instituted pursuant to this Part.

(16) "SBIA" means the Small Business Investment Act of 1958, 15 U.S.C. 661 *et seq.*

(17) "SOP" means Standard Operating Procedure.

(b) *Miscellaneous Rules.* As used in this Part:

(1) Singular nouns, pronouns, and verbs shall be read to include the plural, as appropriate.

(2) In computing the time set forth for the filing of pleadings or for compliance with orders issued pursuant to this Part, the day from which the time is computed is not counted. The last day of the designated time period is counted, unless it is a Saturday, Sunday, or a Federal holiday, in which event the next business day following the Saturday, Sunday, or Federal holiday is counted.

§ 134.3 Jurisdiction and function.

The Office will conduct the following proceedings in accordance with the Act, the SBIA, other relevant statutes, the rules set forth in this Part and other applicable regulations:

(a) Contractor debarment and suspension proceedings, pursuant to Office of Federal Procurement Policy Letter No. 82–1 and § 125.11 of this Chapter;

(b) Proceedings relative to revocation or suspension of Small Business Investment Company licenses; cease and desist orders; and removal or suspension of directors and officers of licensees of Small Business Investment Companies, pursuant to the SBIA and Part 107 of this Chapter;

(c) Proceedings to terminate participants from the Act's Section 8(a) Minority Small Business and Capital Ownership Development Assistance Program, pursuant to 15 U.S.C. 637(a), and Part 124 of this Chapter;

(d) Proceedings relative to violations of title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000(d) *et seq.*, and Parts 112 or 113 of this chapter and violations of the Equal Credit Opportunity Act of 1974, 15 U.S.C. 1601 *et seq.*; Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794; Title VIII of the Civil Rights Act of 1968; Title IX of the Education Amendment of 1972, as amended, 20 U.S.C. 1681 *et seq.*; and Section 4(b) of the Act, 15 U.S.C. 633(b), pursuant to Part 113 of this Chapter, alleged by a person who claims to have been excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under any

financial assistance activities of the Agency;

(e) Proceedings relative to employee formal stage grievances, pursuant to Agency SOP 37–71;

(f) Arbitrations arising under any pertinent labor agreement where all parties agree that the matter should be heard by the Office;

(g) Proceedings relative to the privilege of any applicant or agent to appear before the agency, pursuant to 15 U.S.C. 634 and 642 *et seq.* and Part 103 of this Chapter;

(h) Proceedings relative to the eligibility of, or preferred or certified status of, any bank or non-bank lender to continue to participate in Agency loan programs, once they have begun to do so, pursuant to 15 U.S.C. 634(b)(6) *et seq.* and Parts 120 and 122 of this Chapter;

(i) Proceedings relative to the termination of surety bond program participants, pursuant to 15 U.S.C. 694(a) *et seq.* and Part 115 of this Chapter;

(j) Proceedings relative to the rights, privileges or obligations of development companies, pursuant to Sections 501, 502, and 503 of the SBIA, 15 U.S.C. 687 *et seq.* and Part 108 of this Chapter;

(k) Proceedings to determine allowance of costs and fees, pursuant to the Equal Access to Justice Act, 5 U.S.C. 504 and Part 132 of this Chapter;

(l) Proceedings arising from MAC ratings where the reviewing official challenges the Performance Review Board on the basis of failure to adhere to regulations or alleges arbitrary or capricious action, pursuant to Agency SOP 37–71;

(m) Proceedings relative to debarment from appearance before the Agency because of post-employment restrictions, pursuant to 18 U.S.C. 207(a) *et seq.* and Part 105 of this Chapter;

(n) Proceedings relative to the collection of debts owed to the Agency and to the United States, pursuant to the Debt Collection Act of 1982 and Part 140 of this Chapter.

(o) Such other hearing, determination or appeal proceedings, other than those regarding size determinations or product or service classifications, as may be referred to the Office by appropriate authority.

§ 134.4 Waiver and interpretation of rules.

(a) *Waiver.* In the exercise of discretion and for good cause shown, the judge may, after notice to all parties, waive any time limit set forth in this part, other than those time limits in § 134.011(a) of this part for filing petitions, unless such time is limited by statute.

(b) *Interpretation.* The rules set forth in this Part shall be liberally construed to carry out the purposes of the Act, the SBIA, and rules administered by the Agency, and to secure just and prompt determinations in all proceedings.

Subpart B—Rules of Practice

§ 134.10 Applicability

The rules set forth in this Subpart shall apply to proceedings regarding those matters specified in § 134.003 of this part.

§ 134.11 Commencement of proceedings.

(a) *By Petition.* A proceeding may be commenced by a party other than the Agency by serving and filing a petition in accordance with §§ 134.014 and 134.015 of this part.

(1) The petition shall be in writing and certified and shall contain the following:

(i) The legal authority and jurisdiction for the proceeding;

(ii) A clear and concise statement setting forth the factual basis for the commencement of the proceeding;

(iii) A statement of the relief requested; and

(iv) The signature of the petitioner or authorized representative and his or her address.

(2) Except as provided in paragraphs (a) (3), (4), (5), (6), and (7) of this section, a petition shall be served and filed no later than 30 days after the date of issuance of the written Agency action to which it applies.

(3) In the case of complaints alleging discrimination pursuant to §§ 108.502–1(k) and 122.2(d)(3) of this chapter, a petition shall be filed no later than 90 days after the alleged discrimination occurs.

(4) In the case of applications for an award of fees pursuant to Part 132 of this chapter, a petition shall be filed no later than 30 days after the decision to which it applies becomes final in accordance with § 134.032 of this part.

(5) Except in those cases where such time limit is waived by the judge for good cause shown, a formal employee grievance petition shall be filed no later than 20 days after issuance of the deciding official's decision to which it applies or after expiration of the time limit set forth in Agency SOP 37–71 for issuing such decision, whichever is later.

(6) In the case of MAC ratings, a petition appealing a decision of the Performance Review Board shall be filed no later than ten days after such decision is issued.

(7) In the case of debt collection proceedings pursuant to Part 140 of this Chapter, a petition shall be filed no later than 15 days after receipt of a notice of indebtedness and intention to collect such debt by salary or administrative offset.

(b) *By Order to Show Cause.* The Agency will commence a proceeding by issuing to the respondent an appropriate written order to show cause or notice containing the information set forth in paragraph (a)(1) of this section.

(c) *Motion for More Definite Statement.* Where a reasonable showing is made by a respondent that he or she cannot frame a responsive answer based on the allegations contained in the petition, order to show cause or notice, the respondent may move for a more definite statement of the allegations before filing an answer. Such motion shall be filed no later than 15 days after the service of the petition, order to show cause or notice and shall identify the defects complained of and the details desired. The filing of such motion shall stay the time for filing an answer set forth in § 134.012 of this part.

§ 134.12 Answer.

(a) *Time for Filing.* The answer to a petition, order to show cause or notice shall be served and filed in accordance with §§ 134.014 and 134.015 of this part, no later than 30 days after the service of such petition, order to show cause or notice or an amendment thereto made in response to a motion for more definite statement pursuant to § 134.011(c) of this part or an amendment made pursuant to § 134.013.

(b) *Contents.* The answer to a petition, order to show cause or notice shall contain the following:

(1) A specific admission or denial of each factual allegation contained in the petition, order to show cause or notice or a statement that the respondent denies knowledge or information sufficient to determine the truth of the allegation, which will then be deemed denied;

(2) A concise statement of the facts supporting any affirmative defenses raised; and

(3) The signature of the respondent or authorized representative and his or her address.

(c) *Failure To Deny.* Allegations in the petition, order to show cause or notice not answered in accordance with paragraph (b)(1) of this section shall be deemed to be admitted.

(d) *Admission of Allegations.* An answer that admits all factual allegations shall constitute a waiver of the right to present evidence or witnesses pursuant to § 134.028(c) of this Chapter but the right to further participation in the proceeding shall

continue and questions of law and Agency precedent may be addressed.

(e) *Default.* Failure of the respondent to file an answer within the time set forth in paragraph (a) of this section shall constitute a default, and the judge will, without further notice, render an appropriate decision. The respondent shall have no right to participate further in the proceeding.

§ 134.13 Amendments and supplemental pleadings.

(a) *Amendments by Leave.* If a determination of a controversy on the merits will be facilitated thereby, the judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to pleadings, except that an application for amendment of an order to show cause may be allowed only if the amendment is reasonably within the scope of the proceeding initiated by the original order to show cause.

(b) *Conformance to Evidence.* When issues not raised by the pleadings, but reasonably within the scope of the proceeding initiated by the original petition, order to show cause or notice, are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and such amendments of the pleadings as may be necessary to make them conform to the evidence and to raise such issues shall be allowed at any time.

(c) *Supplemental Pleadings.* The judge may, upon reasonable notice and upon such terms as are just, permit service of a supplemental pleading setting forth transactions, occurrences, or events that have taken place since the date of the pleading sought to be supplemented and that are relevant to any of the issues in the proceeding.

§ 134.14 Filing and service of pleadings.

(a) *Filing.* Except as otherwise specifically provided in this Part, an original and one copy of all pleadings shall be filed with the Office by mail addressed to: Office of Hearings and Appeals, Small Business Administration, Washington, D.C. 20416, or by personal delivery to Suite 300, 2100 K Street, NW., Washington, D.C. The date of filing shall be the date the pleading is received by the Office.

(b) *Service.* Except as provided in Agency SOP 37–71 relating to formal employee grievances, each party shall be responsible for service of all its pleadings upon all other parties or their authorized representative. Service shall be complete upon personal delivery or upon mailing by registered or certified mail to the record address, return receipt requested. All pleadings shall include a signed certificate stating how and when service was made. The returned post office receipt for a document registered or certified or the certificate by the person serving the document by personal delivery, setting forth the manner of said service, shall be proof of the service of the document.

(c) *Excision of Confidential Information.* Any information in pleadings that constitutes proprietary or confidential information need not be served upon other parties so long as such deletions are identified and described in copies served upon such other parties. Such excisions may be the subject of a discovery motion pursuant to § 134.024 of this part and may be released under a protective order, where the judge deems appropriate.

(d) *Waiver of Right to Service.* A party's failure to include a complete address, or to advise the Office of a changed address, shall constitute a waiver of the right to notice and service as provided in this part.

§ 134.15 Form requirements for pleadings.

Except as provided in Agency SOP 37–71, pleadings shall be typewritten on 8½ by 11 inch opaque paper, shall contain a caption that sufficiently identifies the parties, and shall be signed by an authorized person, who shall state as follows: "I have read this document and, under penalty of law and the sanctions imposed under 18 U.S.C. 1001, of which I am aware, I affirm that, to the best of my knowledge, the statements made herein are true and correct, and that this document is not being filed for the purpose of delay or harassment."

§ 134.16 Appearances.

(a) *Qualifications.* Except in arbitrations and in proceedings involving formal employee grievances or arising from MAC ratings (which are governed by the provisions of Agency SOP 37–71) parties to a proceeding may be represented only by a member in good standing of the bar of a Federal court or the highest court of any state or territory of the United States, or may represent themselves (appear *pro se*). A member of a partnership may represent the partnership and an authorized officer of a corporation, trust or association may represent the corporation, trust or association.

(b) *Notice of Appearance.* An attorney or other representative appearing on behalf of a party shall serve and file a written notice of appearance in accordance with §§ 134.014 and 134.015 of this part.

(c) *Restrictions as to Former Employees.* No former employee of the Agency shall appear as attorney for any party in any proceeding, or represent a party in any capacity, in violation of §§ 105.401, 105.402, 105.405, or 105.406 of this chapter.

(d) *Standards of Conduct.* Attorneys appearing in any proceeding shall conform to the standards of ethical conduct required in the Courts of the United States.

(e) *Withdrawal of Appearance.* An attorney or other representative wishing to withdraw from a proceeding shall serve and file a written motion for withdrawal of appearance in accordance with §§ 134.014 and 134.015 of this part. Except in arbitrations or in proceedings involving formal employee grievances, in which a written request for withdrawal by either the grievant or the representative shall be automatically granted, withdrawal of appearance will be allowed by the judge, for good cause shown.

§ 134.17 Intervention.

(a) *Intervention as of Right.* The following rules shall apply to those proceedings in which an oral hearing is conducted pursuant to § 134.019 of this part, provided that the notice or motion is filed prior to the commencement of the oral hearing.

(1) The Agency may intervene, as a matter or right, by serving and filing a notice of intervention in accordance with § 134.021(a) of this part.

(2) Any individual, partnership, association, corporation, or other agency shall serve and file a motion to intervene in accordance with § 134.021(a) of this part. The motion shall contain a brief statement of the movant's relationship to an interest in the proceeding. The judge shall grant leave to intervene, to such extent and upon such terms as are appropriate, upon finding that:

(i) There is a statutory right to intervene; or

(ii) The movant has an immediate property, financial, or other justiciable interest; the relief requested in the proceeding will affect such interest; and other means are not available to protect the movant's interest.

(b) *Discretionary Intervention.* After commencement of an oral hearing or at any stage of a proceeding for which no oral hearing has been provided, the Agency or any other agency, individual, partnership, association or corporation may seek to intervene by serving and filing a motion in accordance with § 134.021(a) of this part. The motion shall contain a brief statement of the

movant's interest in the proceeding. The judge may grant leave to intervene, to such an extent and upon such terms as appropriate if:

(1) The movant's interest will not be represented by the existing parties;

(2) The movant's participation may reasonably be expected to assist in the development of a proper record; and

(3) The movant's participation will not broaden the issues, resulting in prejudicial delay of the proceeding.

§ 134.18 Judges.

(a) *Assignment of Judge.* Proceedings subject to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, shall be assigned to the Chief Administrative Law Judge or, by him or her, to another Administrative Law Judge. All other proceedings subject to this Part shall be assigned to an Administrative Judge or to an Administrative Law Judge. The Office will notify all parties of the identity of the judge assigned.

(b) *Duties and Powers of Judges.* The judge will assume jurisdiction upon assignment to a proceeding and shall have the power to:

(1) Administer oaths and affirmations;

(2) Issue subpoenas and protective orders;

(3) Rule upon motions to quash or to modify subpoenas;

(4) Rule upon offers of proof and receive evidence;

(5) Take or cause depositions to be taken and determine their scope;

(6) Hold pre-hearing and other conferences for the settlement, simplification or clarification of the issues, and for other appropriate purposes;

(7) Dispose of procedural requests and motions;

(8) Regulate the course of the proceeding, require an oral hearing or telephone conference, if appropriate, fix the time and place of such oral hearing or conference, and exclude persons from such oral hearing or conference for contumacious conduct;

(9) Call and examine witnesses and introduce documentary or other evidence;

(10) Require the parties to state their respective positions concerning any issue in the proceeding at any time;

(11) Issue decisions and orders; and

(12) Take any other appropriate action authorized by this Part or the Delegations of Authority to the Office.

(c) *Protective Orders.* Upon motion by a party, or by any person from whom discovery is sought, for good cause shown, or upon his or her own motion, the judge may issue such orders as justice requires to protect a party or person from harassment, embarrassment, oppression, or undue burden or expense, or from breach of confidentiality of material or information warranting protection.

(d) *Recusal.* The following rules shall apply regarding recusal of judges in proceedings under this part:

(1) A judge shall recuse himself or herself from a proceeding on his or her own initiative whenever such judge deems himself or herself to be disqualified.

(2) At any time following assignment of the judge and before issuance of the judge's decision under § 134.032 of this part, any party may request the judge to recuse himself or herself on the grounds of personal bias or disqualification, by serving and filing a motion, promptly upon the discovery of the alleged facts, with an affidavit setting forth, in detail, the matters alleged to constitute grounds for disqualification.

(3) If, in the opinion of the judge, the affidavit is sufficient on its face, the judge shall recuse himself or herself. If the judge does not recuse himself or herself, the judge shall so rule, state the grounds for the ruling, and continue with the proceeding or issue the decision. A denial of a request for recusal may be appealed to the Assistant Administrator or Chief Administrative Law Judge of the Office, but such appeal shall not stay the proceeding.

(e) *Interference.* No officer, employee or agent of the Agency or other person or party shall interfere with a judge's decisional independence. If the judge has a question as to whether there has been a prohibited interference with his or her independence, the matter shall be made part of the record in the proceeding on notice to the parties.

(f) *Substitution of Judge.* In the event of substitution of a new judge for the one originally assigned, any motion predicated upon such substitution shall be made no later than seven days thereafter.

§ 134.19 Oral hearings.

(a) *Request for Oral Hearing.* Any party may request the opportunity for an oral hearing to adduce testimony to support or refute any fact alleged in a pleading. The request for an oral hearing shall be served and filed in accordance with § 134.021(a) no later than 20 days after the service of the answer to such pleading.

(b) *Notice of Oral Hearing.* If a judge grants a request for an oral hearing, or makes his or her own determination that one is necessary, because of a genuine dispute as to a material fact of decisional significance that cannot be resolved except by confrontation of witnesses, he or she will so advise the parties and, with appropriate notice, designate the time and place for such hearing and the issues to be addressed. The judge shall give due regard to the convenience and necessity of the parties or their authorized representatives in designating the time and place of the oral hearing and may conduct such hearing by telephone conference in appropriate circumstances.

(c) *Postponements.* Postponement of an oral hearing will be allowed only upon good cause shown or upon agreement of the parties, concurred in by the judge. Except in unusual circumstances, no motion for a postponement will be considered unless it is served and filed in accordance with § 134.021(a) at least seven days in advance of the date designated for the oral hearing.

(d) *Failure To Appear.* The failure of a party to appear for an oral hearing or to participate in a telephone conference, unless excused by the judge for good cause shown, before or after the fact, may be deemed to be a waiver by that party of all rights to participate further in the proceeding.

(e) *Public Access to Oral Hearing.* All oral hearings, except those involving employee grievances or arising from MAC ratings, shall be public unless, for good cause shown, a closed hearing is ordered by the judge.

(f) *Witnesses.* Subpoenaed witnesses shall be paid the same fees and mileage costs as are paid in the Federal courts. The party who requests the witness's presence shall be responsible for paying such fees. Except in the case of subpoenas issued on behalf of a Federal government entity, one day's fees and mileage costs shall be tendered to the subpoenaed witness at the time of service of the subpoena. Subsequent entitlement shall be payable following the appearance and release of the witness.

(g) *Recording and Transcripts.* Oral hearings will be recorded verbatim. The judget may make a final, initial or recommended decision without having an official transcript of the record, unless a transcript is required pursuant to statute or to rules set forth in this Chapter. A transcript or copies of a recording may be obtained by the parties upon request to the recording service. Any fees in connection therewith shall be the responsibility of the parties.

§ 134.20 Prehearing conferences.

(a) *Nature of Prehearing Conference.* The judge, upon motion of any party or upon his or her own motion, may direct

all parties or their counsel to confer and consider:

(1) Simplification, clarification, compromise, or settlement of the issues;

(2) Necessity and desirability of amendments to the pleadings;

(3) Stipulations, admissions of fact, and the contents, admissibility, and authenticity of documents;

(4) Where an oral hearing is involved, expedition in the presentation of evidence, including, but not limited to, restriction of the number of witnesses;

(5) A statement of the issues as they then appear;

(6) A proposed plan and schedule of discovery;

(7) Any limitations proposed to be placed on discovery; and

(8) Such other matters as may aid in the orderly disposition of the proceeding, including disclosure of the names of witnesses and furnishing for inspection or copying of non-privileged documents, papers, books, or other physicial exhibits, which constitute or contain evidence relevant to the subject matter involved and which are in the possession, custody, or control of any party to the proceedings.

(b) *Record of Prehearing Conference.* A pre-hearing conference may be conducted by telephone or in person at a time and place convenient to all parties, and, in the discretion of the judge, may be recorded verbatim.

(c) *Order.* After such prehearing conference, the judge will issue an order that recites the actions taken and the agreements made. Such order shall control the subsequent course of the proceeding, unless modified.

§ 134.21 Motions.

(a) *Filing and Service.* Except where the judge permits an oral motion to be made at a conference, or on the record in an oral hearing or telephone conference, all motions shall be written, shall be filed with the Office, and shall be served upon all parties in accordance with §§ 134.014 and 134.015 of this Part.

(b) *Contents of Motion.* All motions shall state the particular order, ruling, or action requested and the grounds and authority therefor.

(c) *Answer and Filing of Briefs.* No later than ten days after the service of any motion, or within such time as the judge may direct for good cause shown, the opposing party shall serve and file an answer to the motion, or be deemed to have consented to the relief sought. The moving party shall have no right to reply, except as permitted by the judge. No oral argument will be heard on motions unless the judge directs otherwise. Written briefs may be filed with motions and with answers thereto.

(d) *Disposition of Motion.* All motions shall be ruled upon by the judge assigned, unless the judge is unavailable. In that event, if circumstances warrant, such motion may be acted upon by the Assistant Administrator or the Chief Administrative Law Judge of the Office, as appropriate.

§ 134.22 Summary decision.

(a) *Motion for Summary Decision.* Any party who believes that there is no genuine issue of material fact of decisional significance, and that he or she is entitled to a decision as a matter of law, may move for a summary decision as to all or any part of the proceeding.

(b) *Contents of Motion.* The motion shall include a statement of the facts as to which the moving party contends there is no genuine issue, shall be supported by the pleadings, and may be accompanied by affidavits and a legal memorandum or brief.

(c) *Answer to Motion.* No later than 20 days after the service of the motion, any other party may serve and file an opposition thereto, and may countermove for summary decision in his or her favor.

(d) *Order.* When a motion for summary decision is granted, the judge will issue an appropriate order as to the issues so determined. If the motion is denied, in whole or in part, the judge will issue an order specifying those facts about which there is no genuine issue and those material facts of decisional significance found to be controverted in good faith. Further proceedings will then be ordered.

§ 134.23 Interlocutory appeals.

(a) *General Rules.* An interlocutory appeal is an appeal of a ruling made by a judge during the course of the proceeding, other than a ruling on a request for recusal or a ruling that is fully dispositive of the proceeding. A motion for leave to take an interlocutory appeal will not be entertained in those proceedings specified in § 134.032(a) (1), (3) and (4) of this part, in which the judge's decision is the final decision of the Agency, or in formal employee grievances. In all other proceedings, an interlocutory appeal shall not be permitted unless, upon motion by a party, or upon the judge's determination, the judge certifies that the question presented is immediately appealable. Interlocutory appeals from a ruling by a judge will be decided by the Agency reviewing official identified in the applicable substantive regulations governing the proceeding.

(b) *Motion for Certification.* A party seeking leave to take an interlocutory appeal shall file a motion for certification no later than 10 days after issuance of the ruling to which the motion applies. The motion shall include arguments in support of both the certification and the relief requested on the merits.

(c) *Basis for Certification.* The judge will certify a ruling for interlocutory review only if he or she determines that:

(1) The ruling involves an important question of law or policy regarding which there are substantial grounds for a difference of opinion; and

(2) An immediate review will materially expedite completion of the proceeding or denial of review would cause undue hardship to a party or the public.

(d) *Order.* The judge will issue expeditiously an order granting or denying a motion for certification and, if certification is granted, will refer the record to the Agency reviewing official. If certification is denied, the issue may be raised in any appeal of the judge's decision on the merits.

(e) *Stay of Proceeding.* A stay of the proceeding, while an interlocutory appeal is pending, shall be at the discretion of the judge.

§ 134.24 Discovery.

In the judge's discretion, and upon motion, a party may obtain discovery in the form of requests for admissions, interrogatories, depositions, or requests for production of documents, regarding any matter, not privileged, that is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought will be inadmissible, if it appears reasonably calculated to lead to the discovery of admissible evidence. The judge will ordinarily limit the length of time allowed for discovery consistent with the exigencies of the proceeding.

§ 134.25 Subpoenas.

(a) *Scope.* A request for the issuance of a subpoena requiring a witness to appear and testify at a specified place and time or production of documents shall be made to the judge, except that subpoenas shall not be authorized for any proceeding relative to internal Agency determinations, *e.g.* formal employee grievances, arbitrations and proceedings arising from MAC ratings.

(b) *Requests.* Requests for subpoenas may be made on the record at the oral hearing or *ex parte* by written application, in triplicate. All requests shall clearly identify the person subpoenaed and shall be supported by a

showing of the relevance, scope and materiality of the evidence sought. Requests for a subpoena *duces tecum* shall specify with particularity the books, papers, and documents desired and the facts expected to be proved thereby, and shall be affirmed in accordance with § 134.015 of this Part.

(c) *Service.* The following rules shall apply to service of subpoenas:

(1) Service of a Subpoenas shall be made by any person who is over 18 years of age, or by certified mail, return receipt requested.

(2) Service of a subpoena by a person other than a United States Marshal or Deputy shall be attested by the person making such service. The attesting affidavit shall state the date, time, and method of service.

(3) In the case of service by certified mail, a copy of the document shall be addressed to the person or business entity to be served, at its residence, principal office or place of business. The return receipt shall be proof of service of the document.

(d) *Motion to Quash.* Motions to limit or quash a subpoena shall be served and filed no later than 10 days after receipt of service of the subpoena or by the return date specified. Any response to such motion shall be served and filed within seven days after the service of the motion, unless a shorter time is specified by the judge to meet the exigencies of a particular case. Oral argument on the motion may be heard at the judge's discretion.

§ 134.26 Motions to compel.

Subject to the limitations of § 134.025(a) of this part, and upon reasonable notice to all other parties and persons affected thereby, a party may make a motion for an order compelling discovery or for the production of witnesses or documents. The judge may deny the motion or compel discovery or production and may also issue a protective order, upon the request of the party or person from whom discovery or production is sought or upon his or her own motion.

§ 134.27 Sanctions.

If any party fails to comply with a written or oral order of the judge, the judge may impose appropriate sanctions including, but not limited to:

(a) Drawing an inference in favor of a party regarding the information sought;

(b) Prohibiting the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, evidence relating to the information sought;

(c) Permitting the requesting party to introduce secondary evidence concerning the information sought;

(d) Striking any part of the pleadings of the party failing to comply with such request; or

(e) Taking such other appropriate action as is deemed necessary to serve the ends of justice.

§ 134.28 Evidence.

(a) *Applicability of the Federal Rules of Evidence.* Unless otherwise provided by statute or this Part, the Federal Rules of Evidence may be used as a general guide in all proceedings subject to this Part.

(b) *Admissibility.* All material, relevant, and otherwise reliable information is admissible, but may be excluded if its probative value is substantially outweighed by unfair prejudice or confusion of the issues, or if it is needlessly cumulative. Introduction of heresay evidence will be permitted when it is deemed reliable, probative, material and relevant. Irrelevant, immaterial or unduly repetitious evidence shall be excluded.

(c) *Parties' Rights to Present Evidence or Witnesses.* The parties shall have the following rights regarding the presentation of evidence and witnesses:

(1) When an oral hearing or a telephone conference has been provided, a party shall be entitled to present his or her case or defense by oral, documentary and physical evidence, by depositions, and by duly authenticated copies of records and documents, to submit rebuttal evidence, and to conduct reasonable cross-examination.

(2) When no oral hearing or telephone conference has been provided, a party shall be entitled to present his or her case or defense by documentary and physical evidence, by depositions, and by duly authenticated copies of records and documents.

(d) *Objections.* Motions objecting to the admission of evidence, or to the conduct of the proceeding, may be made orally on the record where an oral hearing or telephone conference has been provided, or shall be served and filed in accordance with § 134.021(a) of this part, and shall include a short statement of the grounds therefor. Argument thereon, or briefs or legal memoranda, if requested by the judge, shall be included in the record. Ruling on objections will be made at the time of the objection or prior to the receipt of further evidence, unless the judge orders otherwise, and will be a part of the record. No objections shall be deemed waived by further participation in the proceeding and an automatic exception shall be deemed applicable to every adverse ruling.

(e) *Stipulations.* The parties may, in writing, or orally on the record where an oral hearing or telephone conference has been provided, agree upon any facts or procedures relevant to the proceeding. Such stipulations shall be binding on the parties.

(f) *Exhibits.* All exhibits offered into evidence shall be numbered and marked so as to identify the party offering the exhibit and shall be filed with the judge in accordance with a pre-trial order or, if there is no pre-trial order, no later than seven days prior to the oral hearing or telephone conference. Copies of all such exhibits shall be served simultaneously upon the opposing party in the proceeding. Admission of exhibits not so served shall be within the judge's discretion. Any information that constitutes proprietary or confidential information may be made the subject of a motion for a protective order.

(g) *Offer of Proof.* Whenever evidence is excluded by the judge, the offering party may make an offer of proof of what the party expects to establish with respect thereto. In the case of an oral hearing or telephone conference, if the offer of proof consists of an oral statement, it shall be included in the record. If the offer of proof consists of an exhibit or other documentary evidence, it shall be marked for identification and retained in the record so as to be available for consideration by any reviewing authority.

§ 134.29 Record.

(a) *Docket File.* Upon commencement of a proceeding, the matter will be assigned a docket number. The docket file will consist of the petition, order to show cause or notice, all other pleadings, motions, judge's orders and decisions, evidence admitted into evidence during the proceeding, and any oral hearing or telephone conference record. Public access to such file shall be permitted as follows:

(1) Except as provided in paragraph (a)(2) of this section, the docket file will be available for public inspection at the Office during normal business hours, and copies of such material may be obtained upon payment of the applicable charges;

(2) The following information in the docket file shall not be subject to public inspection or copying:

(i) Information subject to a protective order issued pursuant to §134.018(c) of this Part;

(ii) Any proprietary or confidential information the withholding of which is provided pursuant to § 134.014(c) of this

Part or which is identified and contained in the Agency case file compiled prior to commencement of the proceeding; and

(iii) Any other information to which public access is prohibited by law or regulation.

(b) *Basis for Decision.* The documents included in the docket file pursuant to paragraph (a) of this section shall constitute the exclusive record for decision. Where the decision is based on official notice of a material fact not appearing in the record, any party will, on written request filed no later than seven days following issuance of the decision, be afforded an opportunity to show the contrary.

(c) *Closing of Record.* The record of the proceeding shall be closed in accordance with the following procedures:

(1) When an oral hearing or telephone conference has been provided, the record will be closed at the conclusion of such hearing, unless the judge directs otherwise. After the record has been closed, no additional evidence or argument will be accepted, except upon the grant of a motion to reopen the record under § 134.033 of this Part. If a transcript of the hearing is made, corrections may be permitted upon motion made no later than ten days after receipt of the transcript, and corrections will be permitted by the judge only if errors of substance are involved. The judge may, on his or her own motion and on notice to the parties, make such corrections as are deemed necessary. The judge shall make a part of the record any approved corrections to the transcript and any motions and rulings made after the closing of the record.

(2) When no oral hearing has been provided, the record will be closed on the date set by the judge as the final date for the receipt of submissions from the parties. After the record has been closed, no additional documents will be accepted except upon grant of a motion to reopen the record under § 134.033 of this Part. The judge shall make a part of the record any motions and rulings made after the close of the record.

(d) *Certification of Record.* Upon the closing of the record, the judge shall certify and file with the Office a true and correct copy of the entire record consisting of the recording or transcript of testimony, if any, and all exhibits, pleadings, orders, papers, and requests filed in the proceeding.

§ 134.30 Proposed findings, conclusions, and order.

(a) *Request to File.* Upon request, in those proceedings where such filing is not a matter of right, the judge may allow the parties to file proposed findings of fact and conclusions of law and a proposed order accompanied by a supporting brief.

(b) *Required by Judge.* In any proceeding, the judge may, in his or her discretion, direct the parties to file proposed findings of fact and conclusions of law and a proposed order accompained by a supporting brief. In the event of noncompliance with such direction, the defaulting party may be deemed to have waived his or her right to object to the findings and conclusions of the judge.

§ 134.31 Decisions.

(a) *Contents.* The decision of the judge will be based upon the whole record, will be predicated upon a preponderence of the evidence, and will include findings of fact and conclusions of law, with reasons therefor, upon each material issue of fact and law of decisional significance.

(b) *Service of Decisions and Orders.* A copy of each written decision and order issued by the judge shall be served by the Office on each party to the proceeding.

§ 134.32 Finality of decisions.

(a) *Final Decisions.* A decision by the judge shall be the final decision, upon issuance, in the following proceedings:

(1) Proceedings arising from MAC ratings, pursuant to Agency SOP 37–71;

(2) Proceedings relative to formal employee grievances, pursuant to Agency SOP 37–71, which shall be final 15 days after issuance, provided that the deciding official designated in such SOP has not petitioned the Deputy Administrator (or the Inspector General, in the case of OIG grievances) for review, upon concurrence of the General Counsel, within such 15 day period, based on an allegation that the decision issued by the judge is contrary to law, regulation or Agency policy or is impracticable to implement, in which case the final decision shall be rendered by the Deputy Administrator (or Inspector General, as appropriate);

(3) Arbitrations arising under any pertinent labor agreement; and

(4) Proceedings relative to the collection of debts owed to the Agency and to the United States, pursuant to the Debt Collection Act of 1982 and Part 140 of this chapter.

(b) *Initial Decisions.* Except as otherwise provided by statute, unless a petition for review has been filed pursuant to § 134.034(a) of this part or the Agency reviewing official has ordered review pursuant to § 134.034(b), an initial decision of the judge shall be the final decision of the Agency 30 days after issuance, in the following proceedings:

(1) Proceedings relative to revocation or suspension of Small Business Investment Company licenses; cease and desist orders; and removal or suspension of directors and officers of licensees of Small Business Investment Companies, pursuant to the SBIA and Part 107 of this chapter;

(2) Proceedings to terminate participants in the Act's Section 8(a) Minority Small Business and Capital Ownership Development Assistance Program, pursuant to 15 U.S.C. 637(a) and Part 124 of this chapter;

(3) Proceedings relative to violations of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000(d) *et seq.*, and Parts 112 or 113 of this chapter, and violations of the Equal Credit Opportunity Act of 1974, 15 U.S.C. 1601 *et seq.;* Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794; Title VIII of the Civil Rights Act of 1968; Title IX of the Education Amendment of 1972, as amended, 20 U.S.C. 1681 *et seq.;* and Section 4(b) of the Act, 15 U.S.C. 633(b), pursuant to Part 113 of this chapter, alleged by a person who claims to have been excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under any financial assistance activities of the Agency;

(4) Proceedings relative to the privilege of any applicant or agent to appear before the Agency, pursuant to 15 U.S.C. 634 and 642 *et seq.* and Part 103 of this chapter.

(5) Proceedings relative to the eligibility of, or preferred or certified status of, any or non-bank lender to participate in Agency loan programs, pursuant to 15 U.S.C. 634 (b)(6) *et seq.;* and Parts 120 and 122 of this chapter;

(6) Proceedings relative to the termination of surety bond program participants, pursuant to 15 U.S.C. 694 (a) *et seq.*, and Part 115 of this chapter;

(7) Proceedings relative to the rights, privileges or obligations of development companies, pursuant to Sections 501, 502, and 503 of the SBIA, 15 U.S.C. 687 *et seq.*, and Part 108 of this chapter.

(8) Proceedings to determine allowance of costs and fees, pursuant to the Equal Access to Justice Act, 5 U.S.C. 504 and Part 132 of this chapter; and

(9) Proceedings relative to debarment from appearance before the Agency because of post-employment restrictions, pursuant to 18 U.S.C. 207(a) *et seq.*, and Part 105 of this chapter.

(c) *Recommended Decisions.* A recommended decision will be issued by the judge in contractor debarment and suspension proceedings, pursuant to

Office of Federal Procurement Policy Letter 82–1 and § 125.11 of this chapter. A final decision by the Agency reviewing official shall be issued and become final in accordance with § 134.035 of this part.

§ 134.33 Requests to reopen record.

(a) *Clerical Errors.* Clerical errors resulting from oversight or omission may be corrected by the judge at any time after the record has been closed, on his or his own initiative after notice to all parties or on motion of any party.

(b) *New Evidence.* If new and material evidence of decisional significance becomes available, which was not available to the moving party before issuance of the decision by the judge, despite due diligence, such party may move to reopen the record within 30 days of issuance of the decision. Such motion shall be directed to the judge by whom the proceeding was conducted.

§ 134.34 Review of initial decision.

(a) *By Petition.* Any party may serve and file a petition for review with the Agency reviewing official identified in the applicable substantive regulations governing the proceeding, within 30 days of issuance of the initial decision. A petition for review shall set forth exceptions to the initial decision, supported by specific references to relevant law, regulations, Agency policy, and the record, and may be supported by a brief.

(b) *By Order.* The Agency reviewing official may issue an order on his or her own motion, within 30 days of issuance of the initial decision, directing that the case be placed on the docket for review and shall serve a copy of such order on all parties to the proceeding.

(c) *Answer.* Within ten days after the filing of the petition or order for review, any party may file an answer.

(d) *Grounds for Review.* The Agency reviewing official may grant a petition for review when it is established that:

(1) The decision of the judge is based on an erroneous finding of fact or an erroneous interpretation or application of law, regulation or Agency policy; and

(2) Review is necessary and appropriate to insure a just and proper disposition of the proceeding and to protect the interests of the parties.

(e) *Order and Effective Date.* After consideration of the record, the Agency reviewing official may:

(a) Affirm, reverse, or modify the initial decision, which action shall be the final decision of the Agency, upon issuance;

(2) Remand the initial decision to the judge, with directions, for appropriate further proceedings; or

(3) Deny the petition for review summarily, in which case the decision of the judge shall forthwith become the final decision of the Agency.

§ 134.35 Recommended decision.

(a) *Exceptions.* Any party may serve and file exceptions to the recommended decision with the Agency reviewing official identified in the applicable substantive regulations governing the proceeding, within 30 days of the issuance of the recommended decision.

(b) *Contents.* Such exceptions shall be supported by specific references to relevant law, regulations, Agency policy, and the record, and may be supported by a brief.

(c) *Answers.* Within ten days after filing of the exceptions, any party may file an answer.

(d) *Order and Effective Date.* After consideration of the record, the Agency reviewing official may:

(1) Adopt, reject, or modify the recommended decision, which action shall be the final decision of the Agency, upon issuance; or

(2) Remand the recommended decision to the judge, with directions, for appropriate further proceedings.

§ 134.36 Termination of jurisdiction.

The jurisdiction of the judge shall terminate upon issuance of the final, initial, or recommended decision, except as provided in § 134.033 of this Part or unless the case is remanded for appropriate further proceedings.

§ 134.37 Settlements.

(a) *Contents of Settlement Agreement.* At any time after the commencement of the proceeding, the parties may submit to the judge a settlement agreement that includes:

(1) The basis for the agreement;

(2) A statement of jurisdiction;

(3) A provision that the settlement order will have the same force and effect as a decision issued in accordance with this Part, except that it shall be final and may not be altered, modified, or set aside.

(4) A waiver of further Agency proceedings and the right to seek judicial review or otherwise challenge the validity of the order;

(5) A statement that the allegations in the petition, order to show cause or notice commencing the proceeding are fully resolved by the agreement and order;

(6) Signatures of the parties to the agreement; and

(7) A proposed order.

(b) *Action on Settlement Agreement.* After considering the agreement and proposed order, the judge will, within 30 days:

(1) Approve the settlement agreement and issue an order incorporating such agreement by reference; or

(2) Reject the settlement agreement and issue an order notifying the parties of the resumption of the proceeding.

(c) *Continuance Pending Settlement.* Any party may move to recess the proceeding for a reasonable time to permit negotiation of a settlement. The allowance of such continuance, and the duration thereof, is in the discretion of the judge. On or before the expiration of the time allowed for negotiations, the parties shall:

(1) Submit the proposed settlement agreement to the judge for consideration; or

(2) Inform the judge that an agreement cannot be reached so that the proceeding can be resumed.

(d) *Admissibility.* A rejected settlement agreement and all negotiations relative thereto shall not be admissible in evidence.

§ 134.38 Ex parte communications.

Except to the extent required for the disposition of *ex parte* matters as authorized by law or this Chapter, no person, party or employee of the Agency who performs any investigative or prosecutorial function in connection with a proceeding under this part shall consult or communicate with a judge concerning any fact or question of law or Agency precedent at issue in such proceeding, except on notice and opportunity for all parties to participate. In the event that such an unauthorized consultation or communication is initiated, the judge shall disclose that occurrence on the record with notice to the parties, either by filing therein a memorandum or by making a statement, if the transaction was oral, or by filing any writing delivered to him or her. When such a prohibited communication has been initiated by a party, the judge may give appropriate consideration to the imposition of such sanctions or remedial relief as the circumstances warrant.

Dated: April 17, 1984.

James C. Sanders,

Administrator.

[FR Doc. 84–12239 Filed 5–7–84; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 229

[Release Nos. 33-6530; 34-20920; 35-23297; IC-13919; File No. S7-17-84]

Disclosure of Certain Legal Proceedings Involving Management, Promoters and Control Persons

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rulemaking.

SUMMARY: The Commission today is publishing for comment amendments to a rule relating to the disclosure of certain information about management. The proposed amendments would add commodities proceedings to the legal proceedings currently required to be disclosed with respect to directors and executive officers and would require new registrants to disclose the same legal proceedings involving promoters and control persons that they must disclose with respect to directors and executive officers. The Commission believes the proposed amendments will result in improved disclosure to investors, particularly in the case of new registrants.

DATE: Comments must be received on or before July 6, 1984.

ADDRESSES: Comments should be submitted in triplicate to George A. Fitzsimmons, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, D.C. 20549. All submissions will be made available for public inspection at the Commission's Public Reference Section, Room 1024, 450 Fifth Street, NW., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Betsy Callicott Goodell, (202) 272-2589, Office of Disclosure Policy, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: Item 401 of Regulations S-K [1] sets forth disclosure requirements with respect to the identity and background of management and certain employees of the registrant. The disclosure is required in registration statements pursuant to the Securities Act of 1933 [2] (the "Securities Act") and registration statements, proxy statements, and annual reports pursuant to the Securities Exchange Act of 1934 [3] (the "Exchange Act"). Among other things, the Item requires disclosure of the involvement of directors and executive officers in specified legal proceedings. The Commission is proposing amendments to Item 401 to add the disclosure of commodities law proceedings to the list of specified legal proceedings and to require new registrants to disclose legal proceedings involving promoters and control persons in addition to those legal proceedings involving executive officers and directors.

I. Discussion

The proposed Item 401 amendments stem from hearings held in December, 1983, by the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs, on "Fraud and Abuse in the 'Hot Issues' and 'Penny Stock' Markets" (the "1983 Hearings"). [4] The purpose of the 1983 Hearings was to highlight the problems pertaining to the new issues market and to examine potential solutions to those problems. [5] Among other matters, the 1983 Hearings indicated that the current provisions of Item 401 may be inadequate in two respects.

First, the 1983 Hearings drew attention to the fact that legal proceedings involving violations of the commodities laws are not among the legal proceedings enumerated in Item 401 and that, therefore, investors may not receive that information. The current disclosure provisions include violations of the securities laws and laws governing related practices such as those involved in the banking, savings and loan and insurance businesses. Because the commodities laws are similar to laws governing other financial practices, disclosure of commodities law violations would be meaningful to investors in their evaluation of management. Moreover, in light of the growth of commodities related activities, the Commission believes that Item 401 should be updated to include the disclosure of certain proceedings involving violations of or sanctions pursuant to the Commodity Exchange Act. [6]

Second, the 1983 Hearings indicated that promoters and control persons, who receive economic benefits from a public offering, also have the potential power to perform or direct the actual management functions of many new registrants. Indeed, in some instances, those persons may have the potential to exert greater management control than the officers and directors, whether or not they exercise that power. Of course, if these persons are directors or executive officers, the current disclosure provisions already include them. [7] If they are not, however, investors may not receive important information when they are making investment decisions.

In a number of other instances in the past, the Commission has considered the type of disclosure needed with respect to new registrants and has tailored specific requirements to meet those disclosure needs. For example, a new registrant that has not received revenue from operations during each of the three fiscal years immediately prior to filing a registration statement must include in its registration statement a plan of operation. [8] New registrants also must identify and disclose the background of certain key employees upon whom the success of the company may depend. [9] Similarly, the Commission believes that disclosure by new registrants of certain legal proceedings information with respect to promoters and control persons is necessary to enhance investor protection.

II. Proposed Amendments

To improve disclosure in these areas, the Commission in proposing two categories of amendments to Item 401: (1) Amendments to paragraph (f)(3) and

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[1] 17 CFR 229.401.

[2] 15 U.S.C. 77a-77aa (1982).

[3] 15 U.S.C. 78a-78kk (1982), *as amended by* Act of June 6, 1983, Pub. L. 98-38, 97 Stat. 205 (1983).

[4] *Fraud and Abuse in the "Hot Issues" and "Penny Stock" Markets Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 98th Cong., 1st Sess. (1983).

[5] Prior to 1972, Forms 10 and 10-K required a ten year litigation history with respect to directors. During hearings on the hot issues market in 1972, securities professionals testified that disclosure relating to the background and prior performance of management is material to an investment decision, particularly when a registrant has no operating history. Public Investigation in the Matter of the Hot Issues Securities Markets (File No. 4-148). As a result, the Commission required disclosure of background information with respect to directors and executive officers in registration statements. Release No. 33-5395 (June 1, 1973) [38 FR 17202]. Subsequently, the disclosure item was moved to Regulation S-K and the time frame was reduced from ten to five years. Release No. 33-5949 (July 28, 1978) [43 FR 34402].

[6] 7 U.S.C 1-26 (1982).

[7] For Securities Act purposes, Rule 405 includes in the definition of director and executive officer any person performing the duties of those positions, whether or not they are named as such. [17 CFR 230.405]. Section 3(a) of the Exchange Act and Rule 3b-7 [17 CFR 240.3b-7] contain the same provisons with respect to Exchange Act filings. The disclosure provision of Item 401 apply with respect to any person meeting that definition.

[8] 17 CFR 229.101(a)(2). This provision was adopted for new registrants because the Commission believed that, absent any historical information about a registrant, a description of that registrant's plan for operations was necessary for an investor's evaluation of a company. Release No. 33-5395 (June 1, 1973) [38 FR 17202, June 29, 1973].

[9] 17 CFR 229.4019 (c). This provision was adopted for nonreporting registrants to enhance the disclosure with respect to management. Release No. 33-5395 (June 1, 1973) [38 FR 17202, June 29, 1973].

a new paragraph (f)(6) of Item 401 that would require the disclosure of commodities law proceedings; and (2) new paragraph (g) that would set forth disclosure requirements regarding promoters and control persons.[10]

Under proposed Item 401(f), all registrants would be required to include legal proceedings involving violations of the Commodity Exchange Act [11] in their disclosure of the background of directors and executive officers. The disclosure would be required in any filing calling for Item 401 disclosure.[12] The proposed requirement, which is patterned after the disclosure now required for securities violations, would include injunctions, civil and criminal penalties, and other sanctions resulting from violations of the Commodity Exchange Act.[13]

Proposed new paragraph (g) of Item 401 would require new registrants to disclose bankruptcy proceedings, criminal proceedings, securities and commodities violations, and certain other legal proceedings involving promoters and control persons.[14] Registrants which have not been subject to the reporting requirements of Section 13a) or 15(d) for the twelve months prior to filing would have to provide the disclosure with respect to control persons. In addition, such registrants which were organized within the last five years would have to include the disclosure with respect to promoters. Therefore, all nonreporting registrants and registrants that have been in the reporting system for less than twelve months would have to include the disclosure in registration statements, proxy statements and annual reports. In addition, any registrant whose reporting obligations have been suspended previously must include the disclosure.[15] Proposed paragraph (g) would not apply to any subsidiary of a company that has been subject to the Exchange Act reporting requirements for the twelve months prior to filing.

The Commission specifically requests comments with respect to whether the disclosure also should be required for an additional period of time; and whether the disclosure should be required for additional registrants, such as all registrants reporting pursuant to Section 15(d), all 13(a) and 15(d) registrants, or all registrants that have not received revenue from operations during each of the last three fiscal years.

In view of the proposed addition of paragraph (g), the Commission also is proposing to retitle Item 401, currently entitled "Directors and Executive Officers." The proposed new title, "Management," reflects the Item's proposed expanded scope.

III. Request for Comment

Any interested persons wishing to submit written comments on the proposed amendments to Item 401 of Regulation S-K, as well as on other matters that might have an impact on the proposals contained herein, are requested to do so. In addition, the Commission requests comment as to whether any other part of Item 410(f) should be revised.

The Commission also requests comment on whether the proposed revisions, if adopted, would have an adverse effect on competition or would impose a burden on competition that is neither necessary nor appropriate in furthering the purposes of the Exchange Act. Comments on this inquiry will be considered by the Commission in complying with its responsibilities under section 23(a)(2) of the Exchange Act.

IV. Initial Regulatory Flexibility Analysis

This initial regulatory flexibility analysis, which relates to proposed amendments to Item 401 of Regulation S-K, has been prepared in accordance with 5 U.S.C. 603.

Reasons for Proposed Action

See Part I *supra.*

Objectives

The basic objective of the proposed amendments is to provide more relevant disclosure to improve investor protection.

See Part I *supra.*

Legal Basis

See Part V *infra.*

Small Entities Subject to Item 401

For purposes of this analysis, the Commission is using the definitions of "small business" as adopted in Release No. 33-6380.[16] That release provides that, when used in reference to the Securities Act, small business means any issuer whose total assets on the last day of its most recent fiscal year were three million dollars or less and is engaged or proposes to engage in "small business financing".[17] When used in reference to an issuer pursuant to the Exchange Act, small business means an issuer that, on the last day of its most recent fiscal year, had total assets of three million dollars or less.[18]

The proposed amendments to Item 401 affect two different groups of issuers. The proposed amendments to 401(f), requiring disclosure of commodities law proceedings, apply to all issuers. Proposed 401(g), requiring information with respect to promoters and control persons, would affect only issuers that have not been subject to the reporting requirements for the twelve months immediately prior to the filing.

1. 401(f)

The information called for by Item 401 is required in all registration statements under the Securities Act. Because an issuer files a registration statement only when it elects to effect a public offering, reliable estimates of the number of small businesses that will be affected by the proposed amendments are difficult to derive. The decision by an issuer to make a public offering traditionally has been a function of, among other things, general economic and market conditions and trends within the particular industry. In the 1983 calendar year, however, 5,674 registration statements were declared effective, of which 2,039 were filed by registrants within the definition of small entity.

Certain issuers selling securities pursuant to exemptions under Regulation D will be affected by the changes to Item 401. Pursuant to Rule 502, an issuer must furnish investors the same kind of information as would be required in Part I of the registration statement such issuer would be eligible

[10] The terms "control" and "promoter" are defined in Rule 405 [17 CFR 230.405] for Securities Act purposes, and in Rule 12b-2 [17 CFR 240.12b-2] for Exchange Act purposes.

[11] 7 U.S.C. 1-26 (1982).

[12] The Item 401 disclosure is required in registration statements under the Securities Act, such as Forms S-1 [17 CFR 239.11], S-11 [17 CFR 239.18], S-15 [17 CFR 239.29], S-18 [17 CFR 239.28] and S-20 [17 CFR 239.20], and in filings under the Exchange Act, such as Form 10 [17 CFR 249.210], Form 10K [17 CFR 249.310] and the proxy statement [17 240.14a-101].

[13] The proposed amendments contain no provisions for commodities proceedings at the state level because, at this time, the states do not have specific statutes relating to commodities transactions.

[14] In any instance in which a registrant provides the information with respect to a promoter or control person pursuant to the existing requirements, because such person meets the definition of director or executive officer in Rule 405 or Rule 3b-7, the registrant need not repeat the information pursuant to proposed paragraph (g).

[15] *See* 17 CFR 240.12g-4, 240.12h-3, 240.15d-1 to -13.

[16] Release No. 33-6380 (January 28, 1982) [47 FR 5215].

[17] 17 CFR 230.157. Small business financing is defined to mean conducting or proposing to conduct an offering of securities which does not exceed the dollar limitation prescribed by Section 3(b) of the Securities Act. Currently the Section 3(b) limitation is $5 million.

[18] 17 CFR 240.0-10.

to use if the offering were registered. Many of those issuers are within the small business definition.[19]

In addition, Item 401 disclosure must be included in registration statements, annual reports and proxy statements under the Exchange Act. The Commission has no means of estimating the size of the class of small issuers, which would be subject to the commodities disclosure in Item 401.[20] Moreover, with the recent adoption of Rules 12g–1[21], 15d–6[22] and 12h–3[23] under the Exchange Act, many small issuers can elect exemption from the periodic reporting requirements of Sections 12(g) or 15(d). No estimates are currently available as to the number of registrants that have elected such exemption.

2. 401(g)

Under proposed 401(g), registrants not subject to the reporting requirements under Section 13(a) or 15(d) of the Exchange Act for the twelve months preceding the filing must disclose legal proceedings involving control persons. This will affect all first time registrants. Of 1,796 effective registration statements filed by first time registrants, in the 1983 calendar year, 788 were filed by small entities. Proposed 401(g) also would require registrants which were not subject to the reporting requirements for the twelve months prior to the filing and which were organized within the past five years to disclose legal proceedings involving promoters. The Commission has no estimates of the number of small entities organized within the past five years.

In addition, the disclosure pursuant to proposed 401(g) would appear in reports pursuant to the Exchange Act as long as the registrant has not been subject to the reporting requirements for the preceding twelve months. The Commission has no estimates of the size of the class of small issuers that would be affected.

Reporting, Recordkeeping and Other Compliance Requirements

See Part II *supra*.

Overlapping or Conflicting Federal Rules

The Commission believes no federal rules duplicate, overlap or conflict with Item 401.

Significant Alternatives

Pursuant to Section 603 of the Regulatory Flexibility Act the following types of alternatives were considered:

(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

(3) the use of performance rather than design standards; and

(4) an exemption from coverage of the rule, or any part thereof, for small entities.

With respect to alternative (3), the Securities Act and the Exchange Act impose obligations on issuers to disclose to investors all information which is material to investment decision-making. These obligations may be considered performance standards. Both Acts also grant the Commission authority to implement the Acts' disclosure objectives through rulemaking; specific disclosure requirements adopted pursuant to this rulemaking authority may be considered design standards. The Commission is proposing the revision in the belief that it is the most appropriate and cost effective approach to meeting its objectives consistent with the Commission's statutory mandate of protecting investors.

In the view of the Commission, alternatives (1), (2) and (4) are inconsistent with the objectives of this rulemaking. First, the disclosure of legal proceedings involving commodities law violations is important, particularly in the case of new issuers, because the current disclosure is insufficient, as discussed in the release. It requires similar information about the same individuals that a registrant already must provide. Second, the Commission proposed the disclosure of certain legal proceedings involving promoters and control persons to improve disclosure to investors and to enhance investor protection with respect to new registrants. While the Commission recognizes that the disclosure produced may effect the registrant's ability to raise capital, the Commission believes that enhanced investor protection far outweighs any burden the proposed amendments to Item 401 might impose on small issuers.

Solicitation of Comments

The Commission encourages the submission of written comments with respect to any aspect of this Initial Regulatory Flexibility analysis. Such written comments will be considered in the preparation of the Final Regulatory Flexibility Analysis if the proposed revisions are adopted.

V. Statutory Basis and Text of Proposed Amendment

Authority

The amendments to Item 401 are being proposed by the Commission pursuant to Sections 6, 7, 8, 10 and 19(a) of the Securities Act of 1933 and Sections 12, 13, 14, 15(d) and 23(a) of the Securities Exchange Act of 1934.

List of Subjects in 17 CFR Part 229

Reporting and recordkeeping requirements, Securities.

Text of Proposal

In accordance with the foregoing, Title 17, Chapter II, of the Code of Federal Regulations is proposed to be amended as follows:

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATIONS S–K

By revising the title and paragraphs (f)(3)(i) and (f)(3)(iii), and adding paragraph (f)(6) and paragraph (g) to § 229.401 as follows:

§ 229.401 (Item 401) Management.

* * * * *

(f) * * *

(3) * * * (i) Acting as a futures commission merchant, introducing broker, commodity trading advisor, commodity pool operator, floor broker, any other person regulated by the Commodity Futures Trading Commission, or an associated person of any of the foregoing, or as an investment adviser, underwriter, broker or dealer in securities, or as an affiliated person, director or employee of any investment company, bank, savings and loan association or insurance company, or engaging in or containing any conduct or practice in connection with such activity;

* * * * *

(iii) Engaging in any activity in connection with the purchase or sale of any security or commodity or in connection with any violation of Federal

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[19] Based upon Form D filings between April, 1982, and April, 1983, the Commission estimates that over 70 percent of the issuers selling securities pursuant to Rules 505 [17 CFR 230.505] and 506 [17 CFR 230.506] were within the definition of small business.

[20] Such class of small issuers was estimated to have numbered 1040 during fiscal year 1979, the most recent year for which a survey of issuers was conducted.

[21] 17 CFR 240.12g–1.

[22] 17 CFR 240.15d–6.

[23] 17 CFR 240.12h–3.

or State securities laws or Federal commodities laws;

* * * * *

(6) Such person was found by a court or competent jurisdiction in a civil action or by the Commodities Futures Trading Commission to have violated any Federal commodities law, and the judgment in such civil action or finding by the Commodities Futures Trading Commission has not been subsequently reversed, suspended or vacated.

* * * * *

(g) *Promoters and control persons.* (1) Registrants, which have not been subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act for the twelve months immediately prior to the filing of the registration statement, report, or statement to which this Item is applicable, and which were organized within the last five years, shall describe with respect to any promoter, any of the events enumerated in paragraphs (f)(1) through (f)(6) that occurred during the past five years and that are material. This subparagraph shall not apply to any subsidiary of a registrant, which has been reporting pursuant to Section 13(a) or 15(d) of the Exchange Act for the twelve months immediately prior to the filing of the registration statement, report or statement.

(2) Registrants, which have not been subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act for the twelve months immediately prior to the filing of the registration statement, report, or statement to which this Item is applicable, shall describe with respect to any control person, any of the events enumerated in paragraphs (f)(1) through (f)(6) that occurred during the past five years and that are material. This subparagraph shall not apply to any subsidiary of a regiatrant, which has been reporting pursuant to Section 13(a) or 15(d) of the Exchange Act for the twelve months immediately prior to the filing of the registration statement, report or statement.

Instruction to Paragraph (g) of Item 401. Instructions 1. through 3. to paragraph (f) shall apply to this paragraph (g).

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 208, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 1, 79 Stat. 1051; sec. 308(a)(2), 90 Stat. 57; secs. 12, 13, 14, 15(d), 23(a), 48 Stat. 892, 894, 895, 901; secs. 1, 3, 8, 49 Stat. 1375, 1377, 1379; sec. 203(a), 49 Stat. 704; sec. 202, 68 Stat. 666, secs. 3, 4, 5, 6, 78 Stat. 565–568, 569, 570–574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3–5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 18, 89 Stat. 117, 118, 119, 155; sec. 308(b), 90 Stat. 57; secs. 202, 203, 204, 91 Stat. 1494, 1498, 1499, 1500; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 781, 78m, 78o(d), 78w(a)).

By the Commission.

Dated: May 2, 1984.

George A. Fitzsimmons,

Secretary.

[FR Doc. 84-12362 Filed 5-7-84; 8:45 am]

BILLING CODE 8010-01-M

17 CFR Part 270

[Release No. IC-13920]

Certain Persons Not Deemed Interested Persons; Definition of Regular Broker or Dealer

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule and rule amendments.

SUMMARY: The Securities and Exchange Commission today is publishing for public comment rule amendments that would conditionally exempt certain persons who are registered brokers or dealers or affiliated persons of registered brokers or dealers from being considered "interested persons" of an investment company, its investment adviser or principal underwriter. The proposed amendments are intended to expand the pool from which disinterested investment company directors may be chosen. The Commission is also proposing a rule that would define the term "regular broker or dealer." The proposed rule is designed to provide an objective standard by which an investment company can determine whether a particular broker-dealer is a "regular broker or dealer."

DATE: Comments should be received on or before July 2, 1984.

ADDRESS: Comments should be submitted in triplicate to George A. Fitzsimmons, Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, D.C. 20549. Comment letters should refer to File No. S7-18-84. All comments received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street NW., Washington, D.C. 20549.

FOR FURTHER INFORMATION CONTACT: Elizabeth K. Norsworthy, Chief, Office of Regulatory Policy, (202) 272-2048, and Brian M. Kaplowitz, Esq. (202) 272-3024, Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street NW., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: The Commission is publishing for public comment proposed amendments to rule 2a-5 (to be renumbered rule 2a19-1) under the Investment Company Act of 1940 ("Act") (15 U.S.C. 80a-1 et seq.) rule 2a-5 presently affords a narrow exemption from the definition of "interested person" contained in section 2(a)(19) of the Act (15 U.S.C. 80a-2(a)(19)) for certain persons who are within the definition solely because they are brokers or dealers registered under the Securities Exchange Act of 1934 ("1934 Act") (15 U.S.C. 78a-1 et seq.) or affiliated persons of such brokers or dealers. The proposed amendments are intended to expand the pool from which disinterested investment company directors may be chosen. While broker-dealers and their affiliated persons presently may serve on investment company boards of directors, in most cases they must be considered interested persons of the company even when they or their firms have no other business relationship with the company. The Commission also is proposing rule 10b-1 to define the term "regular broker or dealer" which is used in section 10(b) of the Act (15 U.S.C. 80a-10(b)) and in form N-1R (17 CFR 274.101), the annual report for management investment companies, as well as in an alternative formulation of the amendments to rule 2a-5 upon which comment is being requested. Proposed rule 10b-1 is intended to provide an objective standard by which an investment company can determine whether a particular broker-dealer is a "regular broker or dealer" of the company.

Background

In 1970, Congress acted to strengthen independent checks on management of investment companies by adding the term "interested person" to the Act in section 2(a)(19). [1] "Interested person"

[1] Section 2(a)(19) was added to the Act as part of the Mutual Fund Amendments of 1970. Pub. L. 91-547, Sec. 2(a)(3), 84 Stat. 1413 (1970). As originally proposed in 1967, the section would have characterized as an interested person of an investment company, or of its adviser or principal underwriter, any person having a material business relationship with those entities. The proposed legislation also would have amended section 10(b)(1) of the Act [15 U.S.C. 80a-10(b)(1)] to require that a majority of the directors of any investment company not be interested persons of a regular broker employed by the company; the proposed amendments to section 10(b)(1) would have substituted the phrase interested person for affiliated person in that section. *See* sections 5(b) and 2(3) of S. 1659, Hearings on S. 1659 Before a Subcom. of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 5, 3 (1967). However, sections 5(b) and 2(3) of H.R. 9510, Hearings on H.R. 9510 and 9511 Before a Subcom. of the House Comm. on Interstate and Foreign Commerce, 90th Cong., 1st Sess. 5, 3 (1967). However as a result of discussions with the Commission and as a result of discussions with the Commission and the industry, Congress revised the proposed legislation to exclude any amendment of section 10(b)(1) and to include instead in the definition of interested person any broker or dealer registered under the Securities Exchange Act of 1934 and any affiliated person of such a broker or dealer. The section as it applies to broker-dealers contrasts with other provisions in the section that include as interested persons only those who have a

Continued

was then substituted for "affiliated person" [2] in other provisions of the Act to expend the class of persons covered by them.[3] These other provisions related to the composition of investment company boards of directors and the vote of the directors on particular matters. The Commission too has relied on the concept of interested person in its recent regulatory simplification efforts with respect to investment companies. The Commission has adopted a number of rules [4] and has granted several exemptive orders that substitute the scrutiny of the disinterested directors for Commission review of certain transactions or arrangements that are otherwise prohibited under the Act.[5]

a. Provisions of the Act Relating to the Composition of Investment Company Boards of Directors

Section 10 of the Act (15 U.S.C. 80a–10) is the major provision governing the composition of investment company boards of directors.[6] Section 10(a) provides that no more than 60 percent of an investment company's board of directors may be interested persons of that company. Congress enacted this provision to ensure that "at least 40 percent of the board of directors of an investment company [will] be 'independent' [of the company's management]" [7] and that shareholder interests will be adequately represented.[8]

The problem which gave rise to the enactment of section 10(a) was described by the Commission's representative during the hearings on the Act. He pointed out that the nature of the relationship between a manager of an investment company and the company itself is such that there is a possibility that the manager may be tempted to operate the company in its own best interest, rather than in the interests of the company's shareholders.[9] Because of section 10(a), however, an investment company manager must consider how the disinterested directors will react to its actions.[10]

Section 10(b)(2) of the Act addresses a similar problem. To prevent brokers, dealers, and investment bankers from controlling investment companies and using those companies "solely as financial adjuncts to enhance their own banking and brokerage business," [11] section 10(b)(2) prevents an investment company from using as its principal underwriter any director, officer or employee of the company, or any person of which the director, officer or employee is an interested person, unless a majority of the board of directors are not interested persons of the underwriter.[12]

Another section of the Act dealing with the composition of investment company boards of directors is section 15(f)(1)(A) (15 U.S.C. 80a–15(f)(1)(A)), enacted as part of the Securities Acts Amendments of 1975.[13] Section 15(f) was enacted to clarify the circumstances under which an adviser to a registered investment company could receive compensation for the sale of its advisory contract.[14] As such, the section is concerned primarily with the percentage of an investment company's directors which are interested persons of either the new or former investment adviser.[15]

b. Provisions of the Act Relating to Voting by Investment Company Boards of Directors

A director's affiliation with a broker-dealer is relevant not only to the composition of an investment company's board of directors, but also to certain of

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significant relationship with the company. Congress may have broadened the scope of the section with respect to broker-dealers and their affiliates in view of the relationships that existed in investment company brokerage arrangements during the era of fixed commission rates. *See generally*, Report of the Securities and Exchange Commission on the Public Policy Implications of Investment Company Growth ("PPI"), H.R. Rep. No. 2337, 89th Cong., 2nd Sess. at 162–188 (1966).

[2] The term "affiliated person" is defined in section 2(a)(3) of the Act (15 U.S.C. 80a–2(a)(3)) as:

(A) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 per centum or more of the outstanding voting securities of such other person; (B) any person 5 per centum or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person; (C) any person directly or indirectly controlling, controlled by, or under common control with, such other person; (D) any officer, director, partner, copartner, or employee of such other person; (E) if such person is an investment company, any investment adviser thereof or any member of an advisory board thereof; and (F) if such other person is an unincorporated investment company not having a board of directors, the depositor thereof.

[3] The term "interested person" is much broader than the term "affiliated person." *Compare* section 2(a)(19) of the Act *supra* note 1, with section 2(a)(3) of the Act, *supra* note 2. Congress determined that the term "affiliated person" did not sufficiently guard against conflicts of interest on the part of those persons taking an active role in investment company affairs. *See, e.g.*, H.R. Rep. No. 1382, 91st Cong., 1st Sess. 13–14 (1970); S. Rep. No. 184, 91st Cong., 1st Sess. 32–33 (1969). Congress has also used the term interested person in more recent legislation to address potential conflicts of interest. The Small Business Investment Incentive Act of 1980, Pub. L. 94–477, 94 Stat. 2275 (1980), for example, which now comprises sections 54 to 65 of the Act (15 U.S.C. 80a–53 to 64), employs the term in various of its provisions.

[4] *See, e.g.*, rule 10f–3 (17 CFR 270.10f–3), which permits an investment company to acquire securities during the existence of certain underwriting or selling syndicates, provided, *inter alia*, that a majority of the disinterested directors have adopted certain procedures to ensure that the company is complying with the conditions of the rule; rule 12b–1 (17 CFR 270.12b–1), which allows a registered open-end management investment company to use its assets to finance the distribution of its shares pursuant to a plan of distribution that, *inter alia*, has been approved by, and may be terminated by, a majority of the disinterested directors; rule 17a–7 (17 CFR 270.17a–7), which permits certain purchase or sale transactions between an investment company and certain of its affiliated persons where, *inter alia*, a majority of the company's disinterested directors have adopted certain procedures to ensure that the company is complying with the rule; rule 17a–8 (17 CFR 270.17a–8), which permits the mergers of certain affiliated investment companies provided, *inter alia*, that a majority of the disinterested directors of each company make certain findings; rule 17d–1(d)(7) (17 CFR 270.17d–1(d)(7)), which permits an investment company and certain of its affiliated persons to jointly purchase liability insurance policies provided, *inter alia*, that a majority of the disinterested directors determine that the company's participation is in its best interests and that the proposed premium is fair and reasonable; and rule 17e–1 (17 CFR 270.17e–1), which permits an affiliated broker to receive a usual and customary broker's commission from an investment company provided, *inter alia*, that a majority of the disinterested directors have adopted certain procedures to monitor such transactions.

[5] *See, e.g.*, Fidelity Fund, Inc., et al., Investment Company Act Release Nos. 12851 (November 24, 1982), 47 FR 54389 (December 2, 1982), and 12912 (December 21, 1982), permitting the investment company applicants to buy certain securities of certain affiliated banks provided, *inter alia*, that the disinterested directors adopt and periodically review procedures for effecting the proposed transactions, and determine that the transactions comply with those procedures.

[6] For business development companies, section 56 of the Act (15 U.S.C. 80a–55) governs the composition of boards of directors. A majority of the board of each such company must not be interested persons of that company.

[7] H.R. Rep. No. 2639, 76th Cong., 3rd Sess. 14 (1940); S. Rep. No. 1775, 76th Cong., 3rd Sess. 14 (1940).

[8] *See* Hearings on S. 3580 Before a Subcom. of the Senate Comm. on Banking and Currency, 76th Cong., 3rd Sess. 209 (1940).

[9] *See* Hearings on H.R. 10065 Before a Subcom. of the House Comm. on Interstate and Foreign Commerce, 76th Cong., 3rd Sess. 109 (1940).

[10] For a prominent example of the potential effectiveness of independent directors, *see* Investment Company Act Release No. 8646 (January 21, 1975), 40 FR 4054 (January 28, 1975), where an investment company's board of directors, following an investigation and unanimous recommendation by its disinterested members, terminated the company's advisory contract and retained a new adviser over the previous adviser's objections.

[11] H.R. Rep. No. 2639, 76th Cong., 3rd Sess. 8 (1940).

[12] *See also* sections 10(b)(1) and 10(b)(3), which are designed to prevent the board from being dominated by regular brokers or dealers of the company or by any investment banker.

[13] Pub. L. 94–29, Sec. 28(1), 89 Stat. 164 (1975).

[14] H.R. Rep. No. 123, 94th Cong., 1st Sess. 90 (1975).

[15] Generally speaking, an investment adviser will be shielded by section 15(f)(1) from any liability which may result from the sale of its advisory contract, provided that two conditions are met: (A) For a period of three years after the transfer of the advisory contract, 75 percent of the members of the investment company's board of directors are not interested persons of either the new or the old investment adviser, and (B) the transaction does not impose an "unfair burden" on the investment company.

the Act's provisions which deal with the type of vote required on specified matters. Probably the most important section governing these votes is section 15(c) [15 U.S.C. 80a–15(c)]. It requires that any contract with an investment company's investment adviser or principal underwriter be approved by the vote of a majority of directors who are neither parties to the contract nor interested persons of any party to the contract. This requirement is designed to subject any advisory or underwriting contract to the scrutiny of directors who are independent of the investment company's adviser or underwriter so that an equitable agreement will result.[16]

More recently, in the 1980 amendments to the Act,[17] Congress gave business development companies ("bdc's") relief from certain of the Act's regulatory provisions provided that a "Required majority" of the board of directors approves the proposed transaction, plan or arrangements.[18] "required majority" is defined to mean a majority of the bdc's directors who are not interested persons of the company and who have no financial interest in the matter being considered.[19]

As indicated above, under section 2(a)(19) of the Act, any broker-dealer registered under the 1934 Act and any affiliated person of a registered broker-dealer is considered an interested person of an investment company and of any investment adviser of or principal underwriter for the investment company. In interpreting section 2(a)(19), the staff of the Commission has taken the position that the section also includes as an interested person any individual affiliated with an entity which is in a control relationship with a registered broker-dealer.[20] In such situations, the second-tier affiliation is "collapsed" into the first-tier affiliation. This means that an investment company director who is an officer or director of a holding company parent of the broker-dealer or a company under common control with the broker-dealer may be considered to be an interested person of the investment company.[21]

The Commission granted limited relief from the section when it adopted rule 2a–5 (17 CFR 270.2a–5) in 1977.[22] That rule provides that a person affiliated with a registered broker-dealer will not be considered an interested person of an investment company, its investment adviser, or principal underwriter, if the only function of the broker-dealer is to distribute shares of other investment companies and if the company in question does not purchase those shares. The rule was intended primarily to provide exemptive relief to persons affiliated with broker-dealers whose only function is to distribute variable annuity contracts, variable life insurance contracts or shares for mutual funds in the same complex as the broker-dealer.

The Commission has also issued a number of orders granting exemptive relief from section 2(a)(19) where it found that potential conflicts of interest were sufficiently minimized.[23] Although the representations and undertakings contained in the applications requesting such orders vary, certain generalizations can be made.

The most important consideration in prior exemptive orders has been the amount of business, particularly portfolio or distribution business, that the director's affiliated broker-dealer could do with or on behalf of the investment company or the complex to which it belongs. Typically, the company has undertaken that, for as long as the director is not to be considered an interested person, the company would not use the broker-dealer for its portfolio or distribution business, or that the company would not do any business at all with the broker-dealer.[24] A number of applicants have also represented that other investment companies in the same complex would not do business with the broker-dealer.[25] Virtually all the applications containing an undertaking concerning an investment company's business with the broker-dealer involved situations where it was unlikely that the company would ever want or be able to do business with the broker-dealer in light of the company's investment policies.[26] Moreover, the applications frequently contained an express representation that the company (or complex) would not be adversely affected by refraining from doing business with the broker-dealer.[27]

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[16] *See* H.R. Rep. No. 2639, 76th Cong., 3rd Sess. 17 (1940); section 15(c) originally required approval of the advisory and underwriting agreements by a majority of directors who were not affiliated persons of the parties to those agreements. Not only do advisory and underwriting agreements, as separate arrangements, require independent scrutiny, but the fact that advisory fees are often affected by the underwriting function also creates problems:

> Since in most instances the principal underwriter is also the investment adviser or closely affiliated with the adviser, the economic benefits derived from the discharge of the underwriting function are not limited to underwriting compensation as such. Growth in the size of the fund which results from new share sales outpacing redemption increases the annual advisory fee.

PPI at 55.

Cf. section 32(a) (15 U.S.C. 80a–31(a)), which requires a majority of the disinterested directors to approve the selection of the company's independent accountant.

[17] The Small Business Investment Incentive Act of 1980, Pub. L. 94–477, 94 Stat. 2275 (1980).

[18] *See, e.g.*, Section 57(f) (15 U.S.C. 80a–56(f)).

[19] *See* section 57(o) (15 U.S.C. 80a–56(o)). It should be remembered that the disinterested directors of a business development company must comprise a majority of its board. As indicated in the legislative history, the reason this is different from section 10(a) is because:

> The special status of [business development] companies under the Act places particular responsibility on their boards of directors to assure compliance with the Act's provisions, particularly where board approval is made expressly a substitute for Commission review or a *per se* restriction.

H.R. Rep. No. 1341, 96th Cong., 2nd Sess. 25 (1980).

[20] This is often the fact pattern described in applications for exemptive relief from section 2(a)(19). *See, e.g.*, the notices of applications for exemption from section 2(a)(19) filed by Fidelity Fund, Inc., et al., Investment Company Act Release No. 12604 (August 16, 1982), 42 FR 36734 (August 23, 1982), and Sears U.S. Government Money Market *et al., infra* note 32. Under section 2(a)(9) of the Act (15 U.S.C. 80a–2(a)(9)), "control" means the power to exercise a controlling influence over the management of policies of a company, unless such power is solely the result of an official position with the company.

[21] In the discussion that follows, directors with such second-tier affiliations with registered broker-dealers are discussed in the same way as directors with first-tier affiliations.

[22] Investment Company Act Release No. 9886 (August 10, 1977), 42 FR 41406 (August 17, 1977).

[23] Section 6(c) of the Act states:

> The Commission, by rules and regulations upon its own motion, or by order upon application, may conditionally or unconditionally exempt any person, security or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of [the Act] or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of [the Act].

[24] *See, e.g.*, American Balance Fund, Inc., et al., Investment Company Act Release No. 13740 (January 27, 1984), 49 FR 4294 (February 3, 1984); New York Municipal Fund for Temporary Investment, Inc., et al., Investment Company Act Release No. 13440 (August 16, 1983), 48 FR 38362 (August 23, 1983); Aetna Life Insurance and Annuity Co., et al., Investment Company Act Release No. 13401 (July 22, 1983), 48 FR 35201 (August 3, 1983); Dean Witter Developing Growth Securities Trust, Investment Company Act Release No. 13179 (April 21, 1983), 48 FR 19103 (April 27, 1983); Chancellor Cash Fund, Inc., et al., Investment Company Act Release No. 12372 (April 14, 1982), 47 FR 17144 (April 21, 1982).

[25] *See, e.g.*, Pioneer Fund, Inc., et al., Investment Company Act Release No. 11060 (February 28, 1980), 45 FR 14736 (March 6, 1980).

[26] *See, e.g.*, Putnam Qualified Accumulation Trust, et al., Investment Company Act Release No. 11935 (September 14, 1981), 46 FR 46454 (September 18, 1981); Massachusetts Financial High Income Trust, et al., Investment Company Act Release No. 11831 (June 25, 1981), 46 FR 34443 (July 1, 1981).

[27] *See, e.g.*, American Birthright Trust, et al., Investment Company Act Release No. 13515 (September 20, 1983), 48 FR 44135 (September 27, 1983); Tri-Continental Corp., Investment Company

Continued

Investment companies that undertook not to do business with the broker-dealer in the future also often represented that the company or complex had not done business with the broker-dealer in the past.[28] On occasion, the applicant also represented that the company's investment adviser and principal underwriter had never done any business with the broker-dealer.[29] These representations were intended to provide assurance that the director would feel no sense of indebtedness to the adviser for portfolio business previously allocated to his or her affiliated broker-dealer,[30] and that the company would not be harmed by refraining from doing business with the broker-dealer in the future.

In those applications where the applicant represented that the company would be adversely affected by refraining from doing business with the director's affiliated broker-dealer, such as where the broker-dealer was a major force in the market, a *de minimis* test was used. Applicants generally represented that the amount of brokerage commissions paid to and dealer markups earned by the director's affiliated broker-dealer from the funds were *de minimis* in relation to the broker-dealer's annual gross revenues.[31] These applicants also often represented that the director's interest in or relationship with the affiliated broker-dealer was fairly tenuous; that he or she did not have a significant financial interest in the broker-dealer and was not responsible for its operations.[32] Applicants also typically undertook that, where there was some business with the affiliated broker-dealer, as a condition to the order, the director concerned would not participate in discussions of, or vote on, the selection of broker-dealers who execute the company's portfolio transactions or who engage in principal transactions with the company.[33] The director concerned would also not participate in discussions of or vote on any matter involving a relationship between the company and the director's affiliated broker-dealer.[34] These voting restrictions were not intended to limit or prohibit the director from voting and acting upon matters relating to the approval or continuation of the company's investment advisory and underwriting contracts.

Discussion

a. The proposed amendments to rule 2a–5

The frequency of applications for exemptive relief from section 2(a)(19) and the variation in those applications has caused the Commission to reexamine the exemptive relief afforded by rule 2a–5 and existing exemptive orders. The present rule provides only a narrow exemption from the section. The proposed amendments are intended to broaden the pool from which disinterested directors may be chosen without the need for an exemptive order, and to standardize the conditions under which a director may be considered disinterested.[35] At the same time, the Commission believes that the conditions of the proposed amendments would minimize potential conflicts of interest for any director who would be considered disinterested under the rule.

There are a number of potential conflicts of interest facing an investment company director affiliated with a broker-dealer. First, the company's investment adviser determines which broker-dealers will receive the portfolio business of the company and other investment companies in the same complex. In addition, the adviser may allocate portfolio business for its own portfolio or for the portfolios of advisory clients outside the complex. A director affiliated with a broker-dealer arguably may be less objective about the advisory agreement or its renewal because he would want the adviser to give its brokerage business to his firm.

Similarly, the company's principal underwriter decides which broker-dealers will distribute shares of the company and its sister funds. That underwriter may also be involved in the selection of broker-dealers who will participate in distributions of other issuers. A director affiliated with a broker-dealer arguably might not be objective in choosing or evaluating the company's underwriter, because of a desire that the underwriter select his broker-dealer firm to handle share distribution for companies in or out of the complex.

Such potential conflicts of interest are much less likely to arise, however, where the broker-dealer does not do any portfolio or distribution business with the fund or its complex. Therefore, the proposed rule provides that, for a fund director who is, or is affiliated with, a broker-dealer to be considered disinterested, the broker-dealer must not do any business with the fund or its complex for as long as the director is considered disinterested. "Complex" would be defined to mean the company on whose board the director sits, its investment adviser and principal underwriter, and other companies having the same investment adviser or principal underwriter.

The revised rule would also provide that only a minority of the disinterested directors of any investment company may be affiliated with registered broker-dealers.[36] The Commission believes that it would be inconsistent with the legislative intent behind section 2(a)(19) to permit all of the company's disinterested directors or for that matter, all members of the board, to be registered broker-dealers or affiliated with registered broker-dealers.

Act Release No. 12414 (April 30, 1982), 47 FR 19607 (May 6, 1982); Pioneer Fund, Inc., et al., *supra* note 28.

[28] *See, e.g.*, Intercapital Income Securities, Inc., et al., Investment Company Act Release No. 11855 (July 9, 1981), 46 FR 34143 (July 17, 1981); Precious Metals Holdings, Inc., Investment Company Act Release No. 11828 (June 24, 1981), 46 FR 33690 (June 30, 1981); American General Bond Fund, et al., Investment Company Act Release No. 9623 (June 22, 1977), 42 FR 32859 (June 28, 1977).

[29] *See, e.g.*, Gintel Fund, Inc., et al., Investment Company Act Released No. 12152 (January 8, 1982), 47 FR 2440 (January 15, 1980).

[30] *Cf.* Sections 2(a)(19)(A)(vi) and (B)(vi), which include as an "interested person" any natural person whom the Commission finds by order to have had, *at any time since the beginning of the last two fiscal years* of the investment company, its investment adviser or principal underwriter, a material business relationship with those entities. These provisions were intended to ensure that where an investment company director may feel an obligation to another person because of a significant business relationship, the director would not be treated as independent of that person. *See* H.R. Rep. No 1382, 91st Cong., 2d Sess. 13–15 (1970); S. Rep. No. 184, 91st Cong., 1st Sess. 32–34 (1970).

[31] *See, e.g.*, Massachusetts Financial High Income Trust, et al., Investment Company Act Release No. 12304 (March 17, 1982), 47 FR 12708 (March 24, 1982); The George Putnam Fund of Boston, et al., Investment Company Act Release No. 12279 (March 8, 1982), 47 FR 11131 (March 15, 1982).

[32] *Id.* A similar representation was generally made in applications where the applicant undertook to refrain from doing business with the broker-dealer. *See, e.g.*, American Balanced Fund, Inc., et al., *supra* note 24; Sears U.S. Government Money Market Trust, et al., Investment Company Act Release No. 12337 (March 30, 1982), 47 FR 15199 (April 8, 1982).

[33] *See, e.g.*, Cash + Plus Trust, et al., Investment Company Act Release No. 12714 (October 7, 1982), 47 FR 46017 (October 14, 1982), Trustfunds Liquid Assests Trust, Investment Company Act Release No. 12104 (December 14, 1981), 46 FR 61979 (December 21, 1981)

[34] *See, e.g.*, Massachusetts Financial High Income Trust, et al., *supra* note 31; Trustfunds Liquid Asset Trust, *supra* note 33.

[35] Investment companies with existing exemptive orders providing exemptive relief broader than proposed rule 2a19–1 may continue to rely on such orders. However, since the orders relate to particular individuals, once they cease serving as directors, other individuals would be subject to the rule, if adopted.

[36] Any investment company director affiliated with a broker-dealer who is currently considered disinterested under an exemptive order would be counted as affiliated with a broker-dealer for purposes of determining whether a minority of the company's disinterested directors are broker-dealers or their affiliates.

b. Alternative Proposal

While the Commission believes that the amendments as proposed are the best approach to striking a balance between broadening the pool from which investment companies could recruit experienced disinterested directors and minimizing potential conflicts of interest for those directors, it is soliciting comment on an alternative approach.

This alternative is based on the hypothesis that some business can be done with a director's independence. Under this hypothesis, it is assumed that a director would not be subject to potential conflicts of interest so long as the mark-ups and commission earned by the director's affiliated broker-dealer do not exceed certain specified percentages.[37]

Under the alternative, the investment company and its complex[38] would be permitted to do some business with the director's affiliated broker-dealer, provided that (1) the broker-dealer, during its most recent fiscal year, has not received as compensation more than (a) one percent of its consolidated gross revenues from executing portfolio transactions for the company, engaging in principal transactions with the company, and distributing shares of the company or (b) five percent of its consolidated gross revenues from performing those functions for the complex; and (2) no company in the complex uses the broker-dealer as a "regular broker or dealer" as that term is defined in proposed rule 10b–1. It is anticipated that the director would provide the company with sufficient information about the broker-dealer to determine whether these suggested conditions are met.

The alternative formulation, as noted, would provide that a director could only be considered disinterested if the director's affiliated broker-dealer does not act as a "regular broker or dealer" for the investment company or for any other entity in the same complex, whether that other entity is another investment company, the adviser or principal underwriter. Proposed rule 10b–1 would define "regular broker or dealer" as one of the ten broker-dealers which, during an investment company's most recent fiscal year: (1) Engaged as principal in the largest dollar amounts of portfolio transactions with the company; (2) received the greatest dollar amounts of brokerage commissions by virtue of direct or indirect participation in the company's portfolio transactions; or (3) sold the largest dollar amounts of the company's shares.[39] This condition focuses on whether the investment company or any other company in the some complex is a steady customer of the director's affiliated broker-dealer, and is an important supplement to the percentage-of-revenues test. Even where a particular company accounts for a relatively small percentage of a broker-dealer's revenues, that company could still be important to the broker-dealer as a steady customer.

The alternative would provide all investment companies with the option of doing portfolio or distribution business with the broker-dealer, rather than limiting this option to those companies which would be harmed by total abstention from such business. Where an investment company would use the broker-dealer for portfolio or distribution business, the amount of business which would be permitted would exceed that done under most prior exemptive orders,[40] the director would be able to discuss and vote on the company's use of broker-dealers, and the exemption would in no way depend on the nature of the director's relationship with the broker-dealer. However, as in the proposed amendments, no more than a minority of the company's disinterested directors could be broker-dealers or their affiliates.

Proposed Rule 10b–1

Although the term "regular broker" is used in section 10(b)(1) of the Act[41] and in form N–1R,[42] there is no definition of that term in the Act or the Commission's rules. The Commission, therefore, believes it is appropriate to propose a definition. Defining the term would be made yet more important in the event of adoption of the alternative formulation of the amendments to rule 2a–5.

Prior to 1940, when the Act was passed, investment company directors affiliated with broker-dealers often controlled the allocation of their company's brokerage business.[43] Section 10(b) prevents an investment company director from controlling the allocation of the company's brokerage by providing that the company cannot use the director or the director's affiliates as a regular broker unless a majority of the board members are not regular brokers or affiliates of regular brokers.[44]

The Commission believes that 30, 31 and 66 of form N–1R provide a good measure of what should constitute a "regular broker or dealer" of an investment company. Under this definition, a "regular broker or dealer" would be any broker-dealer which, during the company's most recently ended fiscal year, was among the ten broker-dealers which (1) engaged as principal in the largest dollar amounts of portfolio transactions with the company,[45] (2) received the greatest dollar amounts of brokerage commissions by virtue of direct or indirect participation in the company's portfolio transactions,[46] or (3) sold the largest dollar amounts of the company's shares.[47]

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[37] Since the proxy rules for the election of investment company directors require disclosure of the amount of commission paid to any broker which is an affiliated person of an affiliated person of an investment company, any shareholder who objects to a director's affiliated broker-dealer receiving a given level of commissions can always choose not to vote for that director. Rule 20a–2 (17 CFR 270.20a–2).

[38] As in the proposed amendments, "complex" would be defined to include the investment company, its investment adviser and principal underwriter and all other investment companies having the same investment adviser or principal underwriter.

[39] As discussed *infra*, a management investment company is already required to identify these broker-dealers in its annual report on form N–1R. If the alternative approach is adopted, proposed rule 10b–1 would have to be modified to apply to a "regular broker or dealer" of an investment company's investment adviser and principal underwriter.

[40] *See, e.g.*, the application of Massachusetts Financial High Income Trust, et al., *supra* note 31, File No. 812–5038 (markups and commissions from the investment company applicants constituted less than one percent of the broker-dealer's gross revenues).

[41] *See supra*, notes 11–12 and accompanying text. While proposed rule 10b–1 defines the phrase "regular broker or dealer," it is intended to embrace the term "regular broker," as used in section 10(b)(1).

[42] Item 4 of the form requires disclosure of whether 50 percent or more of the investment company's directors were regular brokers for the investment company or affiliated persons of such regular brokers.

[43] *See supra*, Notes 11–12 and accompanying text.

[44] *See generally*, Report of the Securities and Exchange Commission on Investment Trusts and Investment Companies ("Trust Study"), Part III, 2485–2581. *See also*, Statement of David Schenker, Hearings on S. 3580 Before a Subcom. of the Senate Comm. on Banking and Currency, 76th Cong., 3rd Sess. 878–888 (1940). The Trust Study also noted that a broker would frequently act as a sponsor of an investment company and would later transfer control of the company with the express or tacit understanding that it would receive the company's brokerage business. *Id.* at 1304–1318. Moreover, the Trust Study found that a full measure of sponsorship was not required to secure the investment company's brokerage business; "[A] modest participation in the financing or the presence of a member of the firm on the board of directors may be sufficient to deflect some of the brokerage business to an investment banking house [which aided in the organization of the investment company]." *Id.* at 2516.

[45] Item 30 of Form N–1R.

[46] Item 31 of Form N–1R.

[47] Item 66 of Form N–1R.

List of Subjects in 17 CFR Part 270

Investment companies, Reporting and recordkeeping requirements, Securities.

Text of Proposed Rules

It is proposed to amend Part 270 of Chapter II of Title 17 of the Code of Federal Regulations as follows:

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

1. By revising and redesignating § 270.2a–5 (rule 2a–5) as § 270.2a19–1 as follows:

§ 270.2a19–1 Certain investment company directors not deemed interested persons.

A director of a registered investment company shall not be deemed an interested person, as defined by section 2(a)(19) of the Act, of such company, or of any investment adviser of or principal underwriter for such company solely because such director is a broker or dealer registered under the Securities Exchange Act of 1934 or an affiliated person of such a broker or dealer, *provided that:*

(a) The broker-dealer does not execute any portfolio transactions for the company's complex, engage in any principal transactions with the complex or distribute shares for the complex;

(b) No more than a minority of the directors of the company who are not interested persons of the company are registered broker-dealers or affiliated persons of registered broker-dealers; and

(c) For purposes of this rule, "complex" shall mean the registered investment company, its investment adviser and principal underwriter, and all other investment companies having the same investment adviser or principal underwriter.

2. By adding §270.10b–1 (rule 10b–1) to read as follows:

§ 270.10b–1 Definition of regular broker or dealer.

The term "regular broker or dealer" of an investment company shall mean:

(a) One of the ten broker-dealers that received the greatest dollar amount of brokerage commissions by virtue of direct or indirect participation in the company's portfolio transactions during the company's most recent fiscal year;

(b) One of the ten dealers that engaged as principals in the largest dollar amount of portfolio transactions of the investment company during the company's most recent fiscal year, or

(c) One of the ten dealers that sold the largest dollar amonts of securities of the investment company during the company's most recent fiscal year.

Statutory Basis

The proposed amendments to rule 2a–5 (rule 2a19–1) and proposed rule 10b–1 would be adopted by the Commission pursuant to the authority granted the Commission in sections 6(c) (15 U.S.C. 80a.–6(c)) and 38(a) (15 U.S.C. 80a–37(a)) of the Act.

Regulatory Flexibility Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act (15 U.S.C. 605(b)), the Chairman of the Commission has certified that the proposed amendments to rule 2a–5 and proposed rule 10b–1 will not, if adopted, have a significant impact on a substantial number of small entities. This certification, including the reasons therefor, is attached to this release.

Dated: May 2, 1984.

George A. Fitzsimmons,

Secretary.

Regulatory Flexibility Certification

I, John S.R. Shad, Chairman of the Securities and Exchange Commission, hereby certify pursuant to 5 U.S.C. 605(b) that the proposed amendments to rule 2a–5 (to be renumbered rule 2a19–1) [17 CFR § 270.2a19–1] and proposed rule 10b–1 under the Investment Company Act of 1940 ("Act") [15 U.S.C. 80a–1 et seq.], set forth in Investment Company Act Release No. 13920, if promulgated, will not have a significant economic impact on a substantial number of small entities. The reason for this certification is that the proposed amendments to rule 2a–5 would simply remove registered broker-dealers and their affiliates from the definition of "interested person" under certain circumstances, thereby relieving affected management investment companies of the short delays and small costs of obtaining an exemptive order from the Commission. Proposed rule 10b–1 would simply define the term "regular broker or dealer" in terms of information already supplied to the Commission in the annual reports of management investment companies, and I see no costs to a substantial number of entities, regardless of size, arising in connection with that definition.

Dated: May 2, 1984.

John S. R. Shad,

Chairman.

[FR Doc. 84–12363 Filed 5–7–84; 8:45 am]

BILLING CODE 8010–01–M

17 CFR Part 275

[Release No. IA–911; S7–981]

Withdrawal of Proposed Rule Relating to Performance Fees Based Upon a Share of Capital Gains Upon or Capital Appreciation of a Client's Account

AGENCY: Securities and Exchange Commission.

ACTION: Withdrawal of proposed rule.

SUMMARY: The Commission is withdrawing a proposed exemptive rule under the Investment Advisers Act of 1940 which, if adopted, would have permitted registered investment advisers to charge certain clients performance or incentive fees. Investment advisers subject to registration under the Advisers Act generally are prohibited from entering into advisory contracts providing for incentive fees. The Commission has decided not to provide exemption relief by rulemaking at this time based on comments received and further analysis.

EFFECTIVE DATE: May 8, 1984.

FOR FURTHER INFORMATION CONTACT: Mary Podesta, Special Counsel (202–272–2039) or Forrest R. Foss, Attorney (202–272–3038), Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission ("Commission") is today withdrawing proposed rule 205–3 under the Investment Advisers Act of 1940 ("the Advisers Act"). The rule, which was proposed for public comment on June 10, 1983, if adopted,[1] would have permitted a registered investment adviser to be compensated on the basis of a share of the capital gains on or capital appreciation of a client's account. This type of compensation, which is commonly referred to as a "performance" or "incentive" fee, is prohibited by Section 205 of the Advisers Act except in limited circumstances specified in Section 205 or pursuant to Commission exemptive rule or order.

The comments which the Commission received reflect divergent views on the proposal. In view of those comments, and upon further analysis of the proposed rule, the Commission has determined not to provide general exemptive relief from section 205 by rule at this time.

[1]Investment Advisers Act (IA) Release No. 865 (48 FR 27771).

By the Commission.
May 2, 1984.
George A. Fitzsimmons,
Secretary.
[FR Doc. 84-12364 Filed 5-7-84; 8:45 am]
BILLING CODE 3010-01-M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 935

Proposed Modification to the Ohio Permanent Regulatory Program Under the Surface Mining Control and Reclamation Act of 1977

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

ACTION: Proposed rule.

SUMMARY: In response to the State's request, OSM is considering modifying the deadline for Ohio to satisfy a condition of approval of the State's permanent regulatory program (hereinafter referred to as the Ohio program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The condition concerns the Ohio bonding system.

DATE: Comments not received on or before 4:00 p.m. June 7, 1984 will not necessarily be considered.

ADDRESSES: Written comments must be mailed or hand-delivered to: Office of Surface Mining, Columbus Field Office, 2nd Floor, 2242 South Hamilton Road, Columbus, Ohio 43227.

FOR FURTHER INFORMATION CONTACT: Ms. Nina Rose Hatfield, Director, Columbus Field Office, Office of Surface Mining, Room 202, 2242 South Hamilton Road, Columbus, Ohio 43227; Telephone: (614) 866-0578.

SUPPLEMENTARY INFORMATION:

I. Background

The Ohio program was approved effective August 16, 1982, by notice published in the August 10, 1982 Federal Register (47 FR 34688). The approval was conditioned on the correction of 28 minor deficiencies contained in 11 conditions—(a), (b), (c), (d), (e), (f)(1)–(f)(10), (g), (h)(1)–(h)(3), (i)(1)–(i)(3), (j) and (k)(1)–(k)(5). In accepting the Secretary's conditional approval, Ohio agreed to correct deficiencies (a), (b), (c), (h)(1) and (k)(1) by August 8, 1983; deficiency (e) by September 16, 1982; and the remaining deficiencies by February 8, 1983. Information pertinent to the general background, revisions, modifications, and amendments to the Ohio program submission, as well as the Secretary's findings, the disposition of comments, and a detailed explanation of the conditions of approval of the Ohio program can be found in the August 10, 1982 Federal Register.

On January 6, 1983, Ohio submitted materials to OSM intended to, among other things, satisfy condition (h). On May 24, 1983, the Secretary approved certain of the amendments and removed a number of conditions, including (h)(2) and (h)(3), but found that condition (h)(1) was not fully satisfied. Condition (h)(1) requires the State to revise its bonding system to provide assurance of more timely reclamation at the site of all operations upon which bond has been forfeited. The Secretary established a deadline of August 8, 1983, for the State to meet condition (h)(1).

On July 26, 1983, Ohio requested an extension of time to meet certain conditions, including condition (h)(1). A six-month extension, until February 8, 1984, was granted on October 11, 1983 (48 FR 46027).

Despite the extension, on August 1, 1983, Ohio submitted a proposed program amendment to satisfy condition (h)(1) and explained that it was submitting the amendment in order to allow OSM sufficient time to review it and require any necessary changes. On march 13, 1984, the Secretary determined that the modification did not fully satisfy the condition and extended until April 15, 1984 the deadline for Ohio to satisfy the condition. (47 FR 9418).

This notice is for the purpose of addressing the State's request for an additional extension that would establish a new deadline for the State to meet condition (h)(1).

On April 16, 1984, the Chief of the Ohio Division of Reclamation wrote to OSM requesting that Ohio be granted an extension of time to meet this condition. The Division has requested a one-year extension, until April 30, 1985. The Chief noted in his letter that the State has already complied with three of the four steps that OSM specified were necessary in order to satisfy condition (h)(1). The remaining step, that of assuring that sufficient funding is available to support the alternative bonding program, requires action by the Ohio Legislature. The Division explained that despite its efforts, due to the complexity of the bonding issue and the short 1984 legislative session, it was unable to have a bill introduced and passed. The Ohio Legislature is expected to reconvene for a two-week period in mid-May, recess and not return until January 1985.

In accordance with the State's request, OSM is proposing that the deadline for the State to meet condition (h)(1) be extended until April 30, 1985.

II. Procedural Matters

1. *Compliance with the National Environmental Policy Act:* The Secretary has determined that, pursuant to Section 702(d) of SMCRA, 30 U.S.C. 1292(d), no environmental impact statement need be prepared on this rulemaking.

2. *Executive Order No. 12291 and the Regulatory Flexibility Act:* On august 28, 1981, the Office of Management and Budget (OMB) granted OSM an exemption from Sections 3, 4, 7, and 8 of Executive Order 12291 for actions directly related to approval or conditional approval of State regulatory programs. Therefore, this action is exempt from preparation of a Regulatory Impact Analysis and regulatory review by OMB.

The Department of the Interior has determined that this rule would 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 rule would not impose any new requirements; rather, it would ensure that existing requirements established by SMCRA and the Federal rules would be met by the State.

3. *Paperwork Reduction Act:* This rule does not contain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3507.

List of Subjects in 30 CFR Part 935

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Authority: Pub. L. 95-87, 30 U.S.C. 1201 *et seq.*

Dated: May 2, 1984.

J. Lisle Reed,
Director, Office of Surface Mining.
[FR Doc. 84-12340 Filed 5-7-84; 8:45 am]
BILLING CODE 4310-10-M

30 CFR Part 948

Public Comment Period and Opportunity for Public Hearing on Modified Portions of the West Virginia Permanent Regulatory Program

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

ACTION: Proposed rule.

SUMMARY: OSM is announcing procedures for a public comment period and hearing on the substantive adequacy of certain program

amendments submitted by the State of West Virginia as modifications to its permanent regulatory program which was conditionally approved by the Secretary of the Interior under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The West Virginia submission primarily contains modifications to the State's surface mining and coal refuse disposal regulations. The submission is intended to satisfy the remaining fifteen conditions of approval concerning auger mining, coal refuse disposal, blasting, transfer of wells, permit approval, revegetation, suspension or revocation of permits, stabilization of rills and gullies, subsidence, Mine Safety and Health Administration (MSHA) approval of permit applications and exemption for coal extraction incident to a government-financed highway or other construction.

This notice sets forth the times and locations that the West Virginia program and proposed amendments are available for public inspection, the comment period during which interested persons may submit written comments on the proposed amendments, and the procedures that will be followed regarding the public hearing.

DATES: Written comments not received on or before 4:00 p.m. on June 7, 1984 will not necessarily be considered. A public hearing on the proposal will be held from 7:00 p.m. to 9:00 p.m. on May 28, 1984 at the OSM Charleston Field Office listed below under "ADDRESSES". Any person interested in making an oral or written presentation at the hearing should contact Mr. David H. Halsey at the OSM Charleston Field Office by the close of business on or before the fifth day prior to the hearing. If no one has contacted Mr. Halsey to express an interest in participating in the hearing by that date, the hearing will not be held. If only one person has so contacted Mr. Halsey, a public meeting, rather than a hearing, may be held and the results of the meeting included in the Administrative Record.

ADDRESS: Written comments should be mailed or hand delivered to: Office of Surface Mining Reclamation and Enforcement, Charleston Field Office, Attention: West Virginia Administrative Record, 603 Morris Street, Charleston, West Virgina 25301, Telephone: (304) 347–7158.

See **"SUPPLEMENTARY INFORMATION"** for addresses where copies the West Virginia program, the amendments and the administrative record on the West Virginia program are available. Each requestor may receive, free of charge, one single copy of the proposed program amendments by contacting the OSM Charleston Field Office listed above.

FOR FURTHER INFORMATION CONTACT: Mr. David H. Halsey, Director, Charleston Field Office, Office of Surface Mining Reclamation and Enforcement, 603 Morris Street, Charleston, West Virgina 25301, Telephone: (304) 347–7158.

SUPPLEMENTARY INFORMATION: Copies of the proposed modifications to the program, the West Virginia program, and the administrative record on the West Virginia program are available for public review and copying at the OSM offices and the office of the State regulatory authority listed below, Monday through Friday, 9:00 a.m. to 4:00 p.m., excluding holidays.

Office of Surface Mining Reclamation and Enforcement, Charleston Field Office, 603 Morris Street, Charleston, West Virginia 25301, Telephone: (304) 347–7158

Office of Surface Mining Reclamation and Enforcement, 1100 "L" Street, NW., Room 5315, Washington, D.C. 20240, Telephone: (202) 343–7896

West Virginia Department of Natural Resources, Room 630, Building 3, 1800 Washington Street, East, Charleston, West Virginia 25305, Telephone: (304) 348–9160.

In addition, copies of the proposed amendments are available for inspection and copying during regular business hours at the following locations:

Office of Surface Mining Reclamation and Enforcement, Morgantown Area Office, Post Office Box 886, Morgantown, West Virginia 26505, Telephone: (304) 291–5821

Office of Surface Mining Reclamation and Enforcement, Beckley Area Office, 119 Appalachian Drive, Beckley, West Virginia 25801, Telephone: (304) 255–5265.

Background on the West Virginia Program

On March 3, 1980, the Secretary of the Interior received a proposed regulatory program from the State of West Virginia. On October 22, 1980, following a review of the proposed program in accordance with 30 CFR Part 732, the Secretary approved in part and disapproved in part the proposed program (45 FR 69249–69271).

West Virginia resubmitted its proposed program on December 19, 1980, and after a subsequent review, the Secretary conditionally approved the program on the correction of thirty-five minor deficiencies on January 21, 1981. Information concerning the general background of the permanent program submission, as well as the Secretary's findings, the disposition of comments and explanation of the initial conditions of approval of the West Virginia program can be found in the January 21, 1981, **Federal Register** (46 FR 5915–5956).

On October 29, 1981, West Virginia submitted revised coal refuse regulations to OSM as an amendment to its permanent regulatory program. The amendment was conditionally approved on May 11, 1982 (47 FR 20119–20122).

At the request of West Virginia, on October 31, 1981, the Secretary extended the deadlines for meeting certain conditions of its approved program to November 1, 1982 (46 FR 54070–54071). Also, on May 27, 1982, the Secretary extended West Virginia's deadlines for meeting the conditions requiring legislative approval to May 1, 1983, and the remaining conditions requiring regulatory change to November 1, 1982 (47 FR 23156–23157).

On September 10, 1982, it was determined that a modification submitted by West Virginia on June 17, 1982, concerning coal refuse disposal satisfied a portion of the condition imposed by the Secretary on May 11, 1982 (47 FR 39821–39822).

On September 14, 1982, and October 29, 1982, West Virginia submitted modifications to satisfy certain other conditions of its program. On March 1, 1983,the Secretary announced in the **Federal Register** that the modifications submitted by West Virginia satisfied eight of the conditions of approval and the deadline for meeting all of the remaining conditions requiring regulatory reform was extended to May 1, 1983 (48 FR 8447–8451).

On February 16, April 29, June 15, and September 13, 1983, West Virginia submitted statutory and regulatory modifications to satisfy the remaining conditions of approval. On November 16, 1983, the Secretary approved some of the modifications which resulted in the removal of twenty-three conditions, the disapproval of two permanent program provisions and the imposition of fifteen conditions (48 FR 52034–52054). West Virginia had until March 30, 1984, to submit modifications to resolve the remaining conditions of approval.

On January 12, 1984, the Secretary preempted and superseded that portion of West Virginia's surface mining law which provided that a permittee and his authorized agents and employees are not liable for any injury sustained by a citizen accompanying the inspector onto a mine site (49 FR 1489–1490).

Submission of program modifications

On March 30, 1984, West Virginia submitted regulatory and policy modifications to its permanent regulatory program. The modifications are intended to satisfy conditions at 30 CFR 948.11(a)(1), (8) (ii) and (iv), (14), (16), (19), (36), (37), (38), (39), (40), (41), (42), (43), (44), and (45). The remaining fifteen conditions result from the following:

1. West Virginia's program does not include provisions for augering on previously mined areas which are no less effective than 30 CFR 819.18(b) and in accordance with section 515 of SMCRA. [Condition (1)];

2. The program contains coal refuse disposal regulations which require compliance with interim program regulations rather than with permanent program regulations [Condition (8)]; the State's coal refuse disposal regulations provide a waiver for stability requirements if site conditions indicate that failure will not occur [Condition (8)(ii)]; and the State's coal refuse disposal regulations fail to (A) require covering of coal mining waste banks with non-toxic and non-combustible material as required by 30 CFR 816.85(d) and 817.85(d), (B) specify construction criteria for subdrainage systems as required by 816.72 (b)(1) and (b)(4), (C) prohibit the use of impoundments on constructed fills as required by 30 CFR 816.71 (g) and (iv) require the inspection of coal refuse piles as required by 30 CFR 816.82(a) [Condition (8)(iv)];

3. The State program does not include provisions which provide that the maximum peak particle velocity shall not be exceeded at the location of any dwelling, public building, school, church, or community or institutional building outside the permit area as required by 30 CFR 816.67(d)(2) and 817.67(d)(2) [Condition (14)];

4. The program does not include criteria for the transfer of wells as required by 30 CFR 816.53 and 817.53 [Condition (16)];

5. The program does not require that the applicant list any and all notices of violations of all state environmental protection laws and regulations during the three year period prior to the date of application in accordance with section 510(c) of SMCRA [Condition (19)];

6. The State program does not provide a definition for the term "substantial legal and financial commitments in a surface coal mining operation" which is no less effective than 30 CFR 762.5 [Condition (36)];

7. The State program does not provide standards for permit approval or denial which are no less effective than 30 CFR 786.19 and in accordance with sections 510 (b), (c) and 522(e) of SMCRA and require certain permit conditions which are no less effective than those contained in 30 CFR 786.27 and 786.29 and in accordance with section 510 of SMCRA [Condition (37)];

8. The program does not include provisions to require that coal exploration applications contain a description of the important habitats of any threatened or endangered species and a description of cultural or historical resources listed or eligible for listing on the National Register of Historic Places which are no less effective than 30 CFR 776.12(a)(3) and in accordance with section 512 of SMCRA and provide standards for the approval or disapproval of coal exploration applications which are no less effective than 30 CFR 776.13 and in accordance with sections 512 (a) and (d) of SMCRA [Condition (38)];

9. The program does not provide for statistical sampling techniques for measuring the success of revegetation which are no less effective than 30 CFR 816.116(a) and 817.116(a) and in accordance with sections 508, 515 and 516 of SMCRA [Condition (39)];

10. The State program does not include provisions for the identification of renewable resource lands which are no less effective than 30 CFR 784.20 and in accordance with section 516(b) of SMCRA [Condition (40)];

11. The program does not include provisions for the suspension or revocation of permits which are the same or similar or 30 CFR 843.13(a)(3) and in accordance with section 521(a)(4) of SMCRA [Condition (41)];

12. The program does not include provisions for the stabilization of rills and gullies which are no less effective than 30 CFR 816.95(b) and 817.95(b) and in accordance with sections 515 and 516 of SMCRA [Condition (42)];

13. The State program does not include provisions to prohibit mining activities beneath or adjacent to bodies of water with a volume of 20 acre-feet which are no less effective than 30 CFR 817.121(d) and in accordance with section 516 (b) and (c) of SMCRA [Condition (43)];

14. The program does not include provisions for MSHA approval of permit applications involving discharging of water into underground mines, mining within five hundred feet of an underground mine and blasting within five hundred feet of an underground mine which are no less effective than 30 CFR 816.5, 817,55, 816.79, and 780.13(c) [Condition (44)]; and

15. The State program does not include minimum criteria for the exemption of government-financed highway and other construction which are no less effective than 30 CFR Part 707 and in accordance with section 528(3) of SMCRA [Condition (45)].

The Secretary is now seeking public comment on the adequacy of the proposed modifications. If the modifications are approved, they will become part of the West Virginia program and all of the conditions of approval discussed above will be removed.

Additional Determinations

1. Compliance with the National Environmental Policy Act: The Secretary has determined that pursuant to the section 702(d) of SMCRA, 30 U.S.C. 1292(d), no environmental impact statement needs be prepared on this rulemaking.

2. *Executive Order No. 12291 and the Regulatory Flexibility Act:* On August 28, 1981, the Office of Management and Budget (OMB) granted OSM an exemption from Sections 3, 4, 7, and 8 of Executive Order 12291 for actions directly related to approval or conditional approval of State regulatory programs. Therefore, this action is exempt from preparation of a Regulatory Impact Analysis and regulatory review by OMB.

The Department of the Interior has determined that this rule would 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 rule would not impose any new requirements; rather, it would ensure that existing requirements established by SMCRA and the Federal rules will be met by the State.

3. Paperwork Reduction Act: The rule does not contain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3057.

List of Subjects in 30 CFR Part 948

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Authority: Pub L. 95–87, Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 *et seq.*).

Dated: May 2, 1984.

J. Lisle Reed,

Director, Office of Surface Mining.

[FR Doc. 84–12341 Filed 5–7–84; 8:45 am]

BILLING CODE 4310–05–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Ch. I

[CC Docket No. 84-369; FCC 84-146]

Special Construction of Lines and Special Service Arrangements Provided by Common Carriers

AGENCY: Federal Communications Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: This Notice of Proposed Rulemaking proposes to require carriers to provide special construction of lines and special service arrangements as non-common carrier offerings. This action is proposed to decrease unnecessary regulatory burdens, increase competition, and aid effective regulation of common carrier services.

DATES: Comments are due June 4, 1984; reply comments are due June 25, 1984.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Warren Lavey, Common Carrier Bureau, (202) 632-6910.

List of Subjects in 47 CFR Part 61

Communications common carriers, Reporting and recordkeeping requirements, Tariffs.

Notice of Proposed Rulemaking

In the matter of Special Construction of Lines and Special Service Arrangements Provided by Common Carriers (CC Docket No. 84-369).

Adopted: April 11, 1984.
Released: April 30, 1984.

By the Commission.

I. Introduction

1. Special construction of lines may be provided by common carriers for individual customers under the tariff and facilities-authorization procedures of Title II of the Communications Act of 1934.[1] Typically, these lines are individually tailored, constructed, and priced in response to a customer's request where existing lines or ordinary tariffed facilities would not satisfy that request. For example, American Telephone and Telegraph Co. (AT&T) filed Tariff FCC No. 262 which states that it is applicable when one or more of the following conditions exist:

a. The channel facilities to provide services or channels are not available and, at the request of the customer, the [carrier] constructs facilities to provide the services or channels for the customers and there is no other requirement for the facilities so constructed.

b. At the request of the customer, the [carrier] constructs channel facilities of a type other than that which the [carrier] would otherwise utilize in order to provide services or channels for the customer.

c. In order to comply with requirements specified by the customer, construction by the [carrier] involves a routing of facilities other than that which the [carrier] would normally utilize in order to provide services or channels for the customer.

d. At the request of the customer, the [carrier] constructs a greater quantity of channel facilities than that which the [carrier] would otherwise construct in order to fulfill the customer's initial requirements for services or channels.

e. The channel facilities to provide services or channels are not available and, at the request of the customer, the [carrier] expedites construction of the facilities at greater expense than would otherwise be incurred.

f. The channel facilities to provide services on channels are not available and, at the request of the customer, the [carrier] constructs temporary facilities to provide services or channels for the period during which the permanent facilities are under construction.[2] Most special construction under this tariff involves lines for television transmission.

2. Under this tariff, when special constructions is to provide services or channels for less than one month, a single charge applies "equal to the cost installed of the specially constructed facilities, less net salvage.[3] Examination of the tariff reveals that in 1983 there were several hundred new special construction projects of less than one month; the average nonrecurring charge was roughly $1,000 per project. When special construction is to provide services or channels for one month or more, this tariff applies a maximum termination liability, expediting charge, non-recurring charge, and/or recurring monthly charge, depending on the type of special construction. All charges and liabilities are developed on an individual case basis; the tariff states that an offering's terms are based on its estimated installation costs.[4] Examination of the tariff also shows that in 1983 there were 92 new special construction projects of one month or more; 90 involved maximum termination liabilities and 3 involved expediting charges (one project had both types of charges). The total maximum termination liabilities (estimated installation costs) of these projects were $2,254,820, averaging about $25,000 per project and with only 4 projects over $100,000. (All were less than $640,000.) The expediting charges for the 3 projects

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[1] In AT&T: Terrestrial Television Transmission Service, 88 FCC 2d 1656, 1665 (1982), we concluded that the provision of enterexchange channels for television transmission is not special construction:

[These channels] are not specially designed or built and are presumably provided in exactly the same way for all customers. AT&T incurs no special costs and constructs no special facilities. Rather, the facility is fungible, and if a long term customer ceases to use it the facility would become available to serve other long term or occasional customers. It is unreasonable, therefore, to attribute to any one customer costs which are necessary to the provision of a general offering. [Interexchange channels] should be provided as ordinary tariffed facilities * * *. Even if AT&T found it necessary to construct new facilities or shift existing facilities, the new customer should not be liable to pay an additional charge. The general tariff rate includes investment necessary to provide the service, and a customer should not be liable to pay extra charges because it happens that new facilities would be needed for the provision of ordinary service.

See also AT&T: Group/Supergroup Facilities, Mimeo No. 4821 at 7 n. 8 (released June 20, 1983) (special construction of local distribution channels might be necessary to provide group and supergroup services to other carriers and customers).

[2] AT &T Tariff FCC No. 262, Section 2.1 (effective Aug. 24, 1982). AT&T filed individual special construction charges in this tariff on behalf of itself and its connecting and concurring carriers. Tariffs filed with provisions similar to those in AT&T Tariff FCC No. 262, but in each case unique in the definition of and terms for special construction, include AT&T Tariff FCC No. 5, Section 2.2 (issued Oct. 3, 1983), Exchange Carrier Association Tariff FCC No. 3, Section 2.6.2 (issued Sept. 30, 1983), Exchange Carrier Association Tariff FCC No. 1, Section 11 (Special Facilities Routing of Access Services) (issued September 30, 1983), and Pacific Northwest Bell Telephone Co. Tariff FCC No. 6, Section 2.6.2 (issued September 26, 1983). AT&T Tariff FCC No. 5, Exchange Carrier Association Traiff FCC Nos. 1 and 3, and Pacific Northwest Bell Telephone Co. Tariff FCC No. 6 were suspended and are subject to an investigation. Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Order FCC 83-470 (released October 19, 1983), Order FCC 84-51, at 11-2/12-2, SC-1 to SC-19 (released February 17, 1984). *See also* Special Permission No. 84-112 (Mar. 6, 1984) (provision of Specialized Facilities by The Chesapeake and Potomac Telephone Companies to MCI Telecommunications Corp.).

[3] *Id.* at Section 2.2.b. (1).

[4] AT & T Tariff FCC No. 262, Section 2.2.a. *See Exchange also* Carrier Association Tariff FCC No. 3, Section 2.6.3. In AT&T and Western Union Private Line Cases, 34 FCC 244, 363-68 (1961), the Commission determined that AT&T's tariff for special construction should not merely provide a general description of how the carrier may determine charges for the service and a statement that charges will be based on cost. While recognizing the problems of a rate schedule for special, tailor-made construction, the Commission concluded that: In the case of large communications systems having their own peculiar characteristics and a limited number of customers rates based on average costs for such a system would appear to be feasible even though in fact limited in applicability. On the other hand, in the case of a type of construction involving numerous "one shot" temporary facilities, it appears that rates based on average costs for this type of construction could be devised, perhaps on an "equipment component" basis. *Id.* at 368.

were $88,328 in total. Much of the costs of special construction projects of one month or more is not recovered from termination liabilities. Rather, it is bundled into the rates for private line services and other transmission services.[5]

3. In addition to special construction of lines, special service arrangements may be provided by commom carriers for individual customers under the tariff and facilities-authorization procedures of Title II. Typically, these services are individually tailored and priced in response to a coustomer's request where ordinary tariffed (generally offered) services would not satisfy that request. For example, AT&T's Tariff FCC No. 258 states that it is applicable to "interstate private line services, channels or equipment as specified herein for use on private line services for miscellaneous or emperimental purposes of a unique or evolutionary nature." [6]

It is unclear what customer requests qualify as "miscellaneous or experimental purposes of a unique or evolutionary nature." This tariff states that all charges are determined on an individual case basis. The tariff supples no rules for developing rates or dividing costs between monthly, installation, and termination charges. AT&T's current Tariff FCC No. 258 contains on behalf of AT&T and its connecting and concurring carriers about a dozen special service arrangements.[7]

4. This proceeding seeks to modify our traditional common-carrier treatment of special construction of lines and special service arrangements (collectively referred to as special activities). Specifically, we propose to (1) use the Commission's complaint process to resolve disputes about whether an offering is a special activity (non-common carrier service) or an indifferent holding out to the public (common carrier service); (2) grant carriers blanket Section 214 authorization for special activities, to the extent that such authorization is necessary; (3) require carriers not to file future special activities in their tariffs, and instead to file semi-annual reports listing the projects for such activities; (4) keep the costs of special activities on books of account separate from those used to calculate the revenue requirement of generally-available, indescriminately-supplied, common carrier service offerings, perhaps with separate subsidiaries required for AT&T and the Bell Operating Companies; (5) require carriers to interconnect on reasonable, nondiscriminatory terms with suppliers of special activities; and (6) use private radio spectrum for those special construction offerings requiring use of radio frequencies. We will incorporate the comments filed in response to the Notice of Inquiry in *Long-Run Regulation of AT&T's Basic, Domestic, Interstate Services* [8] in this proceeding to the extent that they are relevant.

II. No Legal Compulsion to Offer Special Activities to the Public Indifferently

5. In *National Association of Regulatory Utility Commissioners vs. FCC,* 525 F. 2d 630, 642 (D.C. Cir.), *cert. denied,* 425 U.S. 999 (1976) *(NARUC I),* the court identified two criteria determinative of whether a service may be provided on a non-common carrier basis: (1) whether there is or should be any "legal compulsion" to serve the public indifferently; and (2) if not, whether there are reasons implicit "in the nature" of the service "to expect an indifferent holding out to the eligible user public." [9] Regarding "legal compulsion," the court found that Specialized Mobile Radio Systems were not compelled by the Commission to serve any particular applicant and had unlimited discretion in determining whom, and on what terms, to serve. In *Domestic Fixed-Satellite Transponder Sales,* 90 FCC 2d 1238, 1248–55 (1982), *appeal pending sub nom. Wold Communications v. FCC,* D.C. Cir. No. 82–2054 (filed September 10, 1982), we found no "legal compulsion" to provide transponder sales on a common carrier basis under the Communications Act's goal of making available to the public, so far as possible, efficient, reasonably-priced telecommunications services, 47 U.S.C. § 151, or under our regulatory policies. We concluded that permitting offerings of transponder sales on a non-common carrier basis would promote our policies of efficient spectrum usage and competition. This section presents the basis for our tentative finding that there is no "legal compulsion" for a carrier to provide special activities to the public indifferently under the Communications Act or our regulatory policies. The next section discusses the nature of special activities. Together the analysis of these sections supports our proposal to require special activities to be provided on a non-common carrier basis.

6. Our analysis of public interest considerations starts with the statutory provisions of the Communications Act. Generally, the customer benefits in using a common carrier service from the requirements that a carrier must (1) furnish such service upon reasonable request, and (2) charge just, reasonable, and nondiscriminatory rates for the service.[10] In most, if not all, cases of special construction of lines and special service arrangements, it does not appear that customers benefit from imposition of these requirements. We will look to the comments in this proceeding to develop a record on these issues.

7. Regarding the assurance of service on demand inherent in common carrier offerings, it appears that customers may readily obtain special construction of lines from numerous alternative suppliers through private contracts. A wide range of telephone common carriers, specialized and miscellaneous common carriers, and domestic satellite carriers have sources of equipment and expertise in building lines similar to those often requested for special

[5] For example, the maximum termination liability payable by Rockwell International for construction of facilities between the carrier's central office and the customer premises in Pittsburgh, Pa., is $174,010. Rockwell International would have to pay this amount if it discontinued service within one month after the facilities were placed in service. But, if Rockwell International continued service for ten years, it would have to pay no charges for special construction, only the tariffed rates for service. In that case, the costs of special construction are bundled into the rates for a common carrier service and averaged over all customers of that service and, perhaps, other services. *Id.* at Section 2.2.a(1), page 28.2. Generally, "when special construction of channel facilities is involved, the provisions of [Tariff FCC No. 262] apply in addition to those set forth in the tariffs under which the service ordered is offered." *Id.* at Section 2.

[6] AT&T Tariff FCC No. 258, Section 1. AT&T Tariff FCC No. 260 contains AT&T's generally-less-specialized private line offerings. Tariffs filed with provisions similar to those in AT & T Tariff FCC No. 258, but in each case unique in the definition of and terms for special service arrangements, include Exchange Carrier Association Tariff FCC No. 1, Sections 10–12 (issued September 30, 1983), and AT&T Tariff FCC No. 3, Sections 16–17 (issued October 3, 1983). Exchange Carrier Association Traiff FCC No. 1 and AT&T Tariff FCC No. 3 were suspended and are subject to an investigation. Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83–1145, Order FCC 83–470 (released Oct. 19, 1983), Order FCC 84–51, at 11–2/12–2, SC–1, to SC–19 (released February 17, 1984).

[7] As an example of a service offered under AT&T's Tariff FCC No. 258, AT&T provides a radio remoting service to an agency of the United States Government between seven pairs of points; the service includes (a) one Beacon Video Channel of about 2.5 MHz bandwidth, including the Beacon Trigger function, (b) one Radio Normal Video and Gated Moving Target Indicator Channel of about 3 MHz bandwidth, including the Radio System Trigger function, and (c) one Angle Mark Channel of approximately 20 MHz bandwidth. *Id.* at 7. Another special service arrangement is described as "miscellaneous private line services furnished to provide for the transmission of sequential synchronous digital data signals at a rate of approximately 230,400 bits per second." *Id.* at 14.

[8] CC Docket No. 83–1147, 48 FR 51340, 51348 (Nov. 8, 1983).

[9] *See also FCC v. Midwest Video,* 440 U.S. 689, 701 (1979); Competitive Carrier Rulemaking, 84 FCC 2d 445, 520–34 (1981).

[10] 47 U.S.C. 201–202.

construction. Suppliers of private microwave systems, private cable systems, or satellite earth stations also could meet many customers' demands for special construction. Further, since most special construction involves video or other private lines, requiring that special construction be offered on a non-common carrier basis would not endanger the widespread availability of telephone service to customers of special construction. *See* para. 20 *infra.*

8. A related question involves the effects of requiring non-common carrier status for special activities on common carriers customers. The Communications Act seeks to promote the widespread availability of telephone service at reasonable rates. While we do not want to encourage "uneconomic bypass," *MTS and WATS Market Structure,* 48 FR 42984 (Sept. 21, 1983), *Modified,* FCC 84–36 (Feb. 15, 1984), we also do not want to impede *economic* bypass through special activities provided by common carriers. Furthermore, special construction is not necessarily used to bypass telephone exchange facilities. Often special construction provides connections to exchange facilities not otherwise available; these network extensions *increase* usage of network facilities and network capabilities, and may help lower rates to customers of common carrier services. We seek comments on the relationship between regulating special construction as common carrier offerings and bypass, and will adjust our proposal if the record shows that non-common carrier treatment of special activities would impair the efficient use of telecommunications facilities and reasonable rates.

9. The attractiveness to customers of obtaining special construction from suppliers other than the area's franchised telephone carrier (or, possibly, AT&T) often will depend on the existence of reasonable interconnection arrangements to carriers' facilities for customer-provided facilities. The assurance of special activities on demand from multiple suppliers is promoted by our policy in favor of reasonable interconnections. In 1976 we ordered AT&T to "honor customer requests to terminate [private line] services at premises other than those at which the customer has a regular and continuing need to originate and terminate communications unless there are factors present in a particular case which would raise an unreasonable threat to the network."[11] In 1979 and 1983 we ordered AT&T to provide private, high-speed data, and business telephone lines for interconnection with microwave terminals of private systems.[12] Recently, we proposed to require all exchange carriers to provide reasonable terms for interconnection with customer-owned lines in their interstate access tariffs.[13] In Section IV we will return to the question whether additional standards are required to assure reasonable interconnections with special construction and special service arrangements.

10. Application of the common-carrier duty-to-serve requirement to special service arrangements seems to give customers little benefit not otherwise available in the marketplace. Many suppliers are available who can combine existing terrestrial or satellite facilities with the capability to extend or modify them so as to provide special service arrangements. The requirements of reasonable carrier-to-carrier[14] and customer-to-carrier[15] interconnection arrangements, and the ban on resale restrictions[16] reduce the barriers to providing special service arrangements. A supplier can meet a customer's special request by utilizing common carrier services in conjunction with other facilities which add features to the services or repackage them. Also, customers may be able to utilize private telecommunications systems if common carrier services do not meet their special demands.[17] The record developed in this proceeding may lead us to the same conclusion regarding special service arrangements that we reached in the *Second Computer Inquiry* regarding enhanced services, that the market is "truly competitive."[18]

11. We next turn to whether there are public interest benefits from requiring special activities to be provided as common carrier services with regard to tariff regulation designed to assure just, reasonable, and nondiscriminatory rates. Generally, the Commission has had difficulty in controlling cost allocations and determining the proper revenue requirement of common carrier services.[19] The Commission lacks the resources to delve into the cost justification for each special construction and special service arrangement. Anyway, such analysis may not reveal an unlawful rate because of the leeway afforded to carriers in cost allocations. Instead, much of our rate scrutiny attempts to utilize in-kind comparisons (comparing like rate elements in different services) to identify unlawful rates.[20] Such analysis is almost impossible when dealing with bundled rates for individualized special activities. Thus, requiring special activities to be provided as common carrier services does not guarantee effective rate regulation. Furthermore, as we recognized in the *Second Computer Inquiry* and the *Competitive Carrier Rulemaking,*[21] market forces can help

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[11] AT&T: Restrictions on Interconnection of Private Line Services, 60 FCC 2d 939, 945 (1976) (*Piece-Out*). The carrier has the burden of showing that a restriction on interconnection is reasonable.

[12] AT&T: Interconnections with Private Interstate Communications Systems, 71 FCC 2d 1 (1979) (ARINC); AT&T: 1.544 Mbps Channels for Connection with Private Interstate Communications Systems, Mimeo No. 636 (released November 8, 1983). *See also Fort Mill Telephone Co.* v. *Federal Communications Commission,* 719 F. 2d 89 (4th Cir. 1983).

[13] MTS and WATS Market Structure (CC Docket No. 78–72, Phase III), FCC 83–178 at 20 (released May 31, 1983).

[14] *See Bell Tel. Co. of Penn.* v. *Federal Communications Commission,* 503 F. 2d 1205 (3d Cir. 1974), *cert. denied,* 422 U.S. 1026 (1975); Lincoln Tel. and Tel. Co., 72 FCC 2d 724, 74 FCC 2d 196 (1979), 78 FCC 2d 1219 (1980), *aff'd,* 659 F. 2d 365 (D.C. Cir. 1981); *MCI Telecom. Corp.* v. *Federal Communications Commission,* 561 F. 2d 365 (D.C. Cir. 1975), *cert. denied,* 434 U.S. 1040 (1978), 580 F. 2d 590 (D.C. Cir.), *cert. denied,* 439 U.S. 980 (1978).

[15] *See* notes 11–13 *supra.*

[16] Resale and Shared Use, 60 FCC 2d 261 (1976), *aff'd sub nom. American Tel. and Tel. Co.* v. *Federal Communications Commission,* 572 F. 2d 17 (2d Cir.), *cert. denied,* 439 U.S. 895 (1978); Resale and Shared Use of Domestic Public Switched Network Services, 83 FCC 2d 167 (1980).

[17] *See* Domestic Fixed-Satellite Transponder Sales, *supra,* 90 FCC 2d at 1246; Domestic Communications Satellite Facilities, 22 FCC 2d 86 (1970); Land Mobile Service, 51 FCC 2d 945 (1975), *affid sub nom.* National Association of Regulatory Utility Commissioners, *supra;* Above 890, 27 FCC 359 (1959); General Mobile Radio Service, 13 FCC 1190 (1949).

[18] 77 FCC 2d 384, at 433, *reconsid., 84 FCC 2d 50 (1980), Further reconsid.,* 88 FCC 2d 512 (1981), *aff's sub nom. Computer & Communications Ass'n* v. *FCC,* 693 F. 2d 198 (D.C. Cir. 1982), *cert. denied,* 103 S. Ct. 2109 (1983).

[19] *See* AT&T: Manual and Procedures for the Allocation of Costs, 84 FCC 2d 384, 397, *reconsid.,* 86 FCC 2d 667 (1981), *aff'd sub nom.* MCI Telecommunications Corp. v. FCC, 675, F 2d 480 (D.C. Cir. 1982); Long-run Regulation of AT&T's Basic Domestic Interstate Services, *supra,* 48 Fed. Reg. at 51343.

[20] *Id.* at 51344; AT&T: Private Line Structure and Volume Discount Practices, FCC 84–147 (adopted Apr. 11, 1984). Tariffs which do not define rate elements clearly and do not show charges for rate elements are of little value in assuring just, reasonable, and nondiscriminatory rates. We recently required the National Exchange Carrier Association to replace its proposal of charges developed on an individual case basis for engineering and administrative services in connection with special activities. Rather, the tariff should show charges for these services. Investigation of Access and Divestiture Related Tariffs, Order FCC 84–51, at 11–2/12–2 (released Feb. 17, 1984). Yet, these rate elements are only some of the individualized service functions provided in connection with special activities about which tariffs are, to some extent inherently, vague.

[21] 48 FR 52452 (Nov. 18, 1983) (Fourth Report).

assure that consumers will receive services at just, reasonable, and nondiscriminatory rates. The proposals in Section IV are designed to strengthen the ability of market forces to check carriers charges for special activities.

12. We also observe that requiring carriers to provide special activities as common carrier services may impair effective rate regulation of other common carrier services. Many special activities involve bundling the costs of these offerings with rates for other offerings. For example, under the maximum-termination-liability provision in AT&T FCC Tariff No. 262, a customer does not pay special construction costs if he uses a line for ten or more years. The costs of such lines become part of the revenue requirement of the carrier's other services, resulting in possible cross-subsidies and unreasonable rates.[22] Special service arrangements may also involve bundling common carrier services offered under other tariffs with special features, making it difficult for us to determine that the carrier charged the tariffed rate for the common carrier service.[23] In addition, we are concerned about bundling "quotation-preparation" costs for these special activities into the rates for common carrier services.[24]

13. Contrary to our regulatory policies favoring competition, the practice of providing special activities as common carrier services with bundling impairs competition. Suppose that a carrier supplies special lines to a customer at no additional charge when the customer uses the carrier's service for ten or more years. This practice makes it difficult for an independent construction company to compete by building lines for the customer and charging for them separately when the customer intends to take the carrier's service for many years. Also, a carrier may bundle construction to provide ordinary tariffed facilities with special construction. This practice impairs regulation of the terms of offering and revenue requirements for ordinary tariffed facilities, and can lessen competition in special construction.

14. Another problem with tariffing special activities is that tariffing may impair private contractual dealings to the detriment of the customer and/or carrier. This can also impede fair competition between carriers and non-carriers in supplying special activities. Tariffs are not fixed over time, and the terms of a tariff cannot be bound or altered by the terms of a private contract between the carrier and a customer.[25] Tariffing subjects the carrier-customer dealing to possible suspension, rejection, investigation into any aspect of the dealing, or prescription of terms and conditions by the Commission.[26] Thus, dealing with a carrier for a special but tariffed activity may be unsatisfactory to a customer who wants either the security of a fixed, long-term contract or the ability to revise the terms of the relationship in light of future developments. In addition, a customer may bring a suit for recovery of damages under the Communications Act in a federal court, and the Commission can direct the carrier to pay the customer damages after hearing on a complaint filed by the customer at the Commission or initiated by the Commission.[27] All of these provisions alter the rights and liabilities that customers and carriers would have in private contractual dealings for non-common carrier services.

15. We found in the *Second Computer Inquiry* that offerings of enhanced services (as defined therein) and new customer-premises equipment are not within the scope of Title II but are within our ancillary jurisdiction. That decision discontinued Title II regulation of these offerings and required that they be unbundled (offered separately) from basic, common carrier services and provided outside of tariffs. The approach followed in the *Second Computer Inquiry* provides guidance here. Even if there is no "legal compulsion" to provide special activities to the public indifferently, we tentatively conclude that they would fall within our ancillary jurisdiction. That is, we believe that we would have a continuing interest in obtaining information about these special services and establishing certain conditions and terms for their provision.[28] Offerings that are purportedly special activities but which are in fact offered to the public indifferently may provide a carrier with a means to discriminate among its customers.[29] The policies of Title II would require the Commission to scrutinize a carrier's use of offerings by private contract to promote just, reasonable, and nondiscriminatory charges for common carrier services.[30]

III. Nature of Special Activities.

16. In this section we propose to find that the nature of most offerings of special construction and special service

[22] In Communications Satellite Corp.: Hickam Earth Station, 80 FCC 2d 170 (1980), *vacated*, 86 FCC 2d 712 (1981), the carrier proposed to construct two international earth stations and associated facilities to provide direct 1.544 Mbps service to the U.S. Department of Defense. In its 1980 decision the Commission rejected the carrier's facilities applications in part because the carrier allocated far less than all of the costs of the new facilities to the customer requesting the special activity, an allocation that would unnecessarily burden the carrier's general ratepayers. This decision was vacated; this issue was designated for hearing and it later became moot. In another decision, the Commission accepted the carrier's cost allocation for a special activity, even though the Commission's preferred method was not used, RCA Alaska Communications, Inc.: Revisions of Tariff FCC No. 1, Private Line Switching Service and Operator Service to the U.S. Government, Department of Defense, 67 FCC 2d 1318 (1978).

[23] In AT&T: Satellite-Based Private Data Service Offering, 89 FCC 2d 1116, at 1124 n. 25 (1982), we stated: "We do not reach the merits of [the] contention that the terrestrial link . . . encompassed in [this] offering is sufficiently 'like' AT&T's high speed DDS to raise questions of unlawful price discrimination . . . We request, however, that AT&T upon resubmitting its tariff explain why the costs attributable to this element are so much lower than the average DDS costs for similar distances."

[24] In many instances, customers require carriers to prepare estimates of charges for special activities. Preparation of these quotations can involve substantial staff work for the carrier. Charges for special construction may cover these costs. But, these costs may be covered by rates for common carrier services if (1) a potential customer does not take the carrier's special activity, (2) a customer exceeds the period for termination liability and does not pay a charge in addition to rates for common carrier services, or (3) the carrier otherwise shifts some quotation-preparation costs into the revenue requirement for common carrier services.

[25] 25 *American Broadcasting Companies* v. *FCC*, 643 F. 2d 818, 819 (D.C. Cir. 1980) (*ABC*). The courts have referred to a principle called the "filed rate doctrine" which forbids a regulated entity to charge rates for its regulated services other than those properly filed with the appropriate regulatory authority. *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 (1981); *T.I.M.E. Inc.* v *United States*, 359 U.S. 464, 473 (1959); *City of Cleveland* v. *FPC*, 525 F. 2d 845, 854 (D.C. Cir. 1976).

[26] 26 47 U.S.C. 204–205. *See MCI Telecom. Corp.* v. *Federal Communications Commission* 665 F. 2d 1300, 1303 (D.C. Cir. 1981) (Commission may modify a contract after an investigation finding it "unjust, unreasonable, unduly discriminatory, or preferential") *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.* 350 U.S. 332 (1956).

[27] 47 U.S.C. 206–209. *See* New York Telephone, 89 FCC 2d 1126 (1982).

[28] The Commission has the authority to require the filing of any contracts of any carrier, 47 U.S.C. 211.

[29] *ABC*, *supra*, 643 F. 2d at 819.

[30] "No carrier . . . shall engage or participate in [common carrier] communication unless schedules [of its charges, i.e., tariffs] have been filed and published . . . ." 47 U.S.C. 203(c). In AT&T: Earth Station Services, 42 FCC 2d 654, 659 (1973), we ordered AT&T to provide local loops to satellite carriers by tariff rather than contract to promote nondiscrimination. *See also* Interconnection of Facilities Provided to the International Record Carriers, 66 FCC 2d 517, 525, *aff'd sub nom. Western Union International* v. *Federal Communications Commission*, 568 F. 2d 1012, 1018 (2d Cir. 1977). In the Competitive Carrier Rulemaking, 77 FCC 2d 308 (1979) (Notice), 85 FCC 2d 1 (1980) (First Report), 84 FCC 2d 445 (1981) (Further Notice), 91 FCC 2d 59 (1982) (Second Report), *reconsid.*, 93 FCC 2d 54 (1983), 48 FR 46791 (Oct. 14, 1983) (Third Report), 48 Fed. Reg. 52452 (Nov. 18, 1983) (Fourth Report), we concluded that certain carriers would not be required to file tariffs. Nevertheless, these carriers' common carrier services must be provided at just, reasonable, and nondiscriminatory charges in compliance with 47 U.S.C. 201–202.

arrangements does not cause us to expect an indifferent holding out to the eligible user public. The essential characteristic of common carriage is "holding oneself out to serve indiscriminately," as opposed to the practice of making "individualized decisions, in particular cases, where and on what terms to deal." *NARUC I, supra*, 525 F. 2d at 642. The court in *NARUC I* held that Specialized Mobile Radio Systems do not provide common carriage. Applying the court's analysis to proposals to sell domestic fixed-satellite transponders, the Commission determined that these sales do not constitute common carrier activities and are exempt from the Title II requirements: "Stable, long-term contractual offerings to individual customers of technically and operationally distinct portions of a satellite system fall far short of the indiscriminate holding out contemplated in the *NARUC I* decision." [31] The Commission distinguished transponder sales from the prevalent common carrier offerings where many customers are repeatedly requesting the same service and where such individualized dealings are unlikely to occur.[32] In this section we tentatively conclude that special activities do not have the nature of an indifferent holding out to the eligible user public.

17. Even more so than transponder sales, multi-month special construction of lines involves a stable, long-term, custom-tailored, contractual offering to an individual customer, usually of technically and operationally distinct facilities. Pursuant to Special Permission No. 4456, carriers may file special construction offerings on one-day's notice. Where such an offering is shown in tariffs on file with the Commission, the tariffs merely note a private contractual agreement between a carrier and an individual customer.[33] Such tariffs typically do not provide an explicit statement of charges in advance of the offering and a simple and systematic list of situations in which they are applicable.[34] The carrier does not file in its tariff sufficient information to prove to the Commission that the terms and conditions of the offering are just, reasonable, and nondiscriminatory. In at least one way, our rules already treat these special activities differently than common carrier offerings. We require the carrier to transmit to the customer a copy of the explanation and data supporting the rate for special construction, special assembly equipment, and special service arrangements.[35] This carrier-to-individual customer transfer of cost information is consistent with viewing these offerings as private dealings rather than general, indiscriminate offerings.

18. Many special constructions are offered for less than one month. These activities are not stable, long-term offerings. But, unlike most common carrier offerings, they are not provided to many customers who repeatedly request the same service. Short-term special constructions do, however, involve facilities which are customer-tailored to meet an individual customer's needs and are technically and operationally distinct from those used to serve other customers. As in the case of multi-month special construction, when carriers note a short-term special construction in their tariffs, most do not file sufficient information for us or the public to discern whether the terms and conditions are just, reasonable, and nondiscriminatory. Nor do the carriers specify the range of circumstances under which they will offer the same terms and conditions as are agreed to in these private contracts. Nevertheless, because the affected parties agree to the terms for special construction, we have not had cause to find the terms of these offerings unreasonable.

19. Special service arrangements are usually stable, long-term, contractual offerings. Regardless of duration, most special service arrangements involve private agreements with individual customers for technically and operationally distinct services, typically involving technically and operationally distinct facilities. Similar services are not offered to many other customers.[36] Nor are special services offered with specifications as to the circumstances under which they will be available to other customers on the same terms and conditions. As in the case of special constructions, most carriers do not file special service arrangements with sufficient information to discern whether the terms and conditions are just, reasonable, and nondiscriminatory. Here, too, we have not had cause to investigate these tariffs because all affected parties accept the terms.

IV. Proposal for Treatment of Special Construction of Lines and Special Service Arrangements

20. We seek comments on the following six-part proposal for requiring special construction of lines and special service arrangements to be provided as non-common carrier offerings. First, we need to define the jurisdictionally-interstate activities to which this proposal would apply. We propose to treat as non-common carriage only extraordinary, customer-requested, individually-tailored construction and services, not offerings which are or should be general. We do not seek to expand the present rate of occurrence, range, or circumstances of special activities.[37]

In particular, while we do not expect that this proposal will affect the availability of telephone service to customers,[38] we would be concerned if

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[31] Domestic Fixed-Satellite Transponder Sales, *supra*, 90 FCC at 1257.

[32] *Id.* at 1256–57.

[33] An entry in a tariff such as "construction of facilities from WIVB–TV to WKBW–TV, Buffalo, N.Y." with a maximum termination liability of $2,000, AT&T FCC Tariff No. 262 at 15, provides no information about the type of facilities constructed or the mileage. In a 1976 proceeding on tariff notice periods, Southern Pacific Communications Co. (SPC) "suggested a one-day period of public notice for experimental services if that term is defined so as to refer to customer serrvices or special construction which does not involve a general offering to the public at large. SPC argues that such a minimal period of public notice is appropriate in these circumstances because the charges filed have already been agreed to by the customer and a long period of public notice would only result in unnecessary delay." Amendment of Parts 0, 1, and 61 of the Commission's Rules, 62 FCC 2d 474, 480 (1976).

[34] 47 CFR 6155(h). In AT&T Tariff FCC No. 5, filed on October 3, 1983, AT&T proposed to provide special construction only when "the company agrees to construct the plan" (Section 2.2). The tariff does not indicate how AT&T would determine whether to undertake special construction. This tariff is subject to an investigation. *See* Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83–1145, Order FCC 83–470 (released October 19, 1983); Letter to D. Culkin from Chief, Common Carrier Bureau at 15 (dated Jan. 9, 1984).

[35] 47 CFR 61.38(e). *See* Amendment of Section 61.38 of the Commission's Rules, 91 FCC 2d 1074 (1982).

[36] Exchange Carrier Association Tariff FCC No. 1, Section 12.1 stated that the Telephone Company "may provide" a special service or arrangement. This discretion calls into question a carrier's commitment even to offer a special service to a particular customer, let alone the price at which the carrier would be willing to provide it.

[37] We do not believe that the provision of equal exchange access for Other Common Carriers should qualify as a special activity.

[38] We do not seek to preempt state regulatory bodies from determining that a franchised telephone exchange carrier that would supply a line (1) with at least one end in its franchised service area, and (2) to be used to provide some switched voice, intrastate services, should supply that line as a common carrier service. In rare circumstances, a franchised telephone exchange carrier presently may supply a line connected to its exchange for a remotely-located household or business through an individually-negotiated special construction arrangement. According to our proposal, as long as that line would be used for some intrastate switched-voice services, the state regulatory commission could choose to regulate that special construction as a common carrier service through tariff or otherwise. However, if state regulation of special activities appears to conflict with federal regulatory policies, we would consider whether federal preemption would serve the public interest.

the comments show that universal service would be impaired. We would make any necessary adjustments in our proposal to ensure that telephone service continues to be widely available to residences and businesses. Special construction involves lines which are individually tailored, constructed, and priced in response to a customer's request where existing lines or ordinary tariffed facilities would not satisfy that request. Special-construction lines do not include lines made generally available by the carrier for its common carrier services. However, we are concerned that this definition relies in part on the availability of ordinary tariffed facilities (facilities made generally available) to determine whether special construction is necessary to respond to a customer's request. We seek comments on a possible standard for ordinary tariffed facilities.[39]

Special service arrangements involve services which are individually tailored and priced in response to a customer's request where ordinary tariffed (generally offered) services would not satisfy that request. Special service arrangements are different from, and do not include, services made generally available by the carrier. We seek comments on a possible standard for ordinary tariffed services. While we may refine these tentative definitions in light of the record developed in this proceeding, we anticipate that cases will emerge where the carrier and/or customer are uncertain whether the offering is a common carrier service or special activity. The Commission's complaint process (47 U.S.C. 208) or other proceedings would be available if a person beleives that a carrier is providing special activities as common carrier services, or vice versa. For example, the Commission could require that a carrier unbundle an offering to separate special activities from common carrier services, or provide under tariff a service that is purportedly a special activity but which in fact should be offered on a common carrier basis (see para. 22 *infra*). Treatment of jurisdictionally-interstate special activities as not common carrier services is not intended to affect state regulation of special activities under the states' jurisdiction.

21. Second, we propose to grant all carriers Section 214 authorization for all special construction of lines and special service arrangments, to the extent that such authorization is necessary. This proposal covers such lines in all domestic areas, even in a telephone exchange common carrier's exchange service area. In the *Competitive Carrier Rulemaking, supra,* we eliminated the requirement of line-specific Section 214 applications for nondominant carriers to make it easier for them to provide facilities that meet consumers' needs and to reduce regulatory costs. Recently, we proposed to grant blanket Section 214 authorizaton for the provision of lines by a telephone common carrier for its cable television service or other non-common carrier services outside its telephone service area.[40] It appears that line-specific Section 214 authorization in cases of special construction and special service arrangements is unnecessary as a tool to control carriers' revenue requirements for common carrier services (see para. 23 *infra* on separate books of account and possible structural separation) or to promote other policy objectives. Section 214 applications involve costs and delays. Also, non-carriers do not require Section 214 authorization for providing lines. Requiring line-specific Section 214 authorization for carriers' lines used for special construction and special service arrangements may unnecessarily handicap carriers in competition with non-carriers. We tentatively conclude that all lines for special construction and special service arrangements promote the public convenience and necessity.

22. Third, we propose to disallow the filing in tariffs of new projects for special activities. Instead, pursuant to unbundling these services, carriers would file tariffs for the services related to these offerings which are generally-available, common carrier services. In addition, carriers would file publicly-available, semi-annual reports listing each of their special-activity projects with a brief description of the facilities and services provided. At the Commission's request, a carrier would have to file data on the customers, terms, conditions, costs, and charges for any or all of its special-activity projects. These steps will help the Commission discern discrimination and monitor the delineation of common carrier services versus special activities. One of the problems with the present treatment of special activities is that the descriptions in AT&T Tariff FCC Nos. 258 and 262 often are inadequate to determine whether, for example, a service noted therein should have been provided under AT&T's general private line tariff, AT&T Tariff FCC No. 260. A carrier's reports should make clear the distinction between a specific special offering and the carrier's tariffed common carrier services. As for specific special activities filed in currently-effective tariffs, we seek to avoid disruptions in expectations and agreements. Interested parties may file comments on whether some grandfathering provisions would be in the public interest.

23. The fourth part of this proposal is that carriers use books of account for their special activities which are separate from those used for their common carrier services. The costs on the separate books must at a minimum cover the direct, indirect and overhead expenditures incurred for special activities. The costs of preparing quotations for these special activities and the costs of installing and maintaining the special facilities also should be separated from the revenue requirements for common carrier services. In the *Second Computer Inquiry,* we required AT&T to provide customer-premises equipment (CPE) and enhanced services only through a fully-separated subsidiary (now called AT&T Information Systems). Recently we required the Bell Operating Companies (BOCs) to undertake some, but not full, structural separation for offering CPE, enhanced services, and cellular, communications services.[41] It may be that structural separation should not be required for special activities provided by AT&T, the BOCs, or other common carriers. First, if the costs of special activities are small, the harm to subscribers from any cost shifting that may go undertected with separate books of account but that would have been prevented by structural separation would be limited (see paras. 2 and 3 *supra*). The larger costs of marketing CPE and enhanced services pose far greater dangers to subscribers from cost shifting. Second, our orders bar the separate subsidiaries of AT&T and the BOCs from owning transmission facilities. We would have to modify this prohibition if these subsidiaries were to provide special activities. While we are examining the limitations on AT&T's subsidiary in other proceedings,[42] it may

[39] *See* note 1 *supra.*

[40] Blanket Section 214 Authorization for Provision by a Telephone Common Carrier of Lines for its Cable Television and Other Non-Common Carrier Services Outside its Telephone Service Area, 49 FR 3213 (Jan. 26, 1984).

[41] Policy and Rules Concerning the Furnishing of Customer-Premises Equipment, Enhanced Services, and Cellular Communication Serices by the Bell Operating Companies, Order FCC 83-552 (released Dec. 30 1983).

[42] Long-Run Regulation of AT&T's Basic Domestic Interstate Services, *supra;* and AT&T: Provision of Basic Service Via Resale by Separate Subsidiary, 49 Fed Reg. 1248 (Jan. 10, 1984).

be that the costs of spawning new subsidiaries or the possible ramifications of allowing the existing subsidiaries to own transmission facilities are not warranted by any benefits from structural separation for special services. Alternatively, we could require structural separation for speical activities provided by AT&T and the BOCs. We seek comments on these alternatives.

24. Fifth, we propose to require each carrier to provide reasonable, nondiscriminatory interconnections for the special construction, of lines and special service arrangements supplied by other carriers and non-carriers. As described in paras. 9–10 *supra*, we have established a policy favoring reasonable, nondiscriminatory customer-to-carrier and carrier-to-carrier interconnections, and we have entered specific orders requiring interconnections. We seek comments on whether further interconnection standards must be established by the Commission for special construction of lines and special service arrangements.

25. Finally, some special construction offerings may involve use of radio spectrum, *e.g.*, for microwave transmission lines or earth stations. If we decide to treat such construction as non-common carrier offerings, we propose to require that special construction utilize radio spectrum allocated to private, rather than common carrier, uses. Interested parties may comment regarding the effects on spectrum allocations of applying this proposal to future special construction, or to both existing and future special construction.

26. In conclusion, we here propose to change the treatment of special construction of lines and special service arrangements from common carrier to non-common carrier activities. The related facilities-authorization, unbundling, reporting, interconnection, and spectrum proposals are designed to increase competition, reduce cross-subsidies, promote just and reasonable rates for common carrier services, and limit discrimination.

V. Regulatory Flexibility Act—Initial Analysis

27. We conclude that the proposed change contained herein will have a positive economic impact on a substantial number of small entities, within the meaning of Section 605(b) of the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b) (1982). We are issuing this Notice of Proposed Rulemaking to receive public comment on our intention to change the regulatory treatment of special construction of lines and special service arrangements. Our objective is to compile a sufficient record to implement this proposal. The legal basis for this proposal is set forth in para. 27 *infra*. The proposed rule will apply equally to all common carriers and their affiliates—small business entities as well as large corporations—and should aid all carriers by eliminating regulatory costs and delay and increasing the ability of carriers to enter private contracts with customers.

VI. Ordering Clauses

28. This proceeding is instituted pursuant to the provisions contained in 47 U.S.C. 154 (i)–(j), 201–03, 211, and 403.

29. Comments must be filed on or before June 4, 1984. Reply comments will be due on or before June 25, 1984.

30. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally* § 1.1231 of the Commission's Rules, 47 CFR 1.1231. All relevant and timely comments and reply comments will be considered by the Commission. In reaching its decision, the Commission may take into account information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

31. In accordance with the provisions of 47 CFR 1.419(b), an original and six copies of all comments, replies, pleadings, briefs and other documents filed in this proceeding shall be furnished the Commission. Members of the public who wish to express their views by participating informally may do so by submitting one or more copies of their comments, without regard to form (as long as the docket number is clearly stated in the heading). Copies of all filings will be available for public inspection during regular business hours in the Commission's Docket Reference Room (Room 239) at its headquarters in Washington, D.C., 1919 M Street NW.

Federal Communications Commission.

William J. Tricarico,

Secretary.

[FR Doc. 84–12287 Filed 5–7–84; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatended Wildlife and Plants; Proposal of Endangered Status and Critical Habitat for the Large-flowered Fiddleneck (Amsinckia grandiflora)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The Service proposes to list the large-flowered fiddleneck (*Amsinckia grandiflora*) as an endangered species. This action is being taken because population numbers have declined since historic times, possibly as a result of agricultural conversions, intensive livestock grazing, urban development, and other land use activities that have altered the natural plant communities within the large-flowered fiddleneck's historic range. Today the species has an extremely restricted range, very reduced gene pool, and low reproductive potential. The singel known location is being threatened by the encroachment of weedy exotics and other species of *Amsinckia*, and there is the possibility that testing of chemical explosives and controlled burning (both activities occur in its present environment) may be adversely affecting the species.

The large-flowered fiddleneck occurs in southwestern San Joaquin County, California. In August of 1980, fewer than 50 plants were observed. Critical habitat is included with this proposed rule. The proposed rule would provide protection for the remaining wild population of this species.

DATES: Comments from all interested parties must be received by July 9, 1984. Requests for a public meeting must be received by June 22, 1984.

ADDRESSES: Interested persons or organizations are requested to submit comments to: Regional Director, U.S. Fish and Wildlife Service, Lloyd 500 Building, Suite 1692, 500 NE Multnomah Street, Portland, Oregon 97232. Comments and materials relating to this rule are available for public inspection by appointment during normal business hours at the Service's Regional Office at the above address.

FOR FURTHER INFORMATION CONTACT: For further information on the proposed rule contact Mr. Sanford Wilbur, U.S. Fish and Wildlife Service, Lloyd 500 Building, Suite 1692, 500 NE Multnomah Street, Portland, Oregon 97232 (503/231–6131).

SUPPLEMENTARY INFORMATION:

Background

The large-flowered fiddleneck, an annual species, was first described by Asa Gray in 1876 as a variety of *Amsinckia vernicosa* Hooker and Arnott. Historically, the species was found in Alameda, Contra Costa, and San Joaquin Counties, California. Today, it is known to survive only at one site covering ½ acre. Very little is known about its ecology, but a number of studies have been concerned with its unusual reproductive system. It is throught that the rarity and endangerment of this species are due, in part, to its reproductive system, which is more "primitive", less efficient, and thus less competitive than those of related species (see Ray and Chisaki, 1957; Ornduff, 1976). Introduction of grazing animals is believed to have been responsible for extirpation of some previously known populations. Other factors that may threaten to adversely affect the species and/or its habitat include: the testing of chemical high explosives in the vicinity of the proposed critical habitat; grass fires resulting from such tests; controlled burns performed within or near the habitat; and the encroachment of weedy competitors, especially other, more aggressive, fiddleneck species.

The Secretary of the Smithsonian Institution, as directed by Section 12 of the Endangered Species Act of 1973 (the Act), prepared a report on those plants considered to be endangered, threatened, or extinct in the United States. This report (House document #94–51), was presented to Congress on January 9, 1975. On July 1, 1975, the Fish and Wildlife Service published a notice in the **Federal Register** (40 FR 27823–27924) accepting the report as a petition within the context of Section 4(c)(2) of the Act (petition acceptance provisions are now contained in Section 4(b)(3)(A)), and giving notice of its intention to review the status of the plant taxa named therein, including the large-flowered fiddleneck. As a result of this review, on June 16, 1976, the Service published a proposed rule in the **Federal Register** (41 FR 24523–24572) to determine approximately 1,700 vascular plant species, including the large-flowered fiddleneck, to be endangered species pursuant to Section 4 of the Act. In 1978, amendments to the Act required that all proposals over 2 years old be withdrawn. A 1-year grace period was given to proposals already over 2 years old. On December 10, 1979, the Service published a notice in the **Federal Register** (44 FR 70796–70797) withdrawing the portion of the June 16, 1976, proposal that had not been made final, along with four other proposals that had expired. The Service published an updated notice of review for plants on December 15, 1980 (45 FR 82479), including *Amsinckia grandiflora*. On February 15, 1983, the Service published a notice (48 FR 6752) announcing its findings that the listing of this species, as petitioned by the Smithsonian Institution, may be warranted in accord with Section 4(b)(3)(A) of the Act as amended in 1982. On October 13, 1983, a further finding was made the listing of *Amsinckia grandiflora* was warranted, but precluded by other pending listing actions, in accord with Section 4(b)(3)(B)(iii) of the Act; notification of this finding was published on January 20, 1984 (49 FR 2485). Such a finding requires the petition to be recycled, pursuant to Section 4(b)(3)(C)(i) of the Act. The present notice announces a finding that the listing is warranted, and simultaneously proposes to implement the petitioned action, in accord with Section 4(b)(3)(B)(ii) of the Act.

Summary of Factors Affecting the Species

Section 4(a)(1) of the Act sets out a series of factors to be considered in determining whether any species is endangered or threatened. These factors and their application to *Amsinckia grandiflora* are as follows:

A. *The present or threatened destruction, modification, or curtailment of its habitat or range.* Specimens of *Amsinckia grandiflora* were historically collected in Contra Costa, Alameda and San Joaquin Counties, California. Today the plant is known only from a small (approximately ½ acre) site on U.S. Department of Energy (DOE) land in southwestern San Joaquin County. This land is administered by the University of California Lawrence Livermore Laboratory, which uses the land for testing chemical explosives. In recent years, the population has consisted of fewer than 50 plants, all of which were found on the steep, west- and south-facing slopes of a ravine next to a drop tower (explosive test tower). According to DOE, testing does not occur in the immediate vicinity of the population. However, tests conducted nearby have the potential to start grass fires that could burn the population of the fiddleneck. These fires may affect the long-term survival of the species. In addition, DOE has authorized laboratory personnel to perform controlled burning in the test areas. Such burns, if conducted in or near the proposed critical habitat, may adversly affect the species and its habitat.

B. *Overutilization for commercial, recreational, scientific or educational purposes.* The large-flowered fiddleneck has an unusual flower morphology and highly restricted distribution, both of which contrast sharply with most other members of the genus. As a consequence, the species has been the object of a number of studies concerning the reproductive biology and evolution of the genus *Amsinckia*. Such studies often required the use of plant materials, usually reproductive parts or occasionally whole plants. The utilization of this small and restricted population for scientific purposes could become a significant threat to the species if not carefully monitored and managed.

C. *Disease or predation.* Grazing may have been responsible, at least in part, for extirpation of some populations of this species.

D. *The inadequacy of existing regulatory mechanisms.* Although the State of California lists the large-flowered fiddleneck as rare, State law does not provide adequate protection for this species in its natural habitat. The law provides that a land owner who has been notified by the State Fish and Game Commission that a State listed plant is growing on his property must notify the Department of Fish and Game "at least 10 days in advance of changing the land use to allow for salvage of such plant." Although State law also provides for such measures as research and land

acquisition, provisions of the Endangered Species Act would offer additional protection to this species and its habitat.

E. *Other natural or manmade factors affecting its continued existence.* Historically, the large-flowered fiddleneck was known to occur in Alameda, Contra Costa, and San Joaquin Counties. However, its former abundance and distribution were not well documented. Presumably, the decline of this species throughout most of its historic range has been the result of agricultural conversions, intensive livestock grazing, and other land-use activities that altered the natural plant communities of which it was a part. Further, although very little is known about the ecology of *Amsinckia grandiflora*, recent pollination studies suggest that its reproductive system is very primitive and relatively inefficient in comparison with related species (Ray and Chisaki, 1957; Ornduff 1976). Consequently, its inherently low reproductive potential places it at a distinct disadvantage in competition with other more aggressive or "weedy" species of *Amsinckia*.

In determining what action to take regarding *Amsinckia grandiflora*, the Service has carefully assessed the best scientific information available regarding past, present, and future threats to this species. In view of its demonstrated contraction of range and decline in numbers, it was considered most appropriate to propose listing as endangered, and designating the only site from which it is still known as critical habitat.

Critical Habitat

Critical habitat, as defined by Section 3 of the Act and at 50 CFR Part 424 means: (i) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management consideration or protection; and (ii) specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species.

Section 4(a)(3) of the Act requires that critical habitat be designated to the maximum extent prudent and determinable concurrent with the determination that a species is endangered or threatened. Proposed critical habitat for the large-flowered fiddleneck is in San Joaquin County, California, and consists of the W½, NW¼ and W½, SW¼ of T3S R4E, Section 28.

The Service is required to consider in determining what areas are critical habitat those physiological, behavioral, ecological, and evolutionary requirements essential to the conservation of the species and which may require special management consideration or protection. These requirements include, but are not limited to:

(1) Space for individual and population growth and normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally

(5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distribution of listed species.

With respect to the large-flowered fiddleneck, so little is known of its biology and ecology that it cannot definitely be said that the area proposed as critical habitat will satisfy all or most of these requirements on a long-term basis. It appears, however, that the proposed critical habitat, with a steep west and south facing slope and light-textured but stable soil, does at least satisfy the fiddleneck's short-term physiological needs. The area proposed may not included the entire suitable habitat of this plant and revision of critical habitat may be warranted in the future.

The critical habitat proposed exceeds the current range of the fiddleneck; such a designation is believed essential to the conservation of this plant. The fiddleneck's range is now limited to a half-acre area. Its continuation and stabilization within that area would likely not constitute recovery from endangerment, since a single grass fire or other local threat could render it extinct. The area proposed for critical habitat designation is believed to contain places suitable for expansion or relocation; without its full extent, recovery would not be likely. Accordingly, the Service believes designation of this area is essential to the conservation of this species.

Available Conservation Measures

Endangered species regulations published in 50 CFR Section 17.61 set forth a series of general prohibitions and exceptions that apply to all Endangered plant species. These prohibitions, in part, would make it illegal for any person subject to the jurisdiction of the United States to import or export, ship in interstate or foreign commerce in the course of a commercial activity, or to sell this species, or offer it for sale in interstate or foreign commerce. It also would be illegal to deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever, and in the course of a commercial activity, any such plant. The Act, as amended in 1982, also prohibits the removal and reduction to possession of any such plant from land under Federal jurisdiction. Certain exceptions would apply to agents of the Service and State conservation agencies.

Permits may be issued to carry out otherwise prohibited activities involving endangered plant species under certain circumstances. Regulations governing permits are at 50 CFR 17.62 and 17.63. Such permits are available for scientific purposes or to enhance the propagation or survival of the species. In some instances, permits may be issued during a specified period of time to relieve undue economic hardship that would be suffered if such relief were not available.

If this proposal is published as a final rule, Subsection 7(a)(2) of the Act would require Federal agencies not only to insure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the large-flowered fiddleneck but also require them to insure that their actions are not likely to result in the destruction or adverse modification of critical habitat of this species. Provisions for interagency cooperation are codified at 50 CFR Part 402.

Subsection 7(a)(4) of the Act requires Federal agencies to confer informally with the Secretary on any agency action that is likely to jeopardize the continued existence of any species proposed to be listed under Section 4 of the Act or to result in the destruction or adverse modification of critical habitat proposed to be designated for such species.

Section 4(b)(2) of the Act requires the Service to consider economic and other impacts of specifying a particular area as critical habitat. The Service will reevaluate the geographic critical habitat designation when preparing a final rule designating critical habitat for this species, after considering all additional information obtained.

The Service is notifying the Federal agency that has jurisdiction over the land under consideration in this proposed action. This Federal agency and other interested persons or organizations are requested to submit information on potential economic or other impacts of this proposed designation.

Several activities involving Federal agencies are presently known that may have an impact on the proposed critical habitat of the large-flowered fiddleneck. Section 4(b)(8) of the Act requires, to the maximum extent practicable, that any proposal to determine critical habitat be accompanied by a brief description and evaluation of those public or private activities that, in the opinion of the Secretary, may adversely modify such habitat if undertaken or which in turn may be impacted by such designation. Such activities are identified for this species as follows:

As mentioned previously, Lawrence Livermore Laboratory has been given funding and authorization by the Department of Energy to conduct various activities in the vicinity of the large-flowered fiddleneck population and its proposed critical habitat. These activities could occur directly in the vicinity of the population or anywhere within the 27 km^2 area of the testing facility. The principal concerns are with construction activities, testing of chemical high explosives, and controlled burning. It is believed that these activities could have an adverse impact on the large-flowered fiddleneck and its habitat unless carefully implemented.

Any activity that would result in a disturbance of the soil or hydrological regime where the large-flowered fiddleneck occurs would probably adversely modify the critical habitat. Also, any activity that may increase the frequency of grassfires in the area may adversely affect the population and modify the critical habitat. Designation of critical habitat may affect Federal activities and actions in the vicinity of the population by prohibiting or requiring modifications to testing activities, controlled burning, and construction activities.

It should be emphasized that critical habitat designation may not affect any of the Federal activities previously mentioned. If appropriate, the impacts will be addressed during informal conferral or formal consultation with Service as required by Section 7 of the Act.

National Environmental Policy Act

In accordance with a recommendation from the Council on Environmental Quality (CEQ), the Service has not prepared any NEPA documentation for this proposed rule. The recommendation from CEQ was based, in part, upon a decision in the Sixth Circuit Court of Appeals, which held that the preparation of NEPA documentation was not required as matter of law for listings under the Endangered Species Act. *PLF* v. *Andrus*, 657 F.2d 829 (6th Cir. 1981).

Public Comments Solicited

The Service intends that the rules finally adopted will be accurate and as effective as possible in the conservation of the large-flowered fiddleneck. Therefore, any comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, private interests, or any other interested party concerning any aspect of this proposed rule are hereby solicited. Comments particularly are sought concerning:

(1) Biological, commercial, or other relevant data concerning any threat (or the lack thereof) to the species included in this proposal;

(2) The location of and the reasons that any habitat of this species should or should not be determined to be critical habitat as provided for by Section 4 of the Act;

(3) Additional information concerning the range and distribution of this species;

(4) Current or planned activities that may adversely modify the areas being considered for critical habitat; and

(5) The foreseeable economic and other impacts of the critical habitat designation on federally funded or authorized projects.

Author

The primary author of this rule is Monty Knudsen, Sacramento Endangered Species Office, 1230 "N" Street, 14th Floor, Sacramento, California 95814.

References

California Department of Conservation. 1969. Geologic map for the Santa Cruz quad., Division of Mines and Geology.

Greene, E.L. 1894. Manual of the botany of the Region of San Francisco Bay. p. 263. Cubery and Co., San Francisco, California.

Macbride, J.F. 1917. A revision of the North American Species of *Amsinckia*. Contr. from the Gray Herb., n.s. 49, 116 pp.

Ornduff, R. 1976. The reproductive system of *Amsinckia grandiflora*, a distylous species. Syst. Bot. 1:57–66.

Ornduff, R. 1977. Status report on *Amsinckia grandiflora*. California Native Plant Society. 4 pp. Unpublished.

Ray, P.M., and H.F. Chisaki. 1957. Studies on *Amsinckia*. I and II. Amer. J. Bot. 44:529–544.

Rhodes, W.A., and M.L. Sauls. 1980. Preliminary report on the occurrence and status of *Amsinckia grandiflora* at Site 300. Unpublished report on file with Environmental Evaluations Group, Lawrence Livermore Laboratory, Livermore, California. 9 pp, maps and field notes.

U.S. Department of Energy. 1978. Draft Environmental Impact Statement: Livermore Site, Livermore, California. U.S. Dept. of Energy, Wash. D.C., 163 pp. and Appendices.

Weller, S.G., and R. Ornduff. 1977. Cryptic self-incompatibility in *Amsinckia grandiflora*. Evolution 31:47–51.

List of Subjects in 50 CFR Part 17

Endangered and threatened wildlife, Fish, Marine mammals, Plants (agriculture).

Proposed Regulations Promulgation

PART 17—[AMENDED]

Accordingly, it is hereby proposed to amend Part 17, Subchapter B of Chapter I, Title 50 of the Code of Federal Regulations, as set forth below:

1. The authority citation for Part 17 reads as follows:

Authority: Pub. L. 93–205, 87 Stat. 884; Pub. L. 94–359, 90 Stat. 911; Pub. L. 95–632, 92 Stat. 3751; Pub. L. 96–159, 93 Stat. 1225; Pub. L. 97–304, 96 Stat. 1411 (16 U.S.C. 1531 *et seq.*).

2. It is proposed to amend § 17.12 by adding, in alphabetical order by family and genus, the following to the List of Endangered and Threatened Plants:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

PLANTS

Species		Historic range	Status	When listed	Critical habitat	Special rules
Scientific name	Common name					
* * * * * * *						
Boraginaceae—Borage family						
Amsinckia grandiflora	Large-flowered fiddleneck	U.S.A. (CA)	E		17.96(a)	NA
* * * * * * *						

§ 17.96 [Amended]

3. It is further proposed that § 17.96(a) be amended by adding critical habitat of the large-flowered fiddleneck after that of the ——— as follows: [The position of this and any following critical habitat under § 17.96(a) will be determined at the time of publication of a final rule.]

§ 17.96

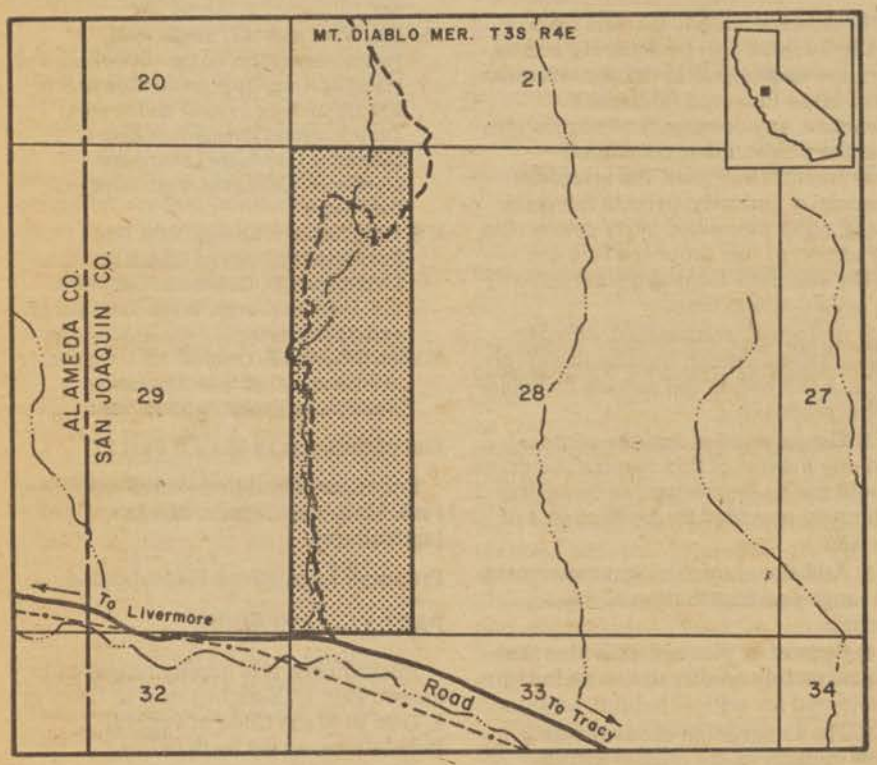
(a) * * *

* * * * *

Critical Habitat for Large-Flowered Fiddleneck

Family Boraginaceae: Large-flowered fiddleneck (*Amsinckia grandiflora*) California, San Joaquin County, Mounty Diablo Meridian, T3S R4E Section 28 W½ NW¼ and W½ SW¼.

This include the known primary constituent elements of a steep, west and south facing slope with light textured but stable soils.



Dated: April 23, 1984.

G. Ray Arnett,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 84-12295 Filed 5-7-84; 8:45 am]

BILLING CODE 4310-55-M

Notices

Federal Register
Vol. 49, No. 90
Tuesday, May 8, 1984

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Coronado National Forest Grazing Advisory Board; Meeting

The Coronado National Forest Grazing Advisory Board will meet at 10 a.m., Room 7X, May 22, 1984, at the Federal Building, 301 West Congress, Tucson, Arizona. The purpose of this meeting is to discuss allotment management planning including the Coronado National Forest Plan and EIS, and the use of range betterment funds. The meeting will be open to the public. Persons who wish to attend should notify Larry Allen, Coronado Supervisor's Office, telephone 602–629–6418. Written statements will be filed with the board before or after the meeting.

The board has established the following rule for public participation: Nonmembers are asked to withhold comments until the close of business.

Dated: April 25, 1984.

Larry S. Allen,

Acting Forest Supervisor.

[FR Doc. 84–12322 Filed 5–7–84; 8:45 am]

BILLING CODE 3410–11–M

CIVIL AERONAUTICS BOARD

Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart Q of the Board's Procedural Regulations

Week ended April 27, 1984.

Subpart Q Applications

The due date for answers, conforming application, or motions to modify scope are set forth below for each application. Following the answer period the board may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings. (See, 14 CFR 302, 1701 et. seq.).

Date filed	Docket No.	Description
Apr. 23, 1984	42160	Jet Charter Service Inc., d/b/a Jet 234, c/o Robert H. Huey, Arent, Fox, Kintner, Plotkin & Kahn, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036. Application of Jet Charter Service Inc., d/b/a Jet 24, pursuant to Section 401 of the Act and Subpart Q of the Board's Procedural Regulations requests a certificate of public convenience and necessity to engage in scheduled foreign air transportation of persons, property and mail, as follows: A. Between Miami, Florida and Madrid, Spain B. Between Miami, Florida and Paris, France C. Between San Juan, Puerto Rico and Bogota, Columbia D. Between San Juan, Puerto Rico, Madrid, Spain and Miami, Florida E. Between San Juan, Puerto Rico and Paris, France and Miami, Florida F. Between San Juan, Puerto Rico and Zurich, Switzerland. Conforming Applications, Motions to Modify Scope and Answers may be filed by May 21, 1984.
Apr. 24, 1984	42161	Varig, S.A. (Viacao Aerea Rio-Grandense), c/o Robert Reed Gray, Hale Russell & Gray, 1025 Connecticut Ave., N.W., Washington, D.C. 20036. Application of Varig, S.A. pursuant to Section 402 of the Act and Subpart Q of the Board's Procedural Regulations requests renewal of its foreign air carrier permit authorizing it to engage in foreign air transportation with respect to persons, property and mail as follows: 1. Between a point or points in the Republic of Brazil, the intermediate points Lima, Peru; Guayaquil and Quito, Edcuador; points in Trinidad; Bridgetown, Barbados; St. Johns, Antiqua; Santo Domingo, Dominican Republic; Port-au-Prince, Haiti; and Kingston and Montego Bay, Jamaica; and the coterminal points New York, N.Y., and Washington, D.C. 2. Between a point or points in the Republic of Brazil, the intermediate points Lima, Peru; Guayaquil and Quito, Ecuador; Bogota, Colombia; Panama City, Panama; Mexico City, Mexico; Los Angeles, Calif.; and Honolulu, Hawaii, and the terminal point Tokyo, Japan. 3. Between a point or points in the Republic of Brazil, the intermediate points Parmaribo, Surinam; Georgetown, Guana; Port-of-Spain, Trinidad: Caracas, Venezuela; Bridgetown, Barbados; St. Johns, Antigua; Santo Domingo, Dominican Republic; Port-au-Prince, Haiti; Kingston and Montego Bay, Jamaica; and Camaguey and Havana, Cuba; and the coterminal points Miami, Fla., and Chicago, Ill. 4. Between a point or points in the Republic of Brazil, the intermediate points Paramaribo, Surinam; Georgetown, Guyana; points in Trinidad; Caracas, Venezuela; Bridgetown, Barbados; St. Johns, Antigua; Santo Domingo, Dominican Republic; Port-au-Prince, Haiti; Kingston and Montego Bay, Jamaica; and Camaguey and Havana, Cuba; and the coterminal points Miami, Fla., and New York, N.Y. Answers may be filed by May 22, 1984.
Apr. 25, 1984	42163	Transbrasil S.A. Linhas Aereas, c/o Joanne W. Young, Barrett Smith Schapiro Simon & Armstrong, 1201 Pennsylvania Avenue, N.W., Washington, D.C. 20004. Application of Transbrasil S.A. Linyas Aereas pursuant to Section 402 of the Act and Subpart Q of the Board's Procedural Regulations for renewal of its foreign air carrier permit to engage in charter foreign air transportation of persons and property between the United States and the Federative Republic of Brazil. Answers may be filed by May 23, 1984.

Phyllis T. Kaylor,

Secretary.

[FR Doc. 84–12345 Filed 5–7–84; 8:45 am]

BILLING CODE 6320–01–M

[Docket 42028]

Alfonso Airways and Export, Inc.; Fitness Investigation; Prehearing Conference

Notice is hereby given that a prehearing conference in the above-titled matter will be held on May 10, 1984, at 10:00 a.m. (local time) in room 1027, Universal Building, 1825 Connecticut Avenue, NW., Washington, D.C., before the undersigned administrative law judge.

Dated at Washington, D.C. May 2, 1984.

William A. Kane, Jr.,

Administrative Law Judge.

[FR Doc. 84-12347 Filed 5-7-84; 8:45 am]

BILLING CODE 6320-01-M

[Docket 42155]

Premiere Airlines, Inc., Continuing Fitness Investigation; Prehearing Conference

Notice is hereby given that a prehearing conference in the above-entitled matter will be held on May 21, 1984, at 10:00 a.m. (local time) in Room 1027, Universal Building, 1825 Connecticut Avenue, NW., Washington, D.C., before the undersigned administrative law judge.

Dated at Washington, D.C., May 2, 1984.

John M. Vittone,

Administrative Law Judge.

[FR Doc. 84-12346 Filed 5-7-84; 8:45 am]

BILLING CODE 6320-01-M

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 251]

Resolution and Order Approving the Application of the St. Louis County Port Authority for a Foreign-Trade Zone in St. Louis County, Missouri, Adjacent to the St. Louis Customs Port of Entry

Proceedings of the Foreign-Trade Zones Board, Washington, D.C.

Resolution and Order

Pursuant to the authority granted in the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board has adopted the following Resolution and Order:

The Board, having considered the matter, hereby orders:

After consideration of the application of the St. Louis County Port Authority, a political subdivision of the State of Missouri, filed with the Foreign-Trade Zones Board (the Board) on May 25, 1983, requesting a grant of authority for establishing, operating, and maintaining a general-purpose foreign-trade zone in St. Louis County, Missouri adjacent to the St. Louis Customs port of entry, the Board, finding that the requirements of the Foreign-Trade Zones Act, as amended, and the Board's regulations are satisfied, and that the proposal is in the public interest, approves the application.

As the proposal involves open space on which buildings may be constructed by parties other than the grantee, this approval includes authority to the grantee to permit the erection of such buildings, pursuant to § 400.815 of the Board's regulations, as are necessary to carry out the zone proposal, providing that prior to its granting such permission it shall have the concurrences of the local District Director of Customs, the U.S. Army District Engineer, when appropriate, and the Board's Executive Secretary. Further, the grantee shall notify the Board's Executive Secretary for approval prior to the commencement of any manufacturing operation within the zone. The Secretary of Commerce, as Chairman and Executive Officer of the Board, is hereby authorized to issue a grant of authority and appropriate Board Order.

Grant To Establish, Operate, and Maintain a Foreign-Trade Zone in St. Louis County, Missouri, Adjacent to the St. Louis Customs Port of Entry

Whereas, by an Act of Congress approved June 18, 1934, an Act "To provide for the establishment, operation, and maintenance of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes," as amended (19 U.S.C. 81a–81u) (the Act), the Foreign-Trade Zones Board (the Board) is authorized and empowered to grant to corporations the privilege of establishing, operating, and maintaining foreign-trade zones in or adjacent to ports of entry under the jurisdiction of the United States;

Whereas, the St. Louis County Port Authority (the Grantee), a political subdivision of the State of Missouri, has made application (filed May 25, 1983, Docket No. 19–83, 48 FR 26491) in due and proper form to the Board, requesting the establishment, operation, and maintenance of a foreign-trade zone in St. Louis County, Missouri, adjacent to the St. Louis Customs port of entry;

Whereas, notice of said application has been given and published, and full opportunity has been afforded all interested parties to be heard; and,

Whereas, the Board has found that the requirements of the Act and the Board's regulations (15 CFR Part 400) are satisfied;

Now, therefore, the Board hereby grants to the Grantee the privilege of establishing, operating, and maintaining a foreign-trade zone, designated on the records of the Board as Zone No. 102 at the location mentioned above and more particularly described on the maps and drawings accompanying the application in Exhibits IX and X, subject to the provisions, conditions, and restrictions of the Act and the regulations issued thereunder, to the same extent as though the same were fully set forth herein, and also to the following express conditions and limitations:

Activation of the foreign-trade zone shall be commenced by the Grantee within a reasonable time from the date of issuance of the grant, and prior thereto the Grantee shall obtain all necessary permits from Federal, State, and municipal authorities.

The Grantee shall allow officers and employees of the United States free and unrestricted access to and throughout the foreign-trade zone site in the performance of their official duties.

The Grantee shall notify the Executive Secretary of the Board for approval prior to the commencement of any manufacturing operations within the zone.

The grant shall not be construed to relieve the Grantee from liability for injury or damage to the person or property of others occasioned by the construction, operation, or maintenance of said zone, and in no event shall the United States be liable therefor.

The grant is further subject to settlement locally by the District Director of Customs and the Army District Engineer with the Grantee regarding compliance with their respective requirements for the protection of the revenue of the United States and the installation of suitable facilities.

In witness whereof, the Foreign-Trade Zones Board has caused its name to be signed and its seal to be affixed hereto by its Chairman and Executive Officer at Washington, D.C. this 27th day of

April 1984, pursuant to Order of the Board.

Foreign-Trade Zones Board.

Malcolm Baldrige,

Chairman and Executive Officer.

Attest:

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 84-12327 Filed 5-7-84; 8:45 am]

BILLING CODE 3510-25-M

[Order No. 252]

Resolution and Order Approving the Application of the St. Louis County Port Authority for a Foreign-Trade Subzone at Ford's Hazelwood, Missouri Plant, Adjacent to the St. Louis Customs Port of Entry

Proceedings of the Foreign-Trade Zones Board, Washington, D.C.

Resolution and Order

Pursuant to the authority granted in the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board has adopted the following Resolution and Order:

The Board, having considered the matter, hereby orders:

After consideration of the application of the St. Louis County Port Authority, filed with the Foreign-Trade Zones Board (the Board) on December 4, 1983, requesting special-purpose subzone status for the auto manufacturing plant of Ford Motor Corporation in Hazelwood, Missouri, adjacent to the St. Louis Customs port of entry, the Board, finding that the requirements of the Foreign-Trade Zones Act, as amended, and the Board's regulations are satisfied, and that the proposal is in the public interest, approves the application.

The Secretary of Commerce, as Chairman and Executive Officer of the Board, is hereby authorized to issue a grant of authority and appropriate Board Order.

Grant of Authority To Establish a Foreign-Trade Subzone in Hazelwood, Missouri, Adjacent to the St. Louis Customs Port of Entry

Whereas, by an Act of Congress approved June 18, 1934, an Act "To provide for the establishment, operation, and maintenance of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes", as amended (19 U.S.C. 81a–81u) (the Act), the Foreign-Trade Zones Board (the Board) is authorized and empowered to grant to corporations the privilege of establishing, operating, and maintaining foreign-trade zones in or adjacent to ports of entry under the jurisdiction of the United States;

Whereas, the Board's regulations (15 CFR 400.304) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved, and where a significant public benefit will result;

Whereas, the St. Louis County Port Authority, grantee of Foreign-Trade Zone No. 102, has made application (filed December 4, 1983, Docket No. 47–83, 48 FR 56620) in due and proper form to the Board for authority to establish a special-purpose subzone at the automobile manufacturing facility of Ford Motor Corporation in Hazelwood, St. Louis County, Missouri, adjacent to the St. Louis Customs port of entry;

Whereas, notice of said application has been given and published, and full opportunity has been afforded all interested parties to be heard; and,

Whereas, the Board has found that the requirements of the Act and the Board's regulations are satisfied;

Now, therefore, in accordance with the application filed December 4, 1983, the Board hereby authorizes the establishment of a subzone at Ford's Hazelwood, Missouri plant, designated on the records of the Board as Foreign-Trade Subzone No. 102A at the location mentioned above and more particularly described on the maps and drawings accompanying the application, said grant of authority being subject to the provisions and restrictions of the Act and the Regulations issued thereunder, to the same extent as though the same were fully set forth herein, and also to the following express conditions and limitations:

Activation of the subzone shall be commenced within a reasonable time from the date of issuance of the grant, and prior thereto, any necessary permits shall be obtained from Federal, State, and municipal authorities.

Officers and employees of the United States shall have free and unrestricted access to and throughout the foreign-trade subzone in the performance of their official duties.

The grant shall not be construed to relieve responsible parties from liability for injury or damage to the person or property of others occasioned by the construction, operation, or maintenance of said subzone, and in no event shall the United States be liable therefor.

The grant is further subject to settlement locally by the District Director of Customs and District Army Engineer with the Grantee regarding compliance with their respective requirements for the protection of the revenue of the United States and the installation of suitable facilities.

In witness whereof, the Foreign-Trade Zones Board has caused its name to be signed and its seal to be affixed hereto by its Chairman and Executive Officer or his delegate at Washington, D.C. this 27th day of April 1984 pursuant to Order of the Board.

Foreign-Trade Zones Board.

Malcolm Baldrige,

Chairman and Executive Officer, Foreign-Trade Zones Board.

Attest:

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 84-12328 Filed 5-7-84; 8:45 am]

BILLING CODE 3510-25-M

[Order No. 253]

Resolution and Order Approving the Application of the Grand Forks Development Foundation for a Foreign-Trade Zone in Grand Forks, North Dakota

Proceedings of the Foreign-Trade Zones Board, Washington, D.C.

Resolution and Order

Pursuant to the authority granted in the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board has adopted the following Resolution and Order:

The Board, having considered the matter, hereby orders:

After consideration of the application of the Grand Forks Development Foundation, a North Dakota non-profit development corporation, filed with the Foreign-Trade Zones Board (the Board) on August 29, 1983, requesting a grant of authority for establishing, operating, and maintaining a general-purpose foreign-trade zone in Grand Forks, North Dakota, adjacent to the Grand Forks station of the Pembina Customs port of entry, the Board, finding that the requirements of the Foreign-Trade Zones Act, as amended, and the Board's regulations are satisfied, and that the proposal is in the public interest, approves the application.

As the proposal involves open space on which buildings may be constructed by parties other than the grantee, this approval includes authority to the grantee to permit the erection of such buildings, pursuant to § 400.815 of the Board's regulations, as are necessary to carry out the zone proposal, providing that prior to its granting such permission it shall have the concurrences of the local District Director of Customs, the U.S. Army District Engineer, when appropriate, and the Board's Executive Secretary. Further, the grantee shall notify the Board's Executive Secretary for approval prior to the commencement of any manufacturing operation within the zone. The Secretary of Commerce, as Chairman and Executive Officer of the Board, is hereby

authorized to issue a grant of authority and appropriate Board Order.

Grant To Establish, Operate, and Maintain a Foreign-Trade Zone in Grand Forks, North Dakota

Whereas, by an Act of Congress approved June 18, 1934, an Act "To provide for the establishment, operation, and maintenance of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes," as amended (19 U.S.C. 81a–81u) (the Act), the Foreign-Trade Zones Board (the Board) is authorized and empowered to grant to corporations the privilege of establishing, operating, and maintaining foreign-trade zones in or adjacent to ports of entry under the jurisdiction of the United States;

Whereas, the Grand Forks Development Foundation, (the Grantee), a North Dakota non-profit development corporation, has made application (filed August 29, 1983, Docket No. 32–83, 48 FR 40289) in due and proper form to the Board, requesting the establishment, operation, and maintenance of a foreign-trade zone in Grand Forks, North Dakota, adjacent to the Grand Forks Station of the Pembina Customs port of entry;

Whereas, notice of said application has been given and published, and full opportunity has been afforded all interested parties to be heard; and,

Whereas, the Board has found that the requirements of the Act and the Board's regulations (15 CFR Part 400) are satisfied;

Now, therefore, the Board hereby grants to the Grantee the privilege of establishing, operating, and maintaining a foreign-trade zone, designated on the records of the Board as Zone No. 103 at the location mentioned above and more particularly described on the maps and drawings accompanying the application in Exhibits IX and X, subject to the provisions, conditions, and restrictions of the Act and the regulations issued thereunder, to the same extent as though the same were fully set forth herein, and also to the following express conditions and limitations:

Activation of the foreign-trade zone shall be commenced by the Grantee within a reasonable time from the date of issuance of the grant, and prior thereto the Grantee shall obtain all necessary permits from Federal, State, and municipal authorities.

The Grantee shall allow officers and employees of the United States free and unrestricted access to and throughout the foreign-trade zone site in the performance of their official duties.

The Grantee shall notify the Executive Secretary of the Board for approval prior to the commencement of any manufacturing operations within the zone.

The grant shall not be construed to relieve the Grantee from liability for injury or damage to the person or property of others occasioned by the construction, operation, or maintenance of said zone, and in no event shall the United States be liable therefor.

The grant is further subject to settlement locally by the District Director of Customs and the Army District Engineer with the Grantee regarding compliance with their respective requirements for the protection of the revenue of the United States and the installation of suitable facilities.

In witness whereof, the Foreign-Trade Zones Board has caused its name to be signed and its seal to be affixed hereto by its Chairman and Executive Officer at Washington, D.C. this 27th day of April 1984, pursuant to Order of the Board.

Foreign-Trade Zones Board.

Malcolm Baldrige,

Chairman and Executive Officer.

Attest:

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 84–12329 Filed 5–7–84; 8:45 am]

BILLING CODE 3510–25–M

International Trade Administration

[A–357–007]

Carbon Steel Wire Rod From Argentina; Preliminary Determination of Sales at Less Than Fair Value

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice.

SUMMARY: We preliminarily determine that carbon steel wire rod from Argentina is being sold, or is likely to be sold, in the United States at less than fair value. Therefore, we have notified the United States International Trade Commission (ITC) of our determination. We have directed the U.S. Customs Service to suspend liquidation of all entries of the subject merchandise, and to require a cash deposit or the posting of a bond for each such entry in an amount equal to the estimated dumping margin as described in the "Suspension of Liquidation" section of this notice. We also preliminarily determine that "critical circumstances" do not exist with respect to exports of carbon steel wire rod from Argentina.

If this investigation proceeds normally, we will make a final determination by July 16, 1984.

EFFECTIVE DATE: May 8, 1984.

FOR FURTHER INFORMATION CONTACT: Gary Taverman, Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, D.C. 20230, telephone: (202) 377–0161.

SUPPLEMENTARY INFORMATION:

Preliminary Determination

We preliminarily determine that there is a reasonable basis to believe or suspect that carbon steel wire rod from Argentina is being sold, or is likely to be sold, in the United States at less than fair value, as provided in section 733 of the Tariff Act of 1930, as amended (19 U.S.C. 1673b) (the Act). We also preliminarily determine that "critical circumstances" do not exist with respect to wire rod from Argentina.

The estimated margin for the merchandise under investigation is 176.10 percent. This estimated margin is based on the best information available as provided for in section 776(b) of the Act (19 U.S.C. 1677e(b)). As explained in the section of this notice describing our fair value comparisons, this margin could change in the final determination if verifiable information is furnished in a timely fashion and in the form required.

Case History

On November 23, 1983, we received a petition from counsel for Atlantic Steel Company, Continental Steel Company, Georgetown Steel Corporation, North Star Steel Co.—Texas, and Raritan River Steel Company on behalf of the domestic producers of carbon steel wire rod. In accordance with the filing requirements of § 353.36 of the our regulations (19 CFR 353.36), the petition alleged that imports of carbon steel wire rod from Argentina are being, or are likely to be, sold in the United States at less than fair value within the meaning of section 731 of the Act and that these imports are materially injuring, or are threatening to materially injure, a United States industry. Petitioners also alleged that "critical circumstances" exist, as defined in section 733(e) of the Act.

After reviewing the petition, we determined that it contained sufficient grounds upon which to initiate an antidumping investigation. We notified the ITC of our action and initiated the

investigation on December 13, 1983 (48 FR 57578). On January 3, 1984, the ITC found that there is a reasonable indication that imports of carbon steel wire rod are materially injuring, or are threatening to materially injure, a United States industry.

We presented a questionnaire to Acindar Industria Argentina de Aceros S.A. (Acindar) on January 13, 1984. In accordance with our normal practices, we requested a response within 30 days. Due to the large number of sales transaction, we instructed Acindar to report its home market sales transactions in hard copy and on computer tape in the format outline in our questionnaire. At respondent's request, we agreed to extend the response period until March 5, 1984. We received Acindar's response to our questionnaire on March 12, 1984. On April 2, 1984, in a letter to counsel for Acindar, we outlined several deficiencies in the response, and requested that the company submit a propertly formatted amended reponse no later that April 10, 1984. We received Acindar's amended response, including a new computer tape, on April 12, 1984. On April 19, we determined that Acindar's new computer tape is formatted incorrectly and therefore is unusable. In view of the respondent's failure to comply with our request for a properly formatted computerized response, and the lack of time available to obtain and analyze a new computer tape, we are using the best information available for purposes of this preliminary determination, in accordance with section 776(b) of the Act (19 U.S.C. 167e(b)). In this case, the best information available is certain information submitted by respondent.

Scope of Investigation

The merchandise covered by this investigation is carbon steel wire rod. Carbon steel wire rod is classified under item number 607.17 of the *Tariff Schedules of the United States* (TSUS) which covers wire rods of iron or steel, other than alloy iron or steel, not tempered, not treated, and not partly manufactured valued over 4 cents per pound.

This investigation covers the period from June 1 to November 30, 1983.

Fair Value Comparison

To determine whether sales of the subject merchandise in the United States were made at less than fair value, we compared the United States price with the foreign market value, as explained below.

United States Price

As provided for in section 772 of the Act, we used purchase price of the subject merchandies to represent the United States price because the merchandise was sold to unrelated purchasers prior to its importation into the United States.

We calculated the purchase price on the basis of the f.o.b. or C.&F. packed price to unrelated U.S. customers. We made deductions, where appropriate, for ocean freight. We made an addition to purchase price for import duties assessed upon the importation of raw materials used in the manufacture of carbon steel wire rod, and for indirect taxes, which were later rebated by reason of exportation of the merchandise under investigation to the United States, pursuant to sections 772(d)(1) (B) and (C) of the Act.

Foreign Market Value

We based foreign market value on the delivered packed prices of Acindar's home market sales made from September through November, 1983. Information on these sales was contained in a computer printout submitted on April 12. We have determined that this is the best information available for purposes of this preliminary determination because the information was provided by the respondent. During that three-month period, aproximately 75 percent of Acindar's U.S. sales occurred.

We made comparisons of "such or similar" merchandise based on AISI grade categories selected by commerce Department industry experts in accordance with section 771(16)(B) of the Act. In calculating foreign market value, we made currency conversions from Argentine pesos to U.S. dollars in accordance with § 353.56(a)(1) of our regulations using the certified daily exchange rates. we made deductions, where appropriate for foreign inland freight, standard and supplemental discounts, and commissions on home market sales. Since wire rod sold in both the United States and the home market was sold in the indentical packed conditions, no adjustments were made for packing.

We disallowed the following adjustments claimed by Acindar. It claimed a level of trade adjustment to compensate for differences in levels of trade existing between the United States market and the market for sales of wire rod. Pursuant to section 353.19 of the our regulations, we have disallowed this deduction because Acindar did not establish that the pricing differential are due to differences in selling costs associated with sales at different levels of trade in the home market. Acindar also claimed an adjustment for bad debt expenses. We disallowed this adjustment because Acindar did not demonstrate that these expenses were directly related to the sales under consideration, as required by § 353.15 of our regulations. Finally, Acindar claimed an adjustment for a case discount, the purpose of which the company states is to make payment conditions on home market sales comparable to those on its U.S. sales. We have disallowed this claim because the company has not provided satisfactory information that would indicate the basis for the adjustment. We will seek additional information on these disallowed adjustments prior to our final determination.

Preliminary Determination of Critical Circumstances

Counsel for the petitioners alleged that imports of carbon steel wire rod from Argentina present "critical circumstances." Under section 733(e)(1) of the Act, we must determine whether there is a reasonable basis to believe or suspect that: (1) There is a history of dumping in the United States or elsewhere of the class of kind of the merchandise which is the subject of the investigation, or the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the merchandise which is the subject of the investigation at less than its fair value, and (2) there have been massive imports of the class of kind of merchandise that is the subject of the investigation over a relatively short period.

In preliminarily determining whether there is a reasonable basis to believe or suspect that there have been massive imports over a relatively short period, we considered the following factors: recent trends in import penetration levels, whether imports have surged recently; whether recent imports are significantly above the average calculated over the last several years (1981–1983), and whether the patterns of imports over that three-year period may be explained by seasonal swings. Based upon our analysis of the information, we preliminarily determine that imports of the products covered by this investigation do not appear massive over a relatively short period (November 1983 through February 1984). Therefore, for the reasons described above, we preliminarily determine that critical circumstances do not exist with respect to carbon steel wire rod from Argentina.

Verification

As provided in section 776(a) of the Act, we will verify all data used in reaching the final determination.

Suspension of Liquidation

In accordance with section 733(d) of the Act, we are directing the United States Customs Service to suspend liquidation of all entries of carbon steel wire rod as described in the "Scope of Investigation" section of this notice. This suspension of liquidation applies to all the subject merchandise entered, or withdrawn from warehouse, for consumption, on or after the date of publication of this notice in the **Federal Register.** The Customs Service shall require a cash deposit or the posting of a bond equal to the estimated weighted-average margin amount by which the foreign market value of merchandise subject to this investigation exceeds the United States price. The suspension of liquidation will remain in effect until further notice. The estimated weighted-average margin is 176.10 percent.

LTC Notification

In accordance with section 733(f) of the Act, we will notify the ITC of our determination, In addition, we are making available to the ITC all nonprivileged and nonconfidential information relating to this investigation. We will allow the ITC access to all privileged and confidential information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order, without the written consent of the Deputy Assistant Secretary for Import Administration.

The ITC will determine whether these imports are materially injuring or threatening to materially injure a U.S. industry, before the later of 120 days after we make our preliminary affirmative determination or 45 days after we make a final affirmative determination.

Public Comment

In accordance with § 353.47 of our regulations, if requested, we will hold a public hearing to afford interested parties an opportunity to comment on this preliminary determination at 1 p.m. on June 4, 1984, at the United States Department of Commerce, Room 3708, 14th St. and Constitution Avenue, NW., Washington, D.C. 20230. Individuals who wish to participate in the hearing must submit a request to the Deputy Assistant Secretary for Import Administration, Room 3099B, at the above address within 10 days of this notice's publication. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; (3) the reason for attending; and (4) a list of the issues to be discussed.

In addition, prehearing briefs in at least 10 copies must be submitted to the Deputy Assistant Secretary for Import Administration by May 29, 1984. Oral presentations will be limited to issues raised in the briefs. All written views should be filed in accordance with 19 CFR 353.46, within 30 days of this notice's publication, at the above address and in at least 10 copies.

Dated: May 1, 1984.

Alan F. Holmer,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 84-12331 Filed 5-7-84; 8:45 am]

BILLING CODE 3510-DS-M

Preliminary Determination of Sales at Not Less Than Fair Value; Carbon Steel Wire Rod From Mexico

AGENCY: International Trade Administration, Commerce.

ACTION: Notice of preliminary determination of sales at not less than fair value; carbon steel wire rod from Mexico.

SUMMARY: We have preliminarily determined that carbon steel wire rod from Mexico is not being, nor is likely to be, sold in the United States at less than fair value. We have notified the U.S. International Trade Commission (ITC) of our determination

If this investigation proceeds normally, we will make a final determination by July 15, 1983.

EFFECTIVE DATE: May 8, 1984.

FOR FURTHER INFORMATION CONTACT: William Kane, Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, D.C. 20230; telephone (202) 377-1766.

SUPPLEMENTARY INFORMATION:

Preliminary Determination

We have preliminarily determined that there is no reasonble basis to believe or suspect that carbon steel wire rod from Mexico is being, or is likely to be, sold in the United States at less than fair value, as provided in section 733 of the Tariff Act of 1930, as amended (the Act).

We found that for Ahmsa the United States price of carbon steel wire rod from Mexico exceeded the foreign market value on all sales of the product. We found seven sales from Sicartsa on which the foreign market value exceeded the United States price. The weighted-average margin for Sicartsa was 0.08 percent, which is *de minimis.*

Case History

On November 23, 1983, we received a petition from counsel for Atlantic Steel Company, Continental Steel Company, Georgetown Steel Corporation, North Star Steel Company—Texas, and Raritan River Steel Company filed on behalf of the U.S. industry producing carbon steel wire rod. In accordance with the filing requirements of § 353.36 of our regulations (19 CFR 353.36), the petitioners alleged that carbon steel wire rod from Mexico is being, or is likely to be, sold in the United States at less than fair value within the meaning of section 731 of the Act, and that these imports are materially injuring a U.S. industry.

After reviewing the petition, we determined that it contained sufficient grounds upon which to initiate an antidumping investigation. We notified the ITC of our action and initiated the investigation on December 13, 1983 (48 FR 57579).

On January 9, 1983, the ITC determined that there is a reasonble indication that imports of carbon steel wire rod are materially injuring a U.S. industry.

Petitioners had specifically alleged that sales by Altos Hornos de Mexico (Ahmsa) and Siderurgica Lazaro Cardenas—Las Truchas, S.A. (Sicartsa) had been made in the United States at less than fair value. We investigated both firms, which together produce approximately 85 percent of the exports to the U.S.

On January 12 and 20, 1984, we presented antidumping questionnaires to counsel for Sicartsa and Ahmsa respectively. Subsequently we granted a two week extension of the response due date. On March 2, 1984, we received a combined response from counsel for Sidermex on behalf of both companies. Sidermex is a management company set up by the Mexican government to rationalize the Mexican steel industry with regard to production, purchasing and marketing. The capital of Sidermex is subscribed by the Mexican steel plants, Ahmsa, Sicartsa and a third company, Fundidora S.A., which does not manufacture wire rod, and by Mexico's state owned industrial development bank, Nacional Financiera. Counsel for Sidermex contended that Ahmsa and Sicartsa should be treated as one company by virtue of the relationship through Sidermex.

However, because each of the companies maintains its own separate corporate and legal identities, separate manufacturing facilities, and negotiates its sales prices with its individual customers, we consider it appropriate to treat these companies as separate commercial entities.

Scope of Investigation

For purposes of the investigation, the term "carbon steel wire rod" covers wire rods of iron or steel; other than alloy iron or steel, not tempered, not treated, and not partly manufactured, valued over 4 cents per pound. The merchandise is currently classifiable under item 607.1700 of the *Tariff Schedules of the United States Annotated.*

Since the exports of Ahmsa and Sicartsa account for approximately 85 percent of exports of this merchandise to the United States, we limited our investigation to these two companies. We investigated 83 percent of sales made by Ahmsa and 100 percent of sales by Sicartsa during the period June 1 through November 30, 1983.

Fair Value Comparisons

To determine whether sales of the subject merchandise in the United States were made at less than fair value, for each company we compared the United States price with the foreign market value.

United States Price

As provided in section 772 of the Act, we used the purchase price of the subject merchandise to represent the United States price for groupings of rod by grade and diameter for sales by each company because the merchandise investigated was sold to unrelated purchasers prior to its importation into the United States. We calculated the purchase price for each United States sale by Sicartsa on the packed, F.O.B. foreign port price to unelated customers in the United States. Where appropriate, we deducted foreign customs clearance, brokerage, and inland freight.

We calculated the purchase price for each United States sale by Ahmsa on the packed, F.O.B. U.S. border, duty paid, price to unrelated customers in the United States. From this price we made deductions for foreign and U.S. brokerage, foreign inland freight, customs clearance and U.S. customs duties.

Foreign Market Value

In accordance with section 773(a)(1)(A) of the Act, we calculated foreign market values for each grouping of rod by grade and diameter based on each company's sales in the home market. Both Ahmsa and Sicartsa made sufficient sales in the Mexican home market to form bases for fair value comparisons.

For both companies we calculated home market prices on F.O.B. factory prices to unrelated customers in Mexico. We made deductions for rebates where applicable. We made adjustments for differences in credit terms pursuant to section 773(a)(4)(B) of the Act, and for differences in packing in accordance with section 773(a)(1) of the Act.

Critical Circumstances

The petitioners alleged that "critical circumstances" exist with respect to imports of carbon steel wire rod from Mexico. Since we have preliminarily determined that the subject merchandise has not been sold in the United States at less than fair value, we will not determine at this time whether critical circumstances exist. Should our final determination in this case be affirmative, we will address this allegation at the time.

Verification

For purposes of this preliminary determination, we have verified the data used in reaching this determination by using standard verification procedures, including an examination of accounting records and randomly selected documents containing relevant information. In accordance with section 776(a) of the Act, we will verify all additional data used in making our final determination.

ITC Notification

In accordance with section 733(f) of the act, we will notify the ITC of our determination. In addition, we are making available to the ITC all nonprivileged and nonconfidential information relating to this investigation. We will allow the ITC access to all privileged and confidential information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order, without the written consent of the Deputy Assistant Secretary for Import Administration.

Public Comment

In accordance with § 353.47 of our regulations, if requested, we will hold a public hearing to afford interested parties an opportunity to comment on this preliminary determination at 10:00 a.m. on May 30, 1984, at the U.S. Department of Commerce, Room 3708, 14th St. and Constitution Avenue, NW., Washington, D.C. 20230. Individuals who wish to participate in the hearing must submit a request to the Deputy Assistant Secretary for Import Administration, Room 3099B, at the above address within 10 days of this notice's publication. Requests should contain: (1) The party's name, address, and telephone number, (2) the number of participants, (3) the reason for attending, and (4) a list of the issues to be discussed. In addition, prehearing briefs in at least ten copies must be submitted to the Deputy Assistant Secretary by May 23, 1984. Oral presentations will be limited to issues raised in the briefs. All written views should be filed in accordance with 19 CFR 353.46, within 30 days of publication of this notice, at the above address in at least 10 copies. This determination is being published pursuant to section 733(f) of the Act (19 U.S.C. 1673b (f)).

Dated: May 1, 1984.

Alan F. Holmer,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 84-12332 Filed 5-7-84; 8:45 am]

BILLING CODE 3510-DS-M

[A-455-002]

Preliminary Determination of Sales at Less Than Fair Value; Carbon Steel Wire Rod From Poland

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice of preliminary determination of sales at less than fair value: carbon steel wire rod from Poland.

SUMMARY: We have preliminarily determined that carbon steel wire rod (wire rod) from the Polish People's Republic (Poland) is being, or is likely to be, sold in the United States at less than fair value. We have notified the U.S. International Trade Commission (ITC) of our determination, and we have directed the U.S. Customs Service to suspend the liquidation of all entries of the subject merchandise that are entered, or withdrawn from warehouse, for consumption, on or after the date of publication of this notice and to require a cash deposit or bond for each such entry in an amount equal to 56.7 percent of the f.o.b. value of the merchandise. If this investigation proceeds normally, we will make a final determination by July 16, 1984.

EFFECTIVE DATE: May 8, 1984.

FOR FURTHER INFORMATION CONTACT: Raymond Busen, Office of Investigations, Import Administration,

International Trade Administration, U. S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington D.C. 20230; Telephone: (202) 377-1278.

SUPPLEMENTARY INFORMATION:

Preliminary Determination

We have preliminary determined that wire rod from Poland is being, or is likely to be, sold in the United States at less than fair value, as provided in section 733 of the Tariff Act of 1930, as amended (the Act). We have preliminarily determined the weighted-average margin of sales at less than fair value to be 56.7 percent.

If this investigation proceeds normally, we will make a final determination by July 16, 1984.

Case History

On November 23, 1983, we received a petition from counsel for Atlantic Steel Company, Continental Steel Co., Georgetown Steel Corp., North Star Steel Co.—Texas, and Raritan River Steel Company, on behalf of the domestic producers of wire rod. In compliance with the filing requirements of § 353.36 of our regulations (19 CFR 353.36), the petitioners alleged that imports of wire rod from Poland are being, or are likely to be, sold in the United States at less than fair value within the meaning of section 731 of the Act, and that these imports are materially injuring or are threatening to materially injure a United States industry. After reviewing the petition, we determined that it contained sufficient grounds upon which to initiate an antidumping investigation. We notified the ITC of our action and initiated such an investigation on December 13, 1983 (48 FR 57579). On January 9, 1984, the ITC determined that there is a reasonable indication that imports of wire rod are materially injuring a U.S. industry.

On February 6, 1984, a questionnaire was presented to Stalexport. On March 14 and 21, 1984, we received Stalexport's response. As discussed under the "Foreign Market Value" section of this notice, we have preliminarily determined that Poland is a state-controlled-economy country for the purpose of this investigation.

Scope of Investigation

The merchandise covered by this investigation is carbon steel wire rod. The term "carbon steel wire rod" covers wire rod of iron or steel other than alloy iron or steel, not tempered, not treated and not partly manufactured, and valued over 4 cents per pound, as currently provided for in item 607.17 of the *Tariff Schedules of the United States*.

Since Stalexport accounted for all exports of this merchandise to the United States, we limited our investigation to that firm. We investigated all sales of wire rod for calendar year 1983.

Fair Value Comparisons

To determine whether sales of the subject merchandise in the United States were made at less than fair value, we compared the United States price with the foreign market value.

United States Price

As provided in section 772 of the Act, we used the purchase price of the subject merchandise to represent the United States price for sales by Stalexport because the merchandise was sold to unrelated purchasers prior to its importation into the United States.

We calculated the purchase price based on the c. & f. or f.o.b. packed price to unrelated purchasers. We made deductions for foreign inland freight and insurance, brokerage, and where appropriate, for ocean freight.

Foreign Market Value

In accordance with section 773(c) of the Act, we used surrogate prices of wire rod imported to the United States to determine foreign market value. Petitioners alleged that Poland is a state-controlled-economy country, citing our investigation of Certain Carbon Steel Plate from Poland (44 FR 23619) April 20, 1979, and that sales of the subject merchandise from that country do not permit a determination of foreign market value under section 773(a). After an analysis of Poland's economy, and consideration of the briefs submitted by the parties, we have preliminarily concluded that Poland is a state-controlled-economy country for purposes of this investigation. Central to our decision on this issue is the fact that the central government of Poland strictly controls the prices and levels of production of the Polish steel industry, as well as the internal pricing of the factors of production.

As a result, section 773(c) of the Act requires us to use prices or the constructed value of such or similar merchandise in a "non-state-controlled-economy" country. Our regulations establish a preference for foreign market value based upon sales prices. They further stipulate that, to the extent possible, we should determine sales prices on the basis of prices in a "non-state-controlled-economy" country at a stage of economic development comparable to the country with the state-controlled economy.

After an analysis of countries producing wire rod, we determined that Greece would be the most appropriate surrogate. However, we learned only shortly before this preliminary determination that the Greek firms we had contacted would not cooperatein our investigation. We are now considering Italy as a possible surrogate, but presently have been unable to ascertain whether Italian producers will cooperate in our investigation.

Therefore, pursuant to § 353.8(a)(1) of our regulations, we based foreign market value on the average ex-mill price of all imports of wire rod into the United States from January through March 1983, except for those imported from Poland and the German Democratic Republic (the economy of which has been considered in previous investigations to be state-controlled), from countries currently covered by antidumping or countervailing duty orders or suspension agreements, and from countries currently covered by the United States-European Communities Steel Arrangement and for which we published final affirmative countervailing duty determinations (e.g., Belgium and France). We based foreign market value on January through March 1983 statistics because more than 99 percent of Stalexport's sales occurred during that time period. We gathered price information from Departmental import statistics, which was the best information available. We made an adjustment to foreign market value to reflect the difference between commissions on sales to the United States and the computed figure which contained no commissions.

Verification

We will verify all data used in reaching the final determination in this investigation.

Suspension of Liquidation

In accordance with section 733(d) of the Act, we are directing the United States Customs Service to suspend liquidation of all entries of wire rod from Poland that are entered or withdrawn from warehouse, for consumption, on or after the date of publication of this notice in the **Federal Register**. The Customs Service shall require a cash deposit or the posting of a bond equal to the estimated weighted-average amount by which the foreign market value of the merchandise subject to this investigation exceeded the

United States price, which was 56.7 percent of the f.o.b. value. This suspension of liquidation will remain in effect until further notice.

ITC Notification

In accordance with section 733(f) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all nonprivileged and nonconfidential information relating to this investigation. We will allow the ITC access to all privileged and confidential information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order, without the consent of the Deputy Assistant Secretary for Import Administration.

The ITC will determine whether these imports are materially injuring, or threatening to materially injure, a U.S. industry before the later of 120 days after we make our preliminary affirmative determination, or 45 days after we make our final determination.

Public Comment

In accordance with § 353.47 of our regulations (19 CFR 353.47), if requested, we will hold a public hearing to afford interested parties an opportunity to comment on this preliminary determination at 10 a.m. on June 1, 1984, at the U.S. Department of Commerce, Room 6802, 14th St. and Constitution Ave., NW., Washington, D.C. 20230. Individuals who wish to participate in the hearing must submit a request to the Deputy Assistant Secretary for Import Administration, Room 3099B, at the above address within 10 days of this notice's publication. Requests should contain: (1) The party's name, address, and telephone number, (2) the number of participants; (3) the reason for attending; and (4) a list of the issues to be discussed. In addition, prehearing briefs in at least 10 copies must be submitted to the Deputy Assistant Secretary by May 25, 1984. Oral presentations will be limited to issues raised in the briefs. All written views should be filed in accordance with 19 CFR 353.46, within 30 days of publication of this notice, at the above address in at least 10 copies.

Dated: May 1, 1984.

Alan F. Holmer,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 84-12333 Filed 5-7-84; 8:45 am]

BILLING CODE 3510-DS-M

[A-469-008]

Preliminary Determination of Sales at Less Than Fair Value; Carbon Steel Wire Rod From Spain

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice of Preliminary Determination of Sales at Less Than Fair Value: Carbon Steel Wire Rod From Spain.

SUMMARY: We have preliminarily determined that carbon steel wire rod (wire rod) from Spain is being, or is likely to be, sold in the United States at less than fair value. We have notified the U.S. International Trade Commission (ITC) of our determination, and we have directed the U.S. Customs Service to suspend the liquidation of all entries of the subject merchandise that are entered or withdrawn from warehouse, for consumption, on or after the date of publication of this notice and to require a cash deposit or bond for each such entry in an amount equal to the estimated dumping margins as described in the "Suspension of Liquidation" section of this notice. If this determination proceeds normally, we wil make a final determination by July 16, 1984. We found that critical circumstances do not exist with respect to exports of wire rod from Spain.

EFFECTIVE DATE: May 8, 1984.

FOR FURTHER INFORMATION CONTACT: Raymond Busen, Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenues, NW., Washington, D.C. 20230, Telephone: (202) 377-1278.

SUPPLEMENTARY INFORMATION:

Preliminary Determination

We have preliminarily determined that wire rod from Spain is being, or is likely to be, sold in the United States at less than fair value, as provided in section 733 of the Tariff Act of 1930, as amended (the Act). We have found no sales at less than fair value for wire rod produced by FASA. Therefore, imports from FASA should be excluded from this preliminary determination. The concerned firms are indicated in the "Suspension of Liquidation" section of this notice.

We have found that the foreign market value of wire rod exceeded the United States price on 90 percent of the sales we compared. These margins ranged from 4.3 percent to 43.2 percent. The overall weighted-average margin on all sales compared is 12.3 percent. The weighted-average margins for individual companies investigated are presented in the "Suspension of Liquidation" section of this notice. We also found that critical circumstances do not exist with respect to exports of wire rod from Spain.

If this investigation proceeds normally, we will make a final determination by July 16, 1984.

Case History

On November 23, 1983, we received a petition from counsel for Atlantic Steel Company, Continental Steel Co., Georgetown Steel Corp., North Star Steel Co.—Texas, and Raritan River Steel Company, on behalf of the domestic producers of wire rod. In compliance with the filing requirements of § 353.36 of our regulations (19 CFR 353.36), the petitioners alleged that imports of wire rod from Spain are being, or are likely to be, sold in the United States at less than fair value within the meaning of section 731 of the Act, and that these imports are materially injuring or are threatening to materially injure a United States industry. Petitioners also alleged that critical circumstance exist, as defined in section 733(e) of the Act. After reviewing the petition, we determined that it contained sufficient grounds upon which to initiate an antidumping investigation. We notified the ITC of our action and initiated such an investigation on December 13, 1983 (48 FR 57580). On January 9, 1984, the ITC determined that there is a reasonable indication that imports of wire rod are materially injuring a U.S. industry.

On February 11, 1984, questionnaires were received by Nueva Montana Quijano, S.A. (NMQ), Empresa Nacional Siderurgica, S.A. (ENSIDESA), and Forjas Alavesas, S.A. (FASA). On March 21, 26, and 28, 1984, we received NMQ's response. ENSIDESA's response was received on March 23, 26, and 28, 1984, and FASA's response was received on March 23 and 30, 1984.

Scope of Investigation

The merchandise covered by this investigation is carbon steel wire rod. The term "carbon steel wire rod" covers wire rods of iron or steel other than alloy iron or steel, not tempered, not treated and not partly manufactured, and valued over 4 cents per pound, as currently provided for in item 607.17 of the *Tariff Schedules of the United States.*

Since NMQ, ENSIDESA, and FASA account for virtually all the exports of this merchandise to the United States, we limited our investigation to these firms. We investigated all sales of wire

rod by the three firms during the period June 1 through November 30, 1983.

Fair Value Comparisons

To determine whether sales of the subject merchandise in the United States were made at less than fair value, we compared the United States price with the foreign market value.

United States Price

As provided in section 772 of the Act, we used the purchase price of wire rod to represent the United States price for sales by NMQ, ENSIDESA, and FASA because the merchandise was sold to unrelated purchasers prior to its importation into the United States. We calculated the purchase price based on the c.&f., c.i.f., or f.o.b. packed price to unrelated purchasers. We made deductions, where appropriate, for foreign inland freight, foreign inland insurance, customs brokerage, ocean freight, and marine insurance. We made additions for uncollected taxes pursuant to section 772(d)(1)C) of the Act.

Foreign Market Value

In accordance with section 773 of the Act, we calculated foreign market value based on home market sales for both NMQ and FASA. We compared identical merchandise where possible. Where no identical merchandise was sold in the home market, in accordance with section 771(16) of the Act, we made comparisons based on quality and dimensional categories selected by a Commerce Department industry expert. For ENSIDESA we used the best information available as provided for in section 776(b) of the Act, because adequate data were not provided to allow us to compare the wire rod sold to the United States with that sold in the home market. As the best information available we compared the weighted-average price of the one grade sold to the United States with the weighted-average price for all sales of the same grade in the home market.

In the cases of NMQ and FASA, we calculated the home market prices on the basis of delivered, packed prices to unrelated purchasers. Where appropriate, we made deductions for inland freight, discounts and rebates. We made adjustments for differences between United States and home market credit costs, and where appropriate, for commissions and for differences in the merchandise based on differences in composition in accordance with §§ 353.15 and 353.16 of our regulations. We disallowed NMQ's claim for an adjustment for bad debt. As we explained in the final antidumping determination of *Color Television Receivers from Taiwan* (49 FR 7628, 7633, March 1, 1984), in which a similar claim was rejected, ". . . bad debt, by its very nature, is an indirect selling expense." As such, it is not the type of expense for which a circumstance of sale adjustment is appropriate under §§ 353.15 of our regulations.

We disallowed FASA's claimed circumstance of sale adjustments for interest costs related to warehousing inventory and their claimed adjustments to United States and home market prices for indirect selling expenses because they are not directly related to the sales under consideration as required by § 353.15 of our regulations.

Determination of Critical Circumstances

Counsel for petitioners alleged that imports of wire rod from Spain present "critical circumstances." Under section 733(e)(1) of the Act (19 U.S.C. 1673b(e)(1)), critical circumstances exist when the Department has a reasonable basis to believe or suspect that: (1)(a) There is a history of dumping in the United States or elsewhere of the merchandise under investigation, or (b) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the merchandise under investigation at less than its fair value; and (2) there have been massive imports of the merchandise under investigation over a relatively short period.

Based upon our analysis of the information, we preliminarily determine that there is no history of dumping and no indication that the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the merchandise under investigation at less than its fair value.

Verification

We will verify all data used in reaching the final determination in this investigation.

Suspension of Liquidation

In accordance with section 733(d) of the Act, we are directing the United States Customs Service to suspend liquidation of all entries of wire rod from Spain which are entered or withdrawn from warehouse, for consumption, on or after the date of publication of this notice in the **Federal Register.** The Customs Service shall require a cash deposit or the posting of a bond equal to the estimated weighted-average amount by which the foreign market value of the merchandise subject to this investigation exceeded the United States price. This suspension of liquidation will remain in effect until further notice. The weighted-average margins are as follows:

Manufacturers and status	Weighted-average margin percentage
NMQ	13.7
ENSIDESA	17.4
FASA (excluded)	0.0
All other manufacturers/producers/exporters	12.3

Article VI.5 of the General Agreement on Tariffs and Trade provides that "(n)o product . . . shall be subject to both antidumping and countervailing duties to compensate for the same situation of dumping or export subsidization. This provision is implemented by section 772(d)(1)D) of the Act. Since dumping duties cannot be assessed on the portion of the margin attributable to export subsidies, there is no reason to require a cash deposit or bond for that amount. Accordingly, the level of export subsidies (as determined in the final affirmative countervailing duty determination issued concurrently with this notice) has been subtracted from the dumping margin for deposit purposes.

ITC Notification

In accordance with section 733(f) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all nonprivileged and nonconfidential information relating to this investigation. We will allow the ITC access to all privileged and confidential information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order, without the written consent of the Deputy Assistant Secretary for Import Administration. The ITC will determine whether these imports are materially injuring, or threatening to materially injure, a U.S. industry before the later of 120 days after we make our preliminary affirmative determination, or 45 days after we make our final determination.

Public Comment

In accordance with section 353.47 of our regulations (19 CFR 353.47), if requested, we will hold a public hearing to afford interested parties an opportunity to comment on this preliminary determination at 10 a.m. on June 4, 1984, at the U.S. Department of Commerce, Room 6802, 14th St. and Constitution Ave., NW., Washington, D.C. 20230. Individuals who wish to participate in the hearing must submit a

request to the Deputy Assistant Secretary for Import Administration, Room 3099B, at the above address within 10 days of this notice's publication. Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; (3) the reason for attending, and (4) a list of the issues to be discussed. In addition, prehearing briefs in at least 10 copies must be submitted to the Deputy Assistant Secretary by May 28, 1984. Oral presentations will be limited to issues raised in the briefs. All written review should be filed in accordance with 19 CFR 353.46, within 30 days of publication of this notice, at the above address in at least 10 copies.

Dated: May 1, 1984.

Alan F. Holmer,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 84-12334 Filed 5-7-84; 8:34 am]

BILLING CODE 3510-DS-M

Petitions by Producing Firms for Determinations of Eligibility to Apply for Trade Adjustment Assistance; Empire Plow Co., Inc. et al.

Petitions have been accepted for filing from the following firms: (1) The Empire Plow Company, Inc., 3140 E. 65th Street, Cleveland, Ohio 44127, producer of agricultural implements (accepted March 8, 1984); (2) Rush-Hampton Industries, Inc., 1201 Silver Lake Drive, Sanford, Florida 32771, producer of air purifiers (accepted March 20, 1984); (3) Fantastic Plastics, Inc., 12400 44th Street North, Clearwater, Florida 33520, producer of plastic novelties (accepted March 21, 1984); (4) Palma Tool and Die Company, Inc., 21 Ashley Street, Buffalo, New York 14212, producer of tools, dies, jigs, fixtures and machinery (accepted March 22, 1984); (5) Cenedella Industries, Inc., 202 W. 2nd Street, Dunkirk, New York 14048, producer of metal tubing and wood pallets (accepted March 22, 1984); (6) Modern Concepts, Inc., 1525 Airport Road, Conroe, Texas 77301, producer of body massagers, vibrators, bed controls and oil field equipment (accepted March 26, 1984); (7) North Shore Sportswear Company, Inc., Dickson Street and The Place, Glencove, New York 11542, producer of women's coats and jackets (accepted March 27, 1984); (8) Pixley Ceric, Inc., 200 West Union Avenue, Englewood, Colorado 80110, producer of industrial kilns, dryers, and conveying and handling equipment (accepted March 27, 1984); (9) Chicago Conveyor Corporation, 330 Lalonde, Addison, Illinois 60101, producer of conveying systems and components (accepted March 27, 1984); (10) Standard Steel Fabricating Company, Inc., 8155 First Avenue South, Seattle, Washington 98108, producer of structural steel (accepted March 27, 1984); (11) Adesal Dress Corporation, 504 Jericho Turnpike, Selden, New York 11784, producer of women's dresses, blouses, skirts and pants (accepted March 27, 1984); (12) Vera Ladies Belt & Novelty Corporation, 213 W. 35th Street, New York, New York 10001, producer of women's belts and sashes (accepted March 27, 1984); (13) Magna Manufacturing, Inc., 1455 Deming Way, Suite 12, Sparks, Nevada 89431, producer of printed circuit boards and other computer parts (accepted March 29, 1984); (14) Wodin, Inc., 5441 Perkins Road, Bedford Heights, Ohio 44146, producer of fasteners, valve parts and other forgings (accepted March 30 1984); (15) Krementz and Company, 49 Chestnut Street, Newark, New Jersey 07101, producer of jewelry and jewelry findings (accepted March 29, 1984); (16) SkidLid Manufacturing Company, 1560 California Street, San Diego, California 92101, producer of bicyclists' helmets and exercise stands (accepted April 2, 1984); (17) M & M Specialties, Inc., 460 E. 76th Avenue, Denver, Colorado 80229, producer of exercising equipment (accepted April 2, 1984); (18) Ronson Metals Corporation, 55 Manufacturers Place, Newark, New Jersey 07105, producer of flints, rare earth metals and metal alloys (accepted April 2, 1984); (19) Wisdom Manufacturing, Inc., P.O. Box 5000, Sterling, Colorado 80751, producer of amusement rides, oil field equipment and stoves (accepted April 2, 1984); (20) Widder Corporation, P.O. Box 1069, Naugatuck, Connecticut 06770–1069, producer of power tools, pipe cutters and welding accessories (accepted April 2, 1984); (21) Perdido Vineyards, Inc., Route 1, Box 20–A, Perdido, Alabama 36562, producer of wine (accepted April 2, 1984); (22) Pilgrim Steel Company, P.O. Box 430, Glassboro, New Jersey 08028, producer of gas processing equipment and other steel fabrications (accepted April 3, 1984); (23) Trio Headwear Manufacturing Company, Inc., 50 Bond Street, New York, New York 10012, producer of headwear (accepted April 5, 1984); (24) Key Bellevilles, Inc., Box 191–C, Leechburg, Pennsylvania 15656, producer of disc springs and washers (accepted April 5, 1984); (25) Goulds Pumps, Inc., 240 Fall Street, Seneca Falls, New York 13148, producer of industrial pumps (accepted April 5, 1984); (26) Morning Sun Trading Company, 2507 Jefferson N.E., Albuquerque, New Mexico 87110, producer of jewelry (accepted April 5, 1984); (27) Levingston Industries, Inc., P.O. Box 968, Orange, Texas 77630, producer of ships and drilling vessels (accepted April 6, 1984); (28) Roundwood Corporation, P.O. Box 13269, Florence, South Carolina 29504, producer of hardwood dowels (accepted April 6, 1984); (29) Universal Wire Products, Inc., 222 Universal Drive, North Haven, Connecticut 06473, producer of wire rope (accepted April 6, 1984); (30) Dauphin Shoe Company, 345 Carlisle Street, Harrisburg, Pennsylvania 17104, producer of children's shoes (accepted April 9, 1984); (31) O'Brien Machinery Company, Inc., Green and Washington Streets, Downingtown, Pennsylvania 19335, producer of power generators (accepted April 9, 1984); (32) The Galante Studio, Inc., Court House Square, Hardinsburg, Kentucky 40143, producer of pillows, blankets, towels and other fabric articles (accepted April 9, 1984); (33) Julian lumber Company, Inc., P.O. Box 146, Rattan, Oklahoma 74562, producer of wood posts and poles (accepted April 9, 1984); (34) Lefeber Bulb Company, Inc., 1335 Memorial Highway, Mount Vernon, Washington 98273, producer of flowers, bulbs, grain and seeds (accepted April 10, 1984); (35) New Square Sportswear Company, Inc., 14 Dunham Place, Brooklyn, New York 11211, producer of men's and children's jackets (accepted April 10, 1984); (36) Valentien Corporation, 2010 North Forbes Boulevard, Tucson, Arizona 85703, producer of stained glass giftware (accepted April 10, 1984); (37) Royal Robes, Inc., 148 Hamlet Avenue, Woonsocket, Rhode Island 02895, producer of women's robes (accepted April 10 1984); (38) Marshall Manufacturing Corporation, 3232 East Corona Avenue, Phoenix, Arizona 85040, producer of valves and other machine parts (accepted April 10, 1984); (39) Chambers Belt Company, 110 N. 24th Street, Phoenix, Arizona 85034, producer of apparel belts and other leather goods (accepted April 10, 1984); (40) Pyramid Products, Inc., 11450 Cherokee Street, Unit A–4, Northglenn, Colorado 80234, producer of air purifiers (accepted April 10, 1984); (41) Hy Fishman Furs, Inc., 305 7th Avenue, New York, New York 10001, producer of fur coats and jackets (accepted April 10, 1984); (42) Acme Burgess, Inc., Route 83, Grayslake, Illinois 60030, producer of insect foggers, paint sprayers, battery chargers, insecticides and other chemicals (accepted April 11, 1984); (43) The Blouse Factory, Inc., 141 West 36th Street, New York, New York 10018, producer of women's blouses (accepted April 11, 1984); (44) Kingsbury

Industries, Inc., 80 Laurel Street, Keene, New Hampshire 03431, producer of machine tools (accepted April 12, 1984); (45) HFE, Inc., 125 South Airpark Drive, Fort Collins, Colorado 80524, producer of agricultural equipment (accepted April 16, 1984); (46) North Country Leather Works, Inc., P.O. Box 25, East Rochester, New Hampshire 03867, producer of handbags (accepted April 17, 1984); (47) Harvard Knitwear, Inc., 50 Keap Street, Brooklyn, New York 11211, producer of women's and children's shirts and sweaters (accepted April 17, 1984); (48) Spokane Injection Molding Company, East 10011 Montgomery Street, Spokane, Washington 99206, producer of plastic novelties (accepted April 17, 1984); 49 Dive N' Surf, Inc., 530 Sixth Street, Redondo Beach, California 90254, producer of wet suits and water sports accessories (accepted April 18, 1984); (50) Jaymar Sportswear, Inc., 489 West Broad Street, Hazelton, Pennsylvania 18201, producer of women's skirts and slacks (accepted April 19, 1984); (51) Automa Corporation, P.O. Box 111, Fenton, Michigan 48430, producer of conveying and loading equipment (accepted April 19, 1984); (52) Mayfield manufacturing Company, Inc., P.O. Box 329, Mayfield, Kentucky 42066, producer of women's slacks and skirts (accepted April 23, 1984); (53) Opelika Manufacturing Corporation, 361 West Chestnut, Chicago, Illinois 60610, producer of toweling, towels, hospital apparel and other fabric goods; and textile machinery (accepted April 25, 1984); (54) New York State 1979 Vinifera Partners, South Roberts Road, Dunkirk, New York 14048, producer of wine (accepted April 26, 1984); and (55) Raymond Toto & Sons, P.O. Box 497, Hockessin, Pennsylvania 19707, producer of mushrooms (accepted April 26, 1984).

The petitions were submitted pursuant to Section 251 of the Trade Act of 1974 (Pub. L. 93–618) and § 315.23 of the Adjustment Assistance Regulations for Firms and Communities (13 CFR Part 315). Consequently, the United States Department of Commerce has initiated separate investigations to determine whether increased imports into the United States of articles like or directly competitive with those produced by each firm contributed importantly to total or partial separation of the firm's workers, or threat thereof, and to a decrease in sales or production of each petitioning firm.

Any party having a substantial interest in the proceedings may request a public hearing on the matter. A request for a hearing must be received by the Director, Certification Division, Office of Trade Adjustment Assistance, International Trade Administration, U.S. Department of Commerce, Washington, D.C. 20230, no later than the close of business of the tenth calendar day following the publication of this notice.

The Catalog of Federal Domestic Assistance official program number and title of the program under which these petitions are submitted is 11.309, Trade Adjustment Assistance. Inasfar as this notice involves petitions for the determination of eligibility under the Trade Act of 1974, the requirements of Office of Management and Budget Circular No. A–95 regarding review by clearinghouses do not apply.

Jack W. Osburn, Jr.,

Director, Certification Division, Office of Trade Adjustment Assistance.

[FR Doc. 84-12328 Filed 5-7-84; 8:45 am]
BILLING CODE 3510-DR-M

[A-421-060]

Animal Glue and Inedible Gelatin From the Netherlands; Final Results of Administrative Review of Antidumping Finding

AGENCY: International Trade Administration, Commerce.

ACTION: Notice of Final Results of Administrative Review of Antidumping Finding.

SUMMARY: On December 23, 1983, the Department of Commerce published the preliminary results of its administrative review of the antidumping finding on animal glue and inedible gelatin from the Netherlands. The review covers the two known manufacturers and/or exporters, one third-country reseller of this merchandise to the United States, and the period December 1, 1981 through November 30, 1982.

We gave interested parties an opportunity to submit oral or written comments on the preliminary results. As a result of our analysis of the comments received, the Department has adjusted the margin for one firm. The final results are the same as the preliminary results for the remaining firms.

EFFECTIVE DATE: May 8, 1984.

FOR FURTHER INFORMATION CONTACT: Elizabeth Wright or David Chapman, Office of Compliance, International Trade Administration, U.S. Department of Commerce, Washington, D.C. 20230, telephone: (202) ,n.m/377–5255/2923.

SUPPLEMENTARY INFORMATION:

Background

On December 23, 1983, the Department of Commerce ("the Department") published in the Federal Register (48 FR 56813–45681) the preliminary results of its administrative review of the antidumping finding on animal glue and inedible gelatin from the Netherlands (42 FR 64115, December 22, 1977). The Department has now completed that administrative review.

Scope of the Review

Imports covered by the review are animal glue and inedible gelatin, of which there are two principal types, hide glue and bone glue. Animal glue is an organic colloid of protein derivation. There is no significant difference between animal glue and inedible gelatin. Animal glues are odorless, dry, hard, hornlike materials. They are used as general purpose adhesives in industries producing abrasives, paper containers, book and magazine bindings, and leather goods. They are also used as sizing agents and as colloids in emulsions and cleaning compounds. Animal glue and inedible gelatin are currently classifiable under items 455.4000 and 455.4200 of the Tariff Schedules of the United States Annotated.

The review covers the two known manufacturers and/or exporters, one known third-country reseller of Dutch animal glue and inedible gelatin to the United States and the period December 1, 1981 through November 30, 1982.

Analysis of Comments Received

We gave interested parties an opportunity to submit oral or written comments on the preliminary results. We received the following comments from U.H.F.C. Company, an importer, and from Peter Cooper Corporations, one of the petitioners.

Comment 1: For exports by Holding Trobas B.V., U.H.F.C., argues that the Department should have used sales to third countries to determine foreign market value, rather than sales in the home market. As currently written, § 353.4(a) of the Commerce Regulations requires testing the sufficiency of home market sales using the quantity of sales, not the value of sales.

Department's Position: We concur. While in this case Trobas had sufficient sales in the home market using value, it did not when measured by quantity. Therefore, we have adjusted our calculations, using sales by Trobas in the U.K. as the basis for foreign market value.

Comment 2: U.H.F.C. claims that, when using home market sales for

Trobas, the Department erred in failing to adjust foreign market value to reflect physical differences between the grades of merchandise being compared.

Department's Position: This issue is moot with respect to imports by U.H.F.C. because of our shift to U.K. sales. Trobas sales in the U.K. were of identical merchandise to that sold to U.H.F.C.

Comment 3: The petitioner argues that it would be inappropriate to base an adjustment for physical differences solely on raw material costs as proposed by U.H.F.C.

Department's Position: Again, this issue is moot with regard to U.H.F.C. sales.

Final Results of Review

As a result of adjustments made based on comments received, we have revised the margin for Holding Trobas B.V., and we determine that the following margins exist for the period:

Manufacturer/exporter	Margin (percent)
Holding Trobas B.V.	0.13
Wed. P. Smits & Zoon b.v.	0
Third-Country Reseller	
F. Leiner & Co., Ltd. (U.K.)	[1] 43.0

[1] No shipments during period.

The Department shall instruct the Customs Service to assess antidumping duties on all appropriate entries. Individual differences between United States price and foreign market value may vary from the percentage stated above.

Further, as provided for by § 353.48(b) of the Commerce Regulations, a cash deposit of estimated antidumping duties based on the above margins shall be required for these firms. Since the weighted-average margin for Holding Trobas B.V. is less than 0.5 percent, and therefore *de minimis* for cash deposit purposes, the Department shall waive the deposit requirement for that firm. For any future shipments from a new exporter not covered in this or prior reviews, whose first shipments occurred after November 30, 1982, and who is unrelated to any covered firm, no cash deposit shall be required. These deposit requirements and waiver shall become effective on the date of publication of these final results and shall remain in effect until publication of the final results of the next administrative reveiw. The Department intends to begin immediately the next administrative review.

The Department encourages interested parties to review the public record and submit applications for protective orders as early as possible after the Department's receipt of the requested information.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act of 1930 (19 U.S.C. 1675(a)(1)) and § 353.53 of the Commerce Regulations (19 CFR 353.53).

Dated: April 30, 1984.

Alan F. Holmer,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 84-12382 Filed 5-7-84; 8:45 am]

BILLING CODE 3510-DS-M

[C-469-009]

Carbon Steel Wire Rod From Spain; Final Affirmative Countervailing Duty Determination

AGENCY: International Trade Administation, Commerce.

ACTION: Notice.

SUMMARY: We determine that certain benefits constituting subsidies within the meaning of the countervailing duty law are being provided to manufacturers, producers, or exporters in Spain of carbon steel wire rod. The net subsidy for each company is identified in the "Suspension of Liquidation" section of this notice. In addition, we determine that critical circumstances exist with respect to the importation of carbon steel wire rod from Spain. We have notified the United States International Trade Commission (ITC) of our determinations. We also are directing the U.S. Customs Service to continue to suspend liquidation of all entries of carbon steel wire rod from Spain that are entered, or withdrawn from warehouse, for consumption on or after November 28, 1983, and to require a cash deposit or bond on this product in an amount equal to the estimated net subsidy.

EFFECTIVE DATE: May 8, 1984.

FOR FURTHER INFORMATION CONTACT: John M. Davies, Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, D.C. 20230, telephone: (202) 377-1784.

SUPPLEMENTARY INFORMATION:

Final Determination

Based upon our investigation, we determine that certain benefits constituting subsidies within the meaning of section 701 of the Tariff Act of 1930, as amended (the Act), are being provided to manufacturers, producers, or exporters in Spain of carbon steel wire rod. For the purpose of this investigation, the following programs are found to confer subsidies:

- Long-term Noncommercial Loans and Loan Guarantees
- Benefits from Long-term Noncommercial Construction Loans to Related Suppliers
- Short-term Working Capital Loans under the Privileged Circuit Exporter Credits Program
- Excessive Rebates of Indirect Taxes on Exports under the Desgravacion Fiscal a la Exportacion (DFE)
- Government Provision of Equity Capital
- Government Interest-free Loans
- Government Grants

We determine the net subsidy to be the rates specified for each company in the "Suspension of Liquidation" section of this notice.

Case History

On November 23, 1983, we received a petition from Atlantic Steel Company, Continental Steel Company, Georgetown Steel Corporation, North Star Steel Company-Texas, and Raritan River Steel Company filed on behalf of the carbon steel wire rod industry. In compliance with the filing requirements of section 355.26 of our regulations (19 CFR 355.26), petitioners alleged that manufacturers, producers, or exporters in Spain of carbon steel wire rod receive, directly or indirectly, benefits constituting subsidies within the meaning of section 701 of the Act, and that these imports are materially injuring, or threatening to meterially injure, a U.S. industry. Petitioners also alleged that "critical circumstances" exist, as defined in section 703(e) of the Act.

We found that the petition contained sufficient grounds upon which to initiate a countervailing duty investigation, and on December 13, 1983, we initiated an investigation (48 Fed. Reg. 56420). We stated that we expected to issue a preliminary determination by February 16, 1984.

Since Spain is a "country under the Agreement" within the meaning of section 701(b) of the Act, an injury determination is required for this investigation. On January 9, 1984, the ITC determined that there is a reasonable indication that these imports are materially injuring, or threatening to materially injure, a U.S. industry (49 Fed. Reg. 2165).

We presented a questionnaire concerning the allegations to the government of Spain at its embassy in

Washington, D.C. on January 4, 1984. On January 24, the government of Spain requested that this case be declared "extraordinarily complicated" under section 703(c) of the Act. On January 27, we determined that the case was not extraordinarily complicated. We received responses to the questionnaire on February 3, 6, 14, 15, and 27.

On February 16, we preliminarily determined that benefits constituting subsidies within the meaning of the countervailing duty law were being provided to manufacturers, producers, or exporters in Spain of carbon steel wire rod and that critical circumstances did exist with respect to imports of carbon steel wire rod from Spain (49 FR 6962).

On March 2, we presented a supplemental questionnaire to the government of Spain at its embassy in Washington, D.C. We received responses to the supplemental questionnaire on March 22 and 23.

In response to requests received on February 29 and March 5, a public hearing on this case was held on March 22. We received briefs from the parties to the proceeding on March 15 and April 9.

We held a verification of the responses in Madrid, Spain, on March 26–30. At the verification on March 30 and later in a letter dated April 4, we requested from the government of Spain additional information on the DFE program; however, we did not receive the requested information.

Scope of Investigation

The product covered by this investigation is carbon steel wire rod. For the purpose of this investigation, the term "carbon steel wire rod" covers a coiled, semi-finished, hot-rolled carbon steel product of approximately round solid cross-section, not under 0.20 inch nor over 0.74 inch in diameter, not tempered, not treated, and not partly manufactured; and valued over 4 cents per pound, as currently provided for in item 607.17 of the *Tariff Schedules of the United States* (TSUS).

There are three firms in Spain that produced and exported carbon steel wire rod to the United States during the period under investigation, calendar year 1982. We have received information from the government of Spain regarding Empresa Nacional Siderurgica, S.A. (ENSIDESA), Nueva Montana Quijano, S.A. (NMQ), and Forjas Alavesas, S.A. (FASA), who together accounted for over 95 percent of Spain's carbon steel wire rod exports to the United States during 1982. The government of Spain provided additional infomation regarding Siderurgica de Galacia, S.A. (SIDEGASA), Esteban Orbegozo, S.A., and Union Cerrajera, S.A. However, since none of these companies exported carbon steel wire rod to the United States during the period of investigation, we did not verify or use their information in this determination.

Analysis of Programs

Certain subsidies discussed in this notice were conveyed through a series of laws and decrees issued by the government of Spain. Those laws and decrees include the following:

Decree 669/1974 of March 14, 1974: This decree established the National Steel Industry Program 1974–1982. To achieve the specific goals established by this program, the government authorized certain benefits for integrated and non-integrated steel firms, which included noncommercial loans and loan terms, accelerated amortization of non-liquid investments, substantial reduction of certain taxes, and expropriation of land for new plant construction.

Law 60/1978 of December 23, 1978: This law authorized government aid in the form of noncommercial loans and loan terms and capital infusions for the three integrated steel producers in Spain, including ENSIDESA.

Order of May 22, 1980: This order authorized the Banco de Credito Industrial (BCI) to extend additional government credits to non-integrated steel companies who had made investments under Decree 669/1974. BCI is a government credit institution which issues loans under government direction to companies in the Spanish steel industry.

Royal Decree 878/1981 of May 8, 1981: This decree, also known as the Integral Iron and Steel Reconversion Plan, provided aid to the integrated steel producers in the form of noncommercial interest rates and terms on outstanding loans, new loans with noncommercial interest rates and terms, loan guarantees, and capital infusions. Certain of the subsidy programs are administered by the Instituto Nacional de Industria (INI), a public holding company created in 1941 as an autonomous government agency to promote and stimulare the industrial development of Spain. INI's responsibilities cover a variety of sectors ranging from basic services to basic industries such as the iron and steel industry.

Throughout this notice, we refer to general principles applied to the facts of the current investigation. These principles are described in the "Subsidies Appendix" contained in the Federal Register notice of "Cold-Rolled Carbon Steel Flat-Rolled Products from Argentina: Final Affirmative Countervailing Duty Determination and Countervailing Duty Order" (49 FR 18006).

For purposes of this final determination, we have calculated company-specific *ad valorem* subsidy rates in accordance with 19 CFR 355.28(a)(3), which states that "if separate enterprises have received materially different benefits, such differences shall also be estimated and stated." We have found that there are significant differences in the size and structure of the companies under investigation and in the usage of programs determined to confer subsidies.

To calculate a company-specific *ad valorem* rate, we allocated the benefits received by each company in 1982 over the total sales value or total export value, as appropriate, of each company. For those Spanish carbon steel wire rod producers not covered under this investigation, we calculated a trade-weighted *ad valorem* subsidy rate based on an average of the three company-specific rates as weighted by each company's 1982 export tonnage of carbon steel wire rod to the United States.

Based on petitioners' allegations regarding the financial condition of ENSIDESA and NMQ, we are required to make an assessment of the "creditworthiness" of these two companies before determining if an to what extent countervailable benefits have been received under certain programs.

We have consistently held that government provision of, or assistance in obtaining, capital or debt does not *per se* confer a subsidy. Government equity purchases or financial backing bestow a countervailable benefit only when they occur on terms inconsistent with commercial considerations. To determine if such actions are commercially unsound, we review and assess financial data for the company in question.

For this final determination, we conducted a comprehensive review of the factors relevant to a determination of inconsistency with commercial considerations for ENSIDESA and NMQ. For loans and loan guarantees, we analyzed whether ENSIDESA was "creditworthy" since 1976 and whether NMQ was "creditworthy" since 1978. In making this assessment, we examined cash flow and other measures of the ability of a company to meet its long-term debt obligations.

In its responses, the government of Spain provided data for the 1982 period of investigation including financial statements and debt information on ENSIDESA, NMQ, and FASA. Based upon our anlaysis of the petition, the responses to our questionnaires, and our verification, we determine the following:

I. Programs Determined To Confer Subsidies

We determine that subsidies are being provided to manufacturers, producers, or exporters in Spain of carbon steel wire rod under the following programs.

A. Long-Term Noncommercial Loans and Loan Guarantees

Petitioners alleged that Spanish wire rod producers were receiving noncommercial loans, loan terms, and loan guarantees which constitute subsidies. We requested information from each company under investigation on all medium- and long-term loans outstanding during the period of investigation. In Spain medium-term financing is from two to five years, and long-term financing, which is less prevalent, is currently for about 10 years. ENSIDESA, NMQ, and FASA reported medium- and long-term loans outstanding during the period of investigation.

We determine that the government of Spain leads or directs banks to lend funds to certain companies in certain industry sectors at rates or on terms inconsistent with commercial considerations.

We used the methodology in the Subsidies Appendix to calculate subsidy rates on the noncommercial loans and loan quarantees reviewed by the three Spanish wire rod producers.

For purposes of this final determination, we determine that NMQ was creditworthy through 1982. Although it experienced operating losses for the 1980–1982 period, NMQ had adequate cash flow to cover its interest expenses in 1980 and received substantial private commercial credit without government intervention in 1981.

We also determine, for the purposes of this final determination, that ENSIDESA was not creditworthy for the period 1979–1982. In the 1982 countervailing duty investigation on certain steel products from Spain and in the preliminary determination in this case, we found ENSIDESA to be uncreditworthy for 1979–1982. Based on a new review of ENSIDESA's financial records under the Subsidies Appendix, we continue to find that ENSIDESA is uncreditworthy because of unhealthy financial ratios during 1977–1982 in times interest earned (operating income divided by interest charges); net income as a percent of sales; and net working capital as a percent of total assets.

Under the Subsidies Appendix methodology, we continued to use most of the benchmark interest rates and all of the discount rates from our preliminary determination in this case. We used company-specific loan rates as benchmarks in those years where verified information on private commercial loans was available. For the 1979–1982 uncreditworthy period of ENSIDESA, we used the benchmark rates plus the "risk premium" as described in the Subsidies Appendix. We allocated total loan benefits over the life of the loans using the declining balance method and calculated subsidy rates by dividing the 1982 loan benefits by total company sales of all steel products in 1982.

Most of the loans reported by these companies contained provisions for deferred principal payments. Since we verified that noncommercial loans and private commercial loans to these companies contained similar deferral periods, we are not treating deferred principal payments as a separate subsidy.

During 1979–1982, ENSIDESA received private commercial loans with INI guarantees. At verification we found that ENSIDESA pays INI a fee for all such loan guarantees. This fee, paid quarterly, amounts to a set percentage of the outstanding principal on the loan. We also found that the INI guarantee fees were less than comparable loan guarantee fees charged by private banks. Since noncommercial INI guarantees on private commercial loans were provided during the period when ENSIDESA was found to be uncreditworthy, we included in our calculations the interest rate benefits derived by ENSIDESA from these loans.

We determine that the following categories of loans to Spanish wire rod producers do not confer subsides: (a) loans that carried no INI or government guarantee and were not the result of a government mandate; and (b) loans from official non-Spanish export-import lending institutions (*e.g.*, U.S. Export-Import Bank) which were guaranteed by INI. Such guarantee are commonly required by official export-import institutions as a condition for this type of lending activity, and therefore the provision of a guarantee by INI does not confer a countervailable benefit in connection with these types of loans.

We determine that the *ad valorem* subsidy rates for noncommercial long-term loans and loan guarantees are 8.03 percent for ENSIDESA, 0.23 percent for NMQ, and 0.29 percent for FASA.

B. Benefits From Long-Term Noncommercial Construction Loans To Related Suppliers

Petitioners alleged that NMQ was receiving subsidies from two of its related suppliers, SIDEGASA and Aceria de Santander, S.A. (ACERIASA), whose plant facilities were constructed using long-term construction loans granted under the National Steel Industry Program (Decree 669/1974).

During verification we found that NMQ has a 6.4 percent share of the stock outstanding in SIDEGASA. In 1981 SIDEGASA was declared by the courts in Spain to be in legal suspension of payments for provisional insolvency and was placed in reorganization in bankruptcy. We also found that SIDEGASA did not supply any of the blooms used by NMQ in production of wire rod. Therefore, we determine that wire rod produced by NMQ does not receive benefits from long-term construction loans granted to SIDEGASA.

In the mid-1970's NMQ and three other Spanish steel companies, not covered by this investigation, formed a joint venture to build a crude-steel manufacturing plant using construction funds available under the National Steel Industry Program. The ACERIASA plant was built in 1978–1979. Currently, NMQ owns 57.8 percent and the other three Spanish steel companies own the remainder of ACERIASA's stock outstanding. There is government stock ownership in ACERIASA.

All of the blooms used by NMQ to product wire rod are purchased from outside sources. In 1982, a large majority of these blooms was purchased by NMQ at cost from ACERIASA. We determine, therefore, that the long-term noncommercial loans granted under Decree 669/1974 for plant construction of ACERIASA are providing countervailable benefits to the production of carbon steel wire rod by NMQ. We used the loan methodology, described earlier in this notice, to calculate the 1982 benefits conferred on ACERIASA from these construction loans. These 1982 benefits were prorated to determine the amount of benefits atttributable to wire rod production at NMQ in 1982. We allocated this final amount over total wire rod sales by NMQ in 1982 to arrive at an *ad valorem* subsidy rate of 0.98 percent.

C. Short-Term Working Capital Loans Under the Privileged Circuit Exporter Credits Program (PCECP)

Petitioners alleged that Spanish wire rod producers received benefits constituting subsidies from short-term working capial loans under PCECP. Short-term borrowing in Spain is for any period up to 18 months. Each of the three companies under investigation received short-term working capital PCECP loans.

The government of Spain requires all Spanish commercial banks to maintain a specific percentage of their lendable funds as privileged circuit accounts available for low-interest loans under certain government-mandated programs. While there is no direct outlay of government funds, the countervailable benefits consist of noncommercial interest rate loans provided by the banks under the export promotion programs of PCECP. We determine that the three Spanish wire rod producers received subsidies under only one of the four available PCECP programs, the short-term working capital loan program.

Under PCECP, companies may obtain working capital loans of up to one year in duration for an amount not to exceed a specified percentage of the value of company exports in the previous year. In November 1981 this percentage was 24 percent for companies with government issued exporter cards and 16 percent for companies without exporter cards. In April 1982 the percentage was reduced to 22.5 percent and 15 percent, respectively. All three Spanish wire rod companies have exporter cards. The government mandated interest rate ceiling on short-term working capital PCECP loans in 1982 was 10 percent, including fees and commissions.

To calculate the subsidy amount, we compared the noncommercial 10 percent interest rate with the national average commercial interest rate on loans with similar terms and conditions. The national average commercial interest rate in 1982 ws calculated to be the average 1982 prime rate in Spain, 16.88 percent, plus two percentage points, reflecting average borrowing experience, plus an additional 0.5 percent, the maximum allowable charge for fees and commisisons under Spanish law. We determine the 1982 national average commercial interest rate to average borrowers to be 19.38 percent for one year loans, including fees and commissions.

We applied the appropriate interest differential to PCECP loans received by each company in 1982, and allocated the resulting loan benefits over total company exports of all steel products in 1982. We determine that the *ad valorem* subsidy rates for short-term working capital PCECP loans is 2.19 percent for ENSIDESA, 1.42 percent for NMQ, and 1.06 percent for FASA.

D. Excessive Rebates of Indirect Taxes on Exports Under the Desgravacion Fiscal a la Exportation (DFE)

Petitioners alleged that countervailable benefits are conferred on Spanish wire rod producers under the DFE program by the excessive rebate of indirect taxes on the export of carbon steel wire rod.

Spain employs a cascading tax system under which a turnover tax is levied on each intermediate sale of a product through its various stages of production, up to, but not including, the final sale at the retail level. The DFE is the program designed to rebate to exporters these accumulated turnover taxes as well as final stage taxes on exportation.

We requested in our questionnaire of January 4, 1984, certain specific information concerning the DFE. The response provided by the government of Spain was inadequate, and requests for further information were made during the verification on March 30 and again by letter on April 4. Because the government of Spain failed to respond to our initial request for this specific information and refused our subsequent requests, we are unable to determine what, if any, amount of the DFE rebate is a proper export rebate of indirect taxes allowable under the Act and our regulations. Accordingly, for purposes of this final determination, we find the entire amount of the DFE rebate, 14.5 percent, to be a subsidy as best information available.

E. Government Provision of Equity Capital

Petitioners alleged that ENSIDESA received equity infusions from the government of Spain under the Law 60/1978 and Royal Decree 878/1981.

INI purchased new stock issuances of ENSIDESA in 1979 and 1981. The 1979 stock issuance by ENSIDESA was subscribed to and paid for by INI in that year. The stock issuance by ENSIDESA in 1981 was subscribed to in full by INI that year; however, INI paid for one fourth of the stock in 1981 and for the remaining stock in 1982.

As stated in the Subsidies Appendix, we do not consider equity infusions by the government or its agencies to be subsidies *per se*. Government provision of equity capital confers a subsidy only when it is on terms inconsistent with commercial considerations.

In accordance with the Subsidies Appendix, we calculated the subsidy amount to be the difference between the stock price paid by INI and the market price of ENSIDESA's stock. We used ENSIDESA's average stock price prior to the time of INI's purchases as our basis for comparison because ENSIDESA's stock was traded on the Spanish exchange and our countervailing duty law indicates a strong presumption for market-based methods of value.

We allocated the resulting subsidy amount using the declining balance method over 15 years, the average useful life of assets in this industry. We then allocated the 1982 portions of these equity infusions over total company sales of all steel products in 1982 to arrive at an *ad valorem* subsidy rate of 2.86 percent.

F. Government Interest-Free Loans

Petitioners requested that we investigate the nature of the "Special INI Funds" capital account to see if any countervailable benefits were involved.

In March 1982, the principal and interest outstanding on certain long-term INI loans to ENSIDESA were consolidated into a capital account "Special INI Funds" appearing in ENSIDESA's 1982 financial reports. In June 1983 a large portion of these funds was used by INI to purchase new stock in ENSIDESA. Since this equity infusion occurred in 1983 and was not reflected in ENSIDESA's 1982 financial reports, we have not included it in this determination. We determine, however, that for the March-December 1982 period, the "Special INI Funds" did confer a benefit to ENSIDESA equivalent to that of an interest-free loan. Using the short-term benchmark interest rate of 19.38 percent as derived earlier in this notice, we calculated the March-December benefit and allocated it over total ENSIDESA sales of all steel products in 1982 to arrive at an *ad valorem* subsidy of 2.36 percent.

G. Government Grant

During verification, we found that FASA had received investment grants from national and local governments in Spain. The government grants were designed to cover a portion of FASA's total investment in purchasing certain new technological equipment. From the information in the record, however, we are unable to determine that these grants are not countervailable subsidies. Therefore, we determine that such grants do provide countervailable benefits to FASA.

We allocated the total amount of these grants over 15 years using the

declining balance method from the Subsidies Appendix. The 1982 grant benefits were divided by total FASA sales of all steel products in 1982 to arrive at an *ad valorem* subsidy of 0.18 percent.

II. Programs Determined Not To Confer Subsidies

We determine that subsidies are not being provided to manufacturers, producers, or exporters in Spain of carbon steel wire rod under the following programs.

A. Amendment of Annual Finance Investment Plans

The government of Spain allowed ENSIDESA to obtain additional loans by permitting amendments to the company's annual finance plans. This, in itself, is not a subsidy. Benefits resulting from the loans under this amendment are dealt with in the loans section of this notice.

B. Deferral of Tax and Social Security Debt

The deferral of company tax and social security debt owed to the government of Spain is authorized by general legislation and is available on equal terms to all Spanish companies. Therefore, we determine that Spanish wire rod producers do not receive a countervailable benefit from their deferrals of these debts.

III. Programs Determined Not To Be Used

We determine that the following programs, listed in the notice of "Initiation of Countervailing Duty Investigation," were not used by manufacturers, producers, or exporters in Spain of carbon steel wire rod.

A. Certain Benefits Under the Privileged Circuit Export Credits Program

In our analysis of the PCECP programs earlier in this notice, we found that one PCECP program, short-term working capital loans, did provide subsidies to wire rod manufacturers, producers, or exporters. We determine that the three remaining PCECP programs identified in our notice of intiation are not used. They are:

(1) Commercial services loans
(2) Short-term export credit
(3) Prefinancing exports

B. Warehouse Construction Loans

Exporters desiring to construct warehouse facilities adjacent to loading zones may borrow 70–75 percent of the total investment. None of the three companies in this investigation received loans under this program.

C. Regional Investment Incentives and Development Programs

The government of Spain and regional and municipal authorities provide various investment incentive programs. We determine that none of the three companies investigated has participated in these regional programs.

D. Accelerated Depreciation and Reduction in Taxes

Decree 669/1974 permits the steel industry to employ accelerated depreciatiion of non-liquid investments and to obtain a substantial reduction in certain taxes. We determine that these programs were not used by the three companies under investigation.

Petitioners' Comments

Comment 1

Co-counsel for petitioners argue the countervailable benefits are conferred as a result of loans from non-Spanish official lending institutions which were guaranteed by INI.

DOC Position

We disagree. It is our established policy that loans from official export-import lending institutions to foreign purchasers of goods produced in the lending institution's own country are not countervailable. INI guarantees on loans from non-Spanish official lending institutions are the result of the policy requirements of these lending institutions rather than an effort by INI to facilitate debt financing or to encourage exports by Spanish wire rod producers.

Comment 2

Co-counsel for petitioners contend that countervailable benefits are conferred under the DFE program by the excessive remission of indirect taxes on the export of carbon steel wire rod.

DOC Position

Because the government of Spain did not provide sufficient information regarding the DFE program, we have countervailed the entire amount of the DFE rebate as best information available.

Comment 3

Co-counsel for petitioners contend that if the government of Spain refuses to supply the additional information on DFE requested by the DOC in a letter of April 4, 1984, then the DOC should consider the initial Spanish response to be deficient and should draw the most adverse inference by finding the entire amount of the DFE export rebate to be a subsidy.

DOC Position

We agree. See our discussion in section I.D. of this notice.

Comment 4

Co-counsel for petitioners contend that because NMQ owns a majority of the stock in ACERIASA and because ACERIASA sells billets to NMQ used in producing carbon steel wire rod, Spanish government subsidies to ACERIASA are passed on to NMQ.

DOC Position

We agree. See our discussion in section I.B. of this notice.

Comment 5

Co-counsel for petitioners contend that NMQ should be declared uncredit worthy because of operating losses in 1981 and 1982 and because no dividends were paid out in these years.

DOC Position

We evaluate creditworthiness by analyzing several factors relating to a company's ability to obtain commercial loans, to maintain its debt obligations, and to meet its other costs. While operating losses and non-payment of dividends are relevant to this analysis, they are not the only bases for determining whether a company is creditworthy. For reasons stated in the "Analysis of Programs" section of this notice, we have determined NMQ was creditworthy during the period of review.

Comment 6

Co-counsel for petitioners contend that critical circumstances exist because, in part, section 703 (e) of the Act neither requires nor sets any minimum *ad valorem* effect of an unlawful export subsidy such as the PCECP.

DOC Position

This issue is irrelevant to this case because the export subsidies determined to be in violation of the Subsidies Code are not *de minimis*.

Comment 7

Co-counsel for petitioners do not object to establishing individual company-specific subsidy rates provided that the information submitted by such companies is fully responsive to the DOC questionnaire and has been fully verified by the DOC.

DOC Position

We have verified all information used in making this final determination in accordance with section 766(a) of the

Act, except where the absence of needed or requested information has forced us to use the best information available. We established individual company-specific subsidy rates.

Comment 8

Co-counsel for petitioners argue that the DOC should not exclude SIDEGASA based on the claim that SIDEGASA no longer benefits from prior noncommercial government loans because it is in bankruptcy reorganization.

DOC Position

As stated earlier in this notice, we found that SIDEGASA did not supply any of the blooms used by NMQ in the production of wire rod as alleged by petitioners. Therefore, we determined that NMQ does not receive benefits from long-term construction loans granted to SIDEGASA. SIDEGASA did not export wire rod to the U.S. in 1982.

Comment 9

Co-counsel for petitioners alleged for the first time in their prehearing brief on March 22, 1984, that Spanish wire rod producers appear to be receiving noncommercial government loans under Law 21/1982.

DOC Position

Since petitioners raised this issue late in the investigation, we will examine it more closely during any administrative annual review under section 751 of the Act should an order be issued. At verification we found that the provisions of Law 21/1982 related primarily to post-1982 policies regarding the restructuring of the Spanish steel industry.

Comment 10

Co-counsel for petitioners contend that the General Answers submitted by the government of Spain to the DOC are insufficient because the Spanish government did not furnish specifc government reports regarding the government's actions in improving the structure of the steel industry.

DOC Position

Although the government of Spain did not provide this specific information in this case, we did not need this information for proper resolution of the issues raised.

Respondent's Comments

Comment 1

Counsel for respondents states that the petition does not mention or describe the technical characteristics or end-uses of three specific types of carbon steel wire rod that are included in TSUS item 607.17 and that account for much of the Spanish wire rod imports to the U.S. Counsel argues, therefore, that these three types of carbon steel wire rod should be excluded from the scope of investigation in this case.

DOC Position

We disagree. We have held in previous wire rod cases, most recently in the countervailing duty annual review under section 751 of the Act on carbon steel wire rod from Brazil, that all qualities of wire rod within TSUS item 606.17 are of the same class or kind of merchandise.

Comment 2

Counsel for respondents states that the petitioner's production facilities either cannot be used for or are not commonly used for production of the three specific types of Spanish wire rod imports. Counsel argues, therefore, that the lack of any significant production by petitioners of these three types of carbon steel wire rod requires their exclusion from the scope of investigation in accord with our decision in the recent petitions filed by Gilmore Steel Corporation against carbon steel plate from Belgium and West Germany.

DOC Position

We disagree. Petitioners do produce all three of these types of wire rod and do properly represent the carbon steel wire rod industry in the United States.

Comment 3

Counsel for respondents contends that with respect to the three Spanish wire rod producers that did not export to the U.S. during the investigation period, the DOC either must completely exclude them from the final determination or must verify their responses and establish a company-specific rate, if any.

DOC Position

We disagree. These producers are covered by a trade weighted *ad valorem* rate for "All Other Manufacturers/Producers/Exporters" as listed in the "Suspension of Liquidation" section of this notice.

Comment 4

Counsel for respondents contends that imports of carbon steel wire rod from Spain were not "massive over a relatively short period" because in 1983 such imports were level throughout the year on a quarterly basis and represented only about 8 percent of total imports and less than 2 percent of apparent U.S. consumption.

DOC Position

We disagree. For purposes of determining whether massive imports have occurred, we are not constrained to review only 1983 imports nor segments of any year, such as calendar quarters. Furthermore, we found that import levels since the filing of this petition (November 1983–February 1984) were higher than in the four months preceding the investigation (July-October 1983) and were higher than in the corresponding four months of the previous year (November 1982–February 1983).

Comment 5

Counsel for respondents argues that the best proof of creditworthiness is a company's ability to obtain private commercial credit (other than short-term supplier credits or receivables financing) without the benefits of government guarantee or direction. Therefore, ENSIDESA, which has been able to obtain significant amounts of private commercial credit in Spain and abroad in recent years without government intervention, should be considered creditworthy.

DOC Position

We do not agree that ENSIDESA is creditworthy. A determination of creditworthiness is based on several factors including, but not limited to, the availability of credit from commercial sources. See our discussion in section I.A of this notice.

Comment 6

Counsel for respondents contends that interest rates on private commercial loans received without any government intervention provide appropriate benchmark interest rates for determining subsidies in those years when such loans are received.

DOC Position

We do not use individual company interest rates as benchmarks for short-term loans. For some of the long-term benchmark rates, however, we have used verified interest rates on company-specific private commercial loans, as available.

Comment 7

Counsel for respondents contends that the short-term working capital loans under the PCECP are not inconsistent with the Subsidies Code since they are covered by a specific Spanish reservation to that Code, under which this export loan program is being rapidly phased out by the Spanish Government.

DOC Position

We disagree. Despite the fact that this program is being phased out, we found that all three companies obtained subsidies under this program during the period of investigation. See our discussion of this in the "Critical Circumstances" section of this notice.

Comment 8

Counsel for respondents contends that the 10 percent rate set by Spanish law on short-term working capital loans under PCECP is in accord with the existing OECD consensus rate for export financing, and that the OECD export financing rate is specifically excluded from consideration as an export subsidy under the Subsidies Code.

DOC Position

Since the OECD consensus rates for export financing do not apply to loans under two years, such as the short-term working capital PCECP loans, the question of the terms of these loans being consistent with the OECD consensus rates is not relevant.

Comment 9

Counsel for respondents contends that the PCECP is not a countervailable subsidy because these credits are not subsidized or paid for by the government of Spain. Spanish banks are required to maintain over 20 percent of their investments in low-interest privileged circuit accounts for financing housing, equipment, exports, and other investments determined to be in the public interest. Therefore, these loans are simply a cost of engaging in the banking business in Spain, a cost that Spanish banks must make up for in interest rates and other charges applied to their normal commercial operations.

DOC Position

As stated earlier in this notice, the short-term working capital loan program is provided by banks under a series of government-mandated programs. The government-mandated interest rate is below the national average short-term borrowing rate and provides a subsidy on exports.

Comment 10

Counsel for respondents argues that since the cost of the low-interest PCECP is passed on by banks in the form of higher interest rates and other charges, the Spanish steel companies do not receive a subsidy because they end up paying for the cost of these PCECP loans in their normal commercial banking transactions.

DOC Position

The banks may have increased their commercial interest rates to pay for the cost of the privileged circuit program. The fact that everyone, including the steel companies, pays these higher commercial rates does not eliminate the benefits conveyed to exporters participating in the program.

Comment 11

Counsel for respondents argues that if the PCECP is determined by DOC to be a countervailable subsidy, then the benchmark interest rates should be adjusted downward so as to reflect the additional costs of the low-rate PCECP loans.

DOC Position

We do not agree with this argument that the benchmark interest rates should be adjusted downward. The benchmark interest rates used in this final determination represent the national average commercial interest rate available for short-term loans.

Comment 12

Counsel for respondents contends that increasing the short-term benchmark interest rate by two percent to reflect "average borrowing experience" is unsupported by evidence in the record and is contrary to the rates actually being charged to exporters for short-term commercial credit.

DOC Position

Our preference for using a national average rate as opposed to company-specific rates for a short-term benchmark is explained in the Subsidies Appendix. The benchmark we have chosen in this case is based on information gathered from Spanish banks.

Comment 13

Counsel for respondents contends that the DOC should take into account the higher rates paid by some companies in their PCECP loans due to financial discounting, where the interest, fees, and other charges are prepaid in advance by deducting these charges from the face amount of the loan.

DOC Position

We took account of discounting practices in our calculations of benefits under those loans where respondents had specifically demonstrated during verification that financial discounting had occurred.

Comments by an Interested Party

Counsel for Davis Walker Corporation, an interested party to the proceeding, submitted comments.

Comment 1

Counsel for Davis Walker Corporation argues that Spanish wire rod imports to the West Coast, which accounted for about half of all Spanish imports in 1983, do not compete with any available U.S. made wire rod and should be excluded from the DOC evaluation of whether Spanish wire rod imports have been "massive."

DOC Position

For our determination we looked at the entire range of imported products subject to the investigation. In the data available, we had no means by which to evaluate "non-competitive West Coast products," and, even if we had such means, we doubt that we have the authority to exclude such imports from our consideration of this issue.

Comment 2

Counsel for Davis Walker Corporation argues that since the PCECP is currently being phased out and will disappear by January 1, 1986, the future benefit of the 1.85 percent subsidy calculated in the DOC preliminary determination for ENSIDESA in 1982 will be minimal if not *de minimis* on future exports to the U.S.

DOC Position

We will evaluate any future change in subsidies at the time of any pertinent administrative annual review under section 751 of the Act.

Verification

In accordance with section 766(a) of the Act, we verified all the information used in making this final determination, except where the absence of needed or requested information has forced us to use the best information available.

Suspension of Liquidation

The suspension of liquidation ordered in our preliminary affirmative countervailing duty determination (49 Fed. Reg. 6962) will remain in effect until further notice. The net subsidy rate for duty deposit purposes for each firm is as follows:

Manufacturers/producers/exporters	Ad valorem rate (percent)
Empresa Nacional Siderurgica, S.A.	29.94
Nueva Montana Quijano, S.A.	17.13
Forjas Alavesas, S.A.	16.03
All Other Manufacturers/producers/exporters	16.95

We are directing the U.S. Customs Service to require a cash deposit or bond in the amount indicated for each entry of carbon steel wire rod from Spain that is entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the Federal Register. Where the manufacturer is known but is not the exporter, the rate for the manufacturer will be used. If the manufacturer is not known, the rate for all other manufacturers/producers/exporters will be used for the amount of each deposit or bond required.

Final Affirmative Determination of Critical Circumstances

Since petitioners have alleged the existence of critical circumstances in this case, we are required under section 705(a)(2) of the Act to include in our final determination "a finding as to whether—(A) the subsidy is inconsistent with the Agreement, and (B) there have been massive imports of the class or kind of merchandise involved over a relatively short period."

A. Inconsistency with the Subsidies Code

One of the subsidies alleged in this case is short-term noncommercial loans for working capital provided under the privileged circuit exporter credits program. As discussed above, we have determined that each of the three Spanish producers of carbon steel wire rod has received such loans.

In 1982, Spain acceded to the Subsidies Code with a time-limited reservation concerning its current export subsidy programs. On November 15, 1982, in our final affirmative countervailing duty determinations on certain steel products from Spain (47 Fed. Reg. 51438), we concluded that "Spain's reservation does not preclude us from finding, for purposes of a critical circumstances determination, that Privileged Circuit Exporter Credits are inconsistent with the Subsidies Code." We continue to believe this, and therefore this criterion for critical circumstances is satisfied.

B. Massive Imports

In determining whether imports of carbon steel wire rod from Spain have been massive over a relatively short period of time, we considered the following factors: whether recent imports have increased significantly; whether recent import penetration ratios have increased significantly; whether the pattern of recent imports may be explained by seasonal factors; and whether recent imports are significantly above average imports calculated over the last three years. Based on these factors, we determine that imports of carbon steel wire rod from Spain have been massive over a relatively short period of time.

For the reasons discussed above, we find that critical circumstances exist within the meaning of section 705(a)(2) of the Act. Therefore, the suspension of liquidation of entries for a period of 90 days prior to our preliminary determination will remain in effect.

ITC Notification

In accordance with section 705(d) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all non-privileged and non-confidential information relating to this investigation. We will allow the ITC access to all privileged and confidential information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order, without the written consent of the Deputy Assistant Secretary for Import Administration.

The ITC will make its determination whether these imports are materially injuring, or threatening to materially injure, a U.S. industry within 45 days of the publication of this notice.

If the ITC determines that material injury or the threat of material injury does not exist, this proceeding will be terminated and all estimated duties deposited or securities posted as a result of the suspension of liquidation will be refunded or cancelled. If, however, the ITC determines that such injury does exist, we will issue a countervailing duty order, directing the Customs Service to assess countervailing duties on all entries of carbon steel wire rod from Spain entered, or withdrawn from warehouse, for consumption on or after the suspension of liquidation date, and to require a cash deposit or bond for an amount equal to the net subsidy amount indicated in the "Suspension of Liquidation" section of this notice.

This notice is published pursuant to section 705(d) of the Act (19 U.S.C. 1671(d)).

Alan F. Holmer,

Acting Assistant Secretary for Trade Administration.

[FR Doc. 84-12335 Filed 5-7-84; 8:45 am]

BILLING CODE 3510-DS-M

[A-588-029]

Fish Netting of Man-Made Fibers From Japan; Tentative Determination To Revoke in Part Antidumping Finding

AGENCY: International Trade Administration, Commerce.

ACTION: Notice of tentative determination to revoke in part antidumping finding.

SUMMARY: The Department of Commerce has tentatively determined to revoke in part the antidumping finding on fish netting of man-made fibers from Japan. Interested parties are invited to comment on this tentative determination to revoke in part.

EFFECTIVE DATE: May 8, 1984.

FOR FURTHER INFORMATION CONTACT: John M. Andersen or David R. Chapman, Office of Compliance, International Trade Administration, U.S. Department of Commerce, Washington, D.C. 20230, telephone: (202) 377-1130/2923.

SUPPLEMENTARY INFORMATION:

Background

On September 22, 1983, the Department of Commerce ("the Department") published in the Federal Register the final results of its last administrative review of the antidumping finding concerning fish netting of man-made fibers from Japan (37 FR 11560, June 9, 1972) and announced its intent to conduct the next administrative review. As required by section 751 of the Tariff Act of 1930 ("the Tariff Act"), the Department has now completed and separately announced the final results of that administrative review.

Tentative Determination To Revoke in Part

Inagaki Fishing Net Mfg. Co., Ltd./Nichimen Co., Ltd., Osada Fishing Net Co., Ltd./Nichimen Co., Ltd., and Miye Seimo Co., Ltd. requested a revocation of the finding. The Department has concluded that sales by those firms were made at not less than fair value for a two-year period. As provided in § 353.54(e) of the Commerce Regulations, those firms have agreed in writing to an immediate suspension of liquidation and reinstatement in the finding if circumstances develop which indicate that Japanese fish netting of man-made fibers manufactured and exported by Inagaki/Nichimen, Osda/Nichimen, and Miye Seimo is being sold by them to the United States at less than fair value.

Therefore, we tentatively determine to revoke the finding on fish netting of man-made fibers from Japan with regard

to Inagaki Fishing Net Mfg. Co., Ltd./Nichimen Co., Ltd., Osada Fishing Net Co., Ltd./Nichimen Co., Ltd., and Miye Seimo Co., Ltd. If this partial revocation is made final, it will apply to all unliquidated entries of this merchandise manufactured and exported by Inagaki/Nichimen, Asada/Nichimen, and Miye Seimo entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice.

Interested parties may submit written comments on this tentative determination to revoke in part within 30 days of the date of publication of this notice and may request disclosure and/or a hearing within 10 days of the date of publication. Any hearing, if requested, will be held 45 days after the date of publication or the first workday thereafter. Any request for an administrative protective order must be made no later than 5 days after the date of publication. The Department will publish the results of its analysis of any comments received.

This tentative determination to revoke in part is in accordance with section 751(c) of the Tariff Act (19 U.S.C. 1675(c)) and § 353.54 of the Commerce Regulations (19 CFR 353.54).

Dated: April 30, 1984.

Alan F. Holmer,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 84-12385 Filed 5-7-84; 8:45 am]

BILLING CODE 3510-DS-M

[A-588-066]

Impression Fabric of Man-Made Fiber From Japan; Preliminary Results of Administrative Review of Antidumping Finding

AGENCY: International Trade Administration, Commerce.

ACTION: Notice of preliminary results of administrative review of antidumping finding.

SUMMARY: The Department of Commerce has conducted an administrative review of the antidumping finding on impression fabric of man-made fiber from Japan. The review covers the four known manufacturers and/or exporters of this merchandise to the United States currently covered by the finding and the period May 1, 1981 through April 30, 1982. The review indicates the existence of dumping margins for certain firms during the period.

As a result of the review, the Department has preliminarily determined to assess dumping duties equal to the calculated differences between United States price and foreign market value on each of their sales during the period of review. One firm failed to respond to our questionnaire. For that firm the Department used the best information available for assessment and estimated antidumping duties cash deposit purposes.

Interested parties are invited to comment on these preliminary results.

EFFECTIVE DATE: May 8, 1984.

FOR FURTHER INFORMATION CONTACT: Philip S. Gallas or Robert J. Marenick, Office of Compliance, International Trade Administration, U.S. Department of Commerce, Washington, D.C. 20230, telephone: (202) 377-5255.

SUPPLEMENTARY INFORMATION:

Background

On October 12, 1983, the Department of Commerce ("the department") published in the **Federal Register** (48 FR 46407-08) the final results of its last administrative review of the antidumping finding on impression fabric of man-made fiber from Japan (43 FR 22344, May 25, 1978) and announced its intent to conduct immediately the next administrative review. As required by section 751 of the Tariff Act of 1930 ("the Tariff Act"), the Department has now conducted that administrative review.

Scope of the Review

Imports covered by the review are shipments of impression fabric of man-made fiber, currently classifiable under items 338.5001, 338.5002, and 347.6020 of the Tariff Schedules of the United States Annotated.

The review covers the four known manufacturers and/or exporters of impression fabric to the United States currently covered by the finding and the period May 1, 1981 through April 30, 1982.

Two firms did not ship Japanese impression fabric to the United States during the period reviewed. The estimated antidumping duties cash deposit rates for those firms will be the most recent rate for each firm. One firm, Nissei Co., Ltd., failed to respond to our questionnaire. For that non-responsive firm we used the best information available to determine the assessment and estimated antidumping duties cash deposit rates. The best information available is the most recent rate for that firm.

United States Price

In calculating United States price the Department used purchase price, as defined in section 772 of the Tariff Act, since all sales were made to unrelated purchasers in the United States prior to the date of importation. Purchase price was based on the packed, delivered price with deductions, where applicable, for U.S. duty, brokerage, U.S. and foreign inland freight, shipping charges, ocean freight, and insurance. No other adjustments were claimed or allowed.

Foreign Market Value

In calculating foreign market value the Department used home market price, as defined in section 773 of the Tariff Act, since sufficient quantities of such or similar merchandise were sold in the home market to provide a basis for comparison. Home market price was based on the packed, delivered price with adjustments, where applicable, for inland freight, discounts, differences in credit costs, technical services, and packing costs, in accordance with section 353.15 of the Commerce Regulations. We made a further adjustment for differences in the physical characteristics of the merchandise, in accordance with § 353.16 of the Commerce Regulations. No other adjustments were claimed or allowed.

Preliminary Results of the Review

As a result of our comparison of United States price to foreign market value, we preliminarily determine that the following margins exist for the period May 1, 1981 through April 30, 1982:

Manufacturer/exporter	Margin (percent)
Nissei Sangyo Co., Ltd.	3.92
Nissei Co., Ltd.	10.12
Mitsui & Co., Ltd.	[1] 7.5
Marubeni Corp.	[1] 7.5

[1] No shipments during the period.

Interested parties may submit written comments on these preliminary results within 30 days of the date of publication of this notice and may request disclosure and/or a hearing within 10 days of the date of publication. Any hearing, if requested, will be held 45 days after the date of publication or the first workday thereafter. Any request for an administrative protective order must be made no later than 5 days after the date of publication. The Department will publish the final results of the administrative review including the results of its analysis of any such comments or hearing.

The Department shall determine, and the U.S. Customs Service shall assess, dumping duties on all appropriate entries. Individual differences between United States price and foreign market value may vary from the percentages

stated above. The Department will issue appraisement instructions on each exporter directly to the Customs Service.

Further, as provided for in § 353.48(b) of the Commerce Regulations, a cash deposit of estimated antidumping duties based upon the above margins shall be required for those firms. For any future entries from a new exporter not covered in this or prior administrative reviews, whose first shipments of impression fabric of man-made fiber occurred after April 30, 1982 and who is unrelated to any reviewed firm, a cash deposit of 3.92 percent shall be required. These deposit requirements are effective for all shipments of Japanese impression fabric of man-made fiber entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and § 353.53 of the Commerce Regulations (19 CFR 353.53).

Dated: April 27, 1984.

Alan F. Holmer,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 84-12381 Filed 5-7-84; 8:45 am]

BILLING CODE 3510-DS-M

[A-122-004]

Steel Reinforcing Bars From Canada; Final Results of Administrative Review of Antidumping Finding

AGENCY: International Trade Administration, Commerce.

ACTION: Notice of final results of administrative review of antidumping finding.

SUMMARY: On March 1, 1984, the Department of Commerce published the preliminary results of its administrative review of the antidumping finding on steel reinforcing bars from Canada. The Review covers the only manufacturer covered by the finding, Western Canada Steel Limited, and the two other known exporters to the United States of this merchandise manufactured by Western Canada Steel Limited. The review period is April 1, 1982 through March 31, 1983. There were no known shipments of this merchandise to the United States during the period and there are no known unliquidated entries.

We gave interested parties an opportunity to submit oral or written comments on the preliminary results. We received no comments. Based on our analysis, the final results of review are unchanged from those presented in the preliminary results.

EFFECTIVE DATE: May 8, 1984.

FOR FURTHER INFORMATION CONTACT: Susan M. Crawford, Office of Compliance, International Trade Administration, U.S. Department of Commerce, Washington, D.C. 20230, telephone: (202) 377-1130.

SUPPLEMENTARY INFORMATION:

Background

On March 1, 1984, the Department of Commerce ("the Department") published in the **Federal Register** (49 FR 7642) the preliminary results of its administrative review of the antidumping finding on steel reinforcing bars from Canada (29 FR 5341, April 24, 1964). The Department has now completed that administrative review.

Scope of the Review

Imports covered by the review are shipments of steel reinforcing bars from Canada, manufactured by Western Canada Steel Limited, currently classifiable under items 606.7900 and 606.8100 of the Tariff Schedules of the United States Annotated.

The review covers Western Canada Steel Limited and the two other known exporters, Rhovaco Holdings Limited (formerly Rhodes Vaughan and Co., Limited) and Russelsteel Limited, to the United States of Canadian steel reinforcing bars manufactured by Western Canada Steel Limited. The review period is April 1, 1982 through March 31, 1983.

Final Results of the Review

We gave interested parties an opportunity to comment on the preliminary results. The Department received no written comments or requests for a hearing. Based on our analysis, the final results of our review are the same as those presented in the preliminary results. We determined that, as provided for in § 353.48(b) of the Commerce Regulations, a cash deposit of estimated antidumping duties of 6.40 percent shall be required on all shipments of Canadian steel reinforcing bars manufactured by Western Canada Steel Limited entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice.

This deposit requirement shall remain in effect until publication of the final results of the next administrative review. The Department intends to begin immediately the next administrative review.

The Department encourages interested parties to review the public record and submit applications for protective orders, if desired, as early as possible after the Department's receipt of the information in the next administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act of 1930 (19 U.S.C. 1675(a)(1)) and § 353.53 of the Commerce Regulations (19 CFR 353.53)).

Dated: May 1, 1984.

Alan F. Holmer,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 84-12384 Filed 5-7-84; 8:45 am]

BILLING CODE 3510-DS-M

[A-405-07]

Viscose Rayon Staple Fiber From Finland; Preliminary Results of Administrative Review of Antidumping Finding

AGENCY: International Trade Administration, Commerce.

ACTION: Notice of Preliminary Results of Administrative Review of Antidumping Finding.

SUMMARY: The Department of Commerce has conducted an administrative review of the antidumping finding on viscose rayon staple fiber from Finland. The review covers the one known exporter of this merchandise to the United States and the period March 1, 1982, through February 28, 1983. There were no known shipments of this merchandise to the United States during the period, and there are no known unliquidated entries.

As a result of the reivew, the Department has preliminarily determined not to require cash deposits of estimated antidumping duties on future entries. Interested parties are invited to comment on these preliminary results.

EFFECTIVE DATE: May 8, 1984.

FOR FURTHER INFORMATION CONTACT: Ron Nichols or John R. Kugelman, Office of Compliance, International Trade Administration, U.S. Department of Commerce, Washington, D.C. 20230, telephone: (202) 377-5255/3601.

SUPPLEMENTARY INFORMATION:

Background

On October 17, 1983, the Department of Commerce ("the Department") published in the **Federal Register** (48 FR 201) the final results of its last administrative review of the antidumping finding on viscose rayon staple fiber from Finland (44 FR 17156, March 21, 1979) and announced its

intent to conduct the next administrative review. As required by section 751 of the Tariff Act of 1930 ("the Tariff Act"), the Department has now conducted that administrative review.

Scope of the Review

Imports covered by the review are shipments of viscose rayon staple fiber, except solution dyed, in noncontinuous form, not carded, not combed and not otherwise processed, wholly of filaments (except laminated filaments and plexiform filaments). This merchandise is currently classifiable under items 309.4320 and 309.4325 of the Tariff Schedules of the United States Annotated.

The review covers the one known exporter of Finnish viscose rayon staple fiber to the United States, Kemira Oy Sateri, and the period March 1, 1982 through February 28, 1983. There were no known shipments of this merchandise to the United States during the period, and there are no known unliquidated entries.

Preliminary Results of the Review

As a result of our review, we preliminarilyy determine that we will not require a cash deposit of estimated antidumping duties, as provided for in § 353.48(b) of the Commerce Regulations, on any shipment of Finnish Viscose rayon staple fiber entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review.

Interested parties may submit written comments on these preliminary results within 30 days of the date of publication of this notice and may request disclosure and/or a hearing within 10 days of the date of publication. Any hearing, if requested, will be held 45 days after the date of publication or the first workday thereafter. The Department will publish the final results of the administrative review including the results of its analysis of any such comments or hearing.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and § 353.53 of the Commerce Regulations (19 CFR 353.53).

Dated: April 25, 1984.

Alan F. Holman,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 84-12383 Filed 5-7-84; 8:45 am]

BILLING CODE 3510-DS-M

The University of Texas Medical School at Houston; Decision on Application for Duty-Free Entry of Scientific Instrument

The decision is made pursuant to section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89-651, 80 Stat. 897; 15 CFR 301). Related records can be viewed between 8:30 AM and 5:00 PM in Room 1523, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, D.C.

Docket No. 84-50. Applicant: The University of Texas Medical School at Houston, Houston, TX 77225. Instrument: Micromanipulator, Model PM 20N. Manufacturer: Biomedical Instrumente, West Germany. Intended use: See notice at 49 FR 3502.

Comments: None received.

Decision: Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as it is intended to be used, is being manufactured in the United States.

Reasons: The foreign instrument can move a microelectode through a cell rapidly in a straight line for a distance of 20 microns. The National Institutes of Health advises in its memorandum dated April 2, 1984 that (1) the capability of the foreign instrument described above is pertinent to the applicant's intended purpose and (2) it knows of no domestic instrument or apparatus of equivalent scientific value to the foreign instrument for the applicant's intended use.

We know of no other instrument or apparatus of equivalent scientific value to the foreign instrument which is being manufactured in the United States.

(Catalog of Federal Domestic Assistance Program No. 11.105, Importation of Duty-Free Educational and Scientific Materials)

Frank W. Creel,

Acting Director, Statutory Import Program Staff.

[FR Doc. 84-12367 Filed 5-7-84; 8:45 am]

BILLING CODE 3510-DS-M

Applications for Duty-Free Entry of Scientific Instruments; Pennsylvania State University, et al.

Pursuant to section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89-651; 80 Stat. 897; 15 CFR 301), we invite comments on the question of whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States.

Comments must comply with Subsections 301.5(a) (3) and (4) of the regulations and be filed within 20 days with the Statutory Import Programs Staff, U.S. Department of Commerce, Washington, D.C. 20230. Applications may be examined between 8:30 a.m. and 5:00 p.m. in room 1523, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, D.C.

Docket No. 84-147. Applicant: The Pennsylvania State University, Department of Mineral Engineering, Geomechanics Section, 104 Mineral Sciences Building, University Park, PA 16802. Instrument: Stress Alert Rock Stress Monitor, Model RM-1. Manufacturer: McPhar Mine Systems Inc., Canada. Intended use: Monitor the structural changes occurring in underground mines due to active mining of coal.

Educational purposes—Acquaint students with geotechnical field instrumentation in the courses Mng. 545—Field Instrumentation. Application Received by Commissioner of Customs: March 22, 1984.

Docket No. 84-148. Applicant: Albert Einstein College of Medicine of Yeshiva University, 1300 Morris Park Avenue, the Bronx, NY 10461. Instrument: Electron Microscope, Model H-600-2 and Accessories. Manufacturer: Hitachi Scientific Instruments, Japan. Intended use: Investigations of immunopathology of multiple sclerosis, autoimmune dmyelination, and genetic defects in myelination. Nervous tissue will be studied in conjunction with immunocytochemical labelling with specific antibodies and horseradish peroxidase conjugates to determine the sites of immunologic attack or labelling. The objectives of the experiments are to elucidate the pathologic mechanisms operative in human multiple sclerosis and to devise a therapeutic approach to the condition using animal models. Application Received by Commissioner of Customs: March 22, 1984.

Docket No. 84-150. Applicant: The Ohio State University Research Foundation, 1314 Kinnear Road, Columbus, OH 43212. Instrument: Solid State Microstrip Detectors. Manufacturer: Micron Semiconductor Limited, United Kingdom. Intended use: The detectors will be used in Fermilab Experiment 653, a High Energy Physics investigation concerning the ultimate constituents of matter. Application Received by Commissioner of Customs: March 22, 1984.

Docket No. 84-153. Applicant: National Aeronautics & Space Administration, NASA Resident Office/ Jet Propulsion Laboratory, 4800 Oak

Grove Drive, Pasadena, CA 91109. Instrument: Laser, Model TEA 820–M and Accessories. Manufacturer: Lumonics, Inc., Canada. Intended use: The instrument will be used to replace an old Model 102–2 laser in a coherent laser radar system. This lidar has a very sensitive receiver which is used primarily to measure the backscatter properties of atmospheric aerosol particles. Application Received by Commissioner of Customs: March 22, 1984.

Docket No. 84–154. Applicant: University of California, San Diego, Department of Physics, B–019, La Jolla, CA 92093. Instrument: Kelvin probe and electronic controls. Manufacturer: Delta-Phi-Elektronik, West Germany. Intended use: Used in conjuntion with an ultra high vacuum system to measure work function changes in physisorbed noble gas films on alkaline metals. The purposes of such experiments are to compare the results with new calculations utilizing the density functional formalism. Application Received by Commissioner of Customs: March 22, 1984.

Docket No. 84–155. Applicant: Arizona State University, Department of Chemistry, Tempe, AZ 85287. Instrument: Calorimeter, Model 1287 with Accessories. Manufacturer: Setaram, France. Intended use: Studies of phase transitions, melting, and heats of mixing in crystalline, glassy, and molten silicates and oxides. Samples will be studied by measurement of heat capacity, heat of transition, and heat of mixing directly in the calorimeter at temperatures of 500–1500°C. This research project will be conducted to gain a better understanding of the reasons oxide and silicate materials are stable or undergo changes at different temperatures and pressures. This research will be part of the Ph. D. thesis work of some students in the departments of Chemistry and Geology. Application Received by Commissioner of Customs: March 22, 1984.

(Catalog of Federal Domestic Assistance Program No. 11.105, Importion of Duty-Free Educational and Scientific Materials)

Frank W. Creel,

Acting Director, Statutory Import Programs, Staff.

[FR Doc. 84–12370 Filed 5–7–84; 8:45 am]

BILLING CODE 3510–DS–M

Applications for Duty-Free Energy of Scientific Instruments; Columbia University, et al.

Pursuant to section 6(c) of the Educational, Scientific and Cultural Materials Importation Acf of 1966 (Pub. L. 89–651; 80 Stat. 897; 15 CFR 301), we invite comments on the question of whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States.

Comments must comply with Subsections 301.5(a)(3) and (4) of the regulations and be filed within 20 days with the Statutory Import Programs Staff, U.S. Department of Commerce, Washington, D.C. 20230. Applications may be examined between 8:30 A.M. and 5:00 P.M. in Room 1523, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, D.C.

Docket No. 84–172. Applicant: Columbia University, 2980 Broadway, New York, NY 10027. Instrument: Mass Spectrometer System, Model MAT 251. Manufacturer: Finnigan MAT, West Germany. Intended use: Measurement of the stable isotopic ratios of calcium carbonate microfossils from deep-sea cores, dissolved gases in sea-water, sea-water, fresh water, ice cores, carbon, nitrogen and water in plant material, atmospheric isotope chemistry, oceanic particulate isotype chemistry and organic matter in deep-sea cores. The experiments to be conducted will include air/sea carbon isotopic fractionation, hydrogen gas/water catalytic equilibration and C–4 plant fractionation. Application received by Commissioner of Customs: April 12, 1984.

Docket No. 84–157. Applicant: University of California, Los Angeles, School of Medicine, Department of Anatomy, Room 73–214, CHS, Los Angeles, CA 90024. Instrument: Electron Microscope, Model EM 10CAS with Accessories. Manufacturer: Carl Zeiss, West Germany. Intended use: The instrument is intended to be used in carrying out the following research projects:

(1) Ultrastructural analysis of ciliogenesis and ciliary activity in mammalian cells.

(2) Hormones and neuronal development.

(3) Electron microscopic cytochemical localization of adenylate cyclase activity in the caudate nucleus.

(4) Evolution of cytotoxicity.

(5) Differentiation antigens of the glial cell surface.

(6) Fine structural analysis of cutaneous nociceptor endings and the role of neuropeptides in skin inflammation induced by environmental irritants.

(7) Morphological studies of neuronal adaptations supporting learned motor performance.

Educational purposes—Training of graduate students to carry out the research in a wide variety of important biomedical areas. Application received by Commissioner of Customs: March 22, 1984.

Docket No. 84–159. Applicant: New York Institute of Basic Research, 85 McKee Drive, Mahway, NJ 07430. Instrument: Electron Microscope, Model EM 420T with STEM System and Accessories; Manufacturer: Philips Gloeilampenfabrieken, The Netherlands. Intended use: Studies of biological specimens in the form of isolated cellular constituents or in sections of intact tissue. The following experiments will be conducted with the goal of discovering the basic causes of mental retardation and developmental disabilities; to translate this knowledge to diagnosis, prevention and cure of these disorders:

(i) High resolution tilt analysis of abnormal proteins from Alzheimer's disease and animal models for this prevalent form of human dementia.

(ii) Analysis of chromosomes associated with genetic related disorders.

(iii) Analysis of structural changes resulting from nutritional deficits and/or toxic metal ingestion.

(iv) Localization of elements important to normal cellular function.

(v) Studies of membrane stuctural changes as a result of the disease process, et al.

Application received by Commissioner of Customs: March 27, 1984.

Docket No. 84–160. Applicant: NASA, Langley Research Center, Hampton, VA 23665. Instrument: Electron Microscope, Model EM 420T with STEM System and Accessories. Manufacturer: N.V. Philips, The Netherlands. Intended use: The instrument will be used to obtain data to provide basic understanding of chemistry/microstructure/mechanical property relationships in metals, ceramics, polymers, and composite materials. Experiments will include determination of fabrication, secondary processing, and environmental effects on the chemistry, structure, and properties of the materials on a sub-crystallographic scale. The objectives of the research activities include developing fundamental understanding of constituent interactions in advanced materials which will result in concepts leading to more efficient aeronautical and aerospace structures. Application received by Commissioner of Customs: March 27, 1984.

Docket No. 84–161. Applicant: North Carolina State University, School of

Veterinary Medicine, 4700 Hillsborough Street, Raleigh, NC 27606. Instrument: Electron Microscope, Model EM 410LS with Eucentric Goniometer Stage and Accessories. Manufacturer: Philips Electronic Instruments, NVD, The Netherlands. Intended use: Studies of normal and diseased tissues and organs taken from a variety of species (e.g., dogs, cats, horses, cows, pigs, chickens and laboratory animals) and organisms such as viruses, bacteria, protozoans, parasites and fungi. Examples of the experiments to be conducted are (1) the study of the normal dog kidney ultrastructure compared to the ultrastructure of the kidney from a dog with glomerulonephritis, (2) the study of the morphological mechanisms viruses and bacteria use to penetrate cells and (3) a study of the cellular changes which occur during the course of a disease and a determination of the possible causative agent(s). Educational purposes—Training in high resolution electron microscopy as well as providing ancillary assistance for a variety of courses in the professional and graduate curricula. Application received by Commissioner of Customs: March 27, 1984.

Docket No. 84–162. Applicant: Midwest Research Institute, 425 Volker Boulevard, Kansas City, MO 64110. Instrument: Mass Spectrometer/Data System, Model MS 50TC/DS 55M. Manufacturer: Kratos Analytical Instruments, United Kingdom. Intended use: Research—(1) Broad scan analysis of human dibenzo-p-dioxins (PCDDs) and polychlorinated dibensofurans (PCDFs), (2) Chemical characterization of a wide range of compounds from chlorinated phenols, commercial dye preparations, metabolites, natural products to compounds like dihydrotrimethyl quinoline or dimethoxane, (3) Isolation and identification of trace quantitites of "complete" unknowns, (4) Isotopic purity determination of stable isotope labeled labile compounds which are anticipated to be used extensively in conjunction with on-line LC/MS and high resolution capillary column gas chromatography/low resolution mass spectrometric analysis of complex samples. Application received by Commissioner of Customs: April 6, 1984.

(Catalog of Federal Domestic Assistance Program No. 11.105, Importation of Duty-Free Educational and Scientific Materials)

Frank W. Creel,

Acting Director Statutory Import Programs Staff.

[FR Doc. 84–12368 Filed 5–7–84; 8:45 am]

BILLING CODE 3510–DS–M

Applications for Duty-Free Entry of Scientific Instruments; Vanderbilt University, et al.

Pursuant to section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651; 80 Stat. 897; 15 CFR 301), we invite comments on the question of whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States.

Comments must comply with Subsections 301.5(a)(3) and (4) of the regulations and be filed within 20 days with the Statutory Import Programs Staff, U.S. Department of Commerce, Washington, D.C. 20230. Applications may be examined between 8:30 A.M. and 5:00 P.M. in Room 1523, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, D.C.

Docket No. 84–127. Applicant: Vanderbilt University, Department of Pharmacology, Nashville, TN 37232. Instrument: (2) Gas Chromatograph/Mass Spectrometers, Model 1000. Manufacturer: Nermag, France. Intended use: High sensitivity structural elucidation and quantitation of metabolites of arachidonic acid including prostaglandins, thromboxanes, leukotrienes and their metabolites, drug metabolites and anesthetic agents and their metabolites. Studies will be conducted to obtain new information about biochemical systems including the mechanisms of action of naturally-occurring bio-active compounds and drugs. The instruments will be used occasionally to train graduate students and post doctoral fellows in techniques of advanced mass spectrometry. Applicant received by Commissioner of Customs: April 11, 1984.

Docket No. 84–151. Applicant: NIAAA, ADAMHA, Building 10, Rm. 3C218, 9000 Rockville Pike, Bethesda, MD 20205. Instrument: Mass Spectrometer, Model SIRA 9 with Accessories. Manufacturer: V.G. Instruments, Inc., United Kingdom. Intended use: Examine the changes in the ability of a patient to metabolize certain drugs during treatment for alcoholism and interpret quantitatively the kinetics of the drug metabolism via the measurement of the appearance of $^{13}CO_2$ in the expired breath samples. In this way, it is hoped to develop a non-invasive diagnostic test for liver damage in alcoholics. Research studies of these indices will be extended to those at risk for alcoholism (e.g. alcoholic family members). Application received by Commissioner of Customs: March 22, 1984.

Docket No. 84–163. Applicant: Brookhaven National Laboratory, Upton, NY 11973. Instrument: Vivitron Portico Intershield Assembly. Manufacturer: Vivirad, France. Intended use: The instrument will be installed in an existing Model MP tandem Van deGraaff accelerator to increase the maximum energies of available heavy ion beams and to increase the operational reliability at present energy levels. The higher maximum energies will provide new capabilities for the nuclear structure studies performed with these heavy ion beams. The improved operational reliability will make it possible to use the accelerator as an injector for the alternating gradient synchrotron for the production of relativistic heavy ions of unprecedented energies and intensities. New nuclear phenomena are expected and will be studied with these beams. Application received by Commissioner of Customs: April 12, 1984.

Docket No. 84–164. Applicant: Brookhaven National Laboratory, Upton, NY 11973. Instrument: Double Monochromator and Remote Control Filter Assembly for Neutron Spectrometer. Manufacturer: Franke & Heydrich KG, West Germany. Intended use: The instruments are accessories to an existing Polarized Neutron Spectrometer being used for the study of both spin-dependent phenomena and non-spin dependent cross sections as well. A variety of phenomena being studied will include: non periodic and aperiodic systems, non-linear systems, non-equilibrium systems, and low dimensional systems. Application received by Commissioner of Customs: April 12, 1984.

Docket No. 84–165. Applicant: Research Foundation of SUNY at Stony Brook, Department of Anatomical Sciences, Health Sciences Center, Stony Brook, N.Y. 11794. Instrument: Electron Microscope, Model JEM–1200 EX with Accessories. Manufacturer: JEOL Ltd., Japan. Intended use: Research purposes:

(a) To determine quantitatively the K, Cl, Ca and P content of isolated thick muscle filaments under various physiological and morphological conditions.

(b) To analyze at ultra-high resolution by STEM, TEM and SEM the position of the myosin heads and any surface changes of the myosin filament in the contracted or relaxed condition (Image analysis of low-dose electron images will be done).

(c) To determine qualitatively and quantitatively the changes in P, S, K, Ca,

Ba, Cr, Cu, Zn and Se content of human, rat, frog and monkey retina and choroid under normal, diseased and physiologically altered conditions and to identify where each element may be localized within the cells of the eye.

(d) To visualize at ultra-high resolution cytoskeletal-surface attachment structures associated with acetylcholine receptor (AChR) sites on the surface of cultured muscle cells, and determine the Ca content and distribution in areas of AChR patches.

(e) To quantify and map the distribution of iron in bee and pigeon neurological cells associated with the "homing" phenomenon.

(f) Minimum dose TEM of fragile critical point dried whole mounts of fibroblasts and HeLa cells (transformed cervical cancerous cells).

(g) To visualize 5nm colloidal gold coupled to antibody to study the distribution of microtubules.

(h) To analyze morphologically and elementally analyze striated muscle, retinal, lacrimal and fibroblast cells which are maintained in a frozen-hydrated state.

Educational purposes: Teach graduate students and post-doctoral fellows how to do transmission and scanning electron microscopy, X-ray microanalytical and computer assisted image analysis techniques. Application received by Commissioner of Customs: April 12, 1984.

Docket No. 84–166. Applicant: University of Rhode Island, Kingston, RI 02881. Instrument: Electron Microscope, Model JEM–1200 EX with Accessories. Manufacturer: JEOL Ltd., Japan. Intended use: Study of composition and structure of experimental plant and animal specimens and biological macromolecules. It will also be used for metallurgical studies. The specimens studied will be of biological and inorganic origin, including heart, tissue from experimental animals, freeze-fracture replicas of developing protozoa, viral DNA marine microfossils, and metallic specimens. The instrument will also be used in the training of graduate students requiring sophisticated electron microscopic analyses in their studies. Application received by Commissioner of Customs. April 12, 1984.

Docket No. 84–167. Applicant: University of California, Santa Barbara, Department of Geological Sciences, Santa Barbara, CA 93106. Instrument: Magnetometer. Manufacturer: Molspin Ltd., United Kingdom. Intended use: Measurement of magnetic properties of rocks. Application received by Commissioner of Customs: April 12, 1984.

Docket No. 84–168. Applicant: University of California, Purchasing Department, Santa Barbara, CA 93106. Instrument: Seven Silicon Microstrip Detectors. Manufacturer: Micron Semiconductor Ltd., United Kingdom. Intended use: Experiment in high energy particle physics. Use of these detectors will allow a unique study of the properties of charmed particles in high energy photoproduction. This experiment is in the area of fundamental physics research, and has no application outside this area. The experiment will produce data to be used for at least four Ph. D. thesis, as well as numerous scientific papers. Application received by Commissioner of Customs: April 12, 1984.

Docket No. 84–169. Applicant: State University of New York/Upstate Medical Center, Department of Anatomy, 766 Irving Avenue, Syracuse, N.Y. 13210. Instrument: two (2) Electron Microscopes, Model JEM–100CX with Accessories. Manufacturer: JEOL, Ltd., Japan. Intended use: Study of the structure of biological cells and tissues. Included among these will be neural tissue, skeletal and cardiac muscle, gut tissue, cancerous and benign tumor tissue, various endocrine and exocrine organs and various cell types in culture. Intercellular relationships will be studied by tilting the specimens and constructing stereo pairs. In addition high resolution studies on tissues will be examined after immunocytchemical stainging using peroxidase; gold- and ferritin-labeled antibodies. Mechanisms of cell differentation will also be studid at the ultrastructural level. Educational purposes: Introduce students to modern techniques in electron microscopy so that they may conduct research activities in their own fields without further supervision. Application received by Commissioner of Customs: April 12, 1984.

Catalog of Federal Domestic Assistance Program No. 11.105, Importation of Duty-Free Educational and Scientific Materials)

Frank W. Creel,

Acting Director, Statutory Import Programs Staff.

[FR Doc. 84–12369 Filed 5–7–84; 8:45 am]

BILLING CODE 3510–DS–M

[C–201–017]

Bricks From Mexico; Final Affirmative Countervailing Duty Determination and Countervailing Duty Order

AGENCY: International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: We determine that certain benefits constituting bounties or grants within the meaning of the countervailing duty law are being provided to manufacturers, producers, or exporters of bricks in Mexico, as described in the "Scope of Investigation" section of this notice. The net bounty or grant is determined to be 3.51 percent *ad valorem.*

EFFECTIVE DATE: May 8, 1984.

FOR FURTHER INFORMATION CONTACT: Vincent P. Kane, Office of Investigations, Import Administration, International Trade Administration, Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, D.C. 20230, telephone: (202) 377–5414.

SUPPLEMENTARY INFORMATION:

Final Determination and Order

Based upon our investigation, we determine that certain benefits constituting bounties or grants within the meaning of section 303 of the Tariff Act of 1930, as amended (the Act), are being provided to manufacturer, producers, or exporters of bricks in Mexico. For purposes of this investigation, the following programs are found to confer bounties or grants:

- Fund for the Promotion of Exports of Mexican Manufactured Products (FOMEX)
- Fund for the Guarantee and Development of Medium and Small Industries (FOGAIN)
- Preferential Federal Tax Incentives (CEPROF I)
- Fund for Industrial Development (FONEI)

The total estimated bounty or grant from these programs is 3.51 percent *ad valorem.*

Case History

On October 24, 1983, we received a petition filed in proper form by the Brick Institute of Texas on behalf of the U.S. brick industry. In compliance with the filing requirements of § 355.26 of our regulations (19 CFR 355.26), the petition alleges that manufacturers, producers, or exporters of bricks in Mexico receive, directly or indirectly, benefits constituting bounties or grants within the meaning of section 303 of the Act.

We found the petition to provide sufficient grounds upon which to initiate an investigation, and on November 14, 1983, we did so (48 FR 52496). We stated that we expected to issue a preliminary determination by January 17, 1984.

Mexico is not a "country under the Agreement" within the meaning of section 701(b) of the Act. Accordingly,

section 303 of the Act governs this investigation. Because the merchandise being investigated is dutiable, the petitioner is not required to allege that, nor is the U.S. International Trade Commission required to determine whether, imports of this product cause or threaten material injury to a U.S. industry.

We presented a questionnaire concerning the allegations to the government of Mexico on November 28, 1983. On January 5, 1984, we received responses to the questionnaire. We conveyed a supplemental questionnaire to the government of Mexico on January 12, 1984. On February 3, 1984, we received a response to the supplemental questionnaire.

On January 12, 1984, we published in the **Federal Register** a notice postponing, at petitioner's request, our preliminary determination in the investigation until February 16, 1984 (49 FR 1547). From March 6 to March 15, 1984, we conducted a verification in Mexico of the responses received from the Mexican government.

On February 16, 1984, we issued our preliminary determination in this investigation (49 FR 6958). We determined preliminarily that benefits constituting bounties or grants within the meaning of the countervailing duty law were being provided to manufacturers, producers, or exporters of brick in Mexico, and that the estimated net bounty or grant was 5.13 percent *ad valorem*.

Scope of Investigation

The products covered by this investigation are unglazed solid bricks and unglazed hollow bricks. These products are classified under item numbers 532.1120 and 532.1140, respectively, of the *Tariff Schedules of the United States Annotated* (TSUSA).

Subsequent to the preliminary determination, petitioner indicated that magnesite refractory bricks, used exclusively for the purpose of lining kilns and furnaces were not competitive with the construction bricks produced by petitioner. Therefore, we are eliminating magnesite refractory bricks used for lining kilns and furnaces from the scope of our investigation. We note, however, that bricks containing magnesite as a colorant and bricks used in the construction of chimneys, which are properly classifiable under TSUSA item number 532.1120 or 532.1140, remain within the scope of investigation.

The period of investigation is January 1, 1982 to September 30, 1983.

Analysis of Programs

In its response to our questionnaire, the government of Mexico provided data for the applicable period. Based upon our analysis of the petition, the responses to our questionnaire, and our verification, we determine the following:

I. Programs Determined To Confer Bounties or Grants

We determine that bounties or grants are being provided to manufacturers, producers, or exporters of bricks in Mexico under the following programs:

A. FOMEX

FOMEX is a trust established by the government of Mexico to promote the manufacture and sale of exported products. The fund is administered by the Mexican Treasury Department with the Bank of Mexico acting as the trustee. The Bank of Mexico administers the financing of FOMEX loans through financial institutions that establish contracts for lines of credit with manufacturers and exporters. On July 27, 1983, FOMEX was formally incorporated into the National Bank for Foreign Trade. Exporters may obtain either FOMEX pre-export loans denominated in pesos with a maximum annual interest rate of 8 percent, or FOMEX export loans denominated in dollars with a maximum annual interest rate of 6 percent.

Since FOMEX pre-export and export financing programs provide loans for export-related purposes at interest rates significantly less than those prevailing for comparable commercially available loans, we determine that this program confers a bounty or grant upon the exportation of bricks.

To quantify the benefit we used, as a benchmark for the commercial interest rate in Mexico, the national average commercial rate for comparable short-term peso or dollar denominated loans during the appropriate period.

For peso loans, we chose the nominal rate published monthly by the Banco de Mexico in the *Indicadores Economicos* (the "IE rate") as our benchmark. These rates are the weighted averages of the rates charged by commercial banks on peso loans. We used a nominal benchmark because our verification showed that the interest rates provided in the response were on a nominal basis. We believe this rate to be a more accurate benchmark than the rate used in our preliminary determination, the Percentage Cost Captation Average plus 10 points.

For dollar-denominated loans, we used the interest rate for commercial and industrial short-term loans, as published by the U.S. Federal Reserve Bank, since we could not find a national average commercial short-term interest rate for dollar-denominated loans in Mexico.

Based on this information, we determine that, during the appropriate period, comparable peso-denominated loans were available commercially at rates ranging from 37.47 percent to 53.4 percent, and comparable dollar-denominated loans were available at an average rate for the investigation period of 18.15 percent.

We determined the benefits from these loans based on a comparison of the cost of the FOMEX financing and the cost of comparable commercially available loans. This benefit was allocated over total brick exports to the United States during the review period. On this basis, we calculated a bounty or grant in the amount of 1.85 percent *ad valorem*.

B. CEPROF I

CEPROF Is are tax credits used to promote National Development Plan (NDP) goals, which include increased employment, encouragement of regional decentralization, and industrial development, particularly of small and medium-sized firms. CEPROF I tax credits are granted for investments in plant and equipment and for certain payments relating to increased employment and wages. The value of the tax credits is established as a percentage of the investment made. Certain types of investments receive higher percentage tax credits than do others.

The CEPROF I tax credits are issued as tax certificates of fixed value, which may be used to pay Mexican federal taxes for up to five-years. Certain CEPROF I certificates are granted for making investments in "priority" industrial activities; others are available to all industries on equal terms.

Article 25 of the decree that established the basic authority for the issuance of CEPROF Is published in the *Diario Oficial* on March 6, 1979, requires each recipient to pay a 4 percent supervision fee. We verified that the brick companies paid the government this 4 percent fee for all CEPROF Is. Further, we determined that the 4 percent supervision fee is "paid in order to qualify for, or to receive" the CEPROF Is. We concluded that it is therefore an allowable offset from the gross bounty or grant as defined by section 771(6)(A) of the Act. Certain brick producers received four types of CEPROF Is for investing in "priority" industrial activities or in certain regions of the

country. Because these types of CEPROF Is are limited to a specific group of industries or to companies located in specific regions, we determine that these CEPROF Is confer a bounty or grant. To calculate the amount of the bounty or grant, we allocated the CEPROF I benefits granted to brick producers during the period of investigation over total sales of the merchandise under investigation. We thus determined a bounty or grant in the amount of 0.35 percent *ad valorem.*

G. Guarantee and Development Fund and Medium and Small Industries (FOGA I N)

FOGA I N is a program that provides financing at interest rates below prevailing commercial rates to all small and medium size firms in Mexico. Interest rates vary depending upon whether a small or medium-sized business has been granted priority status and whether a business is located in a zone targeted for industrial growth.

We determine this program to be countervailable to the extent it provides financing on terms inconsistent with commercial considerations on the basis of priority status granted to certain small- and medium-sized businesses and/or on the basic of the location of firms in particular zones. Without these conditions which limit the availability of the program, FOGA I N would not be countervailable, because all small and medium-sized firms in Mexico are at a minimum eligible to receive FOGA I N loans at the least beneficial interest rate available under the program. Thus the program is countervailable to the extent that the interest received by a small- or medium-sized firm is below the least beneficial rate which that firm can receive under FOGA I N.

Because the interest rates on these loans are subject to change and have changed over the life of the loans, we treated these loans as a series of short-term loans. To determine the estimated bounty or grant, we used as our benchmark the least beneficial interest rate that would have been available under FOGA I N. We computed annual interest costs based on the outstanding balance of each loan, first at the preferential rate, then at the benchmark rate. We determined the amount of the bounty or grant to be the difference in the interest costs so calculated. We allocated the benefit amount over total sales for the period. On this basis we calculated a bounty or grant of 0.47 percent *ad valorem.*

D. Fund for Industrial Development (FONE I)

FONE I is a specialized financial development fund, administered by the Bank of Mexico, which grants long-term credit at below market rates for the creation, expansion or modernization of of enterprises in order to foster industrial decentralization and the efficient production of goods capable of competing in the international market. FONE I loans are available under various programs having different eligibility requirements.

In its response to our supplemental questionnaire, the government of Mexico indicated that one firm had received a FONE I loan in a specified amount. During verification, we found that a second firm also had received a FONE I loan. In the case of the first FONE I loan, we found during verification that only about 20 percent of the loan proceeds were used for brick production. The second loan was used entirely for brick production. Because the interest rates on the FONE I loans under review are subject to change and have changed over the life of the loans, we treated these loans as a series of short-term loans. To evaluate the benefit of these loans, we compared the cost of the FONE I loans applied to brick production with the cost of commercially available loans of equal size and terms and bearing an interest rate equivalent to the IE rate. We then divided the amount of the benefit (i.e., the difference in the two loan costs) by total brick sales for the period. In this manner, we calculated a benefit of 0.18 percent of FONE I loans.

II. Programs Determined Not to Confer Bounties or Grants

We determine that bounties or grants are not being provided to manufactures, producers, or exporters of bricks in Mexico under the following programs:

A. CEPROF Is FOR SALARY ADJUSTMENT

The brick industry received CEPROF Is to cover adjustements of salaries. Under CEPROF I regulations, all companies that adjust employee wages to compensate for inflation quality for CEPROF I benefits, regardless of location or industrial activity. We determine that CEPROF Is for salary adjustment do not confer a bounty or grant because they are not limited to a specific industry or group of industries or to companies in specific regions.

B. CEPROF Is for Equipment of National Origin

CEPROF Is in the amount of 5 percent of the amount invested may be obtained by firms purchasing machinery and equipment of Mexican origin. The 5 percent CEPROF I is available to all firms regardless of priority of activity or location within the country. In addition, certain CEPROF Is for purchase of domestic machinery are granted selectively at a rate of 15 or 20 percent of the amount invested. In our preliminary determination we found CEPROF Is granted for purchases of machinery and equipment of Mexican origin to be countervailable, because it was unclear whether the CEPROF I had been granted at a rate of 5 percent or 15 or 20 percent of the investment. Subsequently, we verified that all these CEPROF Is were granted at the 5 percent rate. Because that rate is generally available, we determined that the CEPROF Is concerned do not confer a bounty or grant.

III. Programs Determined Not To Be Used

We determine that the following programs have not been used by producers or exporters of brick. The basis for our determination is the Mexican government's statement that producers and exporters of brick did not receive benefits under these programs and our confirmation of this fact during verification.

A. Article 94 Loans

This program was titled "Encaje Legal" in prior investigations. A more accurate title is Article 94 Loans.

Under section II of Article 94 of the *General Law of Credit Institutions and Auxiliary Organizations* (the Banking Law), the Bank of Mexico establishes channels of credit to different sectors of economic activity. There are 12 categories of credit under section II.

Most categories carry their own maximum interest rate which is set by the Bank of Mexico. Loans granted under category 12 are targeted to exports of manufactured products. The maximum interest rate under this category is 8 percent.

B. Accelerated Depreciation Allowance

Petitioner alleged that the brick industry benefited from Mexican income tax reductions through accelerated depreciation on the construction or purchase of plant equipment, warehouses, and other facilities.

Machinery and equipment are subject to straight line depreciation over a 10-year period. Under such a schedule, 10

percent of the cost of the asset would be tax deductible in each of 10 years. However, for purposes of economic development, the Income Tax Department may grant accelerated depreciation on the basis of geographical schedules. Under an accelerated schedule, 20 percent of the cost of eligible assets are tax deductible in each of five years.

C. Import Duty Reductions and Exemptions

Petitioners alleged that brick exporters receive import duty reduction or exemptions on equipment used in the production of exports.

D. State Investment Incentives

Certain Mexican states offer exemptions from state taxes, free or low cost land, or infrastructure improvements as incentives to selected industries to establish or expand industrial facilities and to export.

E. The Mexican Institute of Foreign Trade (IMCE)

IMCE was created by a law published on December 31, 1970, in the *Diario Oficial*. IMCE was organized primarily for the purpose of promoting Mexico's foreign trade and coordinating efforts to stimulate such trade. IMCE performs a number of functions including organizing and directing trade fairs abroad, promoting the visits of trade missions to Mexico carrying out investigations to identify national products or services that might be in demand abroad, and providing exporters with technical assistance.

F. Preferential Vessel, Freight, Terminal, and Insurance Benefits

Industries in Mexico may benefit from rebates or other discounts on transportation, storage, and insurance expenses involved in exporting products to the United States.

G. Preferential Prices for Natural Gas, Oil and Electricity

Petitioner alleged that prices for natural gas, oil and electricity are set by the Mexican government and could include a 30 percent discount for respondents. In its response, the Mexican government stated that energy pricing policies are the same for brick manufacturing as they are for all other domestic industries in Mexico. During verification, we ascertained that brick producers paid energy rates that were generally available to industrial users and that they did not receive specific discounts.

H. FOMEX Loans to U.S. Importers

U.S. importers may obtain FOMEX loans by opening a letter of credit in a U.S. bank, for which the importer pays a fee. The importer can then draw on the line of credit as purchases are made. U.S. banks accept drafts against the line of credit and transfer the drafts to Mexican banks. These drafts are finally sold to FOMEX. The repayment schedule is due in full in 180 days at 6 percent annual interest rate, which is below the rates available for comparable commercially available loans. On the basis of responses received from U.S. importers of Mexican brick and our examination of records at FOMEX headquarters in Mexico City, we have concluded that U.S. importers of bricks did not use FOMEX loans.

I. National Preinvestment Fund for Studies and Projects (FONEP); Trust for Industrial Parks, Cities, and Commercial Centers (FIDEIN); National Fund for the Development of Industry (FOMIN)' and Government Financed Technology Development (NDP)

Administered by Nacional Financiera, S.A. FONEP finances economic, technical and feasibility studies, as well basic and detailed engineering projects.

FIDEIN is aimed at developing industrial parks and cities.

FOMIN operates as a trust fund, providing funding for certain small and medium-sized companies either by buying stock or providing loans at rates below those of commercial lending institutions.

Under the NDP, certain Mexican industries may receive benefits in the form of grants to purchase technology for new plants.

During verification we ascertained that no assistance or benefits from these four programs were conferred on brick producers and that brick producers had not participated in any of these programs.

IV. Programs Determined To Be Suspended

We determine that the following program has been suspended.

A. Certificado de Devolucion de Impuesto (CEDI)

The Certificado de Devolucion de Impuesto (CEDI) is a tax certificate issued by the government of Mexico in an amount equal to a percentage of the f.o.b. value of the exported merchandise or, if national insurance and transportation are used, a percentage of the c.i.f. value of the exported product. The CEDI's are nontransferable and may be applied against a wide range of federal tax liabilities (including payroll taxes, value-added taxes, federal income taxes, and import duties) over a period of five years from date of issuance.

The government of Mexico suspended eligibility for CEDI tax certificates by an Executive Order published in the *Diario Oficial* and effective on August 25, 1982.

Before this program was suspended, seven brick companies received CEDI tax rebates. However, CEDI's are used on a current basis and none remain outstanding. Since this program is suspended, it is highly unlikely that bricks benefitting from CEDI's will enter the United States after the date of the suspension of liquidation on entries of the subject merchandise. Therefore, we are not calculating a bounty or grant for CEDI's received by the brick industry before the suspension of this program.

If this program is reactivated, we will review its applicability in administrative reviews conducted under section 751 of the Act.

Verification

In accordance with section 776(a) of the Act, we verified the information used in making our final determination. During verification, we followed normal procedures, including meetings with government officials, inspection of government documents, and on-site inspection of the records and operation of 10 companies exporting the merchandise to the United States. Within the time limits prescribed in the Act, it was administratively impossible to verify information from all 67 firms identified in the response. Therefore, we selected for verification 10 firms that we considered to be most representative of the entire group of brick producers in terms of their size and the level of benefits received.

Respondents' Comments

Comment 1

One respondent claims that it should be excluded from the countervailing duty order because it received no benefit other than FOMEX loans, and it had repaid all of the FOMEX loans prior to our preliminary determination. Respondent cites § 355.38, of the Commerce regulations (19 CFR 355.38) which states that a firm which does not benefit from a subsidy may be excluded from a countervailing duty order. Since the regulations employ the present tense, past benefits which the firm may have received should not be considered.

DOC Responses

In administering the Act, it has been our long established practice to identify

a period of investigation, usually at least a one-year period, and to obtain information on subsidies received during this period. Limiting our period of investigation to include only the most current information would not allow an adequate review of the benefits that may normally apply over a longer, more representative period. The fact that a respondent discontinues use of a program after our investigation begins, as was the case here, has no bearing on our determination that the respondent was found to have applied for and received benefits during the period of investigation. We note that had the government of Mexico modified or eliminated a program country-wide prior to our preliminary determination, we would have taken this change into account.

Comment 2

A respondent producing only refractory brick used solely for lining kilns and furnaces contends that its product is not of the same class or kind of merchandise that is of concern to the petitioner. Therefore, it should not be included within the scope of investigation.

DOC Response

We agree, as noted in the "Scope of Investigation" section of this notice. Petitioner withdrew from consideration refractory bricks used exclusively for lining kilns and furnaces.

Comment 3

Respondent contends that the Department acted arbitrarily in preliminarily countervailing four programs for which it had received no information prior to the preliminary determination.

DOC Response

In our original questionnaire, we included questions regarding each of these programs. We repeated these questions in a supplementary questionnaire. However, respondents provided no information on these programs. Therefore, in accordance with established practice, we used as best information available the average use rate on other domestic programs for which information was available.

Comment 4

Several firms that exported brick to the United States during the period of investigation requested that they be excluded from any countervailing duty order on the basis that they received no benefits during the period. These requests were received by the Department more than 30 days after the publication date of the notice of initiation, the period established by section 355.38 of Commerce Regulations (19 CFR 355.38) for making such requests. In particular, certain respondents have asked that two firms, Tex Mex de Mexico, S.A., and Ladrillera Reynosa, S.R.L., be excluded from any countervailing duty order, because the Department has verified that they received no benefits.

DOC Response

It is our general practice to publish one, "country-wide" countervailing duty rate applicable to all imports of the subject merchandise from a country. We permit individual companies to seek, on a timely basis, exclusions from the country-wide order. Because requests here were made more than 30 days after the date of publication of the notice of initiation, we consider them untimely and we have not excluded these firms from the countervailing duty order. Two firms whose requests for exclusions from the countervailing duty order were untimely were found not to have received benefits merely because they were selected as part of our verification sample. To exclude these companies on the basis of the verifications is unfair to other companies who were not selected for the verification but who are otherwise similarly situated. Accordingly, we seek no reason to depart from our general practice and the requests of these companies are denied.

Administrative Procedures

We afforded interested parties an opportunity to present oral views in accordance with our regulations (19 CFR 355.34(a)). No request was made to present oral views. Written views have been received and considered.

The suspension of liquidation ordered in our preliminary affirmative determination shall remain in effect until further notice. The net bounty or grant for duty deposit purposes is 3.51 percent.

During verification we confirmed that three firms, which had made timely application for exclusion under § 355.38 of our regulations (19 CFR 355.38), received no benefits or received benefits in *de minimis amounts* from the programs under review. Therefore, we are excluding these firms from the final affirmative countervailing duty determination and countervailing duty order.

The firms excluded are Jesus Garza Arocha, S.A.; Arcillas Saltillo, S.A.; and Ceramica Santa Julia, S.A. All estimated countervailing duties deposited subsequent to the preliminary determination on entries of the subject merchandise produced by these firms shall be refunded and the appropriate bonds released.

As required by section 706(a)(3), we are directing the U.S. Customs Service to require a cash deposit in the amount of 3.51 percent of the f.o.b. value for each entry of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the Federal Register, and to assess countervailing duties in accordance with sections 706(a)(1) and 751 of the Act.

In accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)), we hereby give notice that we are commencing an administrative review of this order on May 8, 1984. For further information concerning this review contact Richard Moreland (202) 377–2786. This notice is published pursuant to sections 303 and 706 of the Act (19 U.S.C. 1303, 1671e).

Alan F. Holmer,

Acting Assistant Secretary for Trade Administration.

May 1, 1984.

[FR Doc. 84–12372 Filed 5–7–84; 8:45 am]

BILLING CODE 3510–DS–M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjusting the Import Limit for Certain Man-Made Fiber Apparel Products Produced or Manufactured in Korea

May 3, 1984.

The Chairman of the Committee for Implementation of Textile Agreements (CITA), under the authority contained in E.O. 11651 of March 3, 1972, as amended, has issued the directive published below to the Commissioner of Customs to be effective on May 9, 1984. For further information contact Ross Arnold, International Trade Specialist (202) 377–4212.

Background

A CITA directive dated December 13, 1983 (48 FR 55894) established restraint limit of 2,511,115 dozen for man-made Fiber woven shirts, other than dress shirts, in Category 640 pt. (all T.S.U.S.A. numbers except 379.3130, 379.3342, 279.9535, 379.9540 and 379.9660), produced or manufactured in Korea and exported in 1984, which may be entered into the United States for consumption, or withdrawn from warehouse for consumption. This level is being reduced by 123,124 dozen representing overshipments from 1982. The net effect will be decrease the 1984 limit to

2,387,991 dozen. This action is being taken in accordance with notes exchanged under the terms of the Bilateral Cotton, Wool, and Man-Made Fiber Textile Agreement of December 1, 1982 between the Governments of the United States and the Republic of Korea.

A description of the textile categories in terms of T.S.U.S.A. numbers was published in the **Federal Register** on December 13, 1982 (47 FR 55709) as amended on April 7, 1983 (48 FR 15175), May 3, 1983 (48 FR 19924) and December 14, 1984 (48 FR 55607), December 30, 1983 (48 FR 57584), and April 4, 1984 (49 FR 13397).

Ronald I. Levin,

Acting Chairman, Committee for the Implementation of Textile Agreements.

May 3, 1984.

Committee for the Implementation of Textile Agreements

Commissioner of Customs,
Department of the Treasury,
Washington, D.C.

Dear Mr. Commissioner: This directive further amends, but does not cancel, the directive of December 13, 1983 from the Chairman of the Committee for the Implementation of Textile Agreements, concerning imports into the United States of certain cotton, wool and man-made fiber textile products, produced or manufactured in Korea.

Effective on May 9, 1984, you are directed to reduced the limit established for man-made fiber textile products in cateogry 640 pt.[1] to 2,387,991 dozen.[2]

The Committee for the Implementation of Textile Agreements has determined that these actions falls within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553.

Sincerely,

Ronald I. Levin,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 84-12323 Filed 5-7-84; 8:45 am]
BILLING CODE 3510-DR

Establishing Import Limits for Certain Cotton Textile Products Exported From Indonesia

May 3, 1984.

The Chairman of the Committee for the Implementation of Textile Agreements (CITA), under the authority contained in E.O. 11651 of March 3, 1972, as amended, has issued the directive published below to the Commissioner of Customs to be effective on May 9, 1984. For further information contact Diana Bass, International Trade Specialist, (202) 377-4212.

[1] In Category 640, all T.S.U.S.A. numbers except 379.3130, 379.3342, 379.9535, 379.9540 and 379.9660.

[2] The level has not been adjusted to account for any imports after December 31, 1983.

Background

On February 14, 1984 a notice was published in the **Federal Register** (49 FR 5648) which established an import restraint limit for carded cotton duck in Category 319, produced or manufactured in Indonesia and exported during the ninety-day period which began on January 31, 1984 and extends through April 29, 1984, pursuant to a newly agreed consultation provision under the Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement of October 13 and November 9, 1982, as amended. The notice also stated that the Government of the Republic of Indonesia is obligated under the bilateral agreement, if no mutually satisfactory solution is reached on a level for this category during consultations, to limit its exports during the period beginning on January 31, 1984 and extending through June 30, 1984 to 1,704,163 square yards.

The notice also stated that merchandise in Category 319 which is in excess of the ninety-day limit, if it is allowed to enter, may be charged to the prorated limits.

The United States Government has decided, inasmuch as no mutually satisfactory solution has been agreed concerning Category 319, to control imports in the Categorry at the designated limit. The limit may be adjusted to include prorated swing and carryforward.

A description of the textile categories in terms of T.S.U.S.A. numbers was published in the **Federal Register** on December 13, 1982 (47 FR 55709), as amended on April 7, 1983 (48 FR 15175), May 3, 1983 (48 FR 19924) and December 14, 1983 (48 FR 55607), December 30, 1983 (48 FR 57584), and April 4, 1984 (49 FR 13397).

Ronald I. Levin,

Acting Chairman, Committee for the Implementation of Textile Agreements.

May 3, 1984.

Committee for the Implementation of Textile Agreements

Commissioner of Customs,
Department of the Treasury,
Washington, D.C.

Dear Mr. Commissioner: Under the terms of Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); pursuant to the Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement of October 13 and November 9, 1982, as amended, between the Governments of the United States and the Republic of Indonesia; and in accordance with the provisions in Executive Order 11651 of March 3, 1972, as amended, you are directed to prohibit, effective on May 9, 1984, entry into the United States for consumption and withdrawal from warehouse for consumption of cotton textile products in Category 319, produced or manufactured in Indonesia and exported during the period which began on January 31, 1984 and extends through June 30, 1984, in excess of 1,704,163 square yards.[1]

Textile products in Category 319 which have been exported to the United States during the ninety-day period which began on January 31, 1984 and extends through April 30, 1984 shall be subject to this directive.

A description of the textile categories in terms of T.S.U.S.A. numbers was published in the **Federal Register** on December 13, 1982 (47 FR 55709), as amended on April 7, 1983 (48 FR 15175), May 3, 1983 (48 FR 19924) and December 14, 1983 (48 FR 55607), December 30, 1983 (48 FR 57584), and April 4, 1984 (49 FR 13397).

In carrying out the above directions, the Commissioner of Customs should construe entry into the United States for consumption to include entry for consumption into the Commonwealth of Puerto Rico.

The action taken with respect to the Government of Indonesia and with respect to imports of cotton textile products from Indonesia has been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, these directions to the Commissioner of Customs, which are necessary for the implementation of such actions, fall within the foreign affairs exception to the rule-making provisions of 5 U.S.C. 553. This letter will be published in the **Federal Register**.

Sincerely,

Ronald I. Levin,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 84-12324 Filed 5-7-84; 8:45 am]
BILLING CODE 3510-DR-M

New Import Control Limit for Certain Cotton Apparel Produced or Manufactured in Singapore

May 3, 1984.

The Chairman of the Committee for the Implementation of Textile Agreements (CITA), under the authority contained in E.O. 11651 of March 3, 1972, as amended, has issued the directive published below to the Commissioner of Customs to be effective on May 9, 1984. For further information contact Diana Bass, International Trade Specialist (202) 377-4212.

Background

Under the terms of the Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement of August 21, 1981, between the Governments of the United States and the Republic of Singapore, the Government of the United States has decided to control imports of cotton dresses in Category 336, produced or manufactured in Singapore and

[1] The limit has not been adjusted to reflect any imports exported after January 30, 1984.

exported during the twelve-month period which began on January 1, 1984, at a level of 15,453 dozen. That level is being adjusted to account for imports entered during January and February 1984 which have amounted to 5,099 dozen. Further charges will be made to account for imports during the period which began on March 1, 1984 and extends to the effective date of this action, as well as thereafter. This control limit is in addition to those previously announced for 1984 (See 48 FR 56628).

A description of the textile categories in terms of T.S.U.S.A. numbers was published in the Federal Register on December 13, 1982 (47 FR 55709), as amended on April 7, 1983 (48 FR 15175), May 3, 1983 (48 FR 19924) and December 14, 1983 (48 FR 55607), and December 30, 1983 (48 FR 57584).

Ronald I. Levin,

Acting Chairman, Committee for the Implementation of Textile Agreements.

May 3, 1984.

Committee for the Implementation of Textile Agreements

Commissioner of Customs,
Department of the Treasury,
Washington, D.C.

Dear Mr. Commissioner: This directive amends, but does not cancel, the directive of December 19, 1983 from the Chairman of the Committee for the Implementation of Textile Agreements concerning imports of cotton and man-made fiber textile products, produced or manufactured in Singapore and exported during 1984.

Effective on May 9, 1984, the directive of December 19, 1983 is hereby amended to include a level of restraint of 15,453 dozen [1] for cotton textile products in Category 336.

The action taken with respect to the Government of the Republic of Singapore and with respect to imports of cotton textile products from Singapore has been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, these directions to the Commission of Customs, which are necessary for the implementation of such actions, fall within the foreign affairs exception to the rule-making provisions of 5 U.S.C. 553. This letter will be published in the Federal Register.

Sincerely,

Ronald I. Levin,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 84-12325 Filed 5-7-84; 8:45 am]
BILLING CODE 3510-DR-M

[1] The level of restraint has not been adjusted to reflect any imports after December 31, 1983. During January and February 1984 imports have amounted to 5,099 dozen.

Establishing Import Limits for Certain Wool and Man-Made Fiber Textile Products Exported From the People's Republic of China

May 3, 1984.

The Chairman of the Committee for the Implementation of Textile Agreements (CITA), under the authority contained in E.O. 11651 of March 3, 1972, as amended, has issued the directive published below to the Commissioner of Customs to be effective on May 9, 1984. For further information contact Diana Bass, International Trade Specialist (202) 377-4212.

Background

On February 1, 1984 a notice was published in the Federal Register (49 FR 4031) which established import restraint limits for wool skirts in Category 442, women's girls' and infants' suits in Category 444 and men's and boys' man-made fiber knit shirts in Category 638, produced or manufactured in the People's Republic of China and exported during the ninety-day period which began on January 24, 1984 and extends through April 22, 1984. The notice also stated that the Government of the People's Republic of China is obligated under the Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement of August 19, 1983, if no mutually satisfactory solution is reached on levels for this category during consultations, to limit its exports during the twelve-month period following the ninety-day consultation period to the following:

Category	12-moth restraint level (Apr. 23, 1984 to Apr. 22, 1985)
442	18,230 dozen.
444	9,074 dozen.
638	435,649 dozen.

Consultations were held concerning these categories March 27-30, 1984, but no solution was reached on mutually satisfactory limits. The United States Government has decided, therefore, pending further consultations, to control imports of wool and man-made fiber textile products in Categories 442, 444 and 638, exported during the twelve-month period at the levels described above. The United States remains committed to finding a solution concerning these categories. Should such a solution be reached in further consultations with the Government of the People's Republic of China, notice will be published in the Federal Register.

In the event the limits established for the ninety-day period have been exceeded, such excess amounts, if allowed to enter, will be charged to the levels established for the twelve-month period.

A description of the textile categories in terms of T.S.U.S.A. numbers was published in the Federal Register on December 13, 1982 (47 FR 55709), as amended on April 7, 1983 (48 FR 15175), May 3, 1983 (48 FR 19924) and December 14, 1983 (48 FR 55607), December 30, 1983 (48 FR 57584), and April 4, 1984 (49 FR 13397).

Ronald I. Levin,

Acting Chairman, Committee for the Implementation of Textile Agreements.

May 3, 1984.

Committee for the Implementation of Textile Agreements

Commissioner of Customs,
Department of the Treasury, Washington, D.C.

Dear Mr. Commissioner: Under the terms of Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854), pursuant to the Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement of August 19, 1983, between the Governments of the United States and the People's Republic of China; and in accordance with the provisions in Executive Order 11651 of March 3, 1972, as amended, you are directed to prohibit, effective on May 9, 1984, entry into the United States for consumption and withdrawal from warehouse for consumption of wool and man-made fiber textile products in Categories 442, 444 and 638, produced or manufactured in the People's Republic of China and exported during the twelve-month period which began on April 23, 1984 and extends through April 22, 1985, in excess of the following limits:

Category	12-mo restraint limit [1]
442	18,230 dozen.
444	9,024 dozen.
638	435,649 dozen.

[1] The levels have not been adjusted to account for any imports exported after April 22, 1984.

Textile products in Categories 442, 444 and 638 in excess of the 90-day limits which have been exported to the United States during the ninety-day period which began on January 24, 1984 shall be subject to this directive.

A description of the textile categories in terms of T.S.U.S.A. numbers was published in the Federal Register on December 13, 1982 (47 FR 55709), as amended on April 7, 1983 (48 FR 15175), May 3, 1983 (48 FR 19924) and December 14, 1983 (48 FR 55607), December 30, 1983 (48 FR 57584), April 4, 1984 (49 FR 13397).

In carrying out the above directions, the Commissioner of Customs should construe entry into the United States for consumption to include entry for consumption into the Commonwealth of Puerto Rico.

The actions taken with respect to the Government of the People's Republic of China and with respect to imports of wool and man-made fiber textile products from China have been determined by the

Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, these directions to the Commissioner of Customs, which are necessary for the implementation of such actions, fall within the foreign affairs exception to the rule-making provisions of 5 U.S.C. 553. This letter will be published in the Federal Register.

Sincerely,

Ronald I. Levin,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 84-12380 Filed 5-7-84; 8:45 a.m.]

BILLING CODE 3510-DR-M

DEPARTMENT OF DEFENSE

Office of the Secretary

DOD Intent To Establish a Software Engineering Institute

The Office of the Under Secretary of Defense Research and Engineering, after examining all existing organizational alternatives, has decided to establish a Federally Funded Research and Development Center (FFRDC) to be named the DOD Software Engineering Institute (SEI). The mission of the SEI is to accelerate the transition of emerging or advanced computer software technology into use in the development and maintenance of DOD weapons systems. The ultimate objective is to reduce the labor intensiveness of developing and evolving military applications software such that the DOD can continue to serve a growing demand for sophisticated software systems in a manner which is both efficient and affordable. The scope and nature of the effort to be performed by the SEI are as follows: (1) Identifying and assessing the suitability of existing and potential software technologies from all available sources for use in the development and maintenance of software-intensive defense systems; (2) developing the concept and architecture of an automated software "factory" (i.e., the engineering environment, tools, methods, and techniques supporting software development and maintenance) employing a coherent and integrated system of computerized software tools and reusable software parts as building blocks; (3) acquiring and engineering high payoff software development and support tools and methods to mission-critical production standards for use in the "factory"; (4) designing a fully consistent set of interface specifications to enable integration of these engineered tools and methods and to facilitate industry extensions and additions to the software "factory"; (5) demonstrating and maintaining a model software "factory" containing these high payoff tools, methods and interface standards, which will be the showcase for the state of the art in software engineering excellence; (6) disseminating engineered software tools and methods throughout the DOD mission-critical software community; (7) supporting the Military Services and other DOD Components in software engineering matters; (8) educating in support of software technology insertion into DOD weapons systems; (9) performing goal-directed research in support of software technology transition into DOD weapons systems. The SEI will endeavor to bring together the best professional minds in the area of software systems engineering and technology to address these tasks. This announcement is not a synopsis in accordance with Pub. L. 98-72 or otherwise a synopsis of sources sought in connection with a procurement. It is published consistent with para 6b(2) of the Office of Federal Procurement Policy draft policy letter on FFRDCs, which provides for at least three notices over a 90-day period in the Commerce Business Daily and the Federal Register indicating intention to sponsor an FFRDC and the scope and nature of the effort to be performed by the FFRDC. This is the second in the series of three notices. A competitive procurement is envisioned for the establishment of the SEI. Further details pertaining to this procurement, including a Synopsis of Sources Sought, will soon be provided in the Commerce Business Daily by the Directorate of FCRC Support of the Air Force Electronic Systems Division, Hanscom AFB, MA.

Dated: May 3, 1984.

M. S. Healy,

OSD Federal Register Liaison Officer, Washington Headquarters Services, Department of Defense.

[FR Doc. 84-12303 Filed 5-7-84; 8:45 am]

BILLING CODE 3810-01-M

Corps of Engineers, Department of the Army

Intent To Prepare a Draft Supplement to Two Final Environmental Impact Statements (EIS): The Final EIS for the Operation and Maintenance of the 9-Foot Navigation Channel, Upper Mississippi River, Head of Navigation to Guttenberg, Iowa, and the Final EIS for the GREAT River Environmental Action Team I Study of the Upper Mississippi River, Guttenberg, Iowa, to the Head of Navigation at Minneapolis, Minn.

AGENCY: U.S. Army Corps of Engineers, St. Paul District, Army, DOD.

ACTION: Notice of intent to prepare a draft supplement to two final environmental impact statements.

SUMMARY:

1. *Proposed Action.* The Weaver Bottoms is a 4,000-acre backwater lake in pool 5 of the Upper Mississippi River. This area has changed within the last 20 years from a marsh habitat to a more riverine nature. The Weaver Bottoms was extensively studied in the mid-1970's because of this degradation. From the results of these studies, barrier islands (to reduce wave turbulence) and side channel modifications (to change flow and sedimentation patterns) were recommended to restore the biological productivity of the area. The proposed action calls for the use of material dredged during normal maintenance actions in lower pool 5 to create these barrier islands and side channel modifications. Several alternative ways of constructing these barrier islands and side channel modifications are being considered.

2. *Alternatives.* The only reasonable alternative to the proposed action would be to continue using the historic dredged material disposal practices for lower pool 5. The impacts associated with these historic practices are covered in the final EIS for the 9-foot navigation channel.

3. *Significant Issues.* Significant issues identified to date that will be analyzed in depth in the draft supplement to the final EIS's include the following: Effects on sites that may qualify for inclusion on the National Register of Historic Places; effects on recreational resources; effects on the aquatic biota from the burial of aquatic habitat by the construction of barrier islands and side

channel closures; effects on the aquatic community of the Weaver Bottoms from changing sedimentation and flow patterns; effects on flood levels; effects on adjacent aquatic habitats; effects on dredging requirements; and effects of the project on water quality.

Review of the project will be conducted in accordance with the requirements of the National Environmental Policy Act of 1969, Council on Environmental Quality Regulations (40 CFR 1500–1508), and applicable Corps of Engineers regulations and guidance.

4. *Scoping.* A series of public meetings will be held in the vicinity of pool 5 to present the proposed plan and obtain public comment. An agency scoping meeting will also be held, at a time and place to be announced, to obtain comments from interested Federal and State agencies on the scope of the draft EIS supplement.

5. *Cooperating Agencies.* The U.S. Fish and Wildlife Service would be a cooperating agency. In addition, the St. Paul District will request information for the draft EIS supplement from the Wisconsin Department of Natural Resources, the Minnesota Department of Natural Resources, and the Minnesota Pollution Control Agency.

6. *Scheduling.* The draft EIS supplement is currently scheduled to be available for public distrubution in October 1984.

7. *Distribution.* Copies of the draft EIS supplement will be provided to all concerned Federal, State, and local agencies; affected Indian tribes; private organizations; and individuals. Anyone else who is interested in reviewing this supplement is invited to do so. They should contact the St. Paul District, Corps of Engineers, to assure that they are included on the mailing list.

8. *Inquiries.* Questions concerning the proposed action and draft EIS supplement can be directed to Colonel Edward G. Rapp, District Engineer, St. Paul District, Corps of Engineers, 1135 U.S. Post Office and Custom House, St. Paul, Minnesota 55101.

Dated: April 26, 1984.

Edward G. Rapp,

Colonel, Corps of Engineers, District Engineer.

[FR Doc. 84–12320 Filed 5–7–84; 8:45 am]

BILLING CODE 3710-CY-M

DEPARTMENT OF ENERGY

Agency Information Collections Under Review by the Office of Management and Budget

Correction

In FR Doc. 84–11733 appearing on page 18772 in the issue of Wednesday, May 2, 1984, in the first column, third line under **DATES,** "May 4, 1984" should read "May 14, 1984".

BILLING CODE 150-01-M

Alaska Power Administration

Eklutna Project; Proposal To Adjust Wholesale Power Rates

AGENCY: Alaska Power Administration, Department of Energy.

ACTION: Notice of proposal.

SUMMARY: Proposal to adjust rate schedule A–F8 increasing the firm energy rate from 12.5 mills per kilowatt hour to 19 mills per kilowatt hour and rate schedule A–N7 increasing the nonfirm energy rate from 6 mills per kilowatt hour, to 10 mills per kilowatt hour. In addition, a new rate schedule A–W1, a wheeling rate of .3 mills/kWh is included in the proposal. The proposed rates will be submitted to the Deputy Secretary of Department of Energy for interim approval and the rates are subject to confirmation and final approval from the Federal Energy Regulatory Commission.

DATES: Written comments will be considered for 90 days from the date of publication. Interim basis rates are expected to be in effect by October 1, 1984.

To submit written comments or for further information contact:

Gordon J. Hallum, Chief, Power Division, Alaska Power Administration, Department of Energy, Room 825, Federal Building, P.O. Box 50, Juneau, Alaska 99802, (907) 586–7405;
or
Darlene Low, Power Division, Alaska Power Administration, Department of Energy, Room 825, Federal Building, P.O. Box 50, Juneau, Alaska 99802, (907) 586–7405

SUPPLEMENTARY INFORMATION: The present rates, established in 1979 will expire December 31, 1984. Preliminary studies show that increased rates are necessary to meet cost recovery criteria, and increased costs in O&M. The rate proposal and supporting studies are available in the Alaska Power Administration's headquarters office, Room 825, Federal Building, Juneau, Alaska.

A public information and comment forum will be held June 12, 1984, Room C–121 and C–122, in the Federal Building, Anchorage, Alaska.

All comments will be considered and the proposed rates may be revised on the basis of public input.

Dated: April 27, 1984.

Robert J. Cross,

Administrator.

[FR Doc. 84–12300 Filed 5–7–84; 8:45 am]

BILLING CODE 6450-01-M

Office of Energy Research

Health and Environmental Research Advisory Committee; Open Meeting

Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770), notice is hereby given of the following meeting:

Name: Health and Environmental Research Advisory Committee (HERAC).

Date and Time: May 17, 1984—9:00 a.m.–5:00 p.m.; May 18, 1984—9:00–Noon.

Place: U.S. Department of Energy, Room A–410, Germantown, Maryland 20545.

Contact: David A. Smith, Department of Energy, Office of Health and Environmental Research, Washington, DC 20545, Telephone: 301/353–2987.

Purpose of the Committee: To provide advice on a continuing basis to the Secretary of the Department of Energy (DOE), through the Director of Energy Research, on the many complex scientific and technical issues that arise in the development and implementation of the Health and Environmental Research (HER) program.

Tentative Agenda: Briefings and Discussions of:

Thursday, May 17, 1984

- Status of Epidemiology Program Review
- Status of Complex Mixture Program Review
- Review of HER Program Plan
- Public Comment (10 minute rule)

Friday, May 18, 1984

- Review of HER Program Plan
- Public Comment (10 minute rule)

Public Participation

The meeting is open to the public. Written statements may be filed with the Committee either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact David A. Smith at the address or telephone number listed above. Requests must be received 5 days prior to the meeting and reasonable provision will be made to include the presentation on the agenda. The Chairperson of the Committee is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Less than 15 days notice is being given due to the immediate need to receive advice and recommendations concerning the review of the HER Program Plan.

Transcripts

The transcript of the meeting will be available for public review and copying at the Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC, between 8:30 a.m.

and 4:00 p.m., Monday through Friday, except Federal holidays.

Issued at Washington, DC on May 2, 1984.

Howard H. Raiken,

Deputy Advisory Committee Management Officer.

[FR Doc. 12299 Filed 5-7-84; 8:45 am]

BILLING CODE 6450-01-M

Office of Fossil Energy

National Petroleum Council; Open Meeting

Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92-463, 86 Stat. 770), notice is hereby given of the following Advisory Committee meeting:

Name: National Petroleum Council.

Date and time: Thursday, June 21, 1984—9:30 a.m.

Place: Four Seasons Hotel, Corcoran Ballroom, 2800 Pennsylvania Avenue, NW., Washington, D.C.

Contact: Gerald J. Parker, U.S. Department of Energy, Office of Oil, Gas and Shale Technology, Mail Stop D-122, GTN, Washington, D.C. 20545, Telephone: 301-353-3032.

Purpose of Committee: To provide advice, information, and recommendations to the Secretary of Energy on matters relating to oil and gas or the oil and gas industries.

Tentative Agenda

—Call to Order by Chairman of the National Petroleum Council.
—Remarks by the Secretary of Energy.
—Reports of the Study Committees of the National Petroleum Council:
  a. Committee on Enhanced Oil Recovery
  b. Committee on Petroleum Inventories and Storage Capacity
  c. Committee on the Strategic Petroleum Reserve
—Consideration of Any Other Business Properly Brought before the National Petroleum Council.
—Public Comment (10 minute rule).

Public Participation

The meeting is open to the public. The Chairperson of the Committee is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Any member of the public who wishes to file a written statement with the Committee will be permitted to do do, either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact Gerald J. Parker at the address or telephone number listed above. Requests must be received at least 5 days prior to the meeting and reasonable provision will be made to include the presentation on the agenda.

Transcripts

Available for public review and copying at the Public Reading Room, Room 1E-190, Forrestal Building, 1000 Independence Avenue, SW., Washington, D.C., between 8:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays.

Issued at Washington, D.C., on May 2, 1984.

Howard H. Raiken,

Deputy Advisory Committee, Management Officer.

[FR Doc. 84-12353 Filed 5-7-84; 8:45 am]

BILLING CODE 6450-01-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

Agency Information Collection Submitted to the Office of Management and Budget for Clearance

The Federal Emergency Management Agency (FEMA) has submitted to the Office of Management and Budget the following information collection package for approval in accordance with the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Type: Extension of 3067-001

Title: National Defense Executive Reserve Personal Qualifications Statement

Abstract: FEMA Form 85-3, National Defense Executive Reserve Personal Qualifications Statement, is used in lieu of SF-171, Application for Employment in the Federal Government. It is simplified, requires less burden hours, contains the information for screening qualifications against reserve positions. FEMA uses the form for applicant approval for designation to agencies.

Type of Respondents: Individuals or Households

Number of Respondents: 200

Burden Hours: 100.

Copies of the above information collection request and supporting documentation can be obtained by calling or writing the FEMA Clearance Officer, Linda Shiley, (202) 287-9906, 500 C Street, SW., Washington, D.C. 20472.

Coments should be directed to Ken Allen, Desk Officer for FEMA, Office of Information and Regulatory Affairs, OMB, Rm. 3235, New Executive Office Building Washington, D.C. 20503.

Dated: May 2, 1984.

Walter A. Girstantas,

Director, Administrative Support.

[FR Doc. 84-12297 Filed 5-7-84; 8:45 am]

BILLING CODE 6718-01-M

Agency Information Collection Submitted to the Office of Management and Budget for Clearance

The Federal Emergency Management Agency (FEMA) has submitted to the Office of Management and Budget the following information collection package for approval in accordance with the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Type: Existing Collection in use Without OMB Control Number

Title: National Fire Incident Reporting System (NFIRS)

Abstract: This information is needed to facilitate a uniform method of collecting basic data on fire incidents, including structural and casualty information—It is used to formulate intervention strategies to prevent fire losses and injuries, benefiting the entire program.

Type of Respondents: State or Local Governments

Number of Respondents: 11,000

Burden Hours: 117,000.

Copies of the above information collection request and supporting documentation can be obtained by calling or writing the FEMA Clearance Officer, Linda Shiley, (202) 287-9906, 500 C. Street, SW., Washington, D.C. 20472.

Coments should be directed to Ken Allen, Desk Officer for FEMA, Office of Information and Regulatory Affairs, OMB, Rm. 3235, New Executive Office Building, Washington, D.C. 20503.

Dated: May 1, 1984.

Walter A. Girstantas,

Director, Administrative Support.

[FR Doc. 84-12298 Filed 5-7-84; 8:45 am]

BILLING CODE 6718-01-M

FEDERAL MARITIME COMMISSION

Independent Ocean Freight Forwarder License; Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission applications for licenses as independent ocean freight forwarders pursuant to section 44(a) of the Shipping Act, 1916 (75 Stat. 522 and 46 U.S.C. 841(c)).

Persons knowing of any reason why any of the following applicants should not receive a license are requested to communicate with the Director, Bureau of Tariffs, Federal Maritime Commission, Washington, D.C. 20573.

Inter-Orient Corporation, 946 East Garvey, Monterey Park, CA 91754.

Officers: Dennis Sun Yien Awana, President/Secretary, Frank K. Liu, Vice President

Freight Services Forwarding, Inc., 112 Madison Avenue, New York, NY 10016.

Officers: Patrick Richardson, Secretary/Director, Paul J. Mulazzi, Export Operations Manager, Douglas E. Moll, President/Director

Total Ex-Port Inc., 175-01 Rockaway Blvd., Suite 211, Jamaica, NY 11434.

Officers: James B. Spies, President, Carmine Cuomo, Vice President, Richard Schweitzer, Secretary, John Maser, Export Manager

Transworld Associates, Inc., Suite 703, 1911 N. Fort Myer Drive, Arlington, VA 22209.

Officers: Robert K. Powell, President/Director, Paul F. Hannum, Treasurer/Director, Lawrence DePace, Vice President/Director

Dated: May 2, 1984.

By the Federal Maritime Commission.

Francis C. Hurney,

Secretary.

[FR Doc. 84-12288 Filed 5-7-84; 8:45 am]

BILLING CODE 6730-01-M

Agreements Filed

The Federal Maritime Commission hereby gives notice that the following agreements have been filed with the Commission for approval pursuant to section 15 of the Shipping Act, 1916, as amended (39 Stat. 733, 75 Stat. 763, 46 U.S.C. 814).

Interested parties may inspect and may request a copy of each agreement and the supporting statement at the Washington, D.C. Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit protests or comments on each agreement to the Secretary, Federal Maritime Commission, Washington, D.C. 20573, within 20 days after the date of the **Federal Register** in which this notice appears. The requirements for comments and protests are found in § 522.7 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Any person filing a comment or protest with the Commission shall, at the same time, deliver a copy of that document to the person filing the agreement at the address shown below.

Agreement No.: T-4178.

Title: The South Carolina State Ports Authority and ABC Container Line, N.V., Lease for Container Parking and Assembly Area.

Parties:

The South Carolina State Ports Authority (Authority)

ABC Container Line, N.V. (ABC)

Synopsis: Agreement No. T-4178 provides that the Authority will lease to ABC 2 acres designated as area DU at the Authority's North Charleston Terminal. The premises will be used as a parking and assembly area for ABC's containers and other purposes incidental to ABC's shipping terminal operations. The term of the agreement is for 3-years.

Filing Party: W. M. Lawrence, South Carolina State Ports Authority, Post Office Box 817, Charleston, South Carolina 29402.

Agreement No.: T-4179.

Title: Mississippi State Port Authority at Gulfport and Ceres Gulf, Inc., Lease Agreement.

Parties:

Mississippi State Port Authority (Authority)

Ceres Gulf, Inc. (Ceres)

Synopsis: Agreement No. T-4179 provides that the Authority will lease to Ceres certain premises at the port of Gulfport for the handling of water-borne domestic and foreign commerce through the port. The term of the agreement is for 5-years with option for extension of two renewal periods of 5-years each.

Filing Party: J. W. Clark, Executive Director, Mississippi State Port Authority at Gulfport, Post Office Box 40, Gulfport, Mississippi 39501.

Agreement No.: 10501.

Title: Strategic Transportation Co./Japan Intermodal Transport Co. Agency Agreement.

Parties:

Strategic Transportation Co., Inc. (STC)

Japan Intermodal Transport Co., Ltd. (JIT)

Synopsis: According to the terms of the proposed agreement STC will act as general representative and agent of JIT in the U.S.A., and JIT will act as general representative and agent of STC in Japan, in the sale and promotion of the NVOCC services provided by the other and in the provision of related transportation services relating to the common carriage of goods by sea. Such transportation services may include, but may not be limited to, soliciting and booking cargo in accordance with the applicable tariffs, issuing bills of lading, cargo arranging and handling, arranging for the delivery of cargo to consignees including, where applicable, on-carriage in accordance with the bill of lading, investigating (at the request of the other party) claims relating to cargo and personnel and reporting thereon to the requesting party, collecting freight and arranging for required clearance of cargo, and such other activities and duties consistent with the agreement as may reasonably be requested and agreed. It is the intention of the parties that the proposed agreement shall be exclusive in its application.

Filing Party: Kenneth P. Kosut, Vice President, Strategic Transportation Co., Inc., Post Office Box 52800, Houston, Texas 77052.

By Order of the Federal Maritime Commission.

Dated: May 3, 1984.

Francis C. Hurney,

Secretary.

[FR Doc. 84-12377 Filed 5-7-84; 8:45 am]

BILLING CODE 6730-01-M

Agreements Filed

The Federal Maritime Commission hereby gives notice that the following agreements have been filed with the Commission for approval pursuant to section 15 of the Shipping Act, 1916, as amended (39 Stat. 733, 75 Stat. 763, 46 U.S.C. 814).

Interested parties may inspect and may request a copy of each agreement and the supporting statement at the Washington, D.C. Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit protests or comments on each agreement to the Secretary, Federal Maritime Commission, Washington, D.C. 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments and protests are found in § 522.7 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Any person filing a comment or protest with the Commission shall, at the same time, deliver a copy of that document to the person filing the agreement at the address shown below.

Agreement No: 14-51.

Title: Transpacific Freight Conference (Hong Kong).

Parties:

American President Lines, Ltd.
Barber Blue Sea Line
Kawasaki Kisen Kaisha, Ltd.
A.P. Moller-Maersk Line
Sea-Land Service, Inc.
United States Lines, Inc.
Japan Line, Ltd.
Nippon Yusen Kaisha
Showa Line, Ltd.
Yamashita-Shinnihon Steamship Co., Ltd.

Synopsis: The proposed amendment broadens the scope of the conference's authority by placing service contracts, as defined in the Shipping Act of 1984, under the complete control and jurisdiction of the conference. Additionally, the conference proposes to increase the security bond posted by its members from $30,000 to $120,000 and restates the agreement in its entirety.

Filing Party: Charles F. Warren, Esquire, Warren & Associates, 1100 Connecticut Avenue, NW., Suite 525, Washington, D.C. 20036.

Agreement No: 150–74.

Title: Trans-Pacific Freight Conference Japan/Korea.

Parties:

American President Lines, Ltd.
Barber Blue Sea Line
Hapag-Lloyd AG
Japan Line, Ltd.
Kawasaki Kisen Kaisha, Ltd.
Korea Marine Transport Co., Ltd.
Lykes Bros. Steamship Co., Inc.
Mitsui O.S.K. Lines, Ltd.
A.P. Moller-Maersk Line
Neptune Orient Lines, Ltd.
Nippon Yusen Kaisha
Orient Overseas Container Line, Inc.
Sea-Land Service, Inc.
Showa Line, Ltd.
United States Lines, Inc.
Yamashita-Shinnihon Steamship Co., Ltd.

Synopsis: The proposed amendment broadens the scope of the conference's authority by placing service contracts, as defined in the Shipping Act of 1984, under the complete control and jurisdiction of the conference.

Filing Party: Charles F. Warren, Esquire, Warren & Associates, 1100 Connecticut Avenue, NW., Suite 525, Washington, D.C. 20036.

Agreement No.: 3103–73.

Title: Japan/Korea-Atlantic and Gulf Freight Conference.

Parties:

Barber Blue Sea Line
Japan Line, Ltd.
Kawasaki Kisen Kaisha, Ltd.
Lykes Bros., Steamship Co., Inc.
Mitsui O.S.K. Lines, Ltd.
A.P. Moller-Maersk Lines, Ltd.
Neptune Orient Lines, Ltd.
Nippon Yusen Kaisha
Orient Overseas Container Line, Inc.
United States Lines, Inc.
Yamashita-Shinnihon Steamship Co., Ltd.

Synopsis: The proposed amendment broadens the scope of the conference's authority by placing service contracts, as defined by the Shipping Act of 1984, under the complete control and jurisdiction of the conference.

Filing Party: Charles F. Warren, Esquire, Warren & Associates, 1100 Connecticut Avenue, NW., Suite 525, Washington, D.C. 20036.

Agreement No.: 5600–47.

Title: Philippines North America Conference.

Parties:

American President Lines, Ltd.
Hapag-Lloyd AG
Lykes Bros. Steamship Co., Inc.
A.P. Moller-Maersk Line
Sea-Land Service, Inc.

Synopsis: The proposed amendment broadens the scope of the conference's authority by placing service contracts, as defined by the Shipping Act of 1984, under the complete control and jurisdiction of the conference and restates the agreement in its entirety.

Filing Party: Charles F. Warren, Esquire, Warren & Associates, 1100 Connecticut Avenue, NW., Suite 525, Washington, D.C. 20036.

Agreement No.: 5700–34.

Title: New York Freight Bureau.

Parties:

Barber Blue Sea Line
Kawasaki Kisen Kaisha, Ltd.
Mitsui O.S.K. Lines, Ltd.
A.P. Moller-Maersk Lines, Ltd.
United States Lines, Inc.
Japan Line, Ltd.
Nippon Yusen Kaisha
Yamashita-Shinnihon Steamship Co., Ltd.

Synopsis: The proposed amendment broadens the scope of the conference's authority by placing service contracts, as defined in the Shipping Act of 1984, under the complete control and jurisdiction of the conference. Additionally, the conference proposes to increase the security bond posted by its members from $30,000 to $120,000, and restates the agreement in its entirety.

Filing Party: Charles F. Warren, Esquire, Warren & Associates, 1100 Connecticut Avenue, NW., Suite 525, Washington, D.C. 20036.

By Order of the Federal Maritime Commission.

Dated: May 3, 1984.

Francis C. Hurney,

Secretary.

[FR Doc. 84–12378 Filed 5–7–84; 8:45 am]

BILLING CODE 6730–01–M

Section 15 Agreement; Cancellation

Agreement No: 9745.

Title: Dart Containerline Company, Ltd., Cooperative Working Agreement.

Parties:

Centennial Shipping Limited
Compagnie Maritime Belge (Lloyd Royal) S.A.
Consolidated Container Service Co., Ltd.

Synopsis: By letter dated March 29, 1984, the Commission received notice of the cancellation of Agreement No. 9745, effective December 31, 1983.

Filing Party: Mr. Frederick L. Shreves, II, Hill, Betts & Nash, 1220 Nineteenth Street, NW., Washington, D.C. 20036.

By Order of the Federal Maritime Commission.

Dated: May 3, 1984.

Francis C. Hurney,

Secretary.

[FR Doc. 84–12376 Filed 5–7–84; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL RESERVE SYSTEM

Citicorp, et al.; Applications To Engage de Novo in Permissible Nonbanking Activities

The companies listed in this notice have filed an application under § 225.23(a)(1) of the Board's Regulation Y (49 FR 794) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (49 FR 794) to commence or to engage *de novo*, either directly or through a subsidiary, in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

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 May 25, 1984.

A. **Federal Reserve Bank of New York** (A. Marshall Puckett, Vice President), 33 Liberty Street, New York, New York 10045:

1. *Citicorp,* New York, New York; to engage *de novo* through its subsidiary, Family Guardian Life Insurance Company, in underwriting and/or reinsuring of credit life and accident and health insurance, directly related to extensions of credit by Citicorp's lending subsidiaries. These activities will be conducted in the States of Alaska, Hawaii, Maine, New Hampshire, Pennsylvania, Rhode Island and Vermont. Comments on this action must be received not later than May 24, 1984.

B. **Federal Reserve Bank of Richmond** (Lloyd W. Bostian, Jr., Vice President), 701 East Byrd Street, Richmond, Virginia 23261:

1. *Pee Dee Bankshares, Inc.,* Timmonsville, South Carolina; to engage *de novo* in advertising, soliciting, originating, servicing, and selling in the secondary market, real estate mortgage loans secured by single-family residential, multi-family residential, subdivision and commercial properties; and acting as agent for the sale of credit life, credit accident and health insurance directly related to its extensions of credit. These activities will be conducted in the State of South Carolina.

C. **Federal Reserve Bank of Atlanta** (Robert E. Heck, Vice President), 104 Marietta Street, NW., Atlanta, Georgia 30303:

1. *Bank South Corporation,* Atlanta, Georgia; to engage, through its subsidiary, BankSouth Home Equity, Inc., Atlanta, Georgia, in consumer and commercial mortgage finance activities, including the extension of mortgage loans to consumers and commercial borrowers; purchasing loans from affiliates and servicing loans for affiliates; and acting as agent for sales of life and health and accident insurance directly related to its extensions of credit. Comments on this application must be received not later than May 24, 1984.

Board of Governors of the Federal Reserve System, May 2, 1984.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 84-12355 Filed 5-7-84; 8:45 am]

BILLING CODE 6210-01-M

Central Bancshares of the South, Inc.; Applications to Engage de Novo in Nonbanking Activities

The company listed in this notice has filed applications under § 225.23(a)(3) of the Board's Regulation Y (49 FR 794) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (49 FR 794), to engage *de novo* through national bank subsidiaries in deposit-taking, including the taking of demand deposits, and other activities specified below. The proposed subsidiaries will not engage in commercial lending transactions as defined in Regulation Y. The Board has determined by order that such activities are closely related to banking. *U.S. Trust Company* (Press Release of March 23, 1984). Although the Board is publishing notice of these applications, under established Board policy the record of the applications will not be regarded as complete and the Board will not act on the applications unless and until a preliminary charter for each proposed national bank subsidiary has been submitted to the Board.

The applications are available for immediate inspection at the Federal Reserve Bank indicated. Once the applications have been accepted for processing, they will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Comments regarding the applications must be received at the Federal Reserve Bank or the offices of the Board of Governors not later than May 29, 1984.

A. **Federal Reserve Bank of Atlanta** (Robert E. Heck, Vice President) 104 Marietta Street, NW., Atlanta, Georgia 30303:

1. *Central Bancshares of the South, Inc.,* Birmingham, Alabama; to engage *de novo* through national bank subsidiaries, Central Bank of the South-Tampa Bay, N.A., St. Petersburg, Florida, and Central Bank of the South-Georgia, N.A., Atlanta, Georgia, in the activities of deposit-taking, consumer and mortgage lending (1–4 family dwelling only), trust investment advisor, and other banking services.

Board of Governors of the Federal Reserve System, May 3, 1984.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 84-12356 Filed 5-7-84; 8:45 am]

BILLING CODE 6210-01-M

Chittenden Corp., et al.; Notice of Applications to engage de Novo in Permissible Nonbanking Activities

The companies listed in this notice have filed an application under § 225.23(a)(1) of the Board's Regulation Y (49 Federal Register 794) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and 225.21(a) of Regulation Y (49 FR 794) to commence or to engage *de novo,* either directly or through a subsidiary, in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

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 May 29, 1984.

A. **Federal Reserve Bank of Boston** (Richard E. Randall, Vice President) 600 Atlantic Avenue, Boston, Massachusetts 02106:

1. *Chittenden Corporation*, Burlington, Vermont; to expand the service area of its existing subsidiary, Chittenden Realty Credit Corporation, Burlington, Vermont (real estate construction financing and servicing activities); and to engage in direct loans to customers to purchase or to finance the building of one-to-four-family residences secured by valid first liens on related real property, and to service such loans, in the state of Vermont, New York, New Hampshire, Maine and Massachusetts.

B. **Federal Reserve Bank of New York** (A. Marshall Puckett, Vice President) 33 Liberty Street, New York, New York 10045:

1. *The Chase Manhattan Corporation*, New York, New York; to engage *de novo* through its subsidiary, Rose & Company Investment Brokers, Inc., Chicago, Illinois, in brokerage services restricted to buying and selling securities solely upon the order and for the account of customers, and in the business of extending securities credit lending in conformity with the Board's Regulation T. In addition Applicant would offer the following incidental services through Rose: the payment of interest on net free balances in the accounts of its customers; the provision of security custodial services; the maintenance of an arrangement with a money market fund or funds that would permit customers to invest free balances in the fund; providing to its customers access to IRA accounts; securities borrowing and lending; and acting as "inadvertent principal" in the event of the mistaken purchase of securities. These activities would be conducted worldwide. Comments on this application must be received not later than May 28, 1984.

C. **Federal Reserve Bank of Richmond** (Lloyd W. Bostian, Jr., Vice President) 701 East Byrd Street, Richmond, Virginia 23261:

1. *Union Trust Bancorp*, Baltimore, Maryland; to engage *de novo* through its subsidiary, Landmark Financial Services of North Carolina, Inc., in making installment loans to individuals for personal, family or household purposes; purchasing sales finance contracts executed in connection with the sale of personal, family or household goods or services; acting as agent in the sale of credit life and credit accident and health insurance directly related to its extensions of credit; acting as agent in the sale of insurance protecting collateral held against the extensions of credit; and making mortgage loans secured in whole or in part by mortgages or other liens on real estate; in Greensboro, North Carolina and surrounding area.

D. **Federal Reserve Bank of Dallas** (Anthony J. Montelaro, Vice President) 400 South Akard Street, Dallas, Texas 75222:

1. *LBO Bancorp, Inc.*, West Monroe, Louisiana; to engage through its subsidiary, Louisiana Consumer Finance, Inc., West Monroe, Louisiana, in the activity of making and servicing extensions of credit for its own account as would be made by a consumer finance company in Quachita Parish, Louisiana.

2. *Texas Commerce Bancshares, Inc.*, Houston, Texas; to engage *de novo* through its subsidiary, Texas Commerce Advisory Services Company, Houston, Texas, in providing management consulting advice in Texas and contiguous states.

E. **Federal Reserve Bank of San Francisco** (Harry W. Green, Vice President) 101 Market Street, San Francisco, California 94105:

1. *Alaska Pacific Bancorporation*, Anchorage, Alaska; to engage *de novo* through its subsidiary, Alaska Pacific Mortgage Company, Anchorage, Alaska, in the wholesale and retail origination, sale, and servicing of term, residential, and commercial mortgage loans and residential and commercial interim construction mortgage loans both underwritten on either a whole loan or participation basis for other investors.

Board of Governors of the Federal Reserve System, May 3, 1984.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 84-12357 Filed 5-7-84; 8:45 am]

BILLING CODE 6210-01-M

Continental Bancorp, Inc., et al.; Formations of, Acquisitions by and Mergers of Bank Holding Companies and Acquisitions of Nonbanking Companies

The companies listed in this notice have applied under § 225.14 of the Board's Regulation Y (49 FR 794) for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) to become a bank holding company or to acquire voting securities of a bank or bank holding company. The listed companies have also applied under § 225.23(a)(2) of Regulation Y (49 FR 794) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (49 FR 794) to acquire or control voting securities or assets of a company engaged in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies, or to engage in such an activity. Unless otherwise noted, these activities will be conducted throughout the United States.

The applications are available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

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 May 30, 1984.

A. **Federal Reserve Bank of Philadelphia** (Thomas K. Desch, Vice President) 100 North 6th Street, Philadelphia, Pennsylvania 19105:

1. *Continental Bancorp, Inc.*, Philadelphia, Pennsylvania; to acquire 100 percent of the voting shares of United Penn Corporation, Wilkes-Barre, Pennsylvania, thereby indirectly acquiring United Penn Bank, Wilkes-Barre, Pennsylvania. Applicant has also applied to acquire UniPenn Life Insurance Co., Phoenix, Arizona, and to engage in the activities of acting as underwriter for credit life insurance and credit accident and health insurance that is directly related to an extension of credit by United Penn Bank.

B. **Federal Reserve Bank of Kansas City** (Thomas M. Hoenig, Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *Tuttle Bancshares, Inc.*, Tuttle, Oklahoma; to become a bank holding company by acquiring 24.6 percent of the voting shares of The Bank of Tuttle, Tuttle, Oklahoma; and acquiring 100

percent of Tuttle Insurance Agency, Inc., Tuttle, Oklahoma, thereby indirectly acquiring the remaining 75.4 percent of the Bank of Tuttle. Applicant has also applied to engage in the sale of credit-related insurance in connection with extensions of credit by the Bank of Tuttle, Tuttle, Oklahoma, serving Grady County, Oklahoma. Comments on this application must be received not later than May 25, 1984.

Board of Governors of the Federal Reserve System, May 3, 1984.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 84-12358 Filed 5-7-84; 8:45 am]

BILLING CODE 6210-01-M

Marie R. Turner Holding Co., et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and 225.14 of the Board's Regulation Y (49 FR 794) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than May 30, 1984.

A. **Federal Reserve Bank of Cleveland** (Lee S. Adams, Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101:

1. *Marie R. Turner Holding Company,* Jackson, Kentucky; to become a bank holding company by acquiring 80 percent of the voting shares of Citizens Bank of Jackson, Jackson, Kentucky.

B. **Federal Reserve Bank of Kansas City** (Thomas M. Hoenig, Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *Stock Exchange Bancshares, Inc.,* Woodward, Oklahoma; to become a bank holding company by acquiring 100 percent of the voting shares of The Stock Exchange Bank, Woodward, Oklahoma.

2. *Lamar Trust Bancshares, Inc.,* Lamar, Missouri; to become a bank holding company by acquiring 81.07 percent of the voting shares of Lamar Trust Company, Lamar, Missouri.

C. **Federal Reserve Bank of Dallas** (Anthony J. Montelaro, Vice President) 400 South Akard Street, Dallas, Texas 75222:

1. *Shamrock Bancshares, Inc.,* Coalgate, Oklahoma; to merge with Sooner Bancshares, Inc., Caddo, Oklahoma, thereby indirectly acquiring Bryan County National Bank, Caddo, Oklahoma.

Board of Governors of the Federal Reserve System, May 3, 1984.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 84-12359 Filed 5-7-84; 8:45 am]

BILLING CODE 6210-01-M

Mark Twain Bancshares, Inc.; Acquisition of Company Engaged in Permissible Nonbanking Activities

The organization listed in this notice has applied under § 225.23(a)(2) or (f) of the Board's Regulation Y (49 FR 794) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (49 FR 794) to acquire or control voting securities or assets of a company engaged in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Comments regarding the application must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than May 30, 1984.

A. **Federal Reserve Bank of St. Louis** (Delmer P. Weisz, Vice President), 411 Locust Street, St. Louis, Missouri 63166:

1. *Mark Twain Bancshares, Inc.,* St. Louis, Missouri; to acquire Voss Mortgage Corp., St. Louis, Missouri, and engage in mortgage banking activities.

Board of Governors of the Federal Reserve System, May 3, 1984.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 84-12360 Filed 5-7-84; 8:45 am]

BILLING CODE 6210-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

Medicaid Program; Notice of Hearing; Reconsideration of Disapproval of Two Nebraska State Plan Amendments

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Notice of hearing.

SUMMARY: This notice announces an administrative hearing on June 19, 1984, in Kansas City, Missouri, to reconsider our decision to disapprove Nebraska State Plan Amendments 83-13 and 83-18.

Closing Date: Requests to participate in the hearing as a party must be received by May 23, 1984.

FOR FURTHER INFORMATION CONTACT: Docket Clerk, Hearings Staff, Bureau of Eligibility, Reimbursement and Coverage, 365 East High Rise, 6325 Security Boulevard, Baltimore, Maryland 21207, Telephone: (301) 594-8261.

SUPPLEMENTARY INFORMATION: This notice announces an administrative hearing to reconsider our decision to disapprove two Nebraska State Plan Amendments.

Section 1116 of the Social Security Act and 45 CFR Parts 201 and 213 establish Department procedures that provide an administrative hearing for reconsideration of a disapproval of a State plan or plan amendment. HCFA is required to publish a copy of the notice to a State Medicaid Agency that informs the agency of the time and place of the hearing and the issues to be considered. (If we subsequently notify the agency of

additional issues which will be considered at the hearing, we will also publish that notice.)

Any individual or group that wants to participate in the hearing as a party must petition the Hearing Officer within 15 days after publication of this notice, in accordance with the requirements contained in 45 CFR 213.15(b)(2). Any interested person or organization that wants to participate as amicus curiae must petition the Hearing Officer before the hearing begins, in accordance with the requirements contained in 45 CFR 213.15(c)(1).

If the hearing is later rescheduled, the Hearing Officer will notify all participants.

Nebraska has requested a reconsideration of our decision to disapprove two State Plan Amendments. The issues in the two State Plan Amendments are discussed below:

Nebraska SPA 83–13—The issue in this matter is whether Nebraska's proposal to limit Medicaid reimbursement for inpatient hospital services during fiscal year 1983–1984 to the same payment rate paid during fiscal year 1982–1983 violates § 1902(a)(13)(A) and regulations at 42 CFR 447.253. Section 1902(a)(13)(A) of the Social Security Act requires, in part, that payment for hospital services be provided under the State plan through the use of rates which the State finds and makes assurances satisfactory to the Secretary are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards. The proposed amendment would limit hospital payment rates for fiscal yer 1983–1984 to the same payment rate paid in fiscal year 1982–1983. Nebraska furnished an assurance statement as required by 42 CFR 447.253(a) that it has found the proposed payment rates are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated providers. However, HCFA has determined that Nebraska has not made the findings required under 42 CFR 447.253(b)(1)(i), and that application of this payment limit would not allow for the reimbursement of reasonable and necessary increases in costs that must be incurred by an efficiently and economically operated facility in the State. Therefore, HCFA has concluded that Nebraska 83–13 is in violation of § 1902(a)(13)(A) of the Act.

In addition, the regulations at 42 CFR 447.253(b) require that the State make a finding that payment rates are adequate to assure that recipients have reasonable access taking into account geographic location and reasonable travel time to inpatient hospital services of adequate quality. Paragraph (a) of that regulation requires the State to provide an assurance that this finding has been made. Nebraska did not provide assurance of the requisite finding. Therefore, HCFA has determined that the proposed plan amendment is in violation of 42 CFR 447.253.

Nebraska SPA 83–18—The issue in this matter is whether Nebraska's proposal to limit Medicaid reimbursement for long-term care facility services during fiscal year 1983–1984 to the same reimbursement rate paid during fiscal year 1982–1983 is in violation of § 1902(a)(13)(A) of the Social Security Act and regulations at 42 CFR 447.253. The proposed amendment would limit long-term care payment rates for fiscal year 1983–1984 to the same payment rate paid in fiscal year 1982–1983. HCFA has determined that application of this payment limit would not allow for the reimbursement of reasonable and necessary increases in costs that must be incurred by an efficiently and economically operated facility in the State since application of the State's amendment would preclude reimbursement of reasonable and necessary increases in cost (cost increases over which the provider has little or no control such as increases in the cost of medical supplies or food). In addition Nebraska has not furnished an assurance statement as required by 42 CFR 447.253(a) that it has found under 42 CFR 447.253(b)(1)(i) that the proposed payment rates are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated providers. Therefore, HCFA has concluded that the proposed amendment is in violation of § 1902(a)(13)(A) and regulations at 42 CFR 447.253.

The notice to Nebraska announcing an administrative hearing to reconsider our disapproval of its State plan Amendments reads as follows:

Ms. Gina C. Dunning
Director, Department of Social Services, State of Nebraska, 301 Centennial Mall South, Fifth Floor, P.O. Box 95026, Lincoln, Nebraska

Dear Ms. Dunning: This is to advise you that your request for reconsideration of Nebraska State Plan Amendment 83–13 was received on April 6, 1984. Your request for reconsideration of Nebraska State Plan Amendment 83–18 was received on April 13, 1984. You have requested a reconsideration of whether these plan amendments conform to the requirements for approval under the Social Security Act and pertinent Federal regulations.

I am scheduling hearings on your requests to be held on June 19, 1984, in Room 281, Federal Office Building, 601 East 12th Street, Kansas City, Missouri. The hearings will be held as follows: 10 a.m., Nebraska SPA 83–13, 11 a.m., Nebraska SPA 83–18.

If this date is not acceptable, we would be glad to set another that is mutually agreeable to the parties.

I am designating Mr. Stanley Krostar as the presiding official. If these arrangements present any problems, please contact the Docket Clerk. In order to facilitate any communication which may be necessary between the parties to the hearing, please notify the Docket Clerk of the names of the individuals who will represent the State at the hearing. The Docket Clerk can be reached at (301) 594–8261.

Sincerely yours,

Carolyne K. Davis, Ph.D.

(Sec. 1116 of the Social Security Act (42 U.S.C. 1316))

(Catalog of Federal Domestic Assistance Program No. 13.714, Medical Assistance Program)

Dated: May 3, 1984.

Carolyne K. Davis,

Administrator, Health Care Financing Administration.

[FR Doc. 84–12352 Filed 5–7–84; 8:45 am]
BILLING CODE 4120–03–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Environment and Energy

[Docket No. NI–119]

Terminate an Environmental Impact Statement

The Department of Housing and Urban Development Baltimore Office gives notice to terminate the Environmental Impact Statement (EIS) process for Foxcroft, Farmbrook, and Timberline Subdivisions. These subdivisions were proposed for mortgage insurance under section 203(b) of the Housing and Community Development Act. These subdivisions are located between Ballenger Creek Pike and highway I–270 south of Frederick City, Maryland.

Comments on the Draft EIS were received after the comment period expired June 28, 1982 without identifying any significant impacts. Comments were received from local, State and Federal agencies.

The Farmbrook subdivision is the only subdivision being developed at the present time. No preliminary or Development Plans have been prepared for Timberline, and there has been no

development activity in Foxcroft for more than two years. All land not sold for development is owned by Land Development Association, Inc. Land not sold is anticipated for development by conventional or Veterans Administration financing. The V.A. has approved the Farmbrook subdivision.

The EIS threshold requirements were raised to 2,500 units. Since HUD's participation would be less than 2,500 units, a Final Environmental Impact Statement is no longer required.

An Environmental Assessment and a Finding of No Significant Impact prepared by HUD for these subdivisions may be reviewed between 8:00 a.m. and 4:30 p.m., Monday through Friday at the HUD Baltimore Office, 10 North Calvert Street, Equitable Building, 3rd. floor, Baltimore, MD 21202. Notice of the FONSI determination has been sent to the State designated intergovernmental review agency implementing Executive Order 12372 and to other Federal, State, and local agencies which may be affected by the action.

Issued at Washington, D.C., April 26, 1984.

Francis G. Haas,

Deputy Director, Office of Environment and Energy.

[FR Doc. 84-12314 Filed 5-7-84; 8:45 am]

BILLING CODE 4210-29-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

Utah; Filing of State Indemnity Selection Application

On March 26, 1984, the State of Utah filed a state indemnity selection application, U-53964, to have 58,741.21 acres of federally-owned land and interest in land transferred to the State of Utah pursuant to Sections 2275 and 2276 of the Revised Statutes, as amended, (43 U.S.C. 851-852).

The lands containing the federally-owned lands and interests in land included in this application are described as follows:

Salt Lake Meridian, Utah

T. 19 S., R. 1 E.,
Secs. 3-4, all;
Sec. 5, lots 1-4, S½N½, N½SW¼, SW¼, SW¼, SE¼;
Sec. 6, lots 1-3, 5, S½NE¼, SE¼SW¼, E½ SE¼, SW¼SE¼;
Sec. 7, E½, E½W½;
Sec. 8, W½, N½NE¼, SW¼NE¼, N½ NW¼SE¼NE¼, SW¼NW¼SE¼NE¼, W½W½SW¼SE¼NE¼, N½SE¼;
Sec. 9, N½NE¼, SW¼NE¼, NW¼;
Sec. 10, NE¼, E½NW¼, NW¼NW¼, N½ SE¼, SE¼SE¼;
Sec. 11, W½, W½E½, NE¼NE¼;
Sec. 14, NW¼, W½SW¼;
Sec. 15, NE¼NE¼, S½NW¼, E½SW¼/ SW¼SW¼, W½SE¼, S½NE¼SE¼, SE¼SE¼;
Sec. 16, N½NE¼SE¼;
Sec. 17, NW¼NW¼;
Sec. 18, NE¼, E½NW¼, N½SE¼;
Sec. 22, N½NE¼, SE¼NE¼;
Sec. 23, W½NW¼.
T. 24 S., R. 1 E.,
Sec. 19, lots 1-4, NE¼, E½NW¼;
Sec. 30, lot 1.
T. 3 S., R. 4 E.,
Sec. 1, lots 1-4, S½N½, W½SW¼, NE¼ SW¼, N½SE¼, SE¼SE¼.
T. 23 S., R. 5 E.,
Sec. 24, W½.
T. 12 S., R. 11 E.,
Secs. 32-34, all;
Sec. 35, S½.
T. 13 S., R. 11 E.,
Sec. 1, all;
Sec. 3, lots 1-4, 8;
Sec. 4, all;
Sec. 9, NW¼NE¼, N½NW¼, SW¼NW¼, E½SW¼, S½SE¼;
Sec. 10, E½,E½, SW¼SW¼;
Sec. 11-13, all;
Sec. 14, N½;
Sec. 15, E½NE¼.
T. 12 S., R. 12 E.,
Sec. 31, lot 4, S½NE¼, NW¼NE¼, SE¼ NW¼, SE¼.
T. 13 S., R. 12 E.,
Secs. 3-11, all;
Secs.14-15, all;
Sec. 17, all;
Sec. 18, lot 1, NE¼, NE¼NW¼;
Sec. 20, N½;
Sec. 21, NE¼, N½NW¼;
Sec. 22, N½, N½S½;
Sec. 23, W½NW¼.
T. 13 S., R. 13 E.,
Sec. 13, E½, E½W½, SW¼NW¼, W½ SW¼;
Sec. 14, SE¼;
Sec. 24-26, all;
Sec. 35, NE¼, N½NW¼, SE¼NW¼, N½ SE¼, SE¼SE¼.
T. 13 S., R. 14 E.,
Sec. 1, all;
Sec. 3, all;
Sec. 4, lot 4, SW¼SE¼;
Sec. 5, all;
Sec. 6, lots 1-2, 4, SE¼SE¼;
Sec. 7, E½W½;
Sec. 8, S½N½, NW¼NW¼;
Sec. 9-12, all;
Sec. 13, W½, N½NE¼, SW¼NE¼;
Sec. 14, N½, E½SW¼, SW¼SW¼, SE¼;
Sec. 15, All;
Sec. 17, S½S½, NE¼, NE¼NW¼, NE¼SE¼;
Sec. 18, lots 2-4, W½E½, E½W½, E½SE¼;
Sec. 19-22, all;
Sec. 23, W½, NE¼, NW¼SE¼;
Sec. 24, NW¼NW¼;
Sec. 26, W½, NW¼SE¼;
Secs. 27-28, all;
Sec. 29, E½, E½W½, SW¼NW¼, NW¼SW¼;
Sec. 30, lot 1, N½NE¼, NE¼NW¼, S½SE¼;
Sec. 31, lots 2-4 S½NE¼, SE¼NW¼, E½SW¼, SE¼;
Sec. 33, N½S½, SW¼SW¼, SE¼SE¼;
Sec. 34, N½, N½S½.
T. 14 S., R. 14 E.,
Sec. 4, lot 4, SW¼NW¼, W½SW¼;
Sec. 5, lots 1-4 E½SW¼, E½SE¼, SW¼SE¼;
Sec. 8, N½NE¼, SE¼NE¼;
Sec. 9, S½, S½N½, NW¼NE¼, N½NW¼.
T. 26 S., R. 22 E.,
Sec. 6, SE¼NW¼.
T. 40 S., R. 22 E.,
Sec. 29, lots 3-4, 6;
Sec. 30, lots 3-5.
T. 12 S., R. 24 E.,
Sec. 25, all;
Sec. 26, E½.
T. 2 N., R. 25 E.,
Sec. 3, lots 1-4, S½N½, N½S½, SW¼ SW¼, SE¼SE¼;
Sec. 4, lots 1-2 S½NE¼, SE¼;
Sec. 10, E½NE¼;
Sec. 11, lots 1-3, 5-7, W½NE¼, NW¼.
T. 3 N., R. 25 E.,
Sec. 26, lots 2-4, NW¼SE¼, N½SW¼;
Sec. 34, S½S½;
Sec. 35, lots 1-4, SW¼NE¼, NW¼NW¼, SE¼NW¼, SW¼, W½SE¼.
T. 12 S., R. 25 E.,
Sec. 29, E½;
Sec. 31, E½.
T. 26 S., R. 25 E.,
Sec. 28, W½W½.
T. 26 S., R. 26 E.,
Sec. 31, lots 1-4.
T. 24 S., R. 1 W.,
Sec. 1, all;
Sec. 3, all;
Secs. 10-15 all;
Secs. 22-26, all;
Sec. 27, E½, NW¼NW¼, N½SE¼NW¼, E½SW¼SE¼NW¼, E½NW¼SW¼ SE¼NW¼, SE¼SE¼NW¼, W½SW¼, SE¼SW¼;
Secs. 34-35, all.
T. 31 S., R. 6 W.,
Secs. 8-9, all;
Sec. 14, all;
Sec. 15, N½N½, SE¼NE¼, SW¼, SW¼SE¼;
Sec. 17, all;
Secs. 21-23, all.
T. 29 S., R. 9 W.,
Sec. 26, SE¼NW¼, NE ¼SE¼.

The filing of this application segregates the federally-owned lands and interests in land in the above-described lands from settlement, sale, location, or entry under the public land laws, including the mining laws but not the mineral leasing laws or the Geothermal Steam Act. This segregative effect shall terminate upon the issuance of a document of conveyance to these federally-owned lands and interests in lands, or upon the publication in the **Federal Register** of a notice of termination of the segregation, or upon the expiration of two years from the

date of the filing of this application, whichever occurs first.

J. K. Latimer,

Acting Chief, Branch of Lands and Minerals Operations.

[FR Doc. 84-12291 Filed 5-7-84; 8:45 am]

BILLING CODE 4310-DQ-M

Minerals Management Service

Outer Continental Shelf; Development Operations Coordination Document; Superior Oil Co.

AGENCY: Minerals Management Service, Interior.

ACTION: Notice of the receipt of a proposed Development Operations Coordination Document (DOCD).

SUMMARY: Notice is hereby given that The Superior Oil Company has submitted a DOCD describing the activities it proposes to conduct on Leases OCS 0244 and 0247, Blocks 71 and 102, West Cameron Area, offshore Louisiana. Proposed plans for the above area provide for the development and production of hydrocarbons with support activities to be conducted from an onshore base located at Cameron, Louisiana.

DATE: The subject DOCD was deemed submitted on April 26, 1984.

ADDRESS: A copy of the subject DOCD is available for public review at the Office of the Regional Manager, Gulf of Mexico Region, Minerals Management Service, 3301 North Causeway Blvd., Room 147, Metairie, Louisiana (Office Hours: 9 a.m. to 3:30 p.m., Monday through Friday).

FOR FURTHER INFORMATION CONTACT: Mr. Emile H. Simoneaux, Jr., Minerals Management Service, Gulf of Mexico Region; Rules and Production; Plans, Platform and Pipeline Section, Exploration/Development Plans Unit; Phone (504) 838-0872.

SUPPLEMENTARY INFORMATION: The purpose of this notice is to inform the public, pursuant to Sec. 25 of the OCS Lands Act Amendments of 1978, that the Minerals Management Service is considering approval of the DOCD and that it is available for public review.

Revised rules governing practices and procedures under which the Minerals Management Service makes information contained in DOCDs available to affected states, executives of affected local governments, and other interested parties became effective December 13, 1979 (44 FR 53685). Those practices and procedures are set out in revised Section 250.34 of Title 30 of the CFR.

Dated: April 27, 1984.

John L. Rankin,

Regional Manager, Gulf of Mexico Region.

[FR Doc. 84-12321 Filed 5-7-84; 8:45 am]

BILLING CODE 4310-MR-M

National Park Service

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before April 27, 1984. Pursuant to § 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, U.S. Department of the Interior, Washington, D.C. 20243. Written comments should be submitted by May 23, 1984.

Carol D. Shull,

Chief of Registration, National Register.

ALABAMA

Jefferson County

Birmingham, *West Park,* 5th Ave. and 16th St.

CALIFORNIA

Orange County

Brea, *Brea City Hall and Park,* 401 S. Brea Blvd.

Sacramento County

Sacramento, *Capitol Extension District,* Capitol Mall

Trinity County

Helena, *Helena Historic District,* N of U.S. 299 W, on North Fork of Trinity River

GUAM

Agana, *Mesa House,* Maxwell St.
Agana, *Shimizu House,* W. O'Brien and W. 5th Sts.
Agana, *Ungacta House,* 334 Hernan Cortez
Anigua *Toves House,* Marine Dr.
Tamuning, *Ypao Beach Archeological Site,* San Vitores Rd.

ILLINOIS

DeKalb County

Earlville vicinity, *Nisbet Homestead Farm,* Suydam Rd.

INDIANA

Carroll County

Delphi, *Niewerth Building,* 124 E. Main St.

Delaware County

Muncie, *Moore-Youse-Maxon House,* 122 E. Washington St.

Noble County

Ligonier vicinity, *Stone's Trace,* U.S. 33 and IN 5

Porter County

Valparaiso, *Porter County Memorial Hall,* 104 Indiana Ave.

Shelby County

Edinburgh vicinity, *St. George Lutheran Church,* IN 252

St. Joseph County

South Bend, *Kelley-Fredrickson House and Office Building,* 233 N. Lafayette Blvd. and 314 W. LaSalle St.

Vanderburgh County

Evansville, *Helfrich, Michael D., House,* 700 Helfrich Lane

MARYLAND

Montgomery County

Glen Echo, *Glen Echo Park Historic District,* MacArthur Blvd.

MICHIGAN

Saginaw County

Saginaw, *East Saginaw Historic Business District (Center Saginaw MRA) (Boundary Decrease),* Roughly bounded by Federal, N. Water, N. Washington, and N. Franklin Sts.

Wayne County

Grosse Pointe Park, *Stretton, William B. and Mary Chase, House,* 938 Three Mile Dr.
Wyandotte, *MacNichol, George P., House,* 2610 Biddle Ave.

MINNESOTA

Fillmore County

Wykoff, *Bartlett, Francis H., House,* Gold and Pearl Sts.

MISSISSIPPI

Warren County

Vicksburg,, *Magruder-Morrissey House,* 1117 Cherry St.

NEVADA

Churchill County

Lovelock Cave,

NEW JERSEY

Essex County

Newark, *Griffith Building,* 605-607 Broad St.

NEW YORK

Delaware County

Walton, *Gardiner Place Historic District,* Gardiner Pl.

Herkimer County

Jordanville, *Jordanville Public Library,* Main St.

Tompkins County

Dryden, *Clarke, Luther, House (Dryden Village MRA),* 39 W. Main St.
Dryden, *Dryden Historic District (Dryden Village MRA),* Roughly bounded by E. Main, James, South, and Lake Sts.
Dryden, *Jennings-Marvin House (Dryden Village MRA),* 9 Library St.
Dryden, *Lacy-Van Vleet House (Dryden Village MRA),* 45 Main St.

Dryden, *Methodist Episcopal Church (Dryden Village MRA)*, 2 North St.
Dryden, *Rockwell House (Dryden Village MRA)*, 52 W. Main St.
Dryden, *Southworth House (Dryden Village MRA)*, 14 North St.
Dryden, *Southworth Library (Dryden Village MRA)*, 24 W. Main St.

NORTH CAROLINA

Rockingham County

Site 31Rk1,

PENNSYLVANIA

Bedford County

Site 36Bd90,

Crawford County

Meadville, *Shippen, Judge Henry, House*, 403 Chestnut St.

Northampton County

Bethlehem, *Lehigh Valley Railroad Headquarters Building*, 425 Brighton St.

York County

Leibhart, Byrd, Site (36Yo170),
Leibhart, Oscar, Site (36Yo9),

TENNESSEE

Fentress County

Jamestown, *Old Fentress County Jail*, N. Smith St. and TN 52

Knox County

Knoxville, *Medical Arts Building*, 603 Main Ave.

Madison County

Jackson, *St. Luke Episcopal Church*, 309 E. Baltimore St.

TEXAS

Gillespie and Llano Counties

Enchanted Rock Archeological District,

Harris County

Houston, *Macatee Building*, 101 Austin St.

Lubbock County

Lubbock, *Lubbock High School*, 2004 19th St.

[FR Doc. 84-12379 Filed 5-7-84; 8:45 am]
BILLING CODE 4310-70-M

Western Region; Channel Islands National Park, California; General Management Plan, Availability of Draft General Management Plan Supplement/Environmental Assessment

Pursuant to Section 102(2)(c) of the National Environmental Policy Act of 1969, the National Park Service, U.S. Department of the Interior, has prepared a draft General Management Plan Supplement/Environmental Assessment to the existing General Management Plan approved in 1980, for Channel Islands National Park, California.

The document presents goals and objectives for management; a land classification system that indicates management emphasis for all lands to be ultimately managed by the National Park Service within the park boundary; concepts for management of resources and cooperation with agencies and landowners; directions for managing cultural and natural resources; and general location concepts for visitor use, facilities, and service. It presents descriptions of both the cultural and natural environments. The document presents these elements in a proposed plan, and offers alternative management strategies for resource management and for visitor use, facilities, and services, but which, for reasons discussed, are not part of the plan proposed by the National Park Service. As well, a no-action alternative was considered and is discussed.

The environmental assessment included in the document discusses impacts on natural resources, cultural resources, the socioeconomic environment, and park management, both from the proposed plan and the various alternatives.

To allow public input into the final general management plan supplement, two public meetings will be held. On June 6, 1984, the meeting will be held at park headquarters, 1901 Spinnaker Drive, Ventura, CA at 7:00 p.m. and on June 7, 1984, the meeting will be held at the Santa Barbara Museum of Natural History, 2559 Puesta del Sol Road, Santa Barbara, CA, at 7:00 p.m. Statements on the document may be given at these meetings.

A limited number of copies of the document are available on request from the Superintendent, Channel Islands National Park, 1901 Spinnaker Drive, Ventura, CA 93001, 805-644-8157 or Ron Replogle, 450 Golden Gate Avenue, San Francisco, CA 94102, 415-556-5750.

Public reading copies are available at the above mentioned addresses and also at the Interior Building, 18th and C Streets, NW., Washington, DC.

Written statements or comments concerning the Draft General Management Plan Supplement/ Environmental Assessment may be submitted and should be received by the Superintendent, Channel Islands National Park, 1901 Spinnaker Drive, Ventura, CA 93001, by July 6, 1984.

Dated: April 27, 1984.

Signed:

Howard H. Chapman,

Regional Director, Western Region.

[FR Doc. 84-12350 Filed 5-7-84; 8:45 am]
BILLING CODE 4310-70-M

Salinas National Monument, New Mexico; Availability of Finding of No Significant Impact for the Proposal and Environmental Assessment, General Management Plan/ Development Concept Plan, and Draft Land Protection Plan

Pursuant to the National Environmental Policy Act of 1969, Title 40 of the Code of Federal Regulations, Part 516 of the Departmental Manual, Chapter 1 of Title 36 of the Code of Federal Regulations, and the final policy statement for Preparation of Land Protection Plans printed in the Federal Register on May 11, 1983 (48 FR 21121), the National Park Service has prepared a Finding of No Significant Impact for the Proposal and Environmental Assessment, General Management Plan/ Development Concept Plan, and Draft Land Protection Plan for Salinas National Monument, Torrance and Socorro Counties, New Mexico.

Based on public review comments received and on management decisions, the proposal, with minor modifications, has been selected as the basis for the final plan. The proposal best provides for the repair and maintenance of existing facilities to upgrade operational and safety standards and for the development of new facilities and utilities for recreational use and interpretation, while assuring the preservation and management of the park's resources and aesthetic values.

It is the conclusion of the National Park Service that the proposal is not a major Federal action that will significantly affect the human environment. Therefore, an environmental impact statement will not be prepared. The National Park Service will proceed with development of a final General Management Plan/ Development Concept Plan and Land Protection Plan.

Copies of the Finding of No Significant Impact for the Proposal and Environmental Assessment, General Management Plan/Development Concept Plan, and Draft Land Protection Plan, are available from Salinas National Monument, Post Office Box 496, Mountainair, New Mexico 87036; and the Southwest Regional Office, Post Office Box 728, Santa Fe, New Mexico 87501, and will be sent upon request.

Dated: April 26, 1984.

Robert I. Kerr,

Regional Director, Southwest Region.

[FR Doc. 84-12351 Filed 5-7-84; 8:45 am]
BILLING CODE 4310-70-M

Office of Surface Mining Reclamation and Enforcement

Meeting on the Proposed Montco Mine, Rosebud County, Montana

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

ACTION: Notice of a meeting on the proposed Montco mine.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) and the Montana Department of State Lands (DSL) will jointly meet with regard to a permit application for the proposed Montco mine in Rosebud County, Montana. In response to a request by the Northern Plains Resource Council, Montana State Council of Carpenters, and the Environmental Policy Institute, these groups have been invited to participate in the meeting. This meeting is open to the public.

The meeting will be held in Helena, Montana on May 17, 1984, at the DSL offices which are located at 1625 Eleventh Avenue. The meeting will begin at 10:00 a.m.

FOR FURTHER INFORMATION CONTACT: OSM: Dr. Mark Boster, Acting Chief, Division of Permit and Environmental Analysis, Office of Surface Mining, Department of the Interior, Room 134, Interior South Building, 1951 Constitution Avenue, NW., Washington, DC 20240, or by telephone (202–343–5854). DSL: Mr. Gary Amestoy, Administrator, Reclamation Division, Department of State Lands, State of Montana, 1625 Eleventh Avenue, Helena, MT 59620, or by telephone (406–444–2074).

Dated: May 3, 1984.

Allen O. Perry,

Acting Assistant Director, Technical Services and Research.

[FR Doc. 84-12453 Filed 5-4-84; 8:45 am]

BILLING CODE 4310-05-M

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

DEPARTMENT OF ENERGY

Western Area Power Administration

Market Test for the Diamond Fork Power System, Bonneville Unit, Central Utah Project, Utah; Market Test for Determining the Marketability and Willingness to Non-Federally Finance the Diamond Fork Power System

The Diamond Fork Power System is an integral part of the Central Utah Project's Bonneville Unit and will serve as the conduit through which an average of approximately 200,000 acre-feet of water will be diverted from the Uinta Basin to the Bonneville Basin each year. The proposed plan consists of a series of tunnels, reservoirs, pipelines, and powerplants, including three small conventional hydroplants and one large underground pumped-storage powerplant. The three small conventional powerplants will have a combined installed capacity of 42.4 MW. The pumped storage powerplant will have a capacity of 1,140 MW at maximum head (4 units at 285 MW each), which gives a total installed capacity of 1182.4 MW. Of this amount, approximately 20.9 MW is needed for Bonneville Unit project pumping and will be Federally financed. Reclamation is seeking non-Federal financing for the remainder of the capacity.

In order to substantiate the expressions of interest that might be received, a deposit of $500 per MW of capacity desired will be requested. These deposits will be used as a contribution for final planning and design activities. These deposits will serve as a gauge for measuring the level of interest in the project and will not guarantee an allocation of power. These deposits will be refundable in the event that the contributor does not receive an allocation of Diamond Fork Power.

Reclamation and Western will be mailing an information package describing the project, power resource, costs, and a non-Federal financing option. This package will be sent to preference customers, electric customers, utilities within the Colorado River Storage Project (CRSP) market area and other potential project participants outside the CRSP market area. For copies of this package, contact Ms. Deborah Linke at (801) 524–5452.

All expressions of interest and deposits are due at Reclamation's Upper Colorado Regional Office no later than June 8, 1984.

From May 8, 1984 to June 8, 1984, the Upper Colorado Region of the Bureau of Reclamation (Reclamation) and the Salt Lake Area Office of the Western Area Power Administration (Western) will be conducting a market test to determine if sufficient interest exists in the Diamond Fork resource and in non-Federally financing the Diamond Fork Power System to justify proceeding with final design work on the project. The market test will also help to determine the marketability of the power generated by the project.

For Further Information Contact:

Diamond Fork Generating Facilities

Ms. Deborah M. Linke, Repayments Chief, Upper Colorado Region, Bureau of Reclamation, P.O. Box 11568, Salt Lake City, Utah 84147, (801) 524–5435

or

Mr. Jay Franson, Utah Projects Office, 160 North 200 West, P.O. Box 1338, Provo, Utah 84603, (801) 379–1155.

Transmission System and Power Marketing

Mr. Al. M. Gabiola, Area Manager, Salt Lake Area Office,Western Area Power Administration, P.O. Box 11606, Salt Lake City, Utah 84147, (801) 524–7512.

Dated: May 4, 1984.

Robert A. Olson,

Commissioner of Reclamation.

[FR Doc. 84-12505 Filed 5-7-84; 10:08 am]

BILLING CODE 4310-09-M

DEPARTMENT OF LABOR

Employment and Training Administration

Federal-State Unemployment Compensation Program; Unemployment Insurance Program Letter No. 15–84; Experience Rating—Identification of the Standard Rate and its Application to a Single Schedule of Contribution Rates Applicable to a Single Taxable Wage Base with Respect to a Single Period of Time

Unemployment Insurance Program Letter No. 15–84 provides explanations and interpretative guidelines relating to Sections 3302, 3303(a)(1) and 3303(c)(8) of the Internal Revenue Code of 1954. These interpretations address areas of concern to States in enacting legislation to implement the changes in Federal law resulting from Pub. L. 97–248, the Tax Equity and Fiscal Responsibility Act of 1982. It provides a basis for identifying the standard rate in a State, and explains that a State may have only one taxable wage base and one schedule of rates in effect at any given time.

Dated: April 30, 1984.

Patrick J. O'Keffe,

Deputy Assistant Secretary of Labor.

Directive: Unemployment Insurance Program Letter No. 15–84.

To: All Employment Security Agencies.

From: Bert Lewis, Administrator for Regional Management.

Subject: Experience Rating—Identification of the Standard Rate and its Application to a Single Schedule of Contribution Rates Applicable to a Single Taxable Wage

Base with Respect to a Single Period of Time.

1. *Purpose.* To announce DOL positions on identifying the standard rate for experience rating under State laws in 1985 and thereafter, and on applying contribution rates under a single schedule of rates to a single taxable wage base for a given period, such as a tax year.

2. *References.* Sections 3302, 3303(a)(1), and 3303(c)(8), FUTA; and UIPLs 29–83 and 30–83.

3. *Background.* Effective with respect to wages paid for employment in 1985 and thereafter, the gross Federal tax assessed under Section 3301 of the Federal Unemployment Tax Act (FUTA) will be increased to 5.2 percent of taxable wages, currently $7,000. Total allowable credits against that tax will be doubled from the present 2.7 to 5.4 percent of the Federal taxable wage base. To assure that employers of a State who are subject to the Federal tax will qualify for the full allowable credits. SESAs should seek amendments to their States' experience rating plans as described in UIPL 30–83 consistent with the principles of experience rating described in UIPL 29–83.

A major objective of experience rating is the equitable allocation of the costs of compensable unemployment among employers of a State subject to experience rating. To that end, employers to whom higher amounts of compensable unemployment are attributable under the State law should be assigned computed rates of contributions higher than those assigned to employers to whom lower amounts of compensable unemployment are so attributable.

To assure that the contribution rate of an employer subject to experience rating reflects the employer's experience with the risk of unemployment in relation to the experience of other employers subject to experience rating under the same State law, the factor (or group of factors treated as a single factor) measuring experience must be applied uniformly during the same period. To transform the computations of experience into rates reflecting differential and relative experience, the computations must be applied to a single schedule of rates for the same period, such as a rate year. For rates to lead to the payment of contributions reflecting differential and relative experience, contribution rates must be applied to a single taxable wage base during the same period.

If, for example, computations of two employers' experience under a reserve ratio experience rating plan resulted in identical ratios, but those ratios were applied to two different rate schedules, the two different rates thus assigned would be the equivalent of assigning rates based on different experience. If, in another example, identical rates of two employers were applied to two different taxable wage bases, the amount of contributions payable by each would be the equivalent of different contribution rates. Either example would distort the experience of one employer in relation to the experience of the other, resulting in differential rates not based on the employers' relative experience.

4. *Identification of Standard Rate.* Section 3303(c)(8), FUTA, defines the term "standard rate" as "the rate on the basis of which variations therefrom are computed." The term "computed" in this context means a rate computed on the basis of an employer's experience with his workers' risk of unemployment. The computation must reflect the measure of experience under the provisions of a State's experience rating plan approved under Section 3303(a)(1), FUTA. The variations may be downward or both downward and upward. Section 3303(c)(8), FUTA, also defines the term "reduced rate" as "a rate of contributions lower than the standard rate applicable under the State law."

There may be only a single standard rate applicable during a given period, such as a tax year. Since the reduced rates to which Section 3303(a)(1), FUTA, applies are rates lower than the standard rate, it is essential to identify the standard rate in a State's schedule of contribution rates. For this purpose, the standard rate in 1985 and thereafter will be 5.4 percent only if the applicable rate schedule reflecting variable expoerience contains such a rate as a computed rate that is realistically assignable to an employer on the basis of computed experience (which means that it is possible for some employer to receive this rate) and the schedule contains lower rates (or lower and higher rates) computed on the basis of each employer's own experience. In the absence of a computed rate of 5.4 percent in the applicable schedule, the standard rate will be the highest rate in the applicable schedule computed on the basis of experience. The foregoing criteria for identifying the standard rate will assure that employers will qualify for the largest measure of credits allowable under the Federal law as provided in Section 3302, FUTA.

It is anticipated that States will implement the increase in the Federal tax credit deriving from the new FUTA tax rate by revising or redesigning their rate structures in such fashion as to more effectively relate higher rates to employer experience which has reflected higher benefit costs. Under current laws, the maximum rates assigned to employers with high benefit costs have fequently borne little effective relationship to the aggregate total costs of benefit payments to their former employees. Doubling the Federal tax credit, and thus the required State standard rate from 2.7 to 5.4 percent permits the States to rectify this condition by stretching out the range of rates in a State, thus increasing rates of employers with high benefit costs, and enabling the State to maintain, or where appropriate, even reduce earned rates for employers with stable employment and corresponding low benefit costs. It is important that such steps be taken to assure assignment of rates that have a realistic relationship to an employer's experience as measured under the State's experience rating system so that the basic purposes of experience rating are achieved, i.e., a fair allocation of current benefit costs and stabilization of employment.

The Standard rate or a higher rate must also be applied to employers who do not qualify for a computed rate, except for a new or newly covered employer who may be assigned a reduced rate (not less than 1.0 percent) as authorized by clause (ii) of Section 3303(a).

5. *Single Taxable Wage Base.* Employer contribution rates under an experience rating plan must be applied to a single taxable wage base during the same period, such as a tax year. The use of multiple taxable wage bases during the same period would produce distortions of the measurement of employers' experience resulting in differential rates not based on the relative experience of different employers. Furthermore, the amounts of contributions payable would not reflect the measurement of experience by the same factor during the same period, as required by the Federal law.

6. *Action Required.* Administrators should take timely action to assure that their State laws are amended as needed so that employers subject to experience rating will qualify for full allowable credits against the gross Federal unemployment tax. For clarity, if the State law currently designates a rate lower than 5.4 percent as the standard rate, it should be amended to designate a computed rate of 5.4 percent or, in the absence of such a computed rate, a higher computed rate as the standard rate.

7. *Inquiries.* Direct questions to the appropriate regional office.

[FR Doc. 84–12388 Filed 5–7–84; 8:45 am]

BILLING CODE 4510–30–M

[TA–W–14, 731 et al.]

U.S. Steel Corp., Supply Division Steel Service Centers; Revised Determination on Reconsideration

In the matter of TA–W–14,731 Brighton, Massachusetts, TA–W–14,732 Baltimore, Maryland, TA–W–14,734 Pittsburgh, Pennsylvania, TA–W–14,735 Cleveland, Ohio, TA–W–14,737 Cincinnati, Ohio, TA–W–14,738 Chicago, Illinois, TA–W–14,739 St. Paul, Minnesota, TA–W–14,740 Kansas City, Missouri, TA–W–14,741 St. Louis, Missouri, TA–W–14,743 Memphis, Tennessee, TA–W–14,744 Birmingham, Alabama, TA–W–14,745 Dallas, Texas, TA–W–14,746 Houston, Texas, and TA–W–14,747 Los Angeles, California.

On March 19, 1984, the Department issued an Affirmative Determination Regarding Application for Reconsideration for workers and former workers of U.S. Steel Corporation's Supply Service Centers cited above. This determination was published in the **Federal Register** on March 23, 1984 (49 FR 11025).

The United Steelworkers of America in its application for reconsideration claims that recent Department of Labor certifications for workers at U.S. Steel Corporation's plants would provide a basis for the certification of workers at U.S. Steel Corporation's Supply Service Centers, especially for workers at the St. Paul, Minnesota service center which handles plate produced at the Gary Works where workers producing plate were certified for trade adjustment assistance benefits, TA–W–14,767.

As a general rule, workers may not be certified as eligible to apply for worker adjustment assistance if the firm in which they are employed does not produce an article within the meaning of section 222 of the Trade Act of 1974. However, such workers may be certified if their separation from employment was caused importantly by a reduced demand for their services from a firm which produces an article and which substantially beneficially owns the service workers' firm. In addition, the reduction in demand for services must be determined to have originated at a production facility whose workers independently meet the statutory criteria for certification, and that reduction must directly relate to the product adversely affected by increased imports.

The Department's Notice of Determinations, TA-W-14,767, issued on November 30, 1983 certifying workers at U.S. Steel Corporation's Gary Works in Gary, Indiana producing steel bars and bar-size light shapes and carbon steel plate should have been considered in the Department's original investigation of U.S. Steel Corporation's Supply Service Centers. That certification had an impact date of June 16, 1982. The Department's certification of workers producing plate at the Geneva Works (TA-W-13,520) also should have been considered in determining group eligibility to workers at U.S. Steel Supply Service Centers.

Carbon steel plate from the Gary Works accounted for a significant proportion of the declining sales in 1982 and the first seven months of 1983 compared to the first seven months of 1982 at the Chicago, Illinois; St. Paul, Minnesota; Kansas City, Missouri and St. Louis, Missouri Supply Service Centers. Employment at the above cited supply service centers declined in 1982 and in the first nine months of 1983 compared to the same period in 1982.

Carbon steel plate from the Geneva Works accounted for a significant proportion of the declining sales in 1982 at the Los Angeles, California service center. EmpLoyment at the Los Angeles service center declined in 1982 and in the first nine months of 1983 compared to the same period in 1982.

Other U.S. Steel certifications did not significantly impact on sales or employment at the following Supply Service Centers of U.S. Steel: Brighton, Massachusetts; Baltimore, Maryland; Pittsburgh, Pennsylvania; Cleveland, Ohio; Cincinnati, Ohio; Memphis, Tennessee; Birmingham, Alabama; Dallas, Texas; and Houston, Texas.

Conclusion

After careful review of the facts obtained on reconsideration, it is concluded that increased imports of carbon steel plate produced at the U.S. Steel Corporation's Gary Works in Gary, Indiana and the Geneva Works in Provo, Utah contributed importantly to the decline in sales and to the total or partial separation of workers and former workers at U.S. Steel Corporation's Supply Service Centers at Chicago, Illinois; St. Paul, Minnesota; Kansas City, Missouri; St. Louis, Missouri and Los Angeles, California.

In accordance with the provisions of the Trade Act of 1974, I make the following revised determination:

All workers of U.S. Steel Corporation's Supply Service Centers at Chicago, Illinois; St. Paul, Minnesota; Kansas City, Missouri; St. Louis, Missouri and Los Angeles, California who became totally or partially separated from employment on or after June 16, 1982 are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.

It is further determined that the Department's original denial of trade adjustment assistance benefits for workers at U.S. Steel Corporation's Supply Service Centers at Brighton, Massachusetts; Baltimore, Maryland; Pittsburgh, Pennsylvania; Cleveland, Ohio; Cincinnati, Ohio; Memphis, Tennessee; Birmingham, Alabama; Dallas, Texas; and Houston, Texas be affirmed.

Signed at Washington, D.C., this 30th day of April 1984.

Harold A. Bratt,

Deputy Director, Office of Program Management, UIS.

[FR Doc. 84-12389 Filed 5-7-84; 8:45 am]

BILLING CODE 4510-30-M

Determinations Regarding Eligibility To Apply for Worker adjustment Assistance; Abingdon Steel Fabricating, Inc., et al.

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for adjustment assistance issued during the period April 23, 1984–April 27, 1984.

In order for an affirmative determination to be made and a certification of eligibility to apply for adjustment assistance to be issued, each of the group eligibility requirements of section 222 of the Act must be met.

(1) That a significant number or proportion of the workers in the workers' firm, or an appropriate subdivision thereof, have become totally or partially separated,

(2) That sales or production, or both, of the firm or subdivision have decreased absolutely, and

(3) That increases of imports of articles like or directly competitive with articles produced by the firm or appropriate subdivision have contributed importantly to the separations, or threat thereof, and to the absolute decline in sales or production.

Negative Determinaitons

In each of the following cases the investigation revealed that criterion (3) has not been met. A survey of customers indicated that increased imports did not contribute importantly to worker separations at the firm.

TA-W-15,176; Abingdon Steel Fabricating, Inc., Abingdon, VA

TA-W-14,958; Litton Industrial Products, Inc., Lucas Machine Div., Cleveland, OH

TA-W-15,060; Muirhead, Inc., Mountainside, NJ

In the following case the investigation revealed that criterion (3) has not been met for the reasons specified.

TA-W-15,025; Atlas Bolt & Screw Co., Cleveland, OH

Aggregate U.S. imports of threaded industrial fasteners did not increase as required for certification.

Affirmative Determinations

TA-W-15,027; The Electric Wheel Co., Quincy, IL, A Division of Firestone Tire and Rubber Co.

A certification was issued covering all workers separated on or after September 13, 1982 and before July 15, 1983.

TA-W-15,044; Vulcan Corp., Amesbury, MA

A certification was issued covering all workers separated on or after September 12, 1982 and before November 1, 1983.

TA-W-15,059; Ladish Co., Cudahy Forging Division, Industrial Products Division, Cudahy, WI

A certification was issued covering all workers separated on or after September 29, 1982 and before December 31, 1982.

TA-W-15,031; Rockwell International Corp., Allegan, MI

A certification was issued covering all workers separated on or after January 1, 1983.

I hereby certify that the aforementioned determinations were issued during the period April 23, 1984–April 27, 1984. Copies of these determinations are available for inspection in Room 9120, U.S.

Department of Labor, 601 D Street, NW., Washington, D.C. 20210 during normal business hours or will be mailed to persons who write to the above address.

Dated: May 1, 1984.

Marvin M. Fooks,

Director, Office of Trade adjustment Assistance

[FR Doc. 84-12390 Filed 5-7-84; 8:45 am]

BILLING CODE 4510-30-M

Investigations Regarding Certifications of Eligibility to Apply for Worker Adjustment Assistance; Alco Power, Inc., et al.

Petitions have been filed with the Secretary of Labor under Section 221 (a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than May 18, 1984.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than May 18, 1984.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, 601 D Street, NW., Washington, D.C. 20213.

Signed at Washington, D.C., this 30th day of April 1984.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

APPENDIX

Petitioner Union/workers or former workers of—	Location	Date received	Date of petition	Petition No.	Articles produced
Alco Power, Inc. (workers)	Auburn, NY	4/23/84	4/16/84	TA-W-15,313	Engines—diesel, turbochargers, parts—renewal, fabrication.
Di-Acro Division of Houdaille Industries, Inc. (IAM)	Lake City, MN	4/20/84	4/17/84	TA-W-15,314	Machines—punching, N/C, brakes—press.
Mitel, Inc. (company)	Ogdensburg, NY	4/23/84	4/2/84	TA-W-15,315	Super set IV (highly advanced computerized telephone).
Royal Robes, Inc. (ILGWU)	Bristol, RI	4/24/84	4/10/84	TA-W-15,316	Robes—bath, ladies'.
Wheaton Fine Glass (workers)	Millville, NJ	4/24/84	4/16/84	TA-W-15,317	Tableware—glass, containers—storage & other glass items.
(The) American China Company (company)	Williamstown, WV	4/27/84	4/25/84	TA-W-15,318	Dishes—airline.
Trojan Industries, Inc. (Boilermakers)	Batavia, NY	4/27/84	4/24/84	TA-W-15,319	Loaders—front end, rubber tires.
Wilshire Fashions, Inc. (workers)	South River, NJ	4/30/84	4/9/84	TA-W-15,320	Coats—car, jackets, ladies'.

[FR Doc. 84-12391 Filed 5-7-84; 8:45 am]

BILLING CODE 4510-30-M

Mine Safety and Health Administration

New Personal Audio Dosimeters Accepted

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice of MSHA acceptance of two new personal audio dosimeters.

SUMMARY: After testing and evaluation, the Mine Safety and Health Administration (MSHA) announces the acceptance of the E.I. DuPont DeNemours and Company Models Mark II and Mark III Audio Noise Dosimeters for use in coal mines.

EFFECTIVE DATE: May 8, 1984.

FOR FURTHER INFORMATION CONTACT: Robert G. Peluso, Pittsburgh Technical Support Center, Mine Safety and Health Administration, 4800 Forbes Avenue, Pittsburgh, PA 15213, (412) 621-4500.

SUPPLEMENTARY INFORMATION: On September 12, 1978, the Mine Safety and Health Administration (MSHA) published a final rule that became effective on October 1, 1978 and amended the mandatory health standards governing noise dosimeters (43 FR 40760). The amendments to 30 CFR Parts 70 and 71 permit the use of personal noise dosimeters to determine noise exposure in coal mines and set forth the procedures to be followed in taking such noise measurements. The rule provides that the noise exposure measurements and surveys required by Parts 70 and 71 must be taken by personal noise dosimeters that MSHA has determined to be acceptable. The test and criteria used by MSHA to determine acceptability of personal noise dosimeters are published in "MSHA Test Procedures and Acceptability Criteria for Noise Dosimeters," MSHA Informational Report IR-1072.

MSHA has recently completed testing and evaluation of the E.I. DuPont DeNemours and Company Models Mark II and Mark III Audio Noise Dosimeters. MSHA has determined that these dosimeters meet all of the criteria listed in MSHA Informational Report IR-1072 and hereby gives notice that these dosimeters are acceptable for use under 30 CFR 70.505 and 71.801.

Accordingly, operators may use the E.I. DuPont DeNemours and Company Models Mark II and Mark III Audio Noise Dosimeters to take the noise exposure measurements and surveys at underground coal mines as required by 30 CFR 70.503, 508 and 509 and at surface coal mines as required by 30 CFR 71.802, 803 and 804.

Dated: May 2, 1984.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 84-12293 Filed 5-7-84; 8:45 am]

BILLING CODE 4510-43-M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50-318]

Baltimore Gas and Electric Co.; Consideration of Issuance of Amendment to Facility Operating license and Opportunity for Prior Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is

considering issuance of an amendment to Facility Operating License No. DPR–69, issued to Baltimore Gas and Electric Company (the licensee), for operation of the Calvert Cliffs Nuclear Power Plant, Unit No. 2, located in Calvert County, Maryland.

The amendment would revise the provisions in the Technical Specifications (TS) relating to the operability and surveillance for the auxiliary feedwater system. The proposed revision to TS 3/4.7.1.2, "Auxiliary Feedwater System" includes a provision to extend the maximum period of inoperability of an auxiliary feedwater pump from 72 hours to 7 days. The proposed change to TS 3/4.7.1.2 is in accordance with the licensee's application for amendment dated April 9, 1984, as supplemented by a letter dated May 4, 1984.

Prior to issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

By June 8, 1984, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene. Request for a hearing and petitions for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter, and the bases for each contention set forth with reasonable specificity. Contentions shall be limited to matters within the scope of the amendment under consideration. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, 1717 H Street, NW., Washington, D.C., by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at (800) 325–6000 (in Missouri (800) 342–6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to James R. Miller: (petitioner's name and telephone number), (date petition was mailed), (plant name), and (publication date and page number of this **Federal Register** notice). A copy of the petition should also be sent to the Executive Legal Director, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, and to James A. Biddison, Jr., General Counsel, G and E Building, Charles Center, Baltimore, Maryland 21203, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearings 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 and/or request, that the petitioner has made a substantial showing of good cause for the granting of a late petition and/or request. That determination will be based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)–(v) and 2.714(d).

For further details with respect to this action, see the application for amendment dated April 9, 1984, and a supplement dated May 4, 1984, which are available for public inspection at the Commission's Public Document Room, 1717 H Street, NW., Washington, D.C., and at the Calvert County Library, Prince Frederick, Maryland.

Dated at Bethesda, Maryland, this 1st day of May, 1984.

For the Nuclear Regulatory Commission.

James R. Miller,

Chief, Operating Reactors Branch No. 3, Division of Licensing.

[FR Doc. 84–12342 Filed 5–7–84; 8:45 am]

BILLING CODE 7590–01–M

[Docket Nos. 50–295 and 50–304]

Commonwealth Edison Co.; Withdrawal of Application for Amendment to Facility Operating License

The United States Nuclear Regulatory Commission (the Commission) has granted the request of Commonwealth Edison Company (the licensee) to withdraw its August 8, 1983 application for amendments to Facilities Operating License Nos. DPR–39 and DPR–48 for operation of the Zion Nuclear Power Station, Unit Nos. 1 and 2, located in Zion, Illinois. The proposed amendments would have revised the provisions in the Technical Specifications for the Zion Station regarding the acceptance criteria for containment leakage tests. The Commission issued a Notice of Consideration of Issuance of the Amendments in the **Federal Register** on January 12, 1984 (49 FR 1584). By letter dated February 28, 1984, licensee requested pursuant to 10 CFR 2.107 permission to withdraw its application for the proposed amendments. The Commission has considered licensee's February 28 request and has determined that permission to withdraw the August

8, 1983 application for amendments should be granted.

For further details with respect to this action, see (1) the application for amendments dated August 8, 1983; (2) the licensee's letter dated February 28, 1984, withdrawing the application for license amendments, dated February 28, 1984; and (3) our letter dated April 18, 1984. All of the above documents are available for public inspection at the Commission's Public Document Room, 1717 H Street, NW., Washington, D.C. and at the Zion-Benton Public Library District, 2600 Emmaus Avenue, Zion, Illinois 60099.

Darrell G. Eisenhut,

Director, Division of Licensing.

[FR Doc. 84-12343 Filed 5-7-84; 8:45 am]

BILLING CODE 7590-01-M

OFFICE OF MANAGEMENT AND BUDGET

Circular A-122; Cost Principles for Nonprofit Organizations—"Lobbying" Revision

Correction

In FR Doc. 84-11594 beginning on page 18260 in the issue of Friday, April 27, 1984, make the following corrections:

1. On page 18263, third column, third line from the bottom, "regulations" should read "regulation"; and in the second line from the bottom, "deviaiton" should read "deviation".

2. On page 18265, first column, third paragraph, eighth line, "and" should read "an"; and in the fourth paragraph, fourth line, "and" should read "an".

3. On page 18266, second column, second line, "cost" should read "costs"; in the eighth line from the bottom, "statues" should read "statutes".

4. Also on page 18266, third column, third line from the bottom, "hearing" should read "hearings"; and in the second line from the bottom, "Other" should read "Others".

5. On page 18267, first column, first complete paragraph, 13th line, "section" should read "sections"; in the second column, fifth paragraph, second line, "transportatin" should read "transportation".

6. On page 18268, first column, first complete paragraph, first line, "condidered" should read "considered", and in the second column, first complete paragraph, fourth line, "compaigns" should read campaigns".

7. On page 18269, second column, 12th line, "prusuing" should read "pursuing".

8. On page 18270, first column, third line from the bottom, "contracts" should read "contacts".

9. On page 18271, first column, second complete paragraph, 14th and 15th lines, "or other agreements" should read "performance".

10. On page 18272, third column, first complete paragraph, 11th line, "tht" should read "that".

11. On page 18273, second column, first complete paragraph, 16th line, "be" should read "have".

12. On page 18274, second column, fifth line, "Requirement" should read "Requirements"; and in the first complete paragraph, 18th line, "as basis" should read "as a basis".

13. On page 18275, second column, third complete paragraph, 10th and 11th lines, remove "sufficient information to serve the filing or audit requirements"; and in the third line from the bottom of the column, "agencies" should read "agency".

BILLING CODE 1505-01-M

SECURITIES AND EXCHANGE COMMISSION

[Rel. No. 23295; 70-6970]

Appalachian Power Co., et al.; Proposal to Acquire Promissory Note for Mining Assets; to Guarantee Performance of Subsidiary; to Indemnify Purchasers

May 1, 1984.

Appalachian Power Company ("Appalachian"), 40 Franklin Road, Roanoke, Virginia 24022, an electric utility subsidiary of American Electric Power Company, Inc., a registered holding company, and Appalachian's subsidiaries (the "Coal Subsidiaries"), Southern Appalachian Coal Company ("SACCo"), Central Appalachian Coal Company ("CACCo") and Cedar Coal Company ("Cedar"), have filed an application-declaration with this Commission pursuant to Section 9, 10 and 12(b) of the Public Utility Holding Company Act of 1935 ("Act") and Rule 45 thereunder.

Appalachian and its Coal Subsidiaries have entered into two separate agreements of purchase and sale ("Agreement") with respect to portions of their West Virginia mining assets. Under one Agreement, dated January 27, 1984, NuEast Mining Company, has agreed to acquire all of the mining assets owned or leased by Cedar and CACCo and used by Cedar and CACCo in their mining operations, other than leased mining equipment, together with a portion of mining assets owned by SACCo and currently used by Cedar in its mining operations ("NuEast Agreement"). Under a second Agreement dated as of October 3, 1983, Appalachian and SACCo have agreed to sell or assign to Ashland Coal, Inc. and certain of its subsidiaries, all interests in property and fixed assets (other than leased equipment) which is associated with SACCo's "Julian" area of operations in West Virginia ("Ashland Agreement").

Under the NuEast Agreement, the Coal Subsidiaries have agreed to sell to NuEast certain real property interests, located in Kanawha County, West Virginia, together with certain fixed assets used in connection with mining coal, and to assign to NuEast interests in leased assets, including the White Oak coal preparation plant and related ground lease (which are leased by Cedar), and certain coal leases related to property located in Boone, Fayette and Kanawha Counties, West Virginia. The total price to be paid by NuEast for the real property and fixed assets is $40 million.

The NuEast Agreement provides that NuEast will pay the Coal Subsidiaries $20 million in cash at the time of closing and deliver its promissory note ("Note") for $20 million to be payable over 15 years with interest at 11½% per annum, payable quarterly, and secured by a Deed of Trust, Security Agreement and Assignment of Rent ("Mortgage") dated ——, 1984. The Note is prepayable in whole or in part and is subject to acceleration upon the occurrence of certain events of default. The Mortgage provides, among other things, that in the event of default, Appalachian may enter upon, take possession of, manage and operate the mortgaged premises.

The NuEast Agreement further provides that Appalachian and Cedar will assign the White Oak Facility Lease Agreements and the White Oak Ground Lease, provided that NuEast shall have obtained the consent of the Trustee and the lessors under such leases. The proposed sale of assets to NuEast under the Agreement is not conditional upon the ability of NuEast to obtain the necessary consents.

Under a Lease Agreement and Assignment, also dated January 27, 1984 ("NuEast Lease Agreement"), the Coal Subsidiaries have agreed to lease or assign to NuEast all of their respective interests (as owners in fee of certain Coal Lands or as lessees of certain Coal Lease Lands) in the coal in, on or under certain tracts or parcels of land situated in Boone, Fayette and Kanawha Counties, West Virginia for an initial term of 20 years from the date of closing and from year to year thereafter until NuEast exercises its right to terminate the NuEast Lease Agreement or until all

of the minable and merchantable coal has been mined and removed from the Coal Lands, whichever occurs first.

The consideration to be paid by NuEast under the NuEast Lease Agreement shall consist of tonnage royalties and minimum royalties determined as follows: (a) until such time as the Coal Subsidiaries have received a total of $48,640,000 in tonnage royalties and minimum royalties, NuEast shall pay a minimum royalty of $2,432,000 annually over 20 years, such payments to be made even if no coal is mined from the coal reserves during this period, and thereafter $1.00 per acre of the Coal Lands and Coal Lease Lands on the last day of each lease quarter; and (b) tonnage royalties calculated at 8% of the gross sales price, or $3.00, whichever is greater, for each 2,000 pounds of coal mined from the Coal Lands and sold, consumed or stockpiled during and under the terms of the NuEast Lease Agreement, and 8% of the sales price or $3.00 whichever is greater (less any amount which NuEast is required to pay any does pay to the original lessors pursuant to any Coal Leases, but not in excess of the greater of 8% of the gross sales price or $3.00 for each 2,000 pounds of coal mined from the Coal Lease Lands and sold, consumed or stockpiled during and under the terms of the NuEast Lease Agreement whether or not such coal is mined pursuant to the rights granted by the Coal Leases.

Concurrently with the sale by the Coal Subsidiaries of the real property interests and fixed assets to the purchasers, Appalachian proposes to commence performance under two separate coal purchase agreements ("Coal Contracts") with NuEast which will provide Appalachian with a substitute source of coal on a long-term basis. Under one Coal Contract ("Amos Coal Supply Contract"), Appalachian would be obligated to purchase 1,750,000 tons of coal per year for ten years and reduced amounts thereafter through the fifteenth year at a base price of $37.25/ton F.O.B. rail car/White Oak. Under the second Coal Contract ("Mountaineer Coal Supply Contract"), Appalachian will purchase 600,000 tons of coal for ten years and reduced amounts thereafter through the fifteenth year at a base price of $42.00/ton F.O.B. barge/Morris Creek Dock.

Under the Ashland Agreement, Ashland Coal, Inc. and its subsidiaries, Allegheny Land Company and Hobet Terminals, Inc., have agreed to purchase the "Julian" portion of certain interests in real property owned by Appalachian and SACCo and located in Boone and Lincoln Counties, West Virginia, together with certain fixed mining assets, and to acquire by lease or assignment mineral rights, together with certain associated permits and agreements owned or controlled by Appalachian and SACCo in connection with SACCo's mining operations. The total consideration to be paid by the purchasers for the real property and fixed assets is $16,750,000, which is to be paid at the time of closing.

Appalachian, SACCo and the purchasers have also entered into a coal lease agreement and assignment, dated October 3, 1983 ("Ashland Lease Agreement"), pursuant to which Appalachian and SACCo have agreed to lease to the purchasers the mineral rights underlying certain land owned by Appalachian and SACCo ("Coal Lands") and to assign their interests under various existing coal leases ("Coal Lease Lands"). Under the Ashland Lease Agreement, the purchasers will pay $30 million for the coal rights on the basis of a $5 million cash payment at the time of closing and annual minimum payments of $1.25 million per year over 20 years, such payments to be made even if no coal is mined from the Julian reserves during this period.

Appalachian and Ashland Coal, Inc. have also entered into a Coal Supply Agreement, dated October 3, 1983 pursuant to which Ashland has agreed to furnish Appalachian 1.5 million tons of coal from West Virginia sources each year for 10 years and reduced amounts (reduced by 20% per year) during the next five years. The base price of coal supplied under the Coal Supply Agreement would be $37.50/ton F.O.B. rail car/Bull Creek subject to escalation from a base period of July 1, 1983.

Under the Ashland Agreement, Appalachian has unconditionally guaranteed the performance by SACCo of all its representations, warranties and obligations including SACCo's obligation to convey title to property free of certain liens and encumbrances. In addition, under the Agreements and the Lease Agreements with Ashland and NuEast, respectively, Appalachian and the Coal Subsidiaries have agreed jointly and severally to indemnify the purchasers against certain liabilities and contingencies that may be asserted against such purchasers by employees or former employees of Appalachian or the Coal Subsidiaries or by federal, state or local agencies as a result of non-compliance by such Coal Subsidiaries with laws relating to mining operations.

The application-declaration and any amendments thereto are available for public inspection through the Commission's Office of Public Reference. Interested persons wishing to comment or request a hearing should submit their views in writing by May 25, 1984 to the Secretary, Securities and Exchange Commission, Washington, D.C. 20549, and serve a copy on the applicants-declarants at the addresses specified above. Proof of service (by affidavit or, in case of any attorney at law, by certificate) should be filed with the request. Any request for a hearing shall identify specifically the issues of fact or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in this matter. After said date, the application-declaration, as filed or as it may be amended, may be granted and permitted to become effective.

For the Commission, by the Office of Public Utility Regulation, pursuant to delegated authority.

George A. Fitzsimmons,

Secretary.

[FR Doc. 84-12365 Filed 5-7-84; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 23296; 70-6979]

Middle South Utilities, Inc.; Proposed Issuance and Sale of Common Stock and Exception From Competitive Bidding

May 1, 1984.

Middle South Utilities, Inc. ("Middle South"), 225 Baronne Street, New Orleans, Louisiana 70112, a registered holding company, has filed a declaration with this Commission pursuant to Sections 6(a) and 7 of the Public Utility Holding Company Act of 1935 ("Act") and Rule 50 thereunder.

Middle South proposes to issue and sell, in one or more sales from time to time not later than December 31, 1984, up to 2 million authorized but unissued shares of its common stock, $5 par value ("Additional Common Stock"), by a direct negotiated sale(s) to underwriters for public offering. Middle South intends to sell all or a part of the Additional Common Stock in one or more underwritten public offerings in conjunction with the 8 million shares of its authorized but unissued common stock heretofore authorized to be offered for sale in a negotiated underwriting in File No. 70-6936. Middle South will use the proceeds to reduce outstanding bank loans, to purchase common stock from its subsidiaries, and for other corporate purposes.

It is stated that if, for any reason, Middle South is unable to sell all of the Additional Common Stock pursuant to a

direct negotiated sale to underwriters in accordance with the exception from Rule 50 requested, Middle South would attempt to sell all or a portion of the Additional Common Stock on a delayed basis ("Delayed Offering Stock"), after the receipt, on one or more occasions, of competing proposals therefor. Alternatively, Middle South would attempt to issue and sell all or a portion of the Additional Common Stock ("Continuous Offering Stock") through a continuous offering shelf registration program in accordance with Rule 415 under the Securities Act of 1933. In no event would the total aggregate number of shares of the Negotiated Stock, the Delayed Offering Stock, and the Continuous Offering Stock exceed the 2 million shares of Additional Common Stock.

The declaration and any amendments thereto are available for public inspection through the Commission's Office of Public Reference. Interested persons wishing to comment or request a hearing should submit their views in writing by May 25, 1984, to the Secretary, Securities and Exchange Commission, Washington, D.C. 20549, and serve a copy on the declarant at the address specified above. Proof of service (by affidavit or, in case of an attorney at law, by certificate) should be filed with the request. Any request for a hearing shall identify specifically the issues of fact or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in this matter. After said date, the declaration, as filed or as it may be amended, may be permitted to become effective.

For the Commission, by the Office of Public Utility Regulation, pursuant to delegated authority.

George A. Fitzsimmons,

Secretary.

[FR Doc. 84-12306 Filed 5-7-84; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 13923; 811-3602]

Financial U.S. Treasury Money Fund, Inc.; Application for an Order Declaring That Applicant Has Ceased To Be an Investment Company

Notice is hereby given that Financial U.S. Treasury Money Fund, Inc. ("Applicant"), 7503 Marin Drive, Suite 380D, Englewood, Colorado, 80111, an open-end, diversified management investment company registered under the Investment Company Act of 1940 ("Act"), filed an application on April 3, 1984, pursuant to section 8(f) of the Act and Rule 8f-1 thereunder, for an order of the Commission, declaring that Applicant has ceased to be an investment company. All interested persons are referred to the application on file with the Commission for a statement of the representations contained therein, which are summarized below, and are referred to the Act and the rules thereunder for a statement of the relevant provisions.

Applicant states on November 19, 1982, Applicant filed a notification of registration on Form N-8A and a registration statement on Form N-1. Such registration statement became effective on November 16, 1983.

Applicant states that it has never made a public offering of any of its securities. Applicant further states that it has no securityholders, no assets and that it is not a party to any litigation or administrative proceedings. Applicant maintains that it is not now engaged, nor does it propose to engage, in any business activities other than those necessary for the winding up of its affairs.

Notice is further given that any interested person wishing to request a hearing on the application may, not later than May 28, 1984, at 5:30 p.m., do so by submitting a written request setting forth the nature of his/her interest, the reasons for the request, and the specific issues of fact or law that are disputed, to the Secretary, Securities and Exchange Commission, Washington, D.C. 20549. A copy of the request should be served personally or by mail upon Applicant at the address stated above. Proof of service (by affidavit or, in the case of an attorney-at-law, by certificate) shall be filed with the request. After said date, an order disposing of the application will be issued unless the Commission orders a hearing upon request or upon its own motion.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

George A. Fitzsimmons,

Secretary.

[FR Doc. 84-12307 Filed 5-7-84; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-20921; File No. SR-NYSE-84-3]

Self-Regulatory Organization; New York Stock Exchange Trading of Listed Stock Options

AGENCY: Securities and Exchange Commission.

ACTION: Extension of comment period and request for additional comments.

SUMMARY: The Commission has published notice of a proposed rule change submitted by the NYSE to initiate the trading of standardized put and call options on certain listed stocks. In view of the significant issues raised by this proposal, the Commission has determined to extend to June 15, 1984, the period for public comment and to solicit additional written submissions of data, views and comments from interested persons, particularly with respect to the issues discussed in this release.

DATES: Comments should be received by June 15, 1984.

ADDRESSES: Interested persons should submit 15 copies of their views and comments to George A. Fitzsimmons, Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, D.C. 20549, and should refer to File No. SR-NYSE-84-3. All submissions will be made available for public inspection at the Commission's Public Reference Room.

FOR FURTHER INFORMATION CONTACT: Eneida Rosa or Heidi Steinberg Coppola, Division of Market Regulation, 450 Fifth Street NW., Washington, D.C. 20549 ((202) 272-2913 and (202) 272-2415, respectively).

I. Introduction

On January 17, 1984, the New York Stock Exchange, Inc. ("NYSE"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act") and Rule 19b-4 thereunder, submitted to the Commission a proposed rule change to establish an options trading program for standardized put and call options on individual listed stocks.[1] The NYSE also submitted to the Commission two amendments to this proposed rule change. Amendment No. 1, submitted on January 25, 1984, supplements the Burden on Competition section of the NYSE filing. Amendment No. 2, submitted on February 13, 1984, indicates that the Board of Directors of the NYSE approved this proposed rule change on February 2, 1984.[2]

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[1] Notice of the proposed rule change was published in Securities Exchange Act Release No. 20613 (January 31, 1984), 49 FR 4581 (February 7, 1984).

[2] Specifically, Amendment No. 1 indicates the NYSE's belief that its entry into options trading advances the legislative mandate embodied in the 1975 Amendments to the Act for maximum competition among orders, among market centers and among market makers. The staff has not previously published notice of this amendment. Because Amendment No. 2 is technical in nature, it also was not published for comment.

This release describes the NYSE proposal to enter the market for standardized options on individual listed stocks and solicits written views and data concerning the NYSE proposal and significant related matters. This release extends the comment period on this proposal until June 15, 1984.

II. The NYSE Proposal

A. Background

Between 1973 and 1976, the Commission approved proposed rule changes of several national securities exchanges to list and trade standardized options on individual listed stocks.[3] In late 1976 and early 1977, the Commission received numerous proposals by the existing options exchanges to expand significantly their options activities as well as proposals by other market centers to initiate options programs. Among the latter group was a proposal by the NYSE to trade options on individual equity securities.[4] By letter dated July 18, 1977, the Commission declared a voluntary moratorium (the "Moratorium") on the expansion of options trading..[5] Prior to any expansion of activity in the options markets, the Commission believed that an investigation and study, under the Act, was necessary to "determine whether standardized options trading is occurring in a manner and in an envioronment which is consistent with fair and orderly markets, the public interest, the protection of investors, and other objectives of the Act * * *."[6]

While this study was being undertaken, the Commission commenced proceedings to disapprove all expansionary options rule proposals.[7] This resulted in withdrawal of all of the expansionary proposals, including the NYSE's 1977 proposal to trade options on individual listed stocks.[8]

The study was undertaken to evaluate the adequacy of the surveillance and sales practice procedures and the rules of the options self-regulatory orgranizations ("SRO's").[9]

The result of the investigation was the Report of the Special Study of the Options Markets to the Securities and Exchange Commission (the "Options Study").[10] In addition to reaching a number of conclusions and recommendations with respect to the adequacy of the regulatory programs of the existing options exchanges, it also addressed a number of more general options market structure matters. As discussed in greater detail below, among the market structure issues discussed in the Options Study were a variety of questions associated with NYSE entry into the stock options market and, in particular, the NYSE 1977 proposal.

Approximately one year after receipt of the Options Study, the Commission terminated its moratorium on expansion of standardized options markets, including the listing of additional put and cell classes by the existing options exchanges.[11] The NYSE, however, did not refile its proposal to trade options on individual stocks until the present proposed rule change.

B. The NYSE Proposal

The NYSE has proposed to amend numerous NYSE rules to permit the trading of put and call options on individual listed stocks. Transactions on the NYSE in individual stock options would be governed by the NYSE's 700 series rules, the rules of the Exchange that presently apply to broad-based[12] and narrow-base[13] stock index options traded by the NYSE. The proposal contemplates NYSE participation in the Allocation Plan.[14] Initially, the NYSE proposal authorizes individual stock option trading on those of the seven regional holding companies ("RHC's) recently divested by American Telephone and Telegraph Company ("AT&T") as are allocated to the NYSE as a participant in an appropriately modified version of the "Stock Allocation Plan" currently in effect among the other options exchanges.[15] With respect to these and any subsequent individual listed stock option contracts, the NYSE proposes identical contract terms to the present specifications for individual listed stock options presently trading on other options exchanges.[16] In selecting the stocks underlying there options, the NYSE intends to apply the same standards established be exchanges for stocks underlying individual stock options.[17]

The NYSE proposes to carry over the market structure utilized for its index options contracts to its individual stock options program; that is, it proposes to have a specialist for each options contract and to permit the registration of one or more competitive options traders ("COTs") for each contract.[18] The NYSE

[3] The Commission approved proposals to list and trade such options by the Chicago Board Options Exchange, Inc. ("CBOE"), Securities Exchange Act Release No. 9985 (February 1, 1973); American Stock Exchange, Inc. ("Amex"), Securities Exchange Act Release No.11144 (December 19, 1974); Philadelphia Stock Exchange, Inc. ("Phlx"), Securities Exchange Act Release No. 11423 (May 15, 1975); Midwest Stock Exchange, Inc. ("MSE"), Securities Exchange Act Release No. 13045 (December 8, 1976), 41 FR 54783 (December 15, 1976); and Pacific Stock Exchange, Inc. ("PSE"), Securities Exchange Act Release No. 12283 (March 30, 1976), 41 FR 14454 (April 5, 1976).

[4] *See* File No. SR-NYSE-77-17 (the "1977 NYSE proposal"). Notice of the NYSE proposal was given in Securities Exchange Act Release No. 13674 (June 24, 1977), 42 FR 33829 (July 1, 1977).

[5] Securities Exchange Act Release No. 13760 (July 18, 1977), 42 FR 38035 (July 26, 1977).

[6] *See* Securities Exchange Act Release No. 14056 (October 17, 1977), 42 FR 56706 (October 27, 1977).

[7] Securities Exchange Act Release No. 14878 (June 22, 1978).

[8] Securities Exchange Act Release No. 15027 (August 3, 1978), 43 FR 35766 (August 11, 1978).

[9] Specifically, the study examined the SRO's options surveillance programs in light of the requirements of the Act that the SRO be organized and have the capacity "to carry out the purposes of [the Act] and to comply, and . . . to enforce compliance by its members, with the provisions of [the Act], the rules and regulations thereunder," and the rules of the exchange. *See* Section 6(b)(1) of the Act. The investigation also focused on whether the rules of the SRO, as required by the Act, were designed to prevent fraudulent, deceptive and manipulative acts and practices, to promote just and equitable principles of trade, . . . to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. *See* Section 6(b)(5) of the Act.

[10] *See* H. R. Rep. No. IFC-3, 96th Cong., 1st Sess. (Comm. Print 1978).

[11] Securities Exchange Act Release No. 16701 (March 26, 1980), 45 FR 21426 (April 1, 1980).

[12] *See* File No. SR-NYSE-83-23 Securities Exchange Act Release No. 19462 (January 28, 1982), 48 FR 5640 (February 7, 1983).

[13] *See* File No. SR-NYSE-83-52 Securities Exchange Act Release No. 20663 (February 17, 1984), 49 FR 7171 (February 27, 1984).

[14] The NYSE's proposal to participate in the options exchanges' allocation process subsequently has been codified in File No. SR-NYSE-84-10.

[15] On January 9, 1984, the NYSE sent letters to each of the four options exchanges requesting inclusion in the lottery for options on the RHC stocks. *See e.g.*, letter from John J. Phelan, Jr., President, NYSE, to Robert Birnbaum, President, Amex. By letter dated March 9, 1984 to each of the options exchanges participating in the Allocation Plan, Douglas Scarff, Director of the Division of Market Regulation, requested that each exchange either refrain from conducting any further option allocation proceedings or make a provision for the NYSE to participate conditionally in those proceedings. The existing stock options exchanges have responded by indicating a willingness not to call any further allocation proceedings while the NYSE proposal remains under consideration by the Commission. *See e.g.*, letter from Nicholas A. Giordano, President, Philadelphia Stock Exchange, to Douglas Scarff, dated March 30, 1984.

[16] The NYSE indicates that it has modeled its rules covering the trading of individual listed-stock options after the rules of the Amex presently applicable to such options.

[17] The NYSE proposal notes that the individual listed-stock option standards will include: (i) market criteria of trading volume of 2.4 million shares in the preceding 12 months, 7 million publicly held shares, a market price of $10 per share and 6,000 shareholders and (ii) an issuer criterion of aggregated consolidated net income of $1 million during the preceding eight quarters.

[18] This is the manner in which the options markets are organized on Amex and Phlx.

proposal, however, would preclude a stock specialist from acting as either a specialist or a COT in individual options on his specialty stocks. In addition, NYSE Rule 793, which requires members to furnish books, records and other information about securities transactions, would be amended to include individual stock options in order to insure that the NYSE has access to books and records of members and member organizations reflecting their activity in individual listed-stock options as well as underlying stocks.

The NYSE proposal also would prohibit the trading of options and underlying equities at the same physical location ("side-by-side trading") and simultaneous marketmaking in an individual listed stock option contract and the underlying security ("integrated trading"). The NYSE further proposes, at least initially, to prohibit specialists from "popularizing" either their specialty option or the underlying security, orally or in writing.[19]

C. Request for Comments

The Commission invites comment on the specific aspects of the NYSE proposal discussed below. We also encourage commentators to comment upon aspects of the NYSE proposal not addressed here. Commentators are requested to be as specific as possible in discussing the NYSE proposal and in recommending any changes they believe the NYSE proposal may require.

The NYSE 1977 proposal differed in a number of respects from the current NYSE proposal. The NYSE proposed in 1977 to trade options on stocks that already were the subject of options trading on another exchange. It also proposed to permit both side-by-side and integrated trading of options and their underlying stocks. Based in part on these features of the 1977 NYSE proposal, the Options Study raised a number of questions about NYSE entry into the options market, including concerns about potential NYSE domination of the options market and NYSE specialist market information advantages.

The Options Study suggested imposing the following conditions on the NYSE's entry into the options market in order to "minimize competitive advantages that the NYSE may enjoy as a result of its predominant position in the securities markets generally and in underlying securities particularly." [20]

1. NYSE stock specialists and registered stock marketmakers would not be permitted to trade options on their specialty stocks except perhaps for the purpose of hedging in a manner to be approved by the Commission.

2. NYSE stock specialists and registered stock marketmakers would not have access to the options trading floor, and NYSE options marketmakers would not have access to the NYSE stock trading floor under any circumstances.

3. NYSE stock specialists and registered stock marketmakers who enter option orders and option marketmakers who enter stock orders would be required to enter such orders in the same manner as other market participants who did not have direct access to the NYSE floor.

4. Quotation and transaction information concerning stock and options trading activity would be transmitted between the NYSE stock and options floors only in the same manner that it is currently disseminated between NYSE and the options exchanges.

5. The NYSE options program would be maintained as a separate cost center such that stock revenues and income could not be utilized to subsidize options operations.

The Commission invites commentators to discuss these recommendations in light of the modifications made in the current NYSE proposal, as well as the other specific matters raised below.

1. *The NYSE as a primary market: market information and manipulation concerns.* As the primary market for its listed stocks, the NYSE attracts far more orders and has more volume in these stocks than other exchanges trading these stocks.[21] Consequently, the NYSE floor participants are likely to possess more material market information about these stocks than traders on the other exchanges. This was underscored by the Options Study:

> The larger the percentage of total volume and order flow for an underlying security, the more likely it may be that the exchange will become the exclusive reservoir for market information that might influence the price of the underlying stock.[22]

It can be argued that when options are traded on the same exchange as the primary exchange of the underlying stock, market information concerning the underlying stock is more readily accessible to market professionals and, therefore, more susceptible to misuse. In this connection, the Options Study explained how certain advantages may inure to market professionals on the primary exchange:

> * * * The presence of these professionals on an exchange floor frequently permits them to react virtually instantaneously to the market information that they obtain and to enter, and perhaps execute, their orders before others can receive and act upon information that may be publicly disseminated.[23]

Indeed, as the Options Study indicated, primary market floor participants have access to information not obtainable by others:

> Market participants who are not on an exchange floor . . ., may never become aware of information concerning unexecuted orders, indications of buying and selling interest in a trading crowd, and the trading styles of particular market participants because no mechanism exists for publicly disseminating such valuable market information.[24]

The Options Study also raised concerns regarding enhanced potentials for manipulation in an integrated trading environment. In particular, floor professionals may be able to reduce the risks of engaging in a manipulation through their ability to personally observe trading of both the option and the underlying stock. As a result, a floor participant may be better able to gauge any present or anticipated buying or selling interest in the market and therefore more accurately to calculate the risks and costs of any stock/option manipulation.

To reduce manipulation concerns and avoid the misuse of market information, the NYSE has included prohibitions against integrated trading and side-by-side trading in its proposal. The NYSE proposal also provides certain other safeguards against the use of non-public market information concerning an underlying stock. In trading both broad- and narrow-based index options, the NYSE options floor is physically separated from its equity floor. In addition, the NYSE's index options rules restrict electronic communications of NYSE options market participants to the

[19] The term popularizing is defined to mean the issuance of advertisements, market letters, sales literature, research reports, buy or sell recommendations or any other communication with the public, oral or written, by the specialist or a person associated with the specialist, and in solicitation of customers' order with respect to any option in which the specialist is registered. Rule 750 currently permits popularizing by NYSE options specialists with respect to broad-based index options but not with respect to industry index options.

[20] *See* Options Study, at p. 1022–23.

[21] *See* note 39, *infra.*

[22] *See* Options Study, at p. 904.

[23] In addition, floor members do not pay brokerage commissions when executing their own orders and receive more favorable margin treatment for their positions than other market participants. *Id.*, at pp. 881–882.

[24] *Id.*

NYSE equity floor to those available to market professionals on the floors of other options exchanges. The same provision would apply to the trading of individual stock options.

As noted above,[25] to deal with potential manipulation concerns and market information and related advantages of NYSE trading of stock options, the Options Study recommended several conditions on such an NYSE program. The NYSE has proposed restrictions designed to meet certain of these concerns. The NYSE proposal does not, however, contain the types of restrictions on principal activity of supplemental stock and options marketmakers discussed in the Options Study.[26] The Commission invites comments on the continued appropriateness of these conditions, as well as the NYSE's responses.[27] In addition, commentators are asked to address the following subjects:

(a) Commentators are requested to discuss the specific components of an effective surveillance program, particularly with a view to the special surveillance warranted by the physically and electronically proximate locations of the NYSE equity and options floors.

(b) NYSE specialists currently are not permitted to trade options on their specialty stocks. The NYSE, however, has proposed to permit its stock specialists to trade overlying options for bona fide hedging purposes.[28] Commentators are urged to consider whether there are any additional issues raised with respect to this proposal by the NYSE options proposal. NYSE rules currently permit NYSE floor participants in other contexts to trade listed stock options, but do not permit them to trade a stock once they have established an options position. The NYSE has proposed to remove any restrictions on options trading by NYSE floor participants in these other contexts.[29] Commentators also are urged to examine this proposal in light of the NYSE options proposal.

(c) Commentators are requested to identify whether any conditions instead of or in addition to those set forth in the Options Study would alleviate the concerns regarding misuse of market information by primary exchange market professionals.

2. *The Future of the Allocation Plan: Competitive Concerns.* At the same time it terminated the options moratorium, the Commission indicated it would not object if the existing options exchanges [30] were jointly to devise and agree upon a fair and equitable method of allocating among themselves additional options on those stocks satisfying current listing standards. In May 1980, the options exchanges agreed upon an allocation scheme (the "Allocation Plan") that was filed with and approved by the Commission.[31] The Allocation Plan, which has subsequently been amended several times,[32] established a method of allocating additional put and call options on individual stocks among the four existing options exchanges—Amex, CBOE, Phlx, and PSE.

The Allocation Plan does not explicitly address procedures for the participation of additional options exchanges. On March 9, 1984, the Commission staff sent letters to each of the other four options exchanges requesting that, in light of the NYSE options proposal, the options exchanges either refrain from conducting any additional lotteries or make provisions conditionally to include the NYSE in any new lotteries.[33] In making that recommendation, the Commission staff noted that the lottery method of allocation has not been formally reconsidered by the Commission since its inception after the termination of the options moratorium in early 1980. Consideration of the NYSE proposal would provide an opportunity to examine the experience of the exchanges under the lottery system and the appropriateness of extending it.

In considering the appropriateness of expanding the present allocation approach to the NYSE, commentators are asked to address the following specific issues.

(a) At this time, options are traded by the four existing stock options exchanges on approximately 380 equity securities. Presumably, these are the stocks perceived by the options exchanges to be the most attractive for options trading. In this regard, it is noteworthy that, with a few exceptions, the approximately 150 new stock options introduced since the moratorium's termination have not been among the most active stock options. Hence, commentators are asked to assess the ability of the NYSE (or any new entrant) successfully to enter the market for individual stock options if only permitted to receive a few stocks through participation in an extended options Allocation Plan.

(b) Commentators also are requested to consider the competitive implications for the exchanges with the largest market share of a perpetuation of an allocation system that allots equal numbers of new options classes to each participant, and thereby may serve to dilute the relative market share of the largest exchanges.[34]

(c) Commentators are urged to evaluate the effect of the current allocation system on the quality of the markets and services offered by the options exchanges. A principal advantage frequently cited for multiple trading over such an allocation system is that it increases the opportunities for direct competition between market centers, if not on an order-by-order basis, at least for execution, clearing and other services.[35] The advantage

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[25] *See* text at n. 20, *supra*.

[26] As discussed below, the NYSE makes no provision to operate its options program as a separate cost center.

[27] In this regard, commentators are also asked to consider whether there are any market efficiency gains from the participation of NYSE floor professionals which tend to offset concerns over possible misuse of information.

[28] *See* File No. SR–NYSE–82–20. Notice of this proposal was provided in Securities Exchange Act Release No. 19984 (July 19, 1983), 48 FR 34377 (July 28, 1983).

[29] *See* File No. SR–NYSE–82–19. Notice of this proposal was provided in Securities Exchange Act Release No. 20006 (July 26, 1983), 48 FR 35217 (August 3, 1983).

[30] At that time, only the Amex, CBOE, Phlx and PSE had options trading programs. The MSE's options program was discontinued after its existing call options classes were incorporated in the CBOE's options program.

[31] Approval of the original Allocation Plan was published in Securities Exchange Act Release No. 16863 (May 30, 1980), 45 FR 37928 (June 5, 1980).

[32] In 1981, the Allocation Plan was amended to provide for the replacement of involuntarily delisted options. In 1982, the Plan was amended further to establish OCC as an impartial arbitrator to administer certain aspects of the Plan and to enable each options exchange to select 10 additional underlying securities. Finally, in 1984, the Plan was amended to establish a random order of allocation. *See* Securities Exchange Act Release Nos. 17757 (April 27, 1981), 18464 (February 2, 1982), 18493 (February 17, 1982), and 20793 (March 8, 1984), respectively.

[33] *See, e.g.*, letter from Douglas Scarff, Director, Division of Market Regulation, SEC, to Robert Birnbaum, President, Amex, dated March 9, 1984.

[34] In commenting on Amex's proposal to list options on narrow-based stock indices, the CBOE stated that the trading of such options:

> Should occur in an environment that has a minimum of competitive restrictions. The idea of free and open competition would dictate that each exchange be permitted to list options on industry indices without numerical limitation. At a minimum, in order to be competitively neutral, any limitation on the number of such listings should correlate to the current market share of each exchange.

Letter from Walter E. Auch, Chairman, CBOE, to John S.R. Shad, Chairman, SEC, dated August 10, 1983. In evaluating the CBOE's alternative proposal, commentators are asked to consider how new market entrants would allocated options to correlate allocation to market share.

[35] *See* Securities Exchange Act Release No. 16701 at 26–27, March 26, 1980 ("Moratorium Termination Release").

would appear to be present with respect to NYSE entry into the market for prospectively introduced individual stock options as well as between the existing stock options exchanges. [36]

(d) A principal concern raised by multiple trading has been whether there can be a fair field of competition if the market, rather than a lottery, is relied on to allocate new options classes, especially in the absence of order-by-order routing. [37] In addition, commentators have suggested that NYSE entry, because of its position as the predominent stock market, would exacerbate this concern. Commentators are requested to consider whether this concern remains valid, particularly in light of the NYSE's failure to dominate the market for either index options or index futures.

(e) An additional concern noted by the Commission in the past has been the effects of multiple trading onthe existing market structure. [38] Commentators are asked to examine this question from the perspective of a program that only permitted multiple trading for prospectively traded listed stock options. [39]

[36] In the course of interviewing a substantial number of retail brokerage firms and institutional options investors in connection with a study of the futures and options markets, as mandated by Congress, the Commission's staff has received repeated expressions of concerns: (i) That the rapid growth of index options trading has had a serious and adverse effect on the liquidity of a number of individual options; and (ii) that, totally apart from index options trading, there are significant differences in the quality of the markets made, and in particular the liquidity of markets on, different options exchanges. Comment is sought on both of these assessments.

[37] The reason order-by-order routing has been held to be difficult or impossible on a routine basis is because of the absence of firm quotes in the options markets. In this regard, commentators are urged to consider this issue in light of the NASD's options proposal, which contemplates the use of firm quotations.

[38] The Commission previously has indicated that the preservation of any particular market center cannot be determinative of its evaluation of the competitive consequences of a proposed course of action, but that it was concerned that an expansion of multiple trading on unrestrained basis might jeopardize the ability of some regional exchanges to participate as meaningful competitors in the evolving national market system for stocks. *See Moratorium Termination Release at n. 47.*

[39] The Commission previously has issued orders permitting multiple trading of non-equity and stock index options. In so doing, the Commission found that multiple trading in those contexts did not threaten to disrupt the existing market structure or jeopardize the financial stability of competing marketplaces. *See* Securities Exchange Act Release Nos. 18297 (December 2, 1981), 46 FR 60376 (December 9, 1981) (concerning non-equity options); and 19264 and 20075 (Novbemer 22, 1982 and August 12, 1983), 47 FR 53981 and 48 FR 37556 (November 30, 1982 and August 18, 1983) (concerning stock index options).

3. *NYSE predominance in the equity market.* NYSE predominance in the equity market is evidenced by many factors. Most significantly, the NYSE is the primary market for all NYSE listed stocks. [40] In addition, it has greater financial resources than the other exchanges; [41] greater equity capital associated with its specialists; and unique internal communications networks and sophisticated order routing systems to which many broker-dealers have adapted execution and other systems.

Previous commentators have asserted that the NYSE's overall reputation as the primary market with regard to equity trading compels broker-dealers, investors and listed companies automatically to seek out the NYSE, thereby more firmly establishing its dominance in this market. [42] Discussing the comment letters received in connection with the 1977 NYSE proposal to trade individual stock options, the Options Study addressed whether this phenomenon likely would be transferred automatically to a newly implemented NYSE options program: [43]

> To the extent that an NYSE options market capitalizing on NYSE's financial, market making facilities and other resources as well as NYSE's primary stock market designation and public image as the nation's premier securities market, may attract options order flow and market making talent from the other options exchanges, it may . . . eventually extend NYSE's dominance of the securities markets to options trading and overwhelm weaker competitors in that market.

We encourage commentators to address the following specific questions:

(a) The Options Study has suggested that as a possible condition to NYSE entry into the standardized options market, the NYSE might operate its options program as a separate cost-center such that equity revenues and income could not be used to subsidize options operations. [44] Commentators might address whether NYSE participation in the options market subject to the condition suggested here, or otherwise, would permit the other exchanges to compete with the NYSE on a more equitable basis. Commentators are also requested to discuss whetheehr such a requirement would, in effect, act as a practical bar to NYSE entry into the individual stock options market. In this connection, the Commission understands that marketing and operational costs have generally far exceeded revenues during the first few months after introduction of new options products. [45]

(b) Commentators should note that the NYSE, historically, has used its resources for the purposes of innovation and assuring efficiency in its order-routing, execution and intermarket communications systems in connection with the equities market. Commentators should consider the impact of NYSE's "superior" resources on competition between the options markets, in the absence of predatory practices or other misuse of its resources.

(c) Comment is also requested regarding whether the predominant position of the NYSE in the equities

[40] In February 1984, the number of shares in NYSE listed stocks traded on the NYSE accounted for 84.83 percent of the consolidated share volume in NYSE listed stocks (*i.e.*, share volume on all exchanges and the NASD). The NYSE had 79.9 percent of all consolidated share volume in stocks listed on the NYSE or AMEX (including regionally traded stocks that would satisfy the NYSE or AMEX listing standards).

At least one commentator has argued that one reason the NYSE is able to attract greater equity order flow than other exchanges is because many of its specialists control numerous books. This commentator asserts that NYSE Specialists can offer discounts on brokerage in other securities and/or in the multiple traded security itself in order to attract order flow. In addition, the NYSE's market power in all of its specialty securities may make member firms reluctant to redirect order flow in a particular security because of the fear of "reprisals" in other stocks. *See* the Options Study, at p. 991, citing the letter to George A. Fitzsimmons, Secretary, Securities and Exchange Commission, from Joseph W. Sullivan, President, CBOE (September 22, 1978) (the "CBOE letter"). Commentators are requested to discuss whether these allegations have any factual basis and to provide where relevant, examples of such activity.

[41] At year end 1982, NYSE revenue was $168,984,000. By comparision, the revenue of the CBOE and Amex, the two largest optinos exchanges, was $35,796,500 and $56,525,000, respectively. Prior commentators stated that the NYSE's resources would permit it "to far out-spend other exchanges in an effort to initiate and promote its options program." *See* the Options Study, at p. 997, citing the letter to George A. Fitzsimmons, Secretary, Securities and Exchange Commission, from Robert J. Birnbaum, President, Amex (September 29, 1978) (the "Amex leter").

[42] *See* the Options Study, at p. 993, citing the Amex letter and the CBOE letter.

[43] *See* Options Study, at p. 1008.

[44] *See* Options Study, at p. 1023.

[45] In approving an NYSE proposal to permit members of other securities and commodities exchanges to have free access to the NYSE options floor for a limited period of time, the Commission observed that both the NYSE and the other options exchanges have incurred substantial start-up costs in launching new product markets. *See* Securities Exchange Act Release No. 20202 (September 20, 1983), 48 FR 43752 (September 26, 1983). In the context of the NYSE's index options proposal, the Commission concluded that it would be inappropriate to single out the NYSE's program as an improper cross-subsidization in the face of similar efforts by other exchanges developing new products. Commentators are urged to address with particularity the basis, if any, for reaching a different conclusion in connection with the NYSE stock options proposal.

market is, in fact, likely to cause NYSE domination of the options market, particularly given the fact that the NYSE has been unable to achieve dominance in the stock index options and futures markets against previously established markets.[46]

(d) Finally, comment is requested regarding the relevancy of the competitive concerns discussed above if NYSE individual stock options listings are derived solely from prospective participation in allocation of new stock options classes among the options exchanges.

All interested persons are invited to submit in writing no later than June 15, 1984, 15 copies of their views concerning the proposed rule change to George A. Fitzsimmons, Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. All communications should refer to File No. SR–NYSE–84–3. All communications will be available for public inspection at the Commission's Public Reference Room, 450 Fifth Street NW., Washington, DC 20549.

For the Commission, by the Division of Market Regulation pursuant to delegated authority.

Dated: May 2, 1984.

George A. Fitzsimmons,

Secretary.

[FR Doc. 84–12306 Filed 5–7–84; 8:45 am]

BILLING CODE 8010–01–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Art Advisory Panel; Closed Meeting

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of Closed Meeting of Art Advisory Panel.

SUMMARY: A closed meeting of the Art Advisory Panel will be held in Washington, D.C.

DATE: The meeting will be held June 7 and 8, 1984.

FOR FURTHER INFORMATION CONTACT: Karen Carolan, CC:C:E:V, 1111 Constitution Avenue, N.W., Room 2575, Washington, D.C., 20224, Telephone No. (202) 566–4138, (not a toll free number).

Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. app. (1976), that a closed meeting of the Art Advisory Panel will be held on June 7 and 8, 1984, beginning at 9:30 a.m. in Room 3411, Internal Revenue Service Building, 1111 Constitution Avenue, NW., Washington, D.C. 20224.

The agenda will consist of the review and evaluation of the acceptability of fair market value appraisals of works of art involved in federal income, estate, or gift tax returns. This will involve the discussion of material in individual tax returns made confidential by the provisions of section 6103 of Title 26 of the United States Code.

A determination as required by section 10(d) of the Federal Advisory Committee Act has been made that these meetings are concerned with matters listed in section 552b(c)(3), (4), (6), and (7) of Title 5 of the United States Code, and that the meetings will not be open to the public.

This document does not meet the criteria for significant regulations set forth in paragraph 8 of the Treasury Directive appearing in the **Federal Register** for Wednesday, November 8, 1978. (43 FR 52122.)

Roscoe L. Egger, Jr.,

Commissioner.

[FR Doc. 84–12375 Filed 5–7–84; 8:45 am]

BILLING CODE 4830–01–M

VETERANS ADMINISTRATION

Agencys Form Under OMB Review

AGENCY: Veterans Administration.

ACTION: Notice.

SUMMARY: The Veterans Administration has submitted to OMB for review the following proposals for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). This document contains proposed revisions and extensions and lists the following information: (1) The Department or Staff Office issuing the form; (2) The title of the form; (3) The agency form number, if applicable; (4) How often the form must be filled out; (5) Who will be required or asked to report; (6) An estimate of the number of responses; (7) An estimate of the total number of hours needed to fill out the form; and (8) An indication of whether section 3504(h) of Pub. L. 96–511 applies.

ADDRESSES: Copies of the forms and supporting documents may be obtained from Patricia Viers, Agency Clearance Officer (732), Veterans Administration, 810 Vermont Avenue NW., Washington, DC 20420, (202) 389–2146. Comments and questions about the items on this list should be directed to the VA's OMB Desk Officer, Dick Eisinger, Office of Management and Budget, 726 Jackson Place, NW, Washington, DC 20503, (202) 395–6880.

DATES: Comments on the information collections should be directed to the OMB Desk Officer within 60 days of this notice.

Dated: May 2, 1984.

By direction of the Administrator.

Robert Schultz,

Director, Office of Information Management and Statistics.

Revisions

1. Department of Veterans Benefits
2. Certification of School Enrollment—REPS
3. VA Form 21–8926
4. Annually
5. Individuals or households
6. 900 responses
7. 225 hours
8. Not applicable

* * * * *

1. Department of Veterans Benefits
2. Veteran's Application for Compensation or Pension
3. VA Form 21–526
4. On occasion
5. Individuals or households
6. 225,657 responses
7. 300,876 hours
8. Not applicable

Extension

1. Office of Construction
2. Daily Report of Workmen and Material; Daily Log—Formal Contract
3. VA Form 08–6131
4. Every workday
5. Businesses of other for-profit; Small businesses or organizations
6. 300 responses
7. 13,000 hours
8. Not applicable

Extension

1. Department of Memorial Affairs
2. Verification of Eligibility for Burial in a National Cemetery
3. VA Form 40–4962
4. Completed for each decedent prior to burial in a national cemetery.
5. Federal agencies or employees
6. 44,684 responses
7. 7,447 hours
8. Not applicable.

[FR Doc. 84–2318 Filed 5–7–84; 8:45 am]

BILLING CODE 8320–01–M

[46] While the NYSE, and its wholly-owned subsidiary the New York Futures Exchange ("NYFE"), have established successful markets in options and futures on the NYSE Composite Index, in each instance contracts introduced previously have been able to maintain several times the trading volume garnered by the NYSE and NYFE contracts.

Availability of Reports of 38 U.S.C. 219 Program Evaluations

Notice is hereby given that the following program evaluations of the Veterans Administration have been completed: The Regional Medical Education Centers Program; the Audiology and Speech Pathology Program; and the Hospital Based Home Care Program.

Single copies of the evaluations are available free. Reproduction of multiple copies can be arranged at the user's expense.

Direct inquiries, specifying the name of the program evaluation desired, to Mrs. Lynn H. Covington, Director, Program Evaluation Service, Veterans Administration (074), 810 Vermont Avenue NW., Washington, DC 20420.

Dated: May 1, 1984.

By direction of the Administrator.

Everett Alvarez, Jr.,

Deputy Administrator.

[FR Doc. 84-12317 Filed 5-7-84; 8:45 am]

BILLING CODE 8320-01-M

Sunshine Act Meetings

Federal Register
Vol. 49, No. 90
Tuesday, May 8, 1984

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

CONTENTS

1

CONSUMER PRODUCT SAFETY COMMISSION

TIME AND DATE: 10:00 a.m., May 9, 1984.

LOCATION: Third Floor Hearing Room, 1111-18th Street, NW., Washington, D.C.

STATUS: Open to the Public.

MATTERS TO BE CONSIDERED.

1. Export Policy, CPSA and FHSA

The staff will brief the Commission on issues related to comments received on possible changes to the Commission's export policy under the Consumer Product Safety Act and Federal Hazardous Substances Act.

2. Squeeze Toys—Voluntary Standard Status Report

The staff will brief the Commission on progress of voluntary standards activities regarding squeeze toys.

3. Strong Sensitizers Definition: Final Rule

The staff will brief the Commission on a draft final rule to revoke the definition of "strong sensitizer" in 16 CFR, Part 1500.3(c)(5), Federal Hazardous Substances Act Regulations.

For a recorded message containing the latest agenda information call:

CONTACT PERSON FOR ADDITIONAL INFORMATION: Sheldon D. Butts, Office of the Secretary, 5401 Westbard Ave., Bethesda, Md. 20207, 301-492-6800.

Sheldon D. Butts,

Deputy Secretary.

[FR Doc. 84-12477 Filed 5-4-84; 2:32 pm]

BILLING CODE 6355-01-M

2

FEDERAL COMMUNICATIONS COMMISSION

May 3, 1984.

FCC To Hold a Closed Commission Meeting Thursday, May 10, 1984.

The Federal Communications Commission will hold a Closed Metting on the subjects listed below on Thursday, May 10, 1984 following the Open Meeting, which is scheduled to commence at 9:30 a.m. in Room 856, at 1919 M Street, NW. Washington, D.C.

Agenda, Item No., and Subject

Hearing—1—Applications for Review in the Houma, Louisiana comparative television proceeding (BC Docket Nos. 80-484 and 80-487).

Hearing—2—Judicial remand in the Muncie, Indiana FM radio comparative proceeding (BC Docket Nos. 80-97 and 80-98).

These items are closed to the public because they concern Adjudicatory Matters (See 47 CFR 0.603(j)).

The following persons are expected to attend:

Commissioners and their Assistants
Managing Director and members of his staff
General Counsel and members of his staff
Chief, Office of Public Affairs and members of his staff

Action by the Commission May 2, 1984. Commissioners Fowler, Chairman; Quello. Dawon, Rivera and Patrick voting to consider these items in Closed Session.

This meeting may be continued the following work day to allow the Commission to complete appropriate action.

Additional information concerning this meeting may be obtained from Sally Lawrence. FCC Public Affairs Office, telephone number (202) 254-7674.

Issued: May 3, 1984.

William J. Tricarico,

Secretary, Federal Communications Commission.

[FR Doc 84-12433 Filed 5-4-84; 10:48 am]

BILLING CODE 6712-0-M

3

FEDERAL COMMUNICATIONS COMMISSION

May 3, 1984.

FCC To Hold Open Commission Meeting, Thursday, May 10, 1984

The Federal Communications Commission will hold an Open Meeting on the subjects listed below on Thursday, May 10, 1984, which is scheduled to commence at 9:30 a.m., in Room 856, at 1919 M Street, NW., Washington, D.C.

Agenda, Item No., and Subject

General—1—Title: Preparation for an International Telecommunication Union Region 2 Administrative Radio Conference for the Planning of Broadcasting in the 1605-1705 kHz Band. Summary: The Commission will consider whether to adopt the First Notice of Inquiry in this proceeding, which would solicit comments to assist in the development of U.S. proposals and positions for the above-named Conference.

General—2—Title: In the matter of an Inquiry relating to preparation for an International Telecommunication Union World Administrative Radio Conference on the Use of the Geostationary-Satellite Orbit and the Planning of the Space Services Utilizing It. (GEN Doc. No. 80-741) Summary: The Commission will consider adoption of a *Fourth Notice of Inquiry* addressing the central issue of the Conference first session—the appropriate mechanisms that give everyone assurance that their needs will be met as they arise.

Private Radio—1—Title: Memorandum Opinion and Order in the Matter of Application for Review by Motek Engineering regarding action by the Chief, Private Radio Bureau, reclaiming 15 of Motek's 20 authorized 800 MHz channels for Motek's failure to load its system in accordance with Rule 90.366(d). Summary: The Commission will consider Motek's request for waiver of the minimum loading requirements of Rule 90.366(d).

Common Carrier—1—Title: Satellite Business Systems' Petition to Modify Conditions of Authorization, File No. ENF-83-16. Summary: The Commission will consider whether to grant SBS' petition seeking removal of certain Commission-imposed marketing restrictions.

Common Carrier—2—Title: Blanket Section 214 Authorization for Provision by a Telephone Common Carrier of Lines for its Cable Television and other Non-Common Carrier Services Outside its Telephone Service Area. Summary: Report and Order on granting Section 214 authorization for certain categories of lines constructed by common carriers.

Common Carrier—3—Title: Amendment of Part 31, Uniform System of Accounts for Class A and B Telephone Companies. Summary: The Commission will consider adopting a Notice of Inquiry, seeking comment as to the advisability of amending Part 31, Uniform System of Accounts (USOA), to revise the existing accounting for cost of removal, salvage value and reusable material.

Common Carrier—4—Title: Revision of the Uniform System of Accounts for Telephone Companies (Parts 31, 33, 42, and 43 of the FCC's Rules) Summary: The Commission will consider adopting a Notice of Proposed Rulemaking for Telephone Companies to accommodate generally accepted accounting principles in the revised USOA.

Common Carrier—5—Title: MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, and Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145. Summary: The Commission will

consider issues relating to: (1) Switched access portions of the pending access tariffs; and (2) costs and rates of long distance carriers subject to access tariffs.

Mass Media—1—Title: "Petition for Declaratory Ruling and for Special Relief" and "Motion for Expedited Treatment, For Issuance of Show Cause Order, and for institution of Forfeiture Proceeding" filed by Sainte Broadcasting Corporation, licensee of Television Broadcast Station KCBA. Channel 35, Salinas, California. Summary: Sainte Broadcasting Corporation seeks a declaratory ruling concerning the carriage of Station KCBA by Monterey Peninsula TV Cable on its system via converters.

Mass Media—2—Title: Petitions for Reconsideration, filed by Joseph Ferris, State of New York, Assemblyman from Brooklyn, New York, and by the United Church of Christ, Office of Communications; and Petition for Clarification, filed by the Society for Private and Commercial Earth Stations, of the Commission's decision in *Earth Satellite Communications, Inc.* Summary: The Commission will consider 1) requests to reconsider its decision, which preempts local and state regulation of Satellite Master Antenna Television (SMATV) systems, and 2) requests to clarify the decision and issue statements regarding FCC regulation of SMATV, and limitation or preemption of local zoning ordinances dealing with receive-only satellite earth stations and amateur antenna systems located on residential property.

Mass Media—3—Title: Applications of Satellite Television Corporation for modification of construction permit to establish an interim Direct Broadcast Satellite System and for authority to construct and operate a related earth station, and a petition to deny that modification application by Direct Broadcast Satellite Corporation. Summary: The Commission considers STC's modification application pursuant to the Commission's Processing Order following the Final Acts of RARC–83, wherein STC requests specific channels and orbital positions for its previously approved DBS service, as well as STC's earth station application; the Commission also considers a petition to deny the modification application filed by Direct Broadcast Satellite Corporation alleging that STC's amendment constitutes a major change in its proposed facilities.

Mass Media—4—Title: Application for Review of grant by delegated authority of the application of Creative Educational Media, Inc. for a new non-commercial FM Radio Station at Broken Arrow, Oklahoma. Summary: The Commission will consider whether to grant the application for review or whether to affirm the grant of the application for a new station.

Mass Media—5—Title: License Renewal Applications of Tulsa 23, A Limited Partnership, for Station KOKI–TV and University of Tulsa for Station KWGS–FM, Tulsa, Oklahoma. Summary: The Commission considers a petition to deny filed by the Tulsa Branch of the NAACP and the National Black Media Coalition alleging that the licensees have not complied with the Commission's EEO rule.

Mass Media—6—Title: License Renewal Application of Storer Broadcasting Company for Station WJBK–TV, Detroit, Michigan. Summary: The Commission considers an informal objection filed by the Statewide Media Accountability Coalition alleging that the licensee has not complied with the Commission's public file and EEO rules and that its programming has not met the needs of minority viewers.

Mass Media—7—Title: Application for Review filed by Mary DeBalsi of the Bureau's ruling of November 7, 1984. Summary: The Commission will consider whether or not to reverse the Bureau's ruling that there is no individual right of access to the airwaves.

This meeting may be continued the following work day to allow the Commission to complete appropriate action.

Additional information concerning this meeting may be obtained from Sally Lawrence, FCC Public Affairs Office, Telephone number (202) 254–7674.

William J. Tricarico,

Secretary, Federal Communications Commission.

[FR Doc. 84–12434 Filed 5–4–84; 10:48 am]

BILLING CODE 6712–01–M

4

FEDERAL RESERVE SYSTEM

TIME AND DATE: 11:00 a.m., Monday, May 14, 1984.

PLACE: 20th Street and Constitution Avenue, NW., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204.

Dated: May 4, 1984.

William W. Wiles,

Secretary of the Board.

[FR Doc. 84–12485 Filed 5–4–84; 3:32 pm]

BILLING CODE 6210–01–M

federal register

Tuesday
May 8, 1984

Part II

Department of Labor

Mine Safety and Health Administration

30 CFR Part 75

Safety Standards for Underground Coal Mines; Explosives and Blasting; Availability of Preproposal Draft and Schedule of Public Conferences

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Part 75

Safety Standards for Underground Coal Mines; Explosives and Blasting

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice of availability of preproposal draft and schedule of public conferences.

SUMMARY: The Mine Safety and Health Administration (MSHA) has developed a preproposal draft of revisions to existing standards for the use of explosives in underground coal mines. MSHA seeks written comments on this preproposal draft from all interested parties. In addition, MSHA will conduct public conferences in Lexington, Kentucky and Pittsburgh, Pennsylvania to discuss the preproposal draft.

DATES: *Comments.* Written comments on the preproposal draft must be received on or before July 20, 1984.

Conferences: The conferences will be held at the following locations on the dates indicated, beginning at 9:00 am.: June 12, 1984, Lexington, Kentucky; June 14, 1984, Pittsburgh, Pennsylvania.

ADDRESSES: *Comments.* Send requests for and written comments on the preproposal draft to the Office of Standards, Regulations and Variances, MSHA, Room 631, Ballston Tower #3, 4015 Wilson Boulevard, Arlington, Virginia 22203, telephone (703) 235–1910.

Conferences: The conferences will be held at the following locations on the dates indicated beginning at 9:00 a.m.:

1. June 12, 1984, Holiday Inn North; Thoroughbred Room, First Floor; 1950 Newtown Pike, Lexington, Kentucky;

2. June 14, 1984, Bureau of Mines Auditorium, 4800 Forbes Avenue, Pittsburgh, Pennsylvania.

If possible, persons planning to speak at a public conference should notify the Office of Standards, Regulations and Variances at least five days prior to the conference date.

FOR FURTHER INFORMATION CONTACT: Patricia W. Silvey, Director, Office of Standards, Regulations and Variances, MSHA, (703) 235–1910.

SUPPLEMENTARY INFORMATION: On July 9, 1982, MSHA published an Advance Notice of Proposed Rulemaking in the **Federal Register** (47 FR 30025) announcing a comprehensive review of the underground coal mining standards in 30 CFR Part 75. The Agency is reviewing the standards to eliminate unnecessary reporting and recordkeeping requirements, minimize conflicting provisions, delete irrelevant standards, simplify and consolidate existing standards, update standards to conform to state-of-the-art technology, and to clarify and reorganize standards, where necessary.

This review is consistent with the goals of Executive Order 12291, the Regulatory Flexibility Act, the Paperwork Reduction Act, and the Department of Labor's initiatives with respect to improving regulations. MSHA considers early public participation in this standards review process to be particularly important.

MSHA has now completed development of preproposal safety standards for use of explosives in underground coal mines. The Agency requests comments on the substance of the preproposal standards, as well as on the reorganization of the standards. In addition, the Agency is interested in economic data and other regulatory impact information.

Copies of the preproposal draft have been mailed to persons and organizations known to be interested. Other interested persons and organizations may obtain a copy of the draft by either oral or written request to the address provided above. The document contains the Agency's intended revisions, a comparison with existing provisions, and brief explanations of the draft changes.

MSHA is in the process of developing preproposal drafts on Parts 15, 16, 17 and 25, which would set forth the requirements for approval of explosives, sheathed explosive units, water stemming bags, electric detonators, and blasting units, respectively. These draft approval requirements will be consistent with the substantive safety provisions in this preproposal draft and will be made available to the public in the near future.

Public Conferences

The purpose of the public conferences is to provide a forum for the free and open exchange of ideas in an informal setting. Each conference will begin at 9:00 a.m. All persons making timely, written requests to speak will have time allotted to them for their presentations. The request should identify the person and organization, the amount of time requested for the presentation and the location where the presentation will be made. Although written statements are not required, participants are encouraged to submit written materials in support of their views.

Other persons wishing to speak should register prior to each conference at the beginning of the public session. If time is limited, priority will be given to those who have requested time in advance. Interested persons may request that speakers clarify their comments or provide additional information during the conference.

A formal transcript of these conferences will not be made. Following the conferences, MSHA welcomes additional written comments relevant to issues concerning the preproposal drafts. Following the public conferences, MSHA will develop revised standards which will be published as proposed rules in the **Federal Register.** The proposals will be followed by a comment period and public hearings. In issuing its final rules, MSHA will make every effort to be responsive to the concerns of the coal mining community and to advance the goals of regulatory relief and improved miner safety and health.

Dated: May 3, 1984.

David A. Zegeer,

Assistant Secretary for Mine Safety and Health.

[FR Doc. 84–12292 Filed 5–7–84; 8:45 am]

BILLING CODE 4510–43–M

federal register

Tuesday
May 8, 1984

Part III

Environmental Protection Agency

40 CFR Part 191

Environmental Standards for the Management and Disposal of Spent Nuclear Fuel, High-Level and Transuranic Radioactive Wastes; Notice of Availability; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 191

[ORP-FRL-2583-8]

Environmental Standards for the Management and Disposal of Spent Nuclear Fuel, High-Level and Transuranic Radioactive Wastes

AGENCY: U.S. Environmental Protection Agency.

ACTION: Notice of availability.

SUMMARY: The Environmental Protection Agency (EPA) has received a report from its Science Advisory Board (SAB) detailing the results of its review of the proposed EPA standards for the management and disposal of spent nuclear fuel, high-level and transuranic radioactive wastes (40 CFR Part 191). The SAB report contains many findings and recommendations (see the Supplementary Information section for a reprint of the executive summary), all of which the Agency is considering for incorporation into the final version of 40 CFR Part 191. This notice announces the availability of the report. Copies of the Science Advisory Board's report may be obtained by contacting the individual identified below. Those desiring to comment on the report should follow the instructions given below.

DATE: Comments will be of the greatest value if received on or before May 22, 1984. Comments will be accepted in either written form directly to the Central Docket Section (see address below) or by telephone on or before May 22, 1984 to the individual identified below, to be followed up with written comments to the Central Docket Section on or before May 29, 1984.

ADDRESSES: Comments should be submitted (in duplicate, if possible) to: Central Docket Section (LE–130), U.S. Environmental Protection Agency, Attn: Docket No. R–82–3, Washington, D.C. 20460.

Docket: Docket Number R–82–3, which contains all of the comments received on the proposed rule and the transcripts of the public hearings and the Science Advisory Board meetings, is located in the West Tower Lobby, Gallery 1, Central Docket Section, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, D.C. The docket may be inspected between 8:00 a.m. and 4:00 p.m. on weekdays. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Ray Clark (703) 557–8610, Waste Management Standards Branch (ANR–460), Office of Radiation Programs, U.S. Environmental Protection Agency, Washington, D.C. 20460.

SUPPLEMENTARY INFORMATION: In the January 5, 1983 **Federal Register** (48 FR 509), the Environmental Protection Agency announced the formation of a High-Level Radioactive Waste Disposal Subcommittee of the Agency's Science Advisory Board (SAB) to review the technical basis for the proposed 40 CFR Part 191, Environmental Standards for the Management and Disposal of Spent Nuclear Fuel, High-Level and Transuranic Radioactive Wastes (47 FR 58196). In conducting its investigation, this Subcommittee held nine public meetings (48 FR 509, 48 FR 4320, 48 FR 9935, 48 FR 15950, 48 FR 22360, 48 FR 29600, 48 FR 30188, 48 FR 36646, 48 FR 39688). The Subcommittee has completed its assignment and prepared its report. Following approval by the SAB's Executive Committee, the report was submitted to the Administrator on February 17, 1984.

The SAB report contains a number of findings and recommendations, all of which the Agency is considering incorporating into the final version of 40 CFR Part 191. The public is encouraged to comment on these findings and recommendations. The Agency is particularly interested in comments on recommendations B–1, C–2, D–1, G–2, and G–5.

The following is the complete text of the Executive Summary of the SAB report:

Executive Summary

The High-Level Radioactive Waste Disposal Subcommittee (HLRW) of the Executive Committee of the Science Advisory Board (SAB) has completed an extensive review of the scientific and technical basis for EPA's proposed rule for the disposal of high-level radioactive wastes, the highlights of which are presented in this summary.

Technologies now exist for the disposal of such wastes, and standards adopted for them should strike an appropriate balance between conservatism and practicality. Overall, the Subcommittee is confident that, consistent with the intent of this standard-setting program, the job of disposing of high-level radioactive waste can be achieved with reasonable assurance for the well-being of present and future generations.

The Subcommittee supports the general form of the proposed standards, including: (a) The use of a societal objective as an upper bound of acceptable health (cancer and genetic) effects, (b) the focus on performance standards in terms of release limits rather than individual exposures, (c) the reference level of the initial 10,000-year time frame applicable to both the societal objective and the release limits, (d) the use of a probabilistic approach, and (e) the use of qualitative assurance requirements, as modified by the Subcommitteee, but issued as Federal Radiation Protection Guidance to other Federal agencies in lieu of inclusion in the proposed rule.

The Subcommittee, while accepting the general form of the proposed standards, recommends several changes in the standards and improvements in the supporting methodology. The principal recommendations are highlighted in the following summation. A more comprehensive and detailed presentation of these and other major recommendations can be found in Section IV, Major Findings and Recommendations.

A. The Standard

1. *The Subcommittee recommends that the release limits specified in Table 2 of the proposed standards be increased by a factor of ten, thereby causing a related tenfold relaxation of the proposed societal objective (population risk of cancer.*[1] The Subcommittee notes that the proposed release limits are directly related to the societal objective of not exceeding 1,000 deaths in 10,000 years, and, thus, compliance with this recommendation carries with it a related tenfold increase in the societal objective. The relaxation of the release limits is, in the Subcommittee's opinion, justified for the following reasons: First, the proposed release limits in Table 2, and therefore the proposed societal objective, are considerably more stringent than those standards generally required or adopted in today's society. Second, in addition to the fact that some of the cancer deaths which might result from these releases are calculated using conservative assumptions that probably overestimate the number, some of these deaths would have resulted at least in part from the unmined ore from which the wastes were subsequently generated, and thus are substitutional rather than additional in nature. Third, the Subcommittee believes that the compounding of conservatism by EPA in the choice of probabilities and specific model parameters used throughout the analysis is not warranted.

[1] Two members of the Subcommittee, Dr. Lash and Dr. Giletti, dissent from this view. They believe that the Office of Radiation Programs' more stringent standard is justified and can be met by sufficient numbers of proposed disposal sites.

EPA should also clarify the analytical framework that forms the basis for the limits in Table 2 of the proposed standards. The Subcommittee believes that such clarification will help to establish clearly the relationship between the release limits and the societal objective, and will facilitate future amendments to the standard as knowledge increases regarding radiation health effects or radionuclide migration in the biosphere.

Note.—In Section IV, #7 (Models) and #13 (Geochemical Data), the Subcommittee has recommended that EPA make certain specific changes and corrections to their predictive models. Some of these changes will result in changes to the release limits for individual radionuclides given in Table 2 of the proposed standards, and will be separate from the tenfold change in the release limits recommended above. The Subcommittee believes that the changes in the release limits, resulting from the changes to the predictive models, are independent of and would not lead to additional modification to the proposed societal objective beyond the tenfold increase discussed above.

B. Uncertainty and the Standard

1. *We recommend that the probabilistic release criteria in the draft standard be modified to read "analysis of repository performance shall demonstrate that there is less than a 50% chance of exceeding the Table 2 limits, modified as is appropriate. Events whose median frequency is less than one in one-thousand in 10,000 years need not be considered."*

2. *We recommend that use of a quantitative probabilistic condition on the modified Table 2 release limits be made dependent on EPA's ability to provide convincing evidence that such a condition is practical to meet and will not lead to serious impediments, legal or otherwise, to the licensing of high-level waste geologic repositories. If such evidence cannot be provided, we recommend that EPA adopt qualitative criteria, such as those suggested by the NRC.* The Subcommittee believes that the modified probabilistic criteria will make the proposed standards more practical to apply without undue, time-consuming disagreements. Further risk studies need to be performed and subjected to systematic, critical evaluation in order to establish a more acceptable probabilistic basis for the standard.

C. The Time Frame—10,000 years and Beyond

1. *We recommend the EPA retain the 10,000-year time period as the basis for determining the adequacy of repository performance. We believe that use of formal numerical criteria limited to this approximate time period is a scientifically acceptable regulatory approach.*

2. *We recommend that the process of selection of sites for disposal systems also take into account potential releases of radioactivity somewhat beyond 10,000 years. Particular attention should be focused on potential releases of long-lived alpha-emitting radionuclides and their decay products.* Although the selection of a time frame is in large part arbitrary, we endorse EPA's choice of 10,000 years. Modeling and risk assessments for the time periods involved in radioactive waste disposal require extension of such developing techniques well beyond usual extrapolations; however, the extension for 10,000 years can be made with reasonable confidence. Also, the period of 10,000 years is likely to be free of major geologic changes, such as volcanism or renewed glaciation, and with proper site selection the risk from such changes can be made negligible. Potential radionuclide releases will not stop with 10,000 years, however, but may continue in amounts equal to or exceeding those estimated for the initial period.

The degree of confidence with which impacts can be modeled much further in the future is much less certain. We do not recommend detailed modeling calculations regarding post-10,000-year releases, but estimates should be made, and should be considered as factors in disposal site selection.

D. Population vs. Indivisual Risk

1. *We recommend that EPA retain the use of a population risk criterion as the measure of performance for the proposed standards.* We find that an approach employing individual dose limits, i.e., considering some "maximally exposed individual" or alternatively some "average exposed individual" would, in practice, make the standard costs appear to be relatively independent of the proposed standard; use of a population risk approach is more practical. In our view, however, it is important that for the first several hundred years residents of the region surrounding a repository have very great assurance that they will suffer no, or negligible, ill effects from the repository. For longer periods, we believe that EPA should rely on the existence of continuing requirements similar to its current drinking water standards to protect groups of individuals.

E. Coordination of Policies and Standards

1. *We recommend that EPA initiate action within the Federal Government of the establishment of an interagency council to coordinate the development of high-level radioactive waste disposal policy, standards, and regulatory practices and to serve as a forum for exchange of scientific and technological information.* Several Federal agencies are involved in the process of establishing radiation protection policies, standards, and operational requirements governing the disposal of high-level radioactive wastes, including EPA, NRC, DOE and DOD, together with States, appropriate entities of Congress and the judiciary. Overlapping and independent authorities and responsibilities exist under present laws. Conflicting terminology and standards exist, e.g., the definitions of high-level and other radioactive wastes. Coordination of Federal policies and practices is essential to the U.S. high-level radioactive waste disposal program. Success of the program will depend on extensive interaction and agreement among the appropriate Federal agencies. While the lead in coordination could be appropriate for the NRC or DOE, the Subcommittee feels that the obligation for achieving mutual interaction more appropriately belongs to the EPA under its authority to issue environmental standards and Federal Radiation Protection Guidance.

F. Research Needs—A Matter of Priority

1. *We recommend that EPA support, or encourage other agencies to support, continuing research in technical areas where major uncertainties still exist, particularly in the biological effects of radiation, the geochemical transport of radionuclides, and the characterization of rock-mass deformation.* The Subcommittee strongly endorses support of research aimed at diminishing or clarifying as many of these uncertainties as can be attacked with some hope of resolution. The research, although expensive, could bring about a substantial reduction in the overall cost of the disposal system.

G. Responses to Original Subcommittee Charge

At the time of the Subcommittee's formation, it was directed, by the Executive Committee of the Science Advisory Board, to address six (6) principal issues. Although a brief response to each charge is presented here, the charges are broad in scope and the Subcommittee's review of them generated a number of more explicit and specific issues which are addressed in detail in the body of this report.

1. *The Scientific and technical rationale behind the choice of a 10,000-year time period as the basis for assessment of disposal facility performance.* This issue has been addressed in C above.

2. *The technical basis for the selection of the proposed performance requirements, including risk assessment methodology, uncertainties in the data and in the analytical methods, and the estimation of premature deaths.* These aspects of the analysis form the basis for the proposed standards and were areas most carefully and critically evaluated by the Subcommittee. Although the Subcommittee makes a number of recommendations regarding risk assessment, pathway and health modeling and the need for improved documentation, we believe that Office of Radiation Programs, EPA, has handled these subjects well and, furthermore, has been positively responsive to the recommendations of the Subcommittee. We think, however, that EPA has made overly conservative choices and decisions throughout the development of the technical bases supporting the standards, leading to overestimation of the long-term effect of disposal, and hence that the proposed standards are too restrictive and compliance may be difficult to verify.

3. *The scientific appropriateness of concentrating on disposal in geologic media.* This part of the charge needed no consideration by the Subcommittee, since disposal in geologic media is mandated for at least the first two sites by the Nuclear Waste Policy Act of 1982 (PL 97–425), enacted after the charge was prepared. No member of the Subcommittee, however, disagrees with this initial approach.

4. *The validity of the conclusion that, under the proposed rule, the risks to future generations will be no greater than the risks from equivalent amounts of naturally-occurring uranium ore bodies.* In reviewing this conclusion, we found, and EPA acknowledged, that the comparison is uncertain because of the extreme variability of uranium ore bodies. The Subcommittee thinks that the conclusion is valid in a very general way, if suitably qualified, but feels that it is unwise and not scientifically defensible to use the unmined ore as the only reference for comparison. We recommend that the comparison be extended to include the radioactivity of natural waters and the ambient radiation in the natural environment.

5. *The adequacy of the economic analysis.* The Subcommittee considers there are significant shortcomings in the economic analyses supporting the proposed standards. Since the management, storage, and disposal of high-level waste is a multi-billion dollar venture, we believe that the shortcomings are important and should be remedied. It is noteworthy that, even though the savings associated with individual choices may seem relatively insignificant, the absolute costs are so large that even small percentage savings are worthwhile. The high absolute costs appear to be relatively independent of the proposed standard, and simply reflect the decision to use deep-mined geologic disposal sites with multiple barriers. Thus, appreciable savings are not likely to be realized in terms of basic cost by relaxation of the standards. However, the cost of demonstrating compliance may be very high, and cost reductions that may be achieved by sophisticated compliance demonstrations could be substantial.

We recognize the need for cost/benefit analyses, using the best available data, but we note that a precise economic analysis will not be possible or meaningful until it is performed upon an actual repository at a specific site.

6. *The ability of the analytical methods/models used in the analysis to predict potential releases from the disposal facility and their resultant effects on human health. Included would be an evaluation of the model's ability to deal with uncertainty and the confidence, in a statistical sense, that the model predictions are adequate to support selection of porjected performance requirements.* In general, EPA's analytical methodology and modeling used throughout the development of the generic repository's performance, including releases and subsequent cancer deaths, are deemed to be conservative. The Subcommittee makes several suggestions for specific improvements and updating. We emphasize that modeling, including the evaluation of uncertainty and confidence therein, is an emerging and developing technique. Adding to the uncertainties implicit in a techique that is still under development are the multitude of poorly known factors associated with the extrapolation in time to 10,000 years and beyond, and the problem of securing public acceptance of the standard. We believe, nevertheless, that the EPA's effort, modified as recommended by this report, will fulfill the intent of the Nuclear Waste Policy Act of 1982.

Dated: March 28, 1984.

Joseph A. Cannon,

Assistant Administrator for Air and Radiation.

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federal register

Tuesday
May 8, 1984

Part IV

Environmental Protection Agency

40 CFR Part 261

Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[SWH-FRL 2526-6]

Hazardous Waste Management System; Identification and Listing of Hazardous Waste

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule and request for comments.

SUMMARY: The Environmental Protection Agency (EPA) is today proposing to amend its regulations under the Resource Conservation and Recovery Act (RCRA) by listing certain wastes generated during the production of dinitrotoluene (DNT), toluenediamine (TDA), and toluene diisocyanate (TDI). In addition, the Agency is proposing to amend § 261.33(f) by adding two compounds to the list of commercial chemical products which are hazardous wastes when discarded, and, as a conforming amendment, is proposing to add several toxicants to Appendix VIII of Part 261. The effect of this proposed regulation is that all of these wastes would be subject to the hazards waste management standards contaned in 40 CFR Parts 262–266, Part 124, and the permitting requirements of Parts 270 and 271.

DATES: EPA will accept public comments on this proposed rule until July 9, 1984. Any person may request a hearing on this amendment by filing a request with Eileen B. Claussen, whose address appears below, by June 7, 1984.

ADDRESSES: Comments should be sent to the Docket Clerk, Office of Solid Waste (WH-562), U.S. Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460. Comments should identify the regulatory docket "Listing DNT, TDA, and TDI". Requests for a hearing should be addressed to Eileen B. Claussen, Acting Director, Characterization and Assessment Division, Office of Solid Waste, U.S. Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460.

The public docket for this amendment is located in Room S-212A, U.S. Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460, and is available for viewing from 9:00 am to 4:00 pm Monday through Friday, excluding holidays.

FOR FURTHER INFORMATION CONTACT: The RCRA Hotline at (800) 424-9346 or at (202) 382-3000. For technical information contact Wanda LeBleu-Biswas, Office of Solid Waste (WH-562B), U.S. Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460, (202) 382-5096.

SUPPLEMENTARY INFORMATION:

I. Background

On May 19, 1980, as part of its final and interim final regulations implementing Section 3001 of RCRA, EPA published a list of hazardous wastes generated from specific sources. This list has been amended several times, and is published in 40 CFR 261.32. Among other things, the Agency listed a waste from the production of toluene diisocyanate (TDI) (EPA Hazardous Waste No. K027, Centrifuge and distillation residues from toluene diisocyanate production). In today's action, EPA is proposing to amend this section to add another waste from the production of TDI, as well as five wastes from the production of dinitrotoluene (DNT) and toluenediamine (TDA), which compounds are intermediates in the production of TDI. The wastes generated from the production of DNT and TDA via the processes described below (and in the Background Document) are generally the same whether they are used as intermediates for one step in the production of TDI, or sold as an individual product. These wastes are washwaters, light and heavy ends, vicinals,[1] and organic liquids from the production of DNT, TDA, and TDI.

The hazardous constituents in these wastes include carcinogenic, mutagenic, teratogenic, and otherwise chronically and acutely toxic organic compounds. One or more of these toxicants are typically present in high concentrations in each waste (although each waste does not contain all of the individual toxic constituents of concern). In addition, one of these wastes, product washwaters from dinitrotoluene production, is corrosive, with a pH estimated to be less than 2. These constituents are mobile and persistent, and can reach environmental receptors in harmful concentrations if these wastes are mismanaged. After evaluating these wastes against the criteria for listing hazardous wastes (40 CFR 261.11(a) (3)), EPA has determined that these wastes are hazardous because they are capable of posing a substantial present or potential threat to human health or the environment when improperly treated, stored, transported, disposed of, or otherwise managed.

[1] Vicinals are the process residuals resulting from the separation of the 2,3- and 3,4- isomers from the desired product (2,4- and 2,6- amino-substituted) isomers.

II. Summary of the Regulation

A. List of Wastes

This proposed regulation would list as hazardous certain wastes generated during the production of dinitrotoluene (DNT), toluenediamine (TDA), and toluene diisocyanate (TDI). These residual wastes are: [2]

- K111—Product washwaters from the production of dinitrotoluene via nitration of toluene
- K112—Reaction by-product water from the drying column in the production of toluenediamine via hydrogenation of dinitrotoluene
- K113—Light ends [3] from the purification of toluenediamine in the production of toluenediamine via hydrogenation of dinitrotoluene
- K114—Vicinals from the purification of toluenediamine in the production of toluenediamine via hydrogenation of dinitrotoluene
- K115—Heavy ends from the purification of toluenediamine in the production of toluenediamine via hydrogenation of dinitrotoluene
- K116—Organic condensate from the solvent recovery column in the production of toluene diisocyanate via phosgenation of toluenediamine

In 1981, five domestic companies were producing TDI at seven locations, with a total annual TDI production capacity of 315,000 kkg. Two other major manufacturers produce DNT and/or TDA, primarily for sale to TDI manufacturers. There are also several other producers of DNT and TDA; however, some of the TDA manufacturers may use processes different from those described in the preamble and in the supporting documentation. Only wastes generated by the specific processes described here would be regulated by this proposed regulation. The total volume of the organic residual wastes from DNT, TDA, and TDI production by the processes described here (and in the supporting Background Document) would be regulated by this proposed regulation. The total volume of the organic residual wastes from DNT, TDA, and TDI production by the processes described here is approximately 667,800 kkg per year.

[2] One waste from TDI production (EPA Hazardous Waste No. K027, Centrifuge and distillation residues from toluene diisocyanate production) was previously listed.

[3] Although these wastes come off the distillation column as gases because of the high temperatures employed in distillation, they quickly condense to liquids (their natural state) on contact with the surrounding lower temperatures and are managed as such.

These wastes are formed as residuals at several points in the production of DNT, TDA, and TDI. TDI production is typically a continuous process involving three distinct chemical steps:

1. Nitration of toluene to dinitrotoluene (DNT);
2. Hydrogenation of DNT to toluenediamine (TDA); and
3. Reaction of TDA with phosgene to form TDI.

Our proposal to list these wastes is based on the similarity of production processes employed by the facilities manufacturing DNT, TDA, and TDI. The listing Background Document and the sources cited there describe these production processes in detail.

As derived from both Section 3007 industry questionnaires and sampling analyses, these wastes typically contain significant concentrations of one or more of the following hazardous constituents:

Constituent	Waste Nos.	Estimated Range of Concentrations [1] (percent)
2,4-DNT	K111	0.08.
2,6-DNT	K111	0.02.
2,4- and 2,6-TDA	K112	0.05 to 0.3.
	K113	NR to 37.5.
	K114	4.5 to 50.
	K115	10 to 50.
3,4-TDA	K112	0.5 to 0.3.
	K113	NR to 37.5
	K114	45 to 95.
	K115	NR to 2.5.
o-Toluidine	K112	NR to 0.06.
	K113	0.6 to 8.
	K114	NR to 3.
p-Toluidine	K112	NR to 0.04.
	K113	0.4 to 4.
	K114	NR to 2.
Aniline	K113	0.01 to 0.1.
Carbon tetrachloride	K116	NR to 75.
Tetrachloroethylene	K116	NR to 15.
Chloroform	K116	NR to 7.
Phosgene	K116	NR to 30

[1] NR = Note reported.

These toxicants are known for potential human carcinogens, or they are mutagenic, teratogenic, or otherwise chronically or acutely toxic. For example, the Agency's Carcinogen Assessment Group (CAG) has identified 2,4-DNT, 2,4-TDA, *o*-toluidine, carbon tetrachloride, tetrachloroethylene, and chloroform as known or potential human carcinogens;[4] 2,6-DNT, 2,6-TDA, and 3,4-TDA are experimental mutagens (*i.e.*, they are positive in *in vitro* or other short term tests); and phosgene is an extremely dangerous acute toxicant. These compounds, therefore, exhibit toxicological properties of regulatory concern.

In addition, these toxicants are present in the wastes at levels of regulatory concern. Ambient Water Quality Criteria (AWQC) have been established (see 45 FR 79318, November 28, 1980) for four of the toxicants of concern in the wastes which we are proposing to list, namely, 2,4-DNT; carbon tetrachloride; tetrachloroethylene; and chloroform. The AWQC developed for these substances to protect against a 10^{-6} excess cancer risk to humans resulting from the consumption of water and aquatic organisms are 0.11, 0.4, 0.8, and 0.19 $\mu g/1$, respectively. As seen above, these toxicants are present in the wastes at concentrations 10^{7}—10^{9} times higher than the AWQC; in addition, their solubility in water is many times greater than the AWQC (see accompanying Background Document for solubilities). Thus, even though soil attenuation factors, such as soil binding, biodegradation, and other environmental degradative processes are expected to decrease the amount of the toxicants available for migration, these toxicants are expected to present a substantial hazard since only a small fraction need migrate from the wastes and reach environmental receptors to pose the potential for substantial harm.

Although AWQC or other health-based standards have not been established for the other hazardous constituents, they are also quite toxic. For example, the Agency's Cancer Assessment Group (CAG) has determined that 2,4-TDA and *o*-toluidine are potential human carcinogens. Several of these toxicants are also experimental mutagens; and several are reproductive or teratogenic toxins, or otherwise cause chronic or acute systemic effects. We believe that the concentrations of these toxicants in the wastes are such as to create concern for human health or the environment. For example, we estimate that the 6% concentration of *o*-toluidine in one of the listed wastes (K113) could, if mismanaged, result in a daily drinking water exposure of 7,000 times greater than the daily lifetime ingestion dose (ADI) estimated to result in a 10^{-6} excess cancer risk. Similar estimates were derived for the other toxicants of concern (see the Background Document for this listing for details of these calculations).

All of these hazardous constituents, moreover, are mobile and persistent in the environment. The exposure pathways of principal concern are leaching to ground water or volatilization. Leaching is a concern because most of the toxicants are soluble in both water and solvents, and so could leach out of the wastes, potentially contaminating ground water. In fact, a number of these toxicants have been found in ground and surface water, demonstrating their mobility and persistence in the environment. In addition, several of these toxicants are extremely volatile, posing an additional threat to human health and the environment, if these wastes are improperly managed. (See the Background Document and the Health and Environmental Effects Profiles for details on fate and transport of these toxicants.)

A further risk to human health and the environment may be posed by improper incineration of some of these compounds. Improper incineration of the chlorinated hydrocarbons, including carbon tetrachloride, tetrachloroethylene, and chloroform could cause exposure to unburned toxicants in the wastes, and exposure to products of incomplete combustion, including phosgene and hydrochloric acid.

By virtue of the high concentrations of these toxicants in these wastes, which are generated in large volumes, as well as the mobility of the toxicants (both via leaching and volatilization) and their persistence in the environment, EPA has determined that these wastes pose a substantial present or potential hazard to human health and the environment, when improperly stored, transported, disposed of, or otherwise managed. Therefore, the Agency is proposing to add these wastes to the hazardous waste list.

B. Toxicants Added to Appendix VIII

This action also proposes to add a number of hazardous constituents to Appendix VIII, including 2,4- 2,6-, and 3,4-toluenediamine (already listed as toluenediamine—this proposal would identify these specific isomers of toluenediamine in Appendix VIII) and *o*- and *p*-toluidine. The toxicology and environmental fate and transport of these compounds have been discussed above, as well as in the listing Background Document and the Health and Environmental Effects Profiles; these considerations form the basis for adding them to Appendix VIII.

By adding these new compounds, the Agency also is increasing the number of

[4] The weight of evidence for this determination of carcinogenicity varies. For some compounds there are positive epidemiologic studies in humans, while for others only animal evidence exists. Depending on the amount and quality of data, the evidence for carcinogenicity could be classified as limited or sufficient using, in part, the criteria developed by the International Agency for Research on Cancer (IARC).

hazardous constituents for which land disposal facilities must monitor ground water under compliance monitoring programs (see 40 CFR 264.99). Land disposal permittees also may be required to monitor for these constituents under ground-water detection monitoring programs (see 40 CFR 264.98). The Agency already has specified procedures for analyzing for all of these toxicants in ground water (see USEPA SW-846, Test Methods for Evaluating Solid Waste—Physical/Chemical Methods).

C. Substances Added to 40 CFR 261.33(f)

We also are proposing to add both toluidines to § 261.33(f). Section 261.33(f) is a list of commercial chemical products or manufacturing chemical intermediates which are identified as toxic wastes when discarded, and are subject to the small quantity generator exclusion limit defined in §§ 261.5 (a) and (b), *i.e.*, 1000 kilograms per month.

These commercial chemicals satisfy the criteria for listing contained in § 261.11(a)(3). *o*-Toluidine has been identified by the Agency's CAG as having evidence of carcinogenicity, and *p*-toluidine exhibits other chronic toxicity effects, such as methemoglobinemia.

As commercial chemical products, these isomers are present as the sole active ingredient, and generally are technical grade (85–95% pure chemical). The unsupervised dispoal of such high concentrations of chronically toxic, mobile, and persistent chemicals could lead to a substantial threat to human health and the environment. (Indeed, these chemicals could present a far greater hazard when disposed of in commercial form than they might when disposed of in lower concentrations in the waste streams which we are proposing to list in today's action.) Accordingly, we are proposing to add them to the list of commercial chemical products that are hazardous wastes when discarded.

III. Regulatory Status of Hazardous Wastewaters

Under the existing hazardous waste regulations, wastewaters that are hazardous and that are treated in a tank as part of a wastewater treatment facility that is subject to regulation under either Section 402 or Section 307(b) of the Clean Water Act are exempt from the Parts 264 and 265 management standards. Treatment units, such as concrete basins, which may or may not be in-ground, routinely provide for certain steps in a wastewater treatment process such as equalization, neutralization, aeration (in biological treatment facilities), settling (in both biological and physical/chemical treatment facilities), flocculation and/or treated wastewater storage prior to recycle. Where such units are constructed primarily of non-eathen materials designed to provide structural support, they are defined as tanks for purposes of the hazardous waste regulations. See 40 CFR 260.10 (definition of "tank"). In applying this definition, the Agency has provided guidance that a unit is to be evaluated as if it were free-standing and filled to its design capacity with the material it is intended to hold. If the walls or shell of the unit alone provide sufficient structural support to maintain the structural integrity of the unit under these conditions, the unit is considered to be a tank. Alternatively, if the unit is not capable of retaining its structural integrity without supporting earthern materials, it is considered to be a surface impoundment.

Therefore, when wastewaters, including those covered by the listing proposed today, are stored/treated in containment devices, such as those described above which qualify as tanks, they are presently exempt from the Parts 264 and 265 management standards.

IV. CERCLA Impacts

All hazardous wastes designated by today's proposed rule will, upon promulgation, automatically become hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). (See CERCLA Section 101(14).) CERCLA requires that persons in charge of vessels or facilities from which hazardous substances have been released in quantities that equal to or greater than the reportable quantities (RQs) immediately notify the National Response Center of the release. (See CERCLA Section 103 and 48 FR 23552, May 25, 1983.)

For those hazardous waste streams containing any constituents for which RQs have not been assigned, an RQ of one pound for CERCLA notification purposes is specified by operation of law for the waste until the RQs are adjusted by regulation. These include:

Stream Number	
K112	K114
K113 [5]	K115

[5] These streams contain constituents for which the Agency proposed new RQs (see 48 *FR* 23552–23605). Once the proposal has been made final, the RQs will be adjusted accordingly.

For those hazardous waste streams containing only constituents which have already been assigned RQs, the RQ assigned to the waste stream will represent the lowest RQ associated with a particular constitutent. These include:

Stream No.	RQ
K111 [1]	1 pound.
K116 [1]	1 pound.

[1] These streams contain constituents for which the Agency proposed new RQs (see 48 *FR* 23552–23605). Once the proposal has been made final, the RQs will be adjusted accordingly.

RQs have been designated for the following constitutents of concern: 2,4- and 2,6-DNT; 2,4-, 2,6-, and 3,4-TDA; aniline; carbon tetrachloride; tetrachloroethylene; chloroform; and phosgene. (See 48 FR 23552–23605.)

Additionally, *o*- and *p*-toluidine, which by virtue of this proposal will be added to 40 CFR 261.33(f), will have an RQ of one pound, unless and until adjusted by regulation under CERCLA.

V. State Authorization

A. Applicability in Authorized States

Under Section 3006 of RCRA, EPA may authorize qualified States to operate their State hazardous waste management programs in lieu of EPA operating the Federal program in those States. (See 40 CFR Part 271 for the standards and requirements for authorization.) Upon authorization of the State program, EPA suspends operation within the State of those parts of the Federal program for which the State is authorized.

At present, authorization may be granted for the identification, generation, and transportation of hazardous wastes and the operation of facilities that treat, store or dispose of waste in containers, tanks, piles, surface impoundments, land treatment facilities, landfills, and incinerators. Today's announcement proposes to list additional wastes as hazardous under RCRA. Since EPA suspends operation of the Federal program within States that have been authorized, this proposed listing only applies to States where the Federal program is implemented.

B. Effect on State Authorizations

Following promulgation of the proposed listing, States which have already been granted final authorization will have to revise their programs, in accordance with 40 CFR 271.21. Authorized State programs must be revised within one year of the date of promulgation, or within two years if the State must amend or enact a statute in order to make the required revision.

States which have not yet been granted final authorization (including States with interim authorization) must have equivalent or more stringent standards before being granted final authorization.

VI. Regulatory Impact Analysis

Under Executive Order 12991, EPA must determine whether a regulation is "major" and therefore subject to the requirement of a Regulatory Impact Analysis. The total combined cost for disposal of the wastes as hazardous, assuming that all of these wastes would be managed for the first time as hazardous, and using conservative estimates as to cost, is approximately $52 million, well under the $100 million constituting a major regulation.

However, we know that six of the seven manufacturers of TDI generate and manage other currently regulated hazardous wastes. Therefore, we believe that the total combined cost estimate is actually much lower than that which is provided above.

The addition of the new toxicants of concern to Appendix VIII also will not result in any significant increased burden in ground-water monitoring requirements. The analytical techniques currently employed to test for the presence and concentration of other Appendix VIII constituents (*e.g.*, gas chromatography combined with mass spectroscopy, Method Nos. 8250 and 8270 in Test Methods for Evaluating Solid Waste: Physical/Chemical Methods, SW–846, 2nd ed., July, 1982, Washington, D.C.) will simultaneously test for these new toxicants at virtually the same cost.

Furthermore, the addition of O-toluidine and P-toluidine to 40 CFR 261.33(f) (list of commercial chemical products) will also be minimal. Since the chemicals listed in § 261.33 are only hazardous when discarded, and we believe they are rarely discarded due to their inherent value, there will be minimal regulatory impact.

In addition, we do not expect that there will be adverse impact on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets. Because this proposal is not a major regulation, no Regulatory Impact Analysis is being conducted.

This amendment was submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12991. Any comments from OMB to EPA and any EPA responses to those comments are available for public inspection in Room S–212A at EPA.

VII. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, whenever an agency is required to publish a General Notice of Rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis which describes the impact of the rule on small entities (*i.e.*, small business, small organizations, and small governmental jurisdictions). The Administrator may certify, however, that the rule will not have a significant economic impact on small entities.

The hazardous wastes proposed to be listed here are not generated by small entities (as defined by the Regulatory Flexibility Act), and the Agency does not believe that small entities will dispose of them in significant quantities. Accordingly, I hereby certify that this proposed regulation would not have a significant economic impact on a substantial number of small entities. This regulation therefore does not require a regulatory flexibility analysis.

VIII. List of Subjects in 40 CFR Part 261

Hazardous materials, Waste treatment and disposal, Recycling.

Dated: May 1, 1984.

William D. Ruckelshaus,

Administrator.

For the reasons set out in the preamble, it is proposed to amend Title 40 of the Code of Federal Regulations as follows:

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

1. The authority citation for Part 261 reads as follows:

Authority: Secs. 1006, 2002(a), 3001, and 3002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a), 6921, and 6922).

2. In § 261.32, add the following waste streams to the subgroup 'Organic Chemicals':

§ 261.32 Hazardous wastes from specific sources.

Industry and EPA hazardous waste No.	Hazardous waste	Hazard code
*	* * * * *	
K11	Product washwaters from the production of dinitrotoluene via nitration of toluene.	(C, T).
K112	Reaction by-product water from the drying column in the production of toluenediamine via hydrogenation of dinitrotoluene.	(T).
K113	Light ends from the purification of toluenediamine in the production of toluenediamine via hydrogenation of dinitrotoluene.	(T).
K114	Vicinals from the purification of toluenediamine in the production of toluenediamine via hydrogenation of dinitrotoluene.	(T).
K115	Heavy ends from the purification of toluenediamine in the production of toluenediamine via hydrogenation of dinitrotoluene.	(T).
K116	Organic condensate from the solvent recovery column in the production of toluene diisocyanate via phosgenation of toluenediamine.	(T).
*	* * * * *	

§ 261.33 [Amended]

3. In § 261.33(f), add the following entries in alphabetical order:

Hazardous waste No.	Substance
*	* * * * *
U328	2-Amino-1-methylbenzene.
U353	4-Amino-1-methylbenzene.
U328	*o*-Toluidine.
U353	*p*-Toluidine.
*	* * * * *

4. Add the following entries in numerical order to Appendix VII of Part 261:

Appendix VII—Basis for Listing Hazardous Waste

EPA hazardous waste No.	Hazardous constituents for which listed
*	* * * * *
K111	2,4-Dinitrotoluene, 2,6-dinitrotoluene.
K112	2,4-Toluenediamine, 2,6-toluenediamine, 3,4-toluenediamine, *o*-toluidine, *p*-toluidine.
K113	2,4-Toluenediamine, 2,6-toluenediamine, 3,4-toluenediamine, *o*-toluidine, *p*-toluidine, aniline.
K114	2,4-Toluenediamine, 2,6-toluenediamine, 3,4-toluenediamine, *o*-toluidine, *p*-toluidine.
K115	2,4-Toluenediamine, 2,6-toluenediamine, 3,4-toluenediamine.
K116	Carbon tetrachloride, tetrachloroethylene, chloroform, phosgene.
*	* * * * *

5. Add the following hazardous constituents (with CAS Numbers) in alphabetical order, to Appendix VIII of Part 261:

Appendix VIII—Hazardous Constituents

Constituent	CAS No.
*	* * * * *
Benzene, 2-amino-1-methyl (*o*-toluidine)	95–53–4
Benzene, 4-amino-1-methyl (*p*-toluidine)	106–49–0
2,4-toluenediamine	95–80–7
2,6-toluenediamine	823–40–5
3,4-toluenediamine	496–72–0
*	* * * * *

6. Change the hazardous constituent listing in Appendix VIII of Part 261 from toluenediamine to toluenediamine, N.O.S.

[FR Doc. 84–12310 Filed 5–7–84; 8:45 am]

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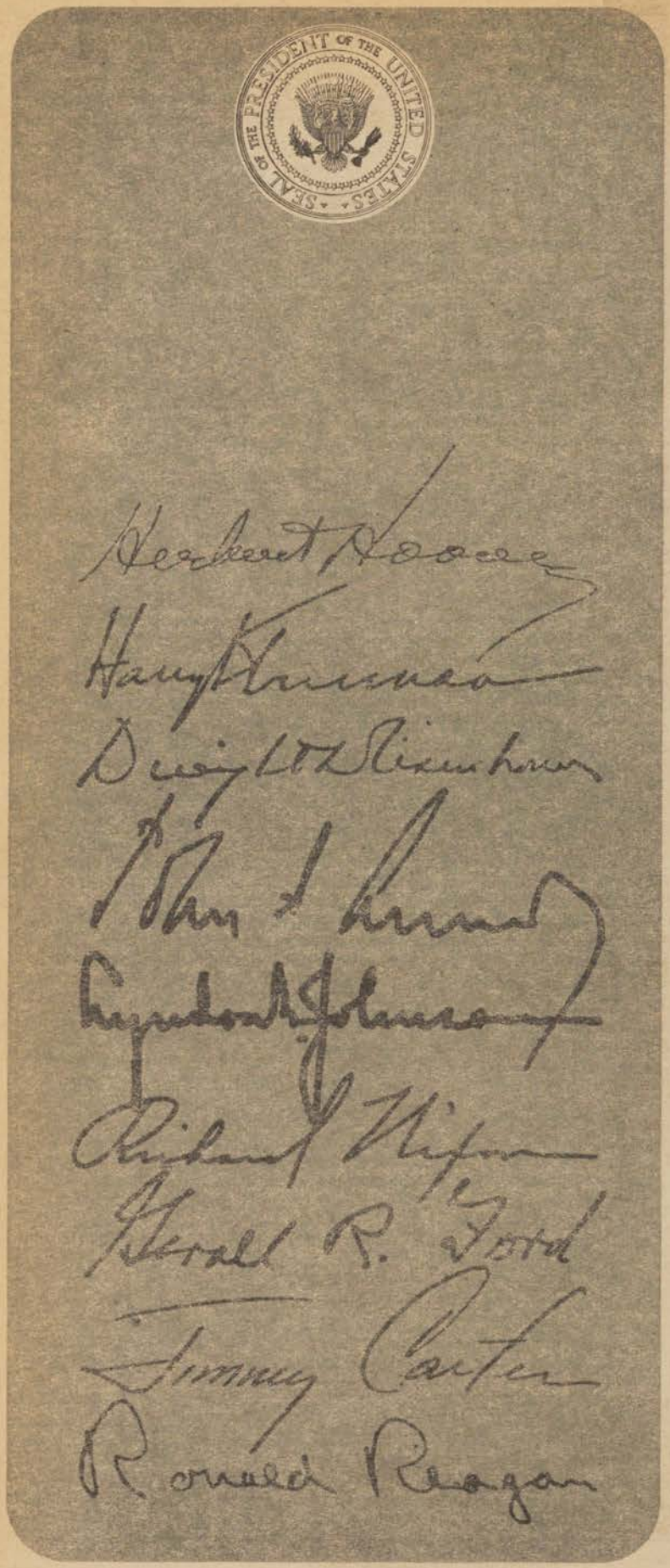
S. 2570 / Pub. L. 98-271

To continue the transition provisions of the Bankruptcy Act until May 26, 1984, and for other purposes. (Apr. 30, 1984; 98 Stat. 163) Price: $1.50

S.J. Res. 210 / Pub. L. 98-272

To designate the period commencing April 1, 1984, and ending March 31, 1985, as the "Year of Excellence in Education." (May 3, 1984; 98 Stat. 164) Price: $1.50



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