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federal register

Friday
August 30, 1985

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Environmental Protection Agency

Animal Drugs
Food and Drug Administration

Aviation Safety
Federal Aviation Administration

Blood
Food and Drug Administration

Coastal Zone
National Oceanic and Atmospheric Administration

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Presidential Documents

Title 3—

The President

Memorandum of August 28, 1985

Nonrubber Footwear Import Relief Determination

Memorandum for the United States Trade Representative

Pursuant to Section 202(b)(1) of the Trade Act of 1974 (P.L. 93–618; 19 U.S.C. 2252(b)(1)), I have determined the action I will take with respect to the report of the United States International Trade Commission (ITC), transmitted to me on July 1, 1985, concerning imports of nonrubber footwear. This investigation covered items 700.05 through 700.45, inclusive, 700.56, 700.72 through 700.83 inclusive, and 700.95 of the Tariff Schedules of the United States.

While the escape clause provisions of the Trade Act of 1974 require the ITC to determine the question of whether a domestic industry has been seriously injured as a result of increased imports, I am charged with the responsibility of determining whether the provision of import relief to the domestic industry is in the national economic interest. After considering all relevant aspects of the case, including those set forth in Section 202(c) of the Trade Act of 1974, I have determined that granting import relief would not be in the national economic interest. I believe my decision today will promote our national economic interest by encouraging an open, nondiscriminatory and fair world economic system, a system in which jobs are created and prosperity grows through increased productivity and competitiveness in an open market. My decision is based on the following reasons:

First, import relief would place a costly and unjustifiable burden on U.S. consumers and the U.S. economy. The Council of Economic Advisers estimates that the global quota remedy recommended by the ITC would create between 13,000 to 22,000 jobs with an average annual wage of $14,000. However, the cost to consumers to create these jobs would be $26,300 per job, amounting to a total cost which could be as high as $2.9 billion over the next 5 years. Moreover, these jobs would not provide permanent employment and would be likely only to last during the 5-year relief period.

Second, import relief would result in serious damage to U.S. trade in two ways. If the ITC global remedy were imposed U.S. trade would stand to suffer as much as $2.1 billion in trade damage either through compensatory tariff reductions or retaliatory actions by foreign suppliers. This would mean a loss of U.S. jobs and a reduction in U.S. exports. U.S. trade would also suffer because of the adverse impact import relief would have on major foreign suppliers, such as Brazil, who are heavily indebted and highly dependent on footwear exports. Import relief would lessen the ability of these foreign footwear suppliers to import goods from the United States and thus cause an additional decline in U.S. exports.

Third, I do not believe that providing relief in this case would promote industry adjustment to increased import competition. While imports of nonrubber footwear have increased rapidly over the last 12 months, I believe that the industry has been and is in the process of successfully adjusting to increased import competition. An industry that was once characterized by many small firms with limited manufacturing capability, has now emerged as an industry led by larger, more efficient producers who have invested in state of the art manufacturing equipment, diversified into profitable retail operations, and filled out their product lines with imports to respond to rapidly changing consumer taste.

In order to address the difficult problems faced by workers in the industry, I have directed the Secretary of Labor to work with State and local officials to develop a retraining and relocation assistance program specifically designed to aid workers in the nonrubber footwear industry. Appropriate programs of the Job Training Partnership Act are to be used to the fullest extent possible under U.S. law.

This determination shall be published in the **Federal Register**.

Ronald Reagan

THE WHITE HOUSE,
Washington, August 28, 1985.

[FR Doc. 85-20945
Filed 8-28-85; 3:08 pm]
Billing code 3195-01-M

Editorial note: For the President's statement and the text of a message to the Congress, dated Aug. 28, on nonrubber footwear import relief, see the *Weekly Compilation of Presidential Documents* (vol. 21, no. 35).

Rules and Regulations

Federal Register
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Friday, August 30, 1985

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.
The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF THE TREASURY

Comptroller of the Currency

12 CFR Part 5

[Docket No. 85-15]

Rules, Policies and Procedures for Corporate Activities; National Bankers' Banks

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Final rule.

SUMMARY: The Office of the Comptroller of the Currency (Office) is providing guidelines for organizing groups seeking approval to organize nationally chartered bankers' banks. These guidelines are needed as a result of Section 404 of the Garn-St Germain Depository Institutions Act of 1982 which authorizes the Office to charter bankers' banks. This final rule provides prospective national bankers' bank organizers with information concerning the procedure to establish a nationally chartered bankers' bank.

EFFECTIVE DATE: August 30, 1985.

ADDRESS: Office of the Comptroller of the Currency, Washington, D.C. 20219.

FOR FURTHER INFORMATION CONTACT: Randall J. Miller, Director, Licensing Policy and Systems, Bank Organization and Structure, (202) 447-1184, or Richard Cleva, Attorney, Legal Advisory Services, (202) 447-1880.

SUPPLEMENTARY INFORMATION:

Purpose

The purpose of this final rule is to clarify procedures and policies applicable to chartering a national bankers' bank.

Background

The final rule provides prospective organizers of national bankers' banks with information concerning the application process and applicable laws and regulations. This rulemaking is necessitated by section 404 of the Garn-St Germain Depository Institutions Act of 1982 (Act) which authorizes the Office to charter bankers' banks.

Section 404 of the Act authorized the Comptroller to charter national bankers' banks, *i.e.*, national banks which are owned exclusively by other depository institutions (except for directors' qualifying shares) and are organized to engage exclusively in providing services for other depository institutions, their officers, directors, and employees. Except for this restriction on those for whom services may be provided and except for waivers as discussed below, under the statute a national bankers' bank has the same rights and powers and is subject to the same limitations that would apply under the national banking laws to a national bank.

The Act provides that a national bankers' bank is:

> Subject to such rules, regulations, and orders as the Comptroller deems appropriate, and except as otherwise specifically provided in such rules, regulations, or orders, shall be vested with or subject to the same rights, privileges, duties, restrictions, penalties, liabilities, conditions, and limitations that would apply under the national banking laws to a national bank.

12 U.S.C. 27(b)(2).

The Office has interpreted the statute and the legislative history of the statute to mean that the Comptroller has discretion in applying statutes and regulations to national bankers' banks. The Senate Report stated that "statutory restrictions applicable to other national banks may be waived if incompatible with the operation of a bankers' bank." S. Rep. 97-537, 97th Cong., 1st Sess. 27 (Sept. 3, 1982), *reprinted at* 1982 U.S. Code Cong. & Ad. News 3081.

Thus, the Comptroller may rule on requests from nationally chartered bankers' banks for waiver of specific statutes and regulations. For example, in previous particular cases the Comptroller has waived the requirements that organizers be natural persons (12 U.S.C. 21), the geographic residency requirements of directors (12 U.S.C. 72), and cumulative voting requirements (12 U.S.C. 61).

Comments Received and Office Response

On January 26, 1983, the Office published an advance notice of proposed rulemaking (48 FR 3624) seeking comment on the standards and procedures appropriate for chartering and regulating national bankers' banks. Five comments were received in response to the advance notice. The comments are summarized as follows.

Flexibility: There was general agreement among the commenters that the Office should provide maximum flexibility for national bankers' banks to compete fully in the provision of correspondent banking services. Commenters also urged the Office to minimize the regulatory requirements imposed on national bankers' banks by providing broad exemptions in the organization and operation of national bankers' banks.

The Office agrees that national bankers' banks should be provided maximum flexibility to compete fully in the correspondent banking services market, and has structured this final rule to provide such flexibility. Applicants should file an application as required in § 5.20 and, at the time the application is filed, request exemption from organizational requirements or waiver of statutory requirements which in their opinion may impede the bankers' bank's ability to compete and provide desired services to its market. Each waiver request must be supported by adequate justification and legal analysis.

Services permitted: Three commenters were opposed to enumeration of the specific services permitted. One commenter was in favor of enumerating only traditional correspondent activities. Two commenters favored the enumeration of activities specifically prohibited for national bankers' banks.

To provide organizers of national bankers' banks the flexibility to structure innovative proposals, the Office will not enumerate permissible or prohibited activities. Organizing groups shall list the anticipated activities of the proposed national bankers' bank in the application. Except for the statutory restriction on those for whom services may be provided, national bankers' banks are authorized under the Act to engage in the same activities as other national banks.

Capital Requirements: Four commenters believe that existing capital requirements should be waived or liberalized for national bankers' banks. Decreased risk in activities undertaken and the peculiar nature of balance sheet items (e.g., inflated federal funds balances) due to the unique operating characteristics of bankers' banks were cited as reasons supporting decreased capital requirements.

The Office recognizes the inherent difference in the balance sheets of national bankers' banks and other national banks but does not consider the blanket establishment of a different capital requirement for national bankers' banks a viable option. On a case-by-case basis the Office will review requests by national bankers' banks under the waiver authority discussed above and make individual determinations as to whether the facts as presented by the applicant support a different capital requirement.

Office Action

At the present time within the industry, the development of the role of bankers' banks is still in the early stages. Accordingly, based on its experience so far, the Office believes it is premature to determine on a general basis what requirements are appropriate, or which organizational, statutory, or regulatory requirements should be waived, for such banks. Therefore, the Office has decided to issue a policy statement at this time which only will set forth application procedures and reiterate applicable statute law. After further experience, the Office may issue more detailed regulations if the need arises. This statement advises organizers that the Office will accept applications for the establishment of a national bankers' bank on the same application form and under the same procedure used to establish a national bank. National bankers' bank organizers are also advised to follow those other regulations and procedures applicable to national banks.

This final rule merely reiterates the statutory provisions, states general agency policy, and refers applicants to the proper established procedure to follow. Accordingly, further public notice and comment in addition to that received regarding the advance notice of proposed rulemaking is unnecessary due to the nonsubstantive nature of this rulemaking. For the same reasons, this rule is effective immediately. See 5 U.S.C. 553 (b)(3)(A) and (d)(2).

Regulatory Flexibility Act

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601-612) it is certified that this final rule is advisory in nature and does not have a significant economic impact on a substantial number of small entities. The effect of this final rule is expected to be beneficial rather than adverse, and small entities are generally expected to share the benefits as well as larger institutions.

Executive Order 12291

This rule is not classified as a "major rule" and therefore does not require a regulatory impact analysis.

Paperwork Reduction Act

The information collection contained in this final rule have been approved by the Office of Management and Budget under Control Number 1557-0014.

List of Subjects in 12 CFR Part 5

National banks, National bankers' banks, Bankers' banks.

Authority and Issuance

Accordingly, for the reasons stated in the preamble, Part 5 of Chapter I of Title 12 of the Code of Federal Regulations is amended as set forth below.

PART 5—[AMENDED]

1. The authority citation for 12 CFR Part 5 continues to read as follows:

Authority: 12 U.S.C. 1 *et seq.*

2. A new § 5.27 is added to Subpart B to read as follows:

§ 5.27 Organization of a national bankers' bank.

(a) *Authority.* 12 U.S.C. 1 *et seq.*, 21a, 22, 24, 26, 27, 93a, 1814(b) and 1816.

(b) *Scope.* This section applies to applications to organize a national bankers' bank.

(c) *Definition.* For the purposes of this Part, a national bankers' bank is a national bank which is owned exclusively by other depository institutions (except for directors' qualifying shares) and is organized to engage exclusively in providing services for other depository institutions and their officers, directors and employees.

(d) *Ownership of national bankers' banks.* A national bank's power to invest in bankers' banks, whether state chartered or nationally chartered, is governed by 12 U.S.C. 24(7). However, ownership of national bankers' banks by depository institutions other than national banks is subject to ownership limitations and statutory conditions prescribed by the owning institutions' primary regulator.

(e) *Procedures.*—(1) *Application.* An organizing group desiring to establish a national bankers' bank shall file an application in accordance with this section and § 5.20. The application process for a national bankers' bank is similar to existing application procedures for a national bank. The Office will follow the procedures and policies stated in § 5.20 of this Part. Organizing groups shall also list the anticipated activities of the proposed national bankers' bank in the application.

(2) *Waiver requests.* The organizers of a proposed national bankers' bank may request waiver of those organizational requirements, statutory requirements or regulatory requirements which may impede the proposed national bankers' bank's ability to compete or to provide desired services to its market. A request for waiver should be submitted with the application and must be supported by adequate justification and legal analysis. Requests for waivers may also be made by a national bankers' bank already in operation.

(f) *Forms.*

CC 7020-01: Application and Instructions to Organize a National Bank
CC 7020-20: Organization Certificate
CC 7020-25: Joint Oath of Interim Directors
CC 7020-26: Oath of Interim Directors
CC 7020-27: List of Interim Directors
CC 7020-29: Sample Subscription Offer
CC 7029-04: Sample Articles of Association
CC 7029-06: Joint Oath of National Bank Directors
CC 7029-07: Oath of National Bank Director
CC7029-08: List of National Bank Directors.

(Approved by the Office of Management and Budget under Control Number 1557-0014)

Dated: July 12, 1985.

H. Joe Selby,

Acting Comptroller of the Currency.

[FR Doc. 85-20759 Filed 8-29-85; 8:45 am]

BILLING CODE 4810-33-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 24758; Amdt. No. 1302]

Standard Instrument Approach Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

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

DATES: *Effective:* An effective date for each SIAP is specified in the amendatory provisions.

Incorporation by reference—approved by the Director of the Federal Register on December 31, 1980, and reapproved as of January 1, 1982.

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

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue SW., Washington, D.C. 20591;
2. The FAA Regional Office of the region in which the affected airport is located; or
3. The Flight Inspection Field Office which originated the SIAP.

For Purchase—

Individual SIAP copies may be obtained from:

1. FAA Public Inquiry Center (APA-430), FAA Headquarters Building, 800 Independence Avenue SW., Washington, D.C 20591; or
2. The FAA Regional Office of the region in which the affected airport is located.

By Subscription—

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

FOR FURTHER INFORMATION CONTACT: Donald K. Funai, Flight Procedures Standards Branch (AFO-230), Air Transportation Division, Office of Flight Operations, Federal Aviation Administration, 800 Independence Avenue SW., Washington, D.C. 20591; telephone (202) 426-8277.

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

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

This amendment to Part 97 is effective on the date of publication and contains separate SIAPs which have compliance dates stated as effective dates based on related changes in the National Airspace System or the application of new or revised criteria. Some SIAP amendments may have been previously issued by the FAA in a National Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for some SIAP amendments may require making them effective in less than 30 days. For the remaining SIAPs, an effective date at least 30 days after publication is provided.

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

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrent preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Aviation safety, Approaches, Standard instrument.

Issued in Washington, D.C. on August 23, 1985.

John S. Kern,

Acting Director of Flight Operations.

Adoption of the Amendment

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

1. The authority citiation for Part 97 continues to read as follows:

Authority: 49 U.S.C. 1348, 1354(a), 1421, and 1510; 49 U.S.C. 106(g) (revised, Pub. L. 97-449, January 12, 1983; and 14 CFR 11.49(b)(2)).

2. By amending § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN SIAPs identified as follows:

. . . *Effective November 21, 1985*

Norman, OK—David Jay Perry, VOR/DME-A, Orig, CANCELLED
Norman, OK—David Jay Perry, VOR/DME-A, Orig

. . . *Effective October 24, 1985*

Griffith, IN—Griffith, VOR RWY 8, Amdt. 4

Abbeville, LA—Abbeville Muni, VOR/DME-B, Amdt. 1
Barnesville, OH—Barnesville-Bradfield, VOR RWY 27, Amdt. 8
Woodsfield, OH—Monroe County, VOR/DME RWY 25, Amdt. 4

. . . Effective August 9, 1985

Hilo, HI—General Lyman Field, VOR/DME or TACAN-A, Amdt. 5
Hilo, HI—General Lyman Field, VOR RWY 26, Amdt. 6
Hilo, HI—General Lyman Field, VOR/DME or TACAN RWY 26, Amdt. 3

. . . Effective August 8, 1985

Santa Ana, CA—John Wayne Airport-Orange County, VOR RWY 19R Amdt. 22

3. By amending § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, and SDF/DME SIAPs identified as follows:

. . . Effective October 24, 1985

Corpus Christi, TX—Corpus Christi Intl, LQC RWY 31, Amdt. 2

. . . Effective September 26, 1985

Beaumont-Port Arthur, TX—Jefferson County, LOC BC RWY 30, Amdt. 18

4. By amending § 97.27 NDB and NDB/DME SIAPs identified as follows:

. . . Effective Nobember 21, 1985

Clinton, OK—Clinton Muni, NDB RWY 35, Amdt. 4
El Reno, OK—Mustang Field, NDB RWY 35, Amdt. 1
Mooreland, OK—Mooreland Muni, NDB RWY 17, Amdt. 2
Weatherford, OK—Thomas P. Stafford, NDB RWY 17, Amdt. 1

. . . Effective October 24, 1985

Alturas, CA—Alturas Municipal, NDB RWY 31, Amdt. 1
York, NE—York Muni, NDB RWY 17, Orig.
York, NE—York Muni, NDB RWY 35, Orig.
Cadiz, OH—Harrison County, NDB RWY 13, Amdt. 3
Carollton, OH—Carroll County-Tolson, NDB RWY 25, Amdt. 3
Corpus Christi, TX—Corpus Christi Intl, NDB RWY 13, Amdt. 22
Amery, WI—Amery Muni, NDB RWY 18, Amdt. 1
Osceola, WI—L. O. Simenstad Muni, NDB RWY 28, Amdt. 7
Watertown, WI—Watertown Muni, NDB RWY 5, Orig.
Watertown, WI—Watertown Muni, NDB RWY 23, Amdt. 2

. . . Effective September 26, 1985

Atlanta, GA—The William B. Hartsfield Atlanta Intl, NDB RWY 9L, Amdt. 8
Atlanta, GA—The William B. Hartsfield Atlanta Intl, NDB RWY 27R, Amdt. 5
Washington, GA—Washington-Wilkes County, NDB RWY 13, Orig.
Beaumont-Port Arthur, TX—Jefferson County, NDB RWY 12, Amdt. 17

5. By amending § 97.29 ILS, ILS/DME, ISMLS, MLS, MLS/DME and MLS/RNAV SIAPs identified as follows:

. . . Effective October 24, 1985

Corpus Christi, TX—Corpus Christi Intl, ILS RWY 13, Amdt. 23
Corpus Christi, TX—Corpus Christi Intl, ILS RWY 35, Amdt. 8

. . . Effective September 26, 1985

Atlanta, GA—The William B. Hartsfield Atlanta Intl, ILS RWY 9L, Amdt. 4
Atlanta, GA—The William B. Hartsfield Atlanta Intl, ILS RWY 27R, Amdt. 2
Beaumont-Port Arthur, TX—Jefferson County, ILS RWY 12, Amdt. 21

. . . Effective August 13, 1985

Baltimore, MD—Baltimore-Washington Intl, ILS RWY 10, Amdt. 11
Baltimore, MD—Baltimore-Washington Intl, ILS RWY 28, Amdt. 6

. . . Effective August 9, 1985

Hilo, HI—General Lyman Field, ILS RWY 26, Amdt. 10

6. By amending § 97.31 RADAR SIAPs identified as follows:

. . . Effective October 24, 1985

Colorado Springs, CO—City of Colorado Springs Muni, Radar-1, Amdt. 16 CANCELLED

[FR Doc. 85-20793 Filed 8-29-85; 8:45 am]

BILLING CODE 4910-14-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Parts 923 and 930

[Docket No. 40565-5108]

Coastal Zone Management: Federal Consistency Regulations; Final Rule

AGENCY: National Oceanic and Atmospheric Administration, Commerce.

ACTION: Final rule.

SUMMARY: The National Oceanic and Atmospheric Administration is amending existing regulations, and associated comments, to exclude Outer Continental Shelf (OCS) oil and gas lease sales from the Federal consistency requirements of Section 307(c)(1) of the Coastal Zone Management Act of 1972, as amended (CZMA). This rulemaking is required to conform current Federal regulations to the January 11, 1984, ruling of the U.S. Supreme Court in *Secretary of the Interior et al.* v. *California et al.* The Notice of Proposed Rulemaking was published on January 28, 1985 (50 FR 3798).

EFFECTIVE DATE: November 9, 1985.

FOR FURTHER INFORMATION CONTACT: Nan Evans, Senior Policy Analyst, Office of Ocean and Coastal Resource Management, National Ocean Service, NOAA, 3300 Whitehaven Street NW., Washington, D.C. 20235 (202) 634-4249.

SUPPLEMENTARY INFORMATION:

A. Authority

This notice of rulemaking is issued under the authority of section 317 of the CZMA (Pub. L. 92-583, as amended).

B. General Background

The Coastal Zone Management Act of 1972 (CZMA, Pub. L. 92-583, as amended) requires each Federal agency conducting or supporting activities directly affecting the coastal zone to conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state coastal zone management programs (Section 307(c)(1)). National Oceanic and Atmospheric Administration (NOAA) regulations implementing this section are found at 15 CFR Part 930 Subpart C. The CZMA also requires that federally licensed or permitted activities affecting land or water uses in the coastal zone, including activities described in detail in Outer Continental Shelf (OCS) exploration, development and production plans, be conducted in a manner consistent with federally approved state coastal management programs (Section 307(c)(3)(A) and (B)). NOAA regulations implementing these sections are found at 15 CFR Part 930 Subparts D and E. Section 307(d) of the CZMA requires that Federal assistance be granted to state and local governments for activities affecting the coastal zone only when such activities are consistent with federally approved coastal zone management programs. NOAA regulations implementing this section are found at 15 CFR 930 Subpart F. NOAA's current regulations interpreting section 307 were promulgated in 1979 (44 FR 37142-37161, June 25, 1979).

On January 11, 1984, the United States Supreme Court issued its decision in *Secretary of the Interior et al.* v. *California et al.* (464 U.S. 312, 104 S. Ct. 656, 52 U.S.L.W. 4063). The Court held that the sale of Outer Continental Shelf (OCS) oil and gas leases is not an activity "directly affecting" the coastal zone within the meaning of Section 307(c)(1) of the CZMA and, therefore, a determination of consistency with approved state coastal management programs is not required before such sale is held.

In an Advance Notice of Proposed Rulemaking (ANPR) issued on June 1, 1984 (49 FR 22825), NOAA announced its intent to review the existing regulations implementing the CZMA to determine which regulations needed to be revised

as a result of the U.S. Supreme Court decision. NOAA also announced that it would consider whether new or additional regulations applicable to the Federal consistency provisions of section 307 of the CZMA were necessary. NOAA provided a 90-day public comment period on the ANPR. NOAA also held eight regional meetings to discuss the issues raised in the ANPR and to gather information.

NOAA published a Notice of Proposed Rulemaking (NPR) on January 28, 1985 (50 FR 3798–3801) limiting the regulatory changes to those changes clearly necessitated by the Supreme Court's decision. The proposed changes specifically excluded OCS oil and gas lease sales from the uses subject to management by state coastal zone management programs and from the Federal consistency provisions of section 307(c)(1). The proposed rule was developed after an analysis of the questions asked in the ANPR and the public comments on a number of regulatory issues. These issues were summarized in the NPR.

C. Final Rulemaking

NOAA is issuing a final rule limited to those changes clearly necessitated by the Supreme Court's decision. The final rule excludes OCS oil and gas lease sales from the uses subject to management by state coastal zone management programs and from the Federal consistency provisions of section 307(c)(1) of the CZMA. The final rule is substantively unchanged from the proposed rule. No new information or alternative solutions were presented in comments on the NPR which resulted in the need for NOAA to revise the substance of the proposed rule. Most commenters supported the narrow scope of the proposed rulemaking. One commenter suggested that the term "lease sales" be substituted for the term "leasing activities" in the proposed rule. The final rule uses the phrase "OCS oil and gas lease sale activities" to more precisely reflect the Supreme Court's holding. In response to comments from the Department of the Interior, NOAA has revised 15 CFR 923.11(c)(2)(ii) of the final rule to provide additional clarification that OCS oil and gas lease sale activities are not development activities within the meaning of the CZMA or the Outer Continental Shelf Lands Act (OCSLA). Also, NOAA revised the proposed rule at 15 CFR 930.33(c) by adding a new subsection (2) to state more precisely that OCS oil and gas lease sales are not Federal activities directly affecting the coastal zone and, therefore, are not subject to the provisions of Section 307(c)(1) of the CZMA.

While the final rule excludes the sale of oil and gas leases on the Outer Continental Shelf (OCS) from the consistency process, affected coastal states and local governments are still able to consult with the Department of the Interior under section 19 of the OCSLA. Also, under section 307(c)(3)(B) of the CZMA, the states can review the consistency of OCS exploration, development and production plans which affect land and water uses in the coastal zone. Federal agencies must continue to review their activities, other than OCS oil and gas lease sales, on a case-by-case basis to determine whether they directly affect the coastal zone within the meaning of section 307(c)(1). If a Federal agency concludes that a proposed activity does directly affect the coastal zone, the Federal agency must provide a consistency determination to the affected state(s) and must conduct the activity in a manner which is consistent to the maximum extent practicable with approved state coastal zone management programs.

This rulemaking coordinates NOAA's rulemaking efforts with the Federal Consistency Study (see below) by making the minimum necessary changes to the regulations while awaiting the results of the Study. Following completion of the Federal Consistency Study, NOAA will determine whether further regulatory changes are required.

Although a 1980 amendment to the CZMA provided a procedure for Congressional disapproval of rules proposed under CZMA authorities, the Supreme Court has since held that such disapproval procedures are unconstitutional (*INS* v. *Chadha*, 462 U.S. 919, 103 S. Ct. 2764 (1983)). NOAA will follow the ruling in *INS* v. *Chadha* in this final rulemaking and treat the Congressional disapproval procedure as a "report and wait" provision. This final rule therefore will be effective 60 calendar days from September 9, 1985, when both Houses of Congress resume the first session of the 99th Congress following the scheduled August recess. If Congress is not in session for 60 continuous calendar days from September 9 (excluding any adjournment of less than 6 days in the House of Representatives), NOAA will issue a technical amendment to clarify the effective date of this final regulation.

D. Public Comments

Most commenters on the Notice of Proposed Rulemaking (NPR) supported the narrow scope of NOAA's proposed rule. Commenters opposing NOAA's proposed rule were divided into two groups. One group opposed the Supreme Court's decision and argued that OCS oil and gas lease sales should be subject to the Federal consistency requirements of section 307(c)(1). The other group supported the Supreme Court's decision and argued for a broader rulemaking which would exclude activities other than OCS oil and gas lease sales from the Federal consistency requirements and/or which would address other issues in the consistency process. The rationale for limiting the rule to excluding OCS oil and gas lease sales from the uses subject to management by state coastal zone management programs and from the Federal consistency requirements of section 307(c)(1) is discussed above.

Fishery management plans prepared under the Magnuson Fishery Conservation and Management Act are one example of a Federal activity which, according to some commenters, should be excluded from the Federal consistency requirements of section 307. NOAA is responsible for the administration of the CZMA and the Magnuson Act. NOAA policy, as discussed in Administrator's Letter No. 37 of November 1982, is that the CZMA and the Magnuson Act are fundamentally compatible and should be administered in a manner to give maximum effect to both laws. NOAA will continue to determine, on a case-by-case basis, whether proposed fishery management plans directly affect the coastal zone and, if so, will assure that such plans are consistent to the maximum extent practicable with approved state coastal zone management programs.

Most of the comments received on the proposed rule addressed subjects which had been previously raised in response to the ANPR. (See the NPR at 50 FR 3799–3800 for a synopsis of these issues). NOAA is continuing to study these issues as part of the Federal Consistency Study (see below). NOAA will continue monitoring the implementation of the Federal consistency requirements and is deferring, for the present, any further rulemaking.

A few comments were received which raised additional issues. These additional comments are addressed below.

Relying on the Supreme Court's decision, as well as other arguments, the General Services Administration (GSA) requested that the regulations at 15 CFR 930.31 be changed to remove GSA's real property disposals from the definition of activities directly affecting the coastal

zone. Like issues raised by other commenters, NOAA will examine in the Federal Consistency Study the applicability of the Federal consistency provisions to GSA's real property disposals. In the interim, the NOAA regulations require that GSA continue to examine, on a case-by-case basis, the disposal of Federal surplus real property to determine whether the proposed action directly affects the coastal zone and, if so, to follow the provisions of section 307(c)(1) and the implementing regulations.

A few commenters urged NOAA to clarify further that the Federal agency, not the state, makes the initial determination regarding whether an activity "directly affects" the coastal zone and is subject to the requirements of section 307(c)(1). NOAA concludes that the regulations at 15 CFR 930.33(a) are sufficiently clear on this point and that no changes are necessary at this time.

A number of industry representatives suggested that NOAA amend the regulatory definition of Federal activities subject to the section 307(c)(1) requirements at 15 CFR 930.31 to exclude OCS oil and gas lease sales, as well as OCS exploration, development and production plans. NOAA observes that the Supreme Court held that OCS lease sales were not Federal activities which directly affected the coastal zone within the meaning of section 307(c)(1). The Supreme Court decision did not change the requirement that federally licensed and permitted activities which affect land or water uses in the coastal zone and are described in detail in OCS exploration, development and production plans prepared under the OCSLA are subject to section 307(c)(3)(B). Therefore, NOAA defines the recommendation to amend 15 CFR 930.31. Moreover, this amendment is not required since NOAA has made editorial changes to the proposed rule at 15 CFR 930.33 to clarify further that OCS oil and gas lease sale activities do not directly affect the coastal zone and, therefore, are, not subject to the consistency requirements of section 307(c)(1).

A few commenters contended that the states often violate the provisions of section 307(e) and thereby diminish Federal agency jurisdiction and responsibility. The second paragraph of 15 CFR 930.32(a) states the relationship between section 307(c)(1) and section 307(e). NOAA is deferring any conclusion on the merits of this contention until completion of further monitoring and analysis, including completion of the Federal Consistency Study.

Comments by the Northwest Office of the Friends of the Earth included a petition to NOAA under the Administration Procedure Act to amend 15 CFR 930.32 by adding a new subsection stating: "A state coastal zone management program cannot bind a Federal agency to be positively consistent with its provisions. A state coastal zone management program provides to the state only a negative (or veto) consistency to the maximum extent practicable." Although the commenter does not state any reason for its request, NOAA denies this petition because the regulations at 15 CFR 930.39(d) already authorize Federal agencies conducting activities directly affecting the coastal zone to impose stricter standards than are required by state coastal zone management programs. Moreover, while sections 307(c) (1), (2), (3), and (d) of the CZMA require Federal consistency with an approved state program, section 307(e) preserves to each Federal agency its responsibility for carrying out its own mission requirements. The regulatory history of the Federal consistency provisions indicates NOAA's longstanding policy that there is no "positive" consistency requirement for Federal activities. NOAA has recognized that, while a proposed activity may be consistent with a state program, the Federal agency may modify or abandon the activity based on its obligations under Federal law despite the state's consistency concurrence.

E. Federal Consistency Study

In recognition of the need for a comprehensive review of the Federal consistency process, NOAA initiated a Federal Consistency Study to create an information base documenting the experiences of states, Federal agencies, industry, and public interest groups in implementing the Federal consistency provisions. A notice of availability of the Draft Study was published on May 1, 1985 (50 FR 18546). The public comment period is scheduled to close on August 31, 1985.

The issues raised in comments on the ANPR and the NPR are included in the issues being examined in the Federal Consistency Study. The Draft Study indicates that the Federal consistency process, in general, is working well, but that there are opportunities for increasing the effectiveness and efficiency of the Federal consistency process. Upon completion of this Study, NOAA will review the need for further rulemaking. NOAA will continue to monitor and evaluate the implementation of state coastal management programs and recommend appropriate improvements.

F. Other Actions Associated with the Rulemaking

(1) Classification Under Executive Order 12291

NOAA has concluded that these regulations are not major because they will not result in:

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

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

(c) Significant adverse effects 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.

The final regulations revise existing regulations to comport with the Supreme Court's decision in *Secretary of the Interior et al.* v. *California et al.*, (cited above) which excluded OCS oil and gas lease sales from the Federal consistency review provisions of section 307(c)(1) of the CZMA. The regulations will not result in any direct economic or environmental effect nor will they lead to any major indirect economic or environmental impacts.

(2) Regulatory Flexibility Act Analysis (Pub. L. 96-354)

A Regulatory Flexibility Analysis is not required for these final rules. The General Counsel of the Department of Commerce has certified to the Small Business Administration that the final rules will not have a significant impact on a substantial number of small entities because the final rules only eliminate OCS oil and gas lease sales from the consistency review provisions of the CZMA. The final rules will have no effect on small businesses and negligible effect on local units of government who participate in consistency reviews only through the states.

(3) Paper Work Reduction Act of 1980 (Pub. L. 96-511)

These final rules do not contain an information collection requirement subject to the Paper Work Reduction Act of 1980.

(4) National Environmental Policy Act

NOAA has concluded that publication of the final regulations does not constitute a major Federal action significantly affecting the quality of the human environment. Therefore, an

environmental impact statement is not required.

G. Modification To Comment on 930.33(c) Published at 44 FR 37146–3714

Outer Continental Shelf oil and gas lease sales do not "directly affect" the coastal zone, and therefore, are not subject to the Federal consistency provisions of this part. However, since subsequent exploration, development and production activities which affect the coastal zone are subject to the Federal consistency provisions of section 307(c)(3)(B). Federal agencies and private parties are strongly encouraged to ensure in advance, through early collaboration with state agencies, that activities to be conducted after the lease sale stage can proceed harmoniously with state coastal management programs.

List of Subjects in 15 CFR Parts 923 and 930

Coastal zone, Outer Continental Shelf, Oil and gas reserves, Intergovernmental relations.

PART 923—[AMENDED]

15 CFR Part 923 is amended as follows:

1. The authority citation for Part 923 continues to read as follows:

Authority: Sec. 317, Pub. L. 92–583, as amended (16 U.S.C. 1451 et seq.).

2. Section 923.11 is amended by revising (c)(2)(ii) to read as follows:

§ 923.11 Uses subject to management.

* * * * *

(c) * * *

(2) * * *

(ii) Industrial developments, such as tank farms and refineries, power plants, manufacturing complexes, industrial parks, onshore and offshore port facilities, mineral and sand extraction operations, liquified natural gas (LNG) facilities, petrochemical plants, and Outer Continental Shelf (OCS) development. (OCS oil and gas lease sale activities do not involve development activities and are not subject to the Federal consistency requirements of section 307(c)(1)).

* * * * *

PART 930—[AMENDED]

15 CFR Part 930 is amended as follows:

1. The authority citation for Part 930 continues to read as follows:

Authority: Sec. 317, Pub. L. 92–583, as amended (16 U.S.C. 1451 et seq.).

2. Part 930.33 paragraph (c) is revised to read as follows:

§ 930.33 Identifying Federal activities directly affecting the coastal zone.

* * * * *

(c)(1) Federal activities outside of the coastal zone, as defined in Section 304(1) of the Act, are subject to Federal agency review to determine whether they directly affect the coastal zone.

(2) OCS oil and gas lease sale activities conducted pursuant to the Outer Continental Shelf Lands Act (43 U.S.C. 1331 *et seq.*) are not Federal activities which directly affect the coastal zone within the meaning of Section 307(c)(1) of the Act, and, therefore, are not subject to review under this Subpart.

* * * * *

(Federal Domestic Assistance Catalog No. 11.419 Coastal Zone Management)

Dated: August 22, 1985.

Paul M. Wolff,

Assistant Administrator for Ocean Services and Coastal Zone Management.

[FR Doc. 85–20579 Filed 8–29–85; 8:45 am]

BILLING CODE 3510-08-M

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 33

Order Extending Contract Market Designations

AGENCY: Commodity Futures Trading Commission.

ACTION: Order.

SUMMARY: The Commodity Futures Trading Commission is publishing the text of an Order in which it has extended the contract market designations of various boards of trade for the trading of options on futures contracts and physical commodities under the first of its options pilot programs. The option contracts so affected do not involve the domestic agricultural commodities specifically enumerated in section 2(a)(1)(A) of the Commodity Exchange Act.

EFFECTIVE DATE: August 21, 1985.

FOR FURTHER INFORMATION CONTACT: Kenneth M. Rosenzweig, Associate Director, Division of Trading and Markets, Commodity Futures Trading Commission, 2033 K Street NW., Washington, DC 20581. Telephone: (202) 254–8955.

SUPPLEMENTARY INFORMATION: The Commodity Futures Trading Commission ("Commission") is today publishing elsewhere in the **Federal Register** proposed rules which, if adopted, would modify in certain respects the Commission's pilot program for the trading, on domestic exchanges, of options on futures contracts and physical commodities not involving the domestic agricultural commodities set forth in section 2(a)(1)(A) of the Commodity Exchange Act ("Act"). The first contract market designations under that pilot program became effective on October 1, 1982 and, absent further action by the Commission, will terminate on October 1, 1985. *See* Commission regulation 33.5(c), 17 CFR 33.5(c). Thus, among the rules today being proposed by the Commission is an amendment to § 33.5(c) which would eliminate the existing three-year limit on the first of the Commission's option pilot programs. Pending a final determination on the duration and terms of that pilot program, however, the Commission believes it is appropriate to extend the contract market designations which have already been granted under the pilot program so that option trading can continue without interruption. The Commission has, therefore, issued an Order which will allow the contract markets which have been designated for the trading of options on commodities other than those which are specifically enumerated in section 2(a)(1)(A) of the Act to continue to trade such option contracts pending further Order, or rule or regulation, of the Commission. The full text of the Commission's Order is set forth below.[1]

In the Matter of Amex Commodities Corporation, Chicago Board of Trade, Chicago Mercantile Exchange, Coffee, Sugar & Cocoa Exchange, Inc., Commodity Exchange, Inc., Kansas City Board of Trade, MidAmerica Commodity Exchange, New York Futures Exchange, Inc., and Philadelphia Board of Trade, Inc.

Order Extending Contract Market Designations

The Amex Commodities Corporation, Chicago Board of Trade, Chicago Mercantile Exchange, Coffee, Sugar & Cocoa Exchange, Inc., Commodity Exchange, Inc., Kansas City Board of Trade, MidAmerica Commodity Exchange, New York Futures Exchange, Inc., and Philadelphia Board of Trade, Inc., having applied for designation as contract markets for the trading of commodity options pursuant to section 4c(c) of the Commodity Exchange Act ("Act"), 7 U.S.C. 6c(c), have been so designated on the dates and for the

[1] The Commission's separate pilot program for the trading of options on futures contracts involving the enumerated domestic agricultural commodities is not scheduled to expire until October 28, 1987 and is unaffected by the actions now being taken by the Commission. *See* 49 FR 2752 (January 17, 1984); 50 FR 14718, 14719 (April 15, 1985).

commodity options set forth in the Appendix to this Order. Absent further Order, or rule or regulation, of the Commission, each of those Orders of Designation will cease to be effective on and after October 1, 1985. The Commission has now determined to extend each such Order of Designation until further notice in order to provide for uninterrupted trading in the above-referenced option contracts pending a final determination on the duration of the Commission's option pilot program and as to whether further amendments to the Commission's option regulations would be appropriate. Therefore,

it is hereby ordered that, under section 4c(c) of the Act, the designation of Amex Commodities Corporation, Chicago Board of Trade, Chicago Mercantile Exchange, Coffee, Sugar & Cocoa Exchange, Inc., Commodity Exchange, Inc., Kansas City Board of Trade, MidAmerica Commodity Exchange, New York Futures Exchange, Inc., and Philadelphia Board of Trade, Inc. as contract markets for the commodity options set forth in the Appendix to this Order shall hereafter remain in effect absent further Order, or rule or regulation, of the Commission.

Issued in Washington, DC, this 21st day of August 1985, by the Commission.

Jean A. Webb,

Secretary of the Commission.

APPENDIX TO ORDER EXTENDING CONTRACT MARKET DESIGNATIONS

Board of Trade	Underlying futures contract or physical commodity	Date of original designation
Amex Commodities Corp.	Gold bullion	Feb. 15, 1985.
Chicago Board of Trade.	U.S. Treasury bond futures.	Aug. 31, 1982.
	Silver futures	Feb. 12, 1985.
	Long-term U.S. Treasury note futures.	Apr. 23, 1985.
Chicago Mercantile Exchange.	Standard & Poors 500-stock price index futures.	Jan. 6, 1983.
	Deutschemark futures.	Dec. 13, 1983.
	British pound futures.	Feb. 22, 1985.
	Swiss franc futures	Do.
	Three-Month Eurodollar futures.	Mar. 19, 1985.
Coffee, Sugar, & Cocoa Exchange, Inc.	Sugar No. 11 futures.	Aug. 31, 1982.
Commodity Exchange, Inc.	Gold futures	Do.
	Silver futures	Aug. 21, 1984.
Kansas City Board of Trade.	Value line average index futures.	Jan. 13, 1983.
MidAmerica Commodity Exchange.	Gold futures	Aug. 31, 1982.
New York Futures Exchange, Inc.	NYSE composite stock index futures.	Jan. 6, 1983.
Philadelphia Board of Trade, Inc.	Eurodollar time deposits.	May 8, 1985.

* * * * *

Issued in Washington, D.C. this 21st day of August 1985, by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 85-20499 Filed 8-29-85; 8:45 am]

BILLING CODE 6351-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 558

New Animal Drugs for Use in Animal Feeds; Tylosin and Sulfamethazine

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) filed for Feed Specialties Co., Inc., providing for the manufacture of premixes containing 20 or 40 grams per pound each of tylosin and sulfamethazine, in addition to currently approved 5- and 10-gram-per-pound premixes, used to make finished swine feeds.

EFFECTIVE DATE: August 30, 1985.

FOR FURTHER INFORMATION CONTACT: Benjamin A. Puyot, Center for Veterinary Medicine (HFV-135), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-1414.

SUPPLEMENTARY INFORMATION: Feed Specialties Co., Inc., 1877 NE 58th Ave., Des Moines, IA 50313, is sponsor of supplemental NADA 107-957 submitted on its behalf by Elanco Products Co. The supplement provides for the manufacture of premixes containing 20 or 40 grams per pound each of tylosin (as tylosin phosphate) and sulfamethazine intended for use to subsequently make finished swine feeds. The firm currently holds approval for manufacturing 5- and 10-gram-per-pound premixes. All finished feeds are for use in maintaining weight gains and feed efficiency in the presence of atrophic rhinitis, lowering the incidence and severity of *Bordetella bronchiseptica* rhinitis, preventing swine dysentery (vibrionic), and controlling swine pneumonias caused by bacterial pathogens (*Pasteurella multocida* and/or *Corynebacterium pyogenes*). The supplemental NADA is approved and the regulations are amended to reflect the approval. The basis for approval is discussed in the freedom of information summary.

In accordance with the freedom of information provisions of Part 20 (21 CFR Part 20) and § 514.11(e)(2)(ii) (21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857, from 9 a.m. to 4 p.m., Monday through Friday.

The agency has determined under 21 CFR 25.24(d)(1)(i) (April 26, 1985; 50 FR 16636) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

List of Subjects in 21 CFR Part 558

Animal drugs, Animal feeds.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, Part 558 is amended as follows:

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

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

Authority: Sec. 512, 82 Stat. 343-351 (21 U.S.C. 360b); 21 CFR 5.10 and 5.83.

§ 558.630 [Amended]

2. In § 558.630 *Tylosin and sulfamethazine* in paragraph (b)(8) by removing "017274"; and in paragraph (b)(10) by inserting numerically "017274."

Dated: August 20, 1985.

Marvin A. Norcross,

Acting Associate Director for Scientific Evaluation.

[FR Doc. 85-20732 Filed 8-29-85; 8:45 am]

BILLING CODE 4160-01-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Housing—Federal Housing Commissioner

24 CFR Part 888

[Docket No. R-85-1224; FR-2079]

Section 8 Fair Market Rents for New Construction and Substantial Rehabilitation

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

ACTION: Final rule.

SUMMARY: Section 8(c)(1) of the U.S. Housing Act of 1937 requires HUD to establish Fair Market Rents (FMRs) and to publish these FMRs at least annually in the **Federal Register.** HUD published that last annual revision of the FMRs for New Construction and Substantial Rehabilitation on April 26, 1985 as an interim rule effective on June 4, 1985. This rule adopts the interim rule as final and makes changes in the Fair Market Rent levels in several areas in response to comments received on the interim rule.

EFFECTIVE DATE: October 3, 1985.

FOR FURTHER INFORMATION CONTACT: Edward M. Winiarski, Chief Appraiser, Valuation Branch, Technical Support Division, Office of Insured Multifamily Housing Development, 451 Seventh Street, SW., Washington, D.C. 20410–8000, (202) 426–7624. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On April 26, 1985, HUD published in the **Federal Register** (50 FR 16612) an interim rule constituting its latest annual revision of the Section 8 Fair Market Rents (FMRs) applicable to New Construction and Substantial Rehabilitation for all market areas, as required by section 8(c)(1) of the U.S. Housing Act of 1937 (42 U.S.C. 1437(c)(1)). The interim rule solicited public comments on the FMR schedules for a 30-day period ending May 28, 1985. HUD received eight comments from the public and seven from HUD Field Offices during the comment period.

Since HUD wished to make the revised FMRs effective as soon as possible after the close of the comment period, it made the rule effective June 4, 1985 for all market areas stating its intention to continue with its evaluation of all comments received and then to publish any needed revisions of the FMR schedules for particular market areas at a future date. Each public comment was forwarded to the Technical Support Division at Headquarters for review. It was determined that the documentation submitted warranted changes in the FMR schedules within selected market areas. Accordingly, this rule makes revisions to the FMR schedules which have been suggested by both the public commenters and the HUD Field Offices as described below.

First, since any proposal for housing for the elderly includes a requirement for a minimum of 25 percent zero-bedroom units, zero-bedroom (efficiency) unit FMRs have been added to the schedules for 18 market areas which did not previously contain them. Second, FMR schedules were raised in response to market studies submitted for the Detroit and Flint, Michigan market areas, the Denver, Colorado market area, Cheyenne, Wyoming market area, the Dubuque and Waterloo, Iowa market areas, Pittsburgh, Altoona, Erie and Johnstown, Pennsylvania market areas, and the Safford, Arizona market area. Third, the seven market areas within the Columbus, Ohio Office jurisdiction were inadvertently omitted from the publication of the interim rule on April 26, 1985 in the **Federal Register.** In order to correct this omission, the FMR schedules for these seven market areas have been included in this final rule.

In all, this final rule modifies the FMR schedules for the following 36 market areas: Pennsylvania, market areas of Pittsburgh, Altoona, Erie and Johnstown; Ohio, market areas of Columbus, Athens, Lima, Newark, Sidney, Springfield and Zanesville; Indiana, market areas of Indianapolis, Evansville, Bloomington, Fort Wayne, Gary, Hammond, Lafayette, South Bend and Terre Haute; Arizona, market area of Safford; Nebraska, market areas of Omaha, Grand Island, Lincoln, Norfolk, North Platte and Scotts Bluff; Michigan, market areas of Detroit and Flint; Iowa, market areas of Dubuque and Waterloo; Colorado, market area of Denver; Wyoming, market area of Cheyenne; and Texas, market areas of Abilene, El Paso and Odessa.

Proposals involving combinations of structural types and unit sizes for which FMRs are not provided or are not in effect may not be approved until the applicable FMRs have been published and have become effective.

The Department also received comments requesting the combining of certain market areas. Since FMRs for New Construction and Substantial Rehabilitation are based on the public housing prototype cost areas, the Department cannot implement these suggestions in this rule. However, the comments have been forwarded to the appropriate personnel in the Field Offices for consideration for future implementation.

Fair Market Rent schedules in effect on the date that the proposal or application for Section 202/Section 8 assistance is accepted for processing by HUD (or, in the case of assistance under 24 CFR Part 884, by FmHA, and by the State Agency in the case of assistance under 24 CFR Part 883) shall apply, except as follows:

1. For all projects where the FMRs are revised upward after the date that a processing stage is completed, the revised FMRs shall apply to all subsequent processing in reviewing contract rents and utilities (unless the borrower agrees at the fund reservation stage to limit the rents to 110 percent of the FMRs in effect at that time in accordance with negotiated bid procedures). The decision concerning appropriate FMRs to use in project processing shall be based upon an entire schedule, rather than selectively choosing the highest unit rents from the currently effective FMR schedule or a previously published schedule for that area.

2. For all projects where the Fair Market Rents are revised downward after the completion date of a processing stage, the applicable FMR shall be the higher of:

(a) The FMR set forth in Schedule A of Part 888 as revised or added by this rule, or

(b) The FMR set forth in the schedule published on February 8, 1984 (49 FR 4892) or any interim revision of that schedule.

HUD regulations in 24 CFR Part 50, implementing section 102(2)(C) of the National Environmental Policy Act of 1969, provide for categorical exclusions from their requirements for the actions, activities, and programs specified in § 50.20. Since the amendments made by this rule fall within the categorical exclusion set forth in § 50.20(l), no environmental finding is needed for this rule and none has been prepared.

This rule does not constitute a "major rule" as that term is defined in section 1(b) of Executive Order 12291 on Federal Regulation, issued 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 cost 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.

This rule was listed as item 126 in the Department's Semiannual Agenda of Regulations published on April 29, 1985 (50 FR 17286, 17317), under Executive Order 12291 and the Regulatory Flexibility Act.

As required by section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601), the Undersigned hereby certifies that this rule does not have a significant economic impact on a substantial number of small entities. While the changes made by this rule will have an

effect on developers of Section 8 projects, some of whom may constitute small entities, it is not expected that the economic impact on them will be substantial.

The Catalog of Federal Domestic Assistance Program number and title is 14.156, Lower Income Housing Assistance Program (Section 8).

List of Subjects in 24 CFR Part 888

Rent subsidies, Grant programs—housing and community development.

Accordingly, the Interim Rule published on April 26, 1985 at 50 FR 16612 is adopted as final without change, except as indicated in the schedule of rents that appears below.

Authority: Sec. 8(c)(1) of the U.S. Housing Act of 1937, 42 U.S.C. 1437f(c)(1); sec. 7(d), Department of HUD Act, 42 U.S.C. 3535(d).

Dated: August 26, 1985.

Janet Hale,

Acting General Deputy, Assistant Secretary for Housing—Deputy Federal Housing Commissioner.

Schedule A—Fair Market Rents for New Construction and Substantial Rehabilitation (Including Housing Finance and Development Agencies Program)

These Fair Market Rents have been trended ahead to October 1, 1986, to update the current Fair Market Rent schedules which these revised schedules replace.

Note.—The Fair Market Rents for (1) dwelling units designed for the elderly or handicapped are those for appropriate size units, not to exceed 2 bedrooms for the elderly, multiplied by 1.05; (2) congregate housing dwelling units are the same as for noncongregate units; (3) single room occupancy dwelling units (applicable only for Substantial Rehabilitation projects) are 75 percent of those for zero bedroom units of the same structural type; (4) living units in a group home (each composed of a bedroom plus a proportionate part of common living space which is ordinarily included in a living unit) are those for zero bedroom or one bedroom units of the walk-up structural type (or, if the group home contains an elevator, of the elevator 2–4 story structural type). In group homes, one bedroom Fair Market Rents may be applied only when the bedroom space plus the proportionate part of the common space is at least 450 square feet; (5) manufactured homes (unit and space) shall be 95 percent of the rents for detached units of the appropriate bedroom size (except that where a manufactured home Fair Market Rent is given on the schedule for the area, the amount on the schedule shall be the Fair Market Rent); and (6) manufactured home spaces in recently constructed or substantially rehabilitated manufactured home parks shall be the Fair Market Rents for spaces published for the Existing Housing Program under Schedule D, multiplied by 1.25.

All rents computed in accordance with this note or with established procedures for exception rents, shall be rounded down to the nearest whole dollar.

BILLING CODE 4210-27-M

SCHEDULE A- FAIR MARKET RENTS FOR NEW CONSTRUCTION AND SUBSTANTIAL REHABILITATION
(INCLUDING HOUSING FINANCE AND DEVELOPMENT AGENCIES PROGRAMS)

REGION 3

PITTSBURGH, PENNSYLVANIA AREA OFFICE

MARKET: PITTSBURGH

STRUCTURE TYPE	NUMBER OF BEDROOMS -0-	-1-	-2-	-3-	-4+
DETACHED			622	691	809
SEMI-DETACHED/ROW		533	592	667	788
WALKUP	394	469	564	667	788
ELEVATOR 2-4 STY	483	540	622		
ELEVATOR 5+ STY	498	564	662		
MANUFACTURED HOME					
EFFECTIVE DATE	100184				
TRENDED DATE	100186				

MARKET: ERIE

STRUCTURE TYPE	NUMBER OF BEDROOMS -0-	-1-	-2-	-3-	-4+
DETACHED			582	651	761
SEMI-DETACHED/ROW		504	554	628	725
WALKUP	339	419	491	578	638
ELEVATOR 2-4 STY	473	535	610		
ELEVATOR 5+ STY	494	565	655		
EFFECTIVE DATE	100184				
TRENDED DATE	100186				

MARKET: ALTOONA

STRUCTURE TYPE	NUMBER OF BEDROOMS -0-	-1-	-2-	-3-	-4+
DETACHED			518	628	747
SEMI-DETACHED/ROW		424	503	598	711
WALKUP	334	412	503	598	684
ELEVATOR 2-4 STY	473	538	561		
ELEVATOR 5+ STY	483	546	597		
EFFECTIVE DATE	100184				
TRENDED DATE	100186				

MARKET: JOHNSTOWN

STRUCTURE TYPE	NUMBER OF BEDROOMS -0-	-1-	-2-	-3-	-4+
DETACHED			529	638	748
SEMI-DETACHED/ROW		424	508	583	705
WALKUP	337	416	508	575	656
ELEVATOR 2-4 STY	439	472	566		
ELEVATOR 5+ STY	448	507	596		
EFFECTIVE DATE	100184				
TRENDED DATE	100186				

REGION 5

DETROIT, MICHIGAN AREA OFFICE

MARKET: DETROIT

STRUCTURE TYPE	NUMBER OF BEDROOMS -0-	-1-	-2-	-3-	-4+
DETACHED			635	688	803
SEMI-DETACHED/ROW		481	511	599	693
WALKUP	317	397	466	552	642
ELEVATOR 2-4 STY	349	431	484		
ELEVATOR 5+ STY	354	461	555		
MANUFACTURED HOME					
EFFECTIVE DATE	100184				
TRENDED DATE	100186				

MARKET: FLINT

STRUCTURE TYPE	NUMBER OF BEDROOMS -0-	-1-	-2-	-3-	-4+
DETACHED			565	673	755
SEMI-DETACHED/ROW		364	454	588	616
WALKUP	312	351	409	536	618
ELEVATOR 2-4 STY	312	368	433		
ELEVATOR 5+ STY	324	420	508		
EFFECTIVE DATE	100184				
TRENDED DATE	100186				

INDIANAPOLIS, INDIANA AREA OFFICE

MARKET: INDIANAPOLIS

STRUCTURE TYPE	NUMBER OF BEDROOMS -0-	-1-	-2-	-3-	-4+
DETACHED			571	636	787
SEMI-DETACHED/ROW	368	406	485	562	685
WALKUP	333	374	447	518	538
ELEVATOR 2-4 STY	368	397	474		
ELEVATOR 5+ STY	453	501	588		
MANUFACTURED HOME					
EFFECTIVE DATE	100184				
TRENDED DATE	100186				

MARKET: BLOOMINGTON

STRUCTURE TYPE	NUMBER OF BEDROOMS -0-	-1-	-2-	-3-	-4+
DETACHED			542	607	677
SEMI-DETACHED/ROW	350	385	459	521	567
WALKUP	315	357	425	482	534
ELEVATOR 2-4 STY	349	374	453		
ELEVATOR 5+ STY	434	482	570		
EFFECTIVE DATE	100184				
TRENDED DATE	100186				

MARKET: EVANSVILLE

STRUCTURE TYPE	NUMBER OF BEDROOMS -0-	-1-	-2-	-3-	-4+
DETACHED			528	593	668
SEMI-DETACHED/ROW	349	398	466	534	595
WALKUP	311	353	425	492	532
ELEVATOR 2-4 STY	347	376	453		
ELEVATOR 5+ STY	428	478	554		
EFFECTIVE DATE	100184				
TRENDED DATE	100186				

MARKET: FORT WAYNE

STRUCTURE TYPE	NUMBER OF BEDROOMS -0-	-1-	-2-	-3-	-4+
DETACHED			535	597	666
SEMI-DETACHED/ROW	344	384	459	539	568
WALKUP	312	352	418	468	515
ELEVATOR 2-4 STY	345	374	445		
ELEVATOR 5+ STY	432	478	559		
EFFECTIVE DATE	100184				
TRENDED DATE	100186				

MARKET: HAMMOND

STRUCTURE TYPE	NUMBER OF BEDROOMS -0-	-1-	-2-	-3-	-4+
DETACHED			584	653	711
SEMI-DETACHED/ROW	404	444	520	583	658
WALKUP	364	413	481	548	584
ELEVATOR 2-4 STY	405	435	506		
ELEVATOR 5+ STY	474	532	613		
MANUFACTURED HOME					
EFFECTIVE DATE	100184				
TRENDED DATE	100186				

MARKET: LAFAYETTE

STRUCTURE TYPE	NUMBER OF BEDROOMS -0-	-1-	-2-	-3-	-4+
DETACHED			564	632	677
SEMI-DETACHED/ROW	368	401	469	536	605
WALKUP	326	367	434	498	548
ELEVATOR 2-4 STY	359	389	462		
ELEVATOR 5+ STY	449	498	582		
EFFECTIVE DATE	100184				
TRENDED DATE	100186				

MARKET: SOUTH BEND

STRUCTURE TYPE	NUMBER OF BEDROOMS -0-	-1-	-2-	-3-	-4+
DETACHED			558	627	701
SEMI-DETACHED/ROW	362	415	482	550	620
WALKUP	324	368	432	489	538
ELEVATOR 2-4 STY	362	392	461		
ELEVATOR 5+ STY	443	501	588		
EFFECTIVE DATE	100184				
TRENDED DATE	100186				

MARKET: TERRE HAUTE

STRUCTURE TYPE	NUMBER OF BEDROOMS -0-	-1-	-2-	-3-	-4+
DETACHED			558	627	702
SEMI-DETACHED/ROW	360	399	478	541	689
WALKUP	322	366	448	503	557
ELEVATOR 2-4 STY	357	388	468		
ELEVATOR 5+ STY	436	487	575		
EFFECTIVE DATE	100184				
TRENDED DATE	100186				

MARKET: GARY

STRUCTURE TYPE	NUMBER OF BEDROOMS -0-	-1-	-2-	-3-	-4+
DETACHED			584	643	709
SEMI-DETACHED/ROW	404	444	512	583	658
WALKUP	364	413	481	548	584
ELEVATOR 2-4 STY	405	435	506		
ELEVATOR 5+ STY	461	511	582		
MANUFACTURED HOME					
EFFECTIVE DATE	100184				
TRENDED DATE	100186				

COLUMBUS, OHIO AREA OFFICE

MARKET: COLUMBUS

STRUCTURE TYPE	NUMBER OF BEDROOMS -0-	-1-	-2-	-3-	-4+
DETACHED			677	756	783
SEMI-DETACHED/ROW		382	454	511	559
WALKUP	382	371	432	493	557
ELEVATOR 2-4 STY	336	410	488		
ELEVATOR 5+ STY	466	575	687		
MANUFACTURED HOME					
EFFECTIVE DATE	100184				
TRENDED DATE	100186				

MARKET: ATHENS

STRUCTURE TYPE	NUMBER OF BEDROOMS -0-	-1-	-2-	-3-	-4+
DETACHED			658	718	748
SEMI-DETACHED/ROW		365	448	494	546
WALKUP	294	359	415	482	546
ELEVATOR 2-4 STY	324	398	471		
ELEVATOR 5+ STY	454	566	705		
EFFECTIVE DATE	100184				
TRENDED DATE	100186				

MARKET: LIMA

STRUCTURE TYPE	NUMBER OF BEDROOMS -0-	-1-	-2-	-3-	-4+
DETACHED			658	718	748
SEMI-DETACHED/ROW		365	448	494	546
WALKUP	294	359	415	482	546
ELEVATOR 2-4 STY	324	398	471		
ELEVATOR 5+ STY	454	566	705		
EFFECTIVE DATE	100184				
TRENDED DATE	100186				

MARKET: NEWARK

STRUCTURE TYPE	NUMBER OF BEDROOMS -0-	-1-	-2-	-3-	-4+
DETACHED			658	718	748
SEMI-DETACHED/ROW		365	448	494	546
WALKUP	294	359	415	482	546
ELEVATOR 2-4 STY	324	398	471		
ELEVATOR 5+ STY	454	566	705		
EFFECTIVE DATE	100184				
TRENDED DATE	100186				

MARKET: SPRINGFIELD

STRUCTURE TYPE	NUMBER OF BEDROOMS -0-	-1-	-2-	-3-	-4+
DETACHED			658	718	748
SEMI-DETACHED/ROW		365	448	494	546
WALKUP	294	359	415	482	546
ELEVATOR 2-4 STY	324	398	471		
ELEVATOR 5+ STY	454	566	705		
MANUFACTURED HOME					
EFFECTIVE DATE	100184				
TRENDED DATE	100186				

MARKET: SIDNEY

STRUCTURE TYPE	NUMBER OF BEDROOMS -0-	-1-	-2-	-3-	-4+
DETACHED			658	718	748
SEMI-DETACHED/ROW		365	448	494	546
WALKUP	294	359	415	482	546
ELEVATOR 2-4 STY	324	398	471		
ELEVATOR 5+ STY	454	566	705		
EFFECTIVE DATE	100184				
TRENDED DATE	100186				

MARKET: ZANESVILLE

STRUCTURE TYPE	NUMBER OF BEDROOMS -0-	-1-	-2-	-3-	-4+
DETACHED			658	718	748
SEMI-DETACHED/ROW		365	448	494	546
WALKUP	294	359	415	482	546
ELEVATOR 2-4 STY	324	398	471		
ELEVATOR 5+ STY	454	566	705		
EFFECTIVE DATE	100184				
TRENDED DATE	100186				

SCHEDULE A- FAIR MARKET RENTS FOR NEW CONSTRUCTION AND SUBSTANTIAL REHABILITATION
(INCLUDING HOUSING FINANCE AND DEVELOPMENT AGENCIES PROGRAMS)

REGION 6

DALLAS, TEXAS AREA OFFICE

MARKET: EL PASO
NUMBER OF BEDROOMS

STRUCTURE TYPE	-0-	-1-	-2-	-3-	-4+
DETACHED			471	545	611
SEMI-DETACHED/ROW	302	339	429	505	571
WALKUP	266	318	406	469	547
ELEVATOR 2-4 STY	278	350	441		
ELEVATOR 5+ STY	391	469	585		
MANUFACTURED HOME					

EFFECTIVE DATE 100184
TRENDED DATE 100186

MARKET: ABILENE
NUMBER OF BEDROOMS

-0-	-1-	-2-	-3-	-4+
		539	657	727
369	370	469	553	644
292	347	449	515	598
304	383	482		
420	515	680		

EFFECTIVE DATE 100184
TRENDED DATE 100186

MARKET: ODESSA
NUMBER OF BEDROOMS

-0-	-1-	-2-	-3-	-4+
		463	709	774
331	350	408	592	692
267	309	379	550	641
282	363	425		
419	468	622		

EFFECTIVE DATE 100184
TRENDED DATE 100186

REGION 7

OMAHA, NEBRASKA AREA OFFICE

MARKET: OMAHA
NUMBER OF BEDROOMS

STRUCTURE TYPE	-0-	-1-	-2-	-3-	-4+
DETACHED					
SEMI-DETACHED/ROW	328	363	463	527	588
WALKUP	281	339	418	517	546
ELEVATOR 2-4 STY	288	381	458		
ELEVATOR 5+ STY	316	394	474		
MANUFACTURED HOME					

EFFECTIVE DATE 100184
TRENDED DATE 100186

MARKET: GRAND ISLAND
NUMBER OF BEDROOMS

-0-	-1-	-2-	-3-	-4+
318	359	454	521	574
281	338	418	517	563
288	376	458		
319	394	474		

EFFECTIVE DATE 100184
TRENDED DATE 100186

MARKET: LINCOLN
NUMBER OF BEDROOMS

-0-	-1-	-2-	-3-	-4+
345	355	449	515	567
288	339	418	518	562
288	383	458		
328	394	474		

EFFECTIVE DATE 100184
TRENDED DATE 100186

MARKET: NORFOLK
NUMBER OF BEDROOMS

-0-	-1-	-2-	-3-	-4+
318	359	454	521	574
281	338	418	517	563
288	376	458		
319	394	474		

EFFECTIVE DATE 100184
TRENDED DATE 100186

MARKET: NORTH PLATTE
NUMBER OF BEDROOMS

STRUCTURE TYPE	-0-	-1-	-2-	-3-	-4+
DETACHED					
SEMI-DETACHED/ROW	292	331	419	481	538
WALKUP	263	328	386	479	521
ELEVATOR 2-4 STY	275	348	438		
ELEVATOR 5+ STY	295	372	458		
MANUFACTURED HOME					

EFFECTIVE DATE 100184
TRENDED DATE 100186

MARKET: SCOTTS BLUFF
NUMBER OF BEDROOMS

-0-	-1-	-2-	-3-	-4+
318	353	447	512	564
288	344	418	518	561
292	370	467		
314	397	487		

EFFECTIVE DATE 100184
TRENDED DATE 100186

DES MOINES, IOWA SERVICE OFFICE

MARKET: DUBUQUE
NUMBER OF BEDROOMS

STRUCTURE TYPE	-0-	-1-	-2-	-3-	-4+
DETACHED			593	683	783
SEMI-DETACHED/ROW		455	515	576	661
WALKUP	325	349	411	505	561
ELEVATOR 2-4 STY	392	437	513		
ELEVATOR 5+ STY	422	474	561		
MANUFACTURED HOME					

EFFECTIVE DATE 100184
TRENDED DATE 100186

MARKET: WATERLOO
NUMBER OF BEDROOMS

-0-	-1-	-2-	-3-	-4+
		594	683	783
	441	513	576	661
325	352	413	505	561
392	438	513		
422	474	561		

EFFECTIVE DATE 100184
TRENDED DATE 100186

REGION 8

DENVER, COLORADO REGIONAL AREA OFFICE

MARKET: DENVER, CO
NUMBER OF BEDROOMS

STRUCTURE TYPE	-0-	-1-	-2-	-3-	-4+
DETACHED			683	812	935
SEMI-DETACHED/ROW	436	489	576	695	782
WALKUP	353	413	462	603	684
ELEVATOR 2-4 STY	369	421	534		
ELEVATOR 5+ STY	468	471	595		
MANUFACTURED HOME					

EFFECTIVE DATE 100184
TRENDED DATE 100186

MARKET: CHEYENNE, WY
NUMBER OF BEDROOMS

-0-	-1-	-2-	-3-	-4+
		549	662	745
325	371	447	555	627
298	341	412	511	584
358	408	493		
382	433	519		

EFFECTIVE DATE 100184
TRENDED DATE 100186

REGION 9

PHOENIX, ARIZONA SERVICE OFFICE

MARKET: SAFFORD
NUMBER OF BEDROOMS

STRUCTURE TYPE	-0-	-1-	-2-	-3-	-4+
DETACHED			469	569	668
SEMI-DETACHED/ROW	319	378	442	536	620
WALKUP	299	353	429	505	559
ELEVATOR 2-4 STY	326	388	456		
ELEVATOR 5+ STY					
MANUFACTURED HOME					

EFFECTIVE DATE 100184
TRENDED DATE 100186

[FR Doc. 85-20744 Filed 8-29-85; 8:45 am]
BILLING CODE 4210-27-C

SELECTIVE SERVICE SYSTEM

32 CFR Part 1699

Enforcement of Nondiscrimination on the Basis of Handicap in Selective Service System Programs

AGENCY: Selective Service System.

ACTION: Final rule.

SUMMARY: This regulation provides for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), which prohibits discrimination on the basis of handicap, as it applies to programs or activities conducted by the Selective Service System.

EFFECTIVE DATE: September 30, 1985.

FOR FURTHER INFORMATION CONTACT: Henry N. Williams, General Counsel, Selective Service System, Washington, D.C. 20435, Phone 202–724–1167. TDD Phone 202–724–0408.

SUPPLEMENTARY INFORMATION: The purpose of this rule is to provide for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), as it applies to programs and activities conducted by the Selective Service System.

The proposed rule was published in the **Federal Register** on May 1, 1984 (49 FR 18550). The period for receiving public comment expired August 28, 1984.

Six comments were received, all from State or National interest organizations, and none from individuals. Two letters of comment, each from a different source, were identical in content. The majority of comments were of a general nature, addressing the concept of the regulations, with a few exceptions which addressed specific sections.

The text of the final rule is identical to the text of the proposed rule except as indicated below. Revisions made reflect changes that are consistent with the final regulation published by the Department of Justice to implement section 504 in the programs and activities conducted by that agency. The revisions were made because the Department of Justice's final rule addresses all the issues raised by comments submitted to the Selective Service System, and because the Selective Service System intends to avoid standards under the Rehabilitation Act that conflict with other executive agencies.

Section-by-Section Analysis of Revised Sections

Section 1699.110 Self-evaluation.

The provision that the Agency shall provide an opportunity to interested persons to participate in the self-evaluation process by submitting comments (both oral and written) has been added. The requirement that the agency maintain a file of the list of interested persons consulted has been eliminated.

Section 1699.130 General prohibitions against discrimination.

The prohibition found in § 1699.130(b)(6) concerning licensing and certification programs has been added.

Section 1699.150 Program accessibility: Existing facilities.

The requirement that the Agency develop the transition plan with the assistance of interested persons has been modified to provide such persons an opportunity to participate in the development of the transition plan by submitted comments (both oral and written).

Section 1699.160 Communications.

The Notice requirement that the Agency take appropriate steps to provide handicapped persons with information regarding their section 504 Rights under the Agency's programs or activities is established in § 1699.111. Because § 1699.111 encompasses the requirements of proposed § 1699.160(d), this latter paragraph has been deleted as duplicative.

This regulation has been reviewed by the Department of Justice. It is an adaptation of a prototype prepared by the Department of Justice under Executive Order 12250 (45 FR 72995, 3 CFR, 180 Comp., p. 298) and distributed to Executive agencies on April 15, 1983.

This regulation has also been reviewed by the Equal Employment Opportunity Commission under Executive Order 12067 (43 FR 29867, 3 CFR 1978 Comp., 206).

It is not a major rule within the meaning of Executive Order 12291 (46 FR 13193, 3 CFR, 1981 Comp. p. 127) and, therefore, a regulatory impact analysis has not been prepared.

This regulation does not have an impact on small entities. It is not, therefore, subject to the Regulatory Flexibility Act (5 U.S.C. 601–612).

Section 504 requires that regulations that apply to the programs and activities of Federal Executive agencies shall be submitted to the appropriate authorizing committees of Congress and that such regulations may take effect no earlier than the thirtieth day after they have been so submitted. The System has today submitted this regulation to the Senate Committee on Labor and Human Resources and the House Committee on Education and Labor pursuant to the terms of section 504. The regulation will become effective on September 30, 1985.

List of Subjects in 32 CFR Part 1699

Blind, Civil rights, Deaf, Disabled, Discrimination against handicapped, Equal employment opportunity, Federal buildings and facilities, Handicapped, Nondiscrimination, Physically handicapped.

Thomas K. Turnage,

Director of Selective Service.

August 27, 1985.

Part 1699 is added to 32 CFR Chapter XVI as follows:

PART 1699—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY SELECTIVE SERVICE SYSTEM

Sec.
1699.101 Purpose.
1699.102 Application.
1699.103 Definitions.
1699.104–1699.109 [Reserved]
1699.110 Self-evaluation.
1699.111 Notice.
1699.112–1699.129 [Reserved]
1699.130 General prohibitions against discrimination.
1699.131–1699.139 [Reserved]
1699.140 Employment.
1699.141–1699.148 [Reserved]
1699.149 Program accessibility: Discrimination prohibited.
1699.150 Program accessibility: Existing facilities.
1699.151 Program accessibility: New construction and alterations.
1699.152–1699.159 [Reserved]
1699.160 Communications.
1699.161–1699.169 [Reserved]
1699.170 Compliance procedures.
1699.171–1699.999 [Reserved]

Authority: 29 U.S.C. 794.

§ 1699.101 Purpose.

The purpose of this part is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 1699.102 Application.

This part applies to all programs or activities conducted by the agency

§ 1699.103 Definitions.

For purposes of this part, the term—

"Agency" means the Selective Service System.

"Assistant Attorney General" means the Assistant Attorney General, Civil

Rights Division, United States Department of Justice.

"Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, telecommunications devices and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

"Complete complaint" means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

"Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

"Handicapped person" means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

As used in this definition, the phrase:

(1) "Physical or mental impairment" includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such disease and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addition and alcoholism.

(2) "Major life activities" includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) "Is regarded as having an impairment" means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (l) of this definition but is treated by the agency as having such an impairment.

"Qualified handicapped person" means—

(1) With respect to any agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, a handicapped person who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature; or

(2) With respect to any other program or activity, a handicapped person who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.

"Section 504" means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617), and the Rehabilitation, Comprehensive Services, and Development Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

§§ 1699.104–1699.109 [Reserved]

§ 1699.110 Self-evaluation.

(a) The agency shall, within one year of the effective date of this part, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, for at least three years following completion of the evaluation required under paragraph (a) of this section, maintain on file and make available for public inspection—

(1) A description of areas examined and any problems identified; and

(2) A description of any modifications made.

§ 1699.111 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the agency head finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and its regulation.

§§ 1699.112–1699.129 [Reserved]

§ 1699.130 General prohibitions against discrimination.

(a) No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or

service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aids, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified handicapped persons to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to handicapped persons.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude handicapped persons from, deny them the benefits of, or otherwise subject them to discrimination under, any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to handicapped persons.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified handicapped persons to discrimination on the basis of handicap.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified handicapped persons to discrimination on the basis of handicap, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified handicapped persons to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this part.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or Executive order to a different class of handicapped person is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

§§ 1699.131–1699.139 [Reserved]

§ 1699.140 Employment.

No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established in 29 CFR Part 1613, shall apply to employment in federally conducted programs or activities.

§§ 1699.141–1699.148 [Reserved]

§ 1699.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 1699.150, no qualified handicapped persons shall, because the agency's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subject to discrimination under any program or activity conducted by the agency.

§ 1699.150 Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by handicapped persons;

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 1699.150(a) would result in such alterations or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity.

(b) *Methods.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignments of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by handicapped persons. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4141–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified handicapped persons in the most integrated setting appropriate.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section within sixty days of the effective date of this part except that where structural changes in facilities are undertaken, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, within six months of the effective date

of this part, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the development of the transition by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, at the time, identify steps that will be taken during each year of the transition period; and

(4) Indicate the officials responsible for implementation of the plan.

§ 1699.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by handcapped persons. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600 to 14–19.607, apply to buildings covered by this section.

§§ 1699.152–1699.159 [Reserved]

§ 1699.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aid where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the handicapped person.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunications devices for deaf persons (TDD's), or equally effective telecommunication systems shall be used.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signs at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 1699.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

§§ 1699.161–1699.169 [Reserved]

§ 1699.170 Compliance procedure.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established in 29 CFR Part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) Responsibility for implementation and operation of this section shall be vested in the Associate Director for Administration.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), or section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 792), is not readily accessible and usable to handicapped persons.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusion of law;

(2) A description of a remedy of each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by § 1699.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the Director of Selective Service.

(j) The agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the agency determines that it needs additional information from the complainant, it shall have 60 days from the date it receives the additional information to make its determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated.

§§ 1699.171–1699.999 [Reserved]

[FR Doc. 85–20833 Filed 8–29–85; 8:45 am]

BILLING CODE 8015–01–M

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 61

Procedures for Approved State and Local Government Historic Preservation Programs

AGENCY: National Park Service, Interior.

ACTION: Final rule.

SUMMARY: These final rules present the requirements for approval of State and local historic preservation programs participating in the national preservation program as specified in the National Historic Preservation Act, as amended in 1980 ("the Act"). These rules are necessary in order to implement procedures for: (1) The approval of State programs; (2) the certification of local governments when there is no approved State historic preservation program; and (3) funding Certified Local Governments (CLGs) when there is no approved State historic preservation program. The intended effect of this rulemaking is to meet the requirements of the Act by providing the procedures and standards for the evaluations of State historic preservation programs and by noting the policy to be followed in the national CLG program in States without approved State historic preservation programs.

EFFECTIVE DATE: September 30, 1985.

FOR FURTHER INFORMATION CONTACT: Hardy L. Pearce, Chief, Survey and Planning Branch, Interagency Resources Division, National Park Service, U.S. Department of the Interior, P.O. Box 37127, Washington, D.C. 20013-7127. Telephone Number: (202-343-9505).

SUPPLEMENTARY INFORMATION: This rulemaking was necessitated by enactment of the National Historic Preservation Act Amendments of 1980, Pub. L. 96-515, on December 12, 1980.

Section 101(b)(2) of the Act requires the Secretary of the Interior (Secretary) to conduct performance evaluations of State historic preservation programs. These rules provide the procedures and standards for these evaluations.

These sections of 36 CFR Part 61, which were reserved when other sections of Part 61 were published in final on April 13, 1984, were proposed on May 14, 1984. Sections of Part 61 already in effect establish procedures for approval of State historic preservation programs; procedures for Historic Preservation Fund (HPF) matching grants-in-aid to approved State programs; a process by which local governments will be certified to participate formally in the National historic preservation program; and procedures for the transfer of a portion of each State's annual HPF grant to Certified Local Governments. Upon the effective date of the sections of Part 61 published herein, the entire 36 CFR Part 61 shall be in effect.

The Secretary will evaluate each State program for compliance with 36 CFR Part 61 and other program requirements. The program evaluations will be conducted every second or third fiscal year. They will be rigorous with respect to assessing States' performance under the requirements of the Act. The State programs will be selectively examined to the depth of existing regulations and standards pertinent to each requirement but only to the extent these were in effect during the performance period being evaluated. The Secretary will verify the accuracy of required periodic State reports used in meeting governmentwide requirements of OMB Circular A-102, in allocating grant funds, and in reporting on the status of the national historic preservation program; provide States with an analysis of program strengths and weaknesses; and, initiate a periodic program approval process based upon State compliance with statutory program responsibility and implementation of Federal administrative controls.

As required by section 101(c)(1) of the National Historic Preservation Act, as amended, States with approved historic preservation programs are required to develop procedures for the certification of local governments and for the transfer of funds to local governments.

The Secretary also is required by the Act to issue rules for the certification of local governments in States that do not have an approved historic preservation program. These rules, which were proposed on May 14, 1984, are herein issued as final.

When there is no approved State program, the Secretary will certify local governments directly. The Secretary will base the review of applications from local governments wishing to become certified upon the requirements for local government certification contained in 36 CFR Part 61.

The Secretary will ensure that, to the extent feasible, there is consistency and continuity in the CLG program of a State that does not have an approved program. Therefore, if a now disapproved State program had an approved local government certification process and had already certified local governments, the Secretary will consider that process in his review of any application for local government certification from within that State.

Under section 101(c)(1) of the Act, the Secretary also is required to issue rules for the transfer of funds to local governments. When there is no approved State program, the Secretary will directly administer the transfer of funds to CLGs. The Secretary will base the review of applications from local governments wishing to receive funding upon the requirements set forth in § 61.7.

Comments and Response to Comments on the May 14, 1984, Publication of Proposed Rules

Section 61.4 Approved state programs.

Section 61.4 (c)(2)(i): Three comments were received on this section. One commentor suggested that "the Secretary will evaluate each State for compliance with 36 CFR 61" may be interpreted more narrowly than intended. As the proposed rule notes, all aspects of each State Historic Preservation Program are subject to review including, for example, aspects regulated by OMB circular and Treasury requirements. The commentor, therefore, recommended that the first sentence be revised as follows: "The Secretary will evaluate each State program for compliance with the Act and other applicable laws and regulations." The suggestion was adopted to more accurately reflect the general categories of activities subject to review by the National Park Service.

Another commentor suggested that the word "immediately" be dropped in the second sentence because it does not qualitatively add to the meaning of the sentence and implies an unrealistic degree of precision in scheduling reviews. Because the important concept is that State program evaluations occur every two or three years, the word "immediately" has been dropped as unnecessarily inflexible.

Two people suggested that the word "selectively" be inserted in the fourth sentence prior to "examined". We agree with the suggestion. Even though, in order to ascertain the status of State programs, all categories listed in § 61.4 (c)(2)(ii) will be examined and each aspect of State operations must be subject to examination, no single review will be equally detailed on all aspects of State operations. A sampling method based on random selection, results of previous reviews, and as indicated by other sources of information, is equally effective (as a 100% examination) in determining the status of a State program but is less costly.

Section 61.4 (c)(2)(ii): A commentor suggested that "Tax Act" be added to the list of categories of activities for

evaluation. We do not agree. Preservation Tax Incentives are not applicable to all States by law (e.g., the Virgin Islands) and participation by other States is voluntary pursuant to 36 CFR Part 67; therefore, it cannot be listed as a separate category. However, because tax incentive activities are eligible costs for State programs, such activities are subject to review and approval as part of the Secretary's evaluation.

Section 61.4(c)(2): A commentor proposed that the National Park Service publish in the **Federal Register** a notice announcing planned State program reviews and soliciting public comments on the State programs, and a second notice announcing the availability of National Park Service results after the visit. **Federal Register** notices to the public would be an unduly burdensome requirement. However, the idea of providing a standard method for public involvement in State program review is a good one. Accordingly, a procedure for doing this has been added to the *National Register Programs Manual* (NPS Guideline 49), which implements 36 CFR Part 61. As a result of the suggestion, a procedure was adopted for notifying a cross-section of the State's preservation constituency by a Statewide newsletter or similar State government publication with extensive distribution. The notice must invite public comments on the State's performance in implementing the Act and other laws and regulations. Copies of the National Park Service State evaluation report are sent to commentors.

Approved Local Programs (§ 61.5) and Transfer for Grants to Certified Local Governments (§ 61.7)

One comment was made concerning procedures in the Certified Local Government (CLG) program in instances when there is no approved State program. The commentor suggests that "language be used to clarify that any previously approved State procedures may be used, but only to the extent feasible, to preclude the implication that [the Secretary] must adhere to these procedures when it may be neither desirable or administratively feasible to do so." We agree with both points made and have modified the final rule to allow for as much consistency within State CLG programs as is feasible given the absence of an approved State historic preservation program.

Revisions

After consideration and review, the National Park Service has made the following revisions to 36 CFR Part 61. A few editorial changes have also been made.

Section 61.4(c)(2)(i): The first sentence has been revised by dropping, "36 CFR Part 61" and language has been added as follows, "the Act and other applicable laws and regulations".

Section 61.4(c)(2)(i): The word "immediately" has been dropped in the second sentence.

Section 61.4(c)(2)(i): The word "selectively" has been added in the fourth sentence.

Section 61.5(n)(4): A new paragraph was added to indicate that, to the extent feasible, the Secretary will be consistent with previously approved State certification procedures when reviewing certification applications from local governments in States without approved State historic preservation programs.

Section 61.7(q): Two new sentences were added to indicate that, to the extent feasible, the Secretary will be consistent with previously approved State CLG allocation procedures when reviewing applications for funding from CLGs in States without approved State historic preservation programs.

Classification

In accordance with Executive Order 12291, the Department of the Inferior has determined that these rules are not major. In accordance with the Regulatory Flexibility Act, the Department of the Interior has determined that these rules will not have a significant economic effect on a substantial number of small entities. The information collection requirements contained in this part have been approved and assigned clearance number *1024-0038* by the Office of Management and Budget under 44 U.S.C. 3501 *et set.*

Regulatory Analysis

Not required for this rulemaking.

Environmental Impact Statement

This regulation does not not significantly impact the environment. Because these rules have to do with procedural aspects of State and local historic preservation programs and have no impact on the environment, an Environmental Impact Statement is not required.

List of Subjects in 36 CFR Part 61

Grant programs, Natural resources, Historic preservation.

The originators of these procedures are Theodore Pochter, Preservation Planner, and John W. Renaud, Historian, Interagency Resources Division, National Park Service (202/343-9505).

Dated: June 25, 1985.

Susan E. Recce,

Acting Assistant Secretary, Fish and Wildlife and Parks.

PART 61—PROCEDURES FOR APPROVED STATE AND LOCAL GOVERNMENT HISTORIC PRESERVATION PROGRAMS

In consideration of the foregoing, 36 CFR Part 61 is amended as follows:

1. The authority citation for Part 61 continues to read as follows:

Authority: National Historic Preservation Act of 1966, as amended 16 U.S.C. 470 et seq.

2. Section 61.4(c)(2) is amended by revising the heading and by adding paragraphs (c)(2)(i)–(v) to read as follows:

§ 61.4 Approved state programs.

* * * * *

(c) * * *

(2) *Procedures for Review and Approval of State Historic Preservation Programs.* (i) The Secretary will evaluate each State program for compliance with the requirements of the Act and other applicable laws and regulations. The program evaluation process will be conducted after the end of every second or third fiscal year. It will be rigorous with respect to assessing the State's performance of the requirements in the Act. The State programs will be selectively examined to the depth of existing regulations and standards pertinent to each requirement but only to the extent these were in effect during the performance period being evaluated. The Secretary will verify the accuracy of required periodic State reports used in allocating grant funds and in reporting on the status of the national historic preservation program and provide States with analyses of program strengths and weaknesses.

(ii) The categories of activities to be evaluated are:

(A) Requirements of the Act.

(*1*) Legal authority and designation of the State Historic Preservation Officer.

(*2*) State Staff Qualifications and Composition.

(*3*) State Review Board Qualifications and Composition.

(*4*) Historic Preservation Fund Grant Management.

(*5*) Comprehensive Historic Preservation Planning.

(*6*) Survey and Inventory.

(*7*) National Register.

(*8*) Public Participation.

(*9*) Technical Assistance to Governmental Agencies.

(*10*) Review and Compliance.

(11) Public Education.

(12) Certification Assistance to Local Governments.

(B) Conditions and other requirements as specified in *The National Register Programs Manual* (NPS Guideline 49).

(C) Annual Historic Preservation Fund grant applications.

(D) OMB circular and Treasury requirements.

(E) Appropriate implementing regulations.

(iii) The Secretary will use a combination of on-site and off-site inquiries to perform the evaluation. To achieve uniformity of review and comprehensive coverage of the approval criteria, the following questions will generally form the basis for verifying State activities for each of the requirements:

(A) Is there an adequate system or process in place for the requirement?

(B) Is the system or process being used such that a minimal level of activity for each requirement can be demonstrated?

(C) Have all conditions of any grant awards been met?

(D) Are the data contained in the previous year's End-of-Year Report accurate?

(iv) Approval Method.

(A) States meeting all requirements in the review will receive immediate official notice that their approved status is continued.

(B) States not meeting all requirements will receive immediate notice of deficiencies along with recommendations on how to correct them. The Secretary will defer making a decision on program approval for up to a 4 month period during which time technical assistance in correcting the problems will be offered. States must either correct cited deficiencies, or provide an acceptable justification for requiring additional time and a plan and timetable for correcting deficiencies. During this period, States have the opportunity to appeal to the Secretary any findings and recommendations.

(C) States successfully resolving deficiencies will receive notice from the Secretary that their approved status is continued. Once approved status is renewed, States will not be reviewed until the next regular evaluation period, although evaluations may be conducted more often in individual States if the Secretary deems this necessary. The Secretary may disapprove a State program as a result of any such evaluation subject to the provisions of Sec. 61.4(c)(2)(iv) (A), (B), and (D).

(D) States will be "disapproved" only when, after the expiration of the specified period, they are officially notified that their approved status is removed for failure to correct cited deficiencies. The Secretary will then initiate financial suspension and other actions in accordance with administrative guidelines specified in *The National Register Programs Manual* (NPS Guideline 49).

(v) Instructions on carrying out the evaluation process are provided in *The National Register Programs Manual* (NPS Guideline 49).

* * * * *

3. Section 61.5(n) is revised to read as follows:

§ 61.5 Approved local programs.

* * * * *

(n) *Procedures for direct certification by the Secretary where there is no approved State program.* (1) When there is no approved State program, local governments wishing to be certified must apply directly to the Secretary.

(2) The application must demonstrate that the local government meets the specifications for certification set forth in paragraph (c) of this section.

(3) The Secretary shall review certification applications under this subsection and take action within 90 days of receipt.

(4) To the extent feasible, the Secretary will ensure that there is consistency and continuity in the CLG program of a State that does not have an approved historic preservation program. Therefore, if a now disapproved State program had an approved local government certification process and had already certified local governments, the Secretary will consider the process in his review of any applications for local govenment certification from within the State.

3. Section 61.7(q) is revised to read as follows:

§ 61.7 Transfer of grants to certified local governments.

* * * * *

(q) Where there is no approved State program, the method for allocating funds will be determined by the Secretary in accordance with the procedures set forth for States in this section. To the extent feasible, there should be consistency and continuity in funding allocation policy of the CLG program of a State that does not have an approved historic preservation program. Therefore, if a now disapproved State program had an approved allocation process, the Secretary will consider it in the review of any application for funding from CLGs within that State.

[FR Doc. 85-20785 Filed 8-29-85; 8:45 am]

BILLING CODE 4310-70-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 64

[Docket No. FEMA 6675]

Suspension of Community Eligibility; Illinois et al.

AGENCY: Federal Emergency Management Agency, FEMA.

ACTION: Final rule.

SUMMARY: This rule lists communities, where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP), that are suspended on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If FEMA receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will be withdrawn by publication in the **Federal Register.**

EFFECTIVE DATES: The third date ("Susp.") listed in the fourth column.

FOR FURTHER INFORMATION CONTACT: Frank H. Thomas, Assistant Administrator, Office of Loss Reduction, Federal Insurance Administration, (202) 646-2717, 500 C Street, Southwest, FEMA—Room 416, Washington, D.C. 20472.

SUPPLEMENTARY INFORMATION: The National Flood Insurance Program (NFIP), enables property owners to purchase flood insurance at rates made reasonable through a Federal subsidy. In return, communities agree to adopt and administer local floodplain management measures aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4022) prohibits flood insurance coverage as authorized under the National Flood Insurance Program (42 U.S.C. 4001-4128) unless an appropriate public body shall have adopted adequate floodplain management measures with effective enforcement measures. The communities listed in this notice no longer meet that statutory requirement for compliance with program regulations (44 CFR Part 59 et. seq.). Accordingly, the communities are suspended on the effective date in the fourth column, so that as of that date flood insurance is no longer available in the community. However, those communities which, prior to the suspension date, adopt and submit documentation of legally enforceable

floodplain management measures required by the program, will continue their eligibility for the sale of insurance. Where adequate documentation is received by FEMA, a notice withdrawing the suspension will be published in the Federal Register.

In addition, the Director of Federal Emergency Management Agency has identified the special flood hazard areas in these communities by publishing a Flood Hazard Boundary Map. The date of the flood map, if one has been published, is indicated in the fifth column of the table. No direct Federal financial assistance (except assistance pursuant to the Disaster Relief Act of 1974 not in connection with a flood) may legally be provided for construction or acquisition of buildings in the identified special flood hazard area of communities not participating in the NFIP and identified for more than a year, on the Federal Emergency Management Agency's initial flood insurance map of the community as having flood-prone areas. (Section 202(a) of the Flood Disaster Protection Act of 1973 (Pub. L. 93–234), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column.

The Director finds that notice and public procedure under 5 U.S.C. 553(b) are impracticable and unnecessary because communities listed in this final rule have been adequately notified. Each community receives a 6-month, 90-day, and 30-day notification addressed to the Chief Executive Officer that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. For the same reasons, this final rule may take effect within less than 30 days.

Pursuant to the provision of 5 U.S.C. 605(b), the Administrator, Federal Insurance Administration, to whom authority has been delegated by the Director, Federal Emergency Management Agency, hereby certifies that this rule if promulgated will not have a significant economic impact on a substantial number of small entities. As stated in Section 2 of the Flood Disaster Protection Act of 1973, the establishment of local floodplain management together with the availability of flood insurance decreases the economic impact of future flood losses to both the particular community and the nation as a whole. This rule in and of itself does not have a significant economic impact. Any economic impact results from the community's decision not to (adopt) (enforce) adequate floodplain management, thus placing itself in noncompliance of the Federal standards required for community participation. In each entry, a complete chronology of effective dates appears for each listed community.

List of Subjects in 44 CFR Part 64

Flood insurance, Floodplains.

The authority citation for Part 64 continues to read as follows:

Authority: 42 U.S.C. 4001 et. seq., Reorganization Plan No. 3 of 1978, E.O. 12127.

Section 64.6 is amended by adding in alphabetical sequence new entries to the table.

§ 64.6 List of eligible communities.

State and county	Location	Community No.	Effective dates of authorization/cancellation of sale of flood insurance in community	Special flood hazard area identified	Date[1]
Region V					
Illinois					
Gallatin	Equality, village of	170244B	July 2, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Mar. 22, 1974 and Mar. 26, 1976	Sept. 4, 1985
Monroe	Fults, village of	170511C	June 26, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Dec. 17, 1973, Jan. 30, 1976 and July 13, 1979.	Do.
Randolph	Kaskaskia, village of	170736B	Dec. 27, 1973, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Dec. 17, 1973	Do.
Gallatin	Old Shawneetown, Village of	170247B	July 29, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Dec. 17, 1973 and Apr. 16, 1976	Do.
LaSalle	Ottawa, city of	170405B	Apr. 23, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Apr. 5, 1974 and Jan. 3, 1975	Do.
Monroe	Valmeyer, village of	170780C	Apr. 15, 1974, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Mar. 29, 1974, June 4, 1976 and Feb. 16, 1979.	Do.
Ohio: Medina	Wadsworth, city of	390386B	July 1, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Mar. 1, 1974 and June 4, 1976	Do.
Wisconsin: Lincoln	Tomahawk, city of	550235B	Nov. 29, 1974, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.		Sept. 4, 1986
Region I—Minimal Conversions					
Maine:					
Oxford	Byron, town of	230330A	July 15, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Dec. 6, 1974	Sept. 4, 1985
Aroostook	Chapman, town of	230015A	Apr. 20, 1976, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Mar. 28, 1975	Do.
Washington	Columbia Falls, town of	2303088	May. 4, 1976, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Apr. 18, 1975 and Jan. 14, 1977	Do.
Oxford	Greenwood, town of	230332A	June 24, 1976, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Feb. 21, 1975	Do.
Somerset	Embden, town of	230359B	Aug. 11, 1976, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Feb. 21, 1975 and Oct. 22, 1976	Do.
Oxford	Hanover, town of	230333A	Aug. 11, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Dec. 24, 1976	Do.
Somerset	Smithfield, town of	230370B	Mar. 17, 1976, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Jan. 24, 1975 and Sept. 24, 1976	Do.
do	Roxbury, town of	230181A	Oct. 24, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Feb. 14, 1975	Do.
Hancock	Sullivan, town of	230295A	Apr. 15, 1976, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Mar. 14, 1975	Do.
Vermont:					
Windham	Brookline, town of	500280A	Aug. 11, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Dec. 6, 1974	Do.
do	Halifax, town of	500281A	Mar. 3, 1976, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Jan. 31, 1975	Do.

State and county	Location	Community No.	Effective dates of authorization/cancellation of sale of flood insurance in community	Special flood hazard area identified	Date[1]
Region II					
New York: Madison	Lincoln, town of	360405B	Sept. 10, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Apr. 12, 1974 and Apr. 23, 1976	Do.
Region III					
Pennsylvania:					
Cambria	Allegheny, township of	422265A	Aug. 26, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Jan. 24, 1975	Do.
Chester	East Nottingham, township of	421482B	Feb. 9, 1976, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Sept. 13, 1974 and Nov. 28, 1975	Do.
Somerset	Jenner, township of	422051B	Feb. 18, 1976, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Jan. 24, 1975 and Nov. 23, 1979	Do.
Monroe	Tunkhannock, township of	421898B	Apr. 23, 1980, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Jan. 31, 1975 and June 20, 1980	Do.
Region IV—Minimal Conversions					
Alabama:					
Conecuh	Evergreen, city of	010051A	Sept. 3, 1976, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Aug. 8, 1975	Do.
Clarke	Grove Hill, town of	010039A	June 3, 1976, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Apr. 25, 1975	Do.
Kentucky: Montgomery	Mt. Sterling, city of	210234B	Apr. 3, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	May 10, 1974 and Apr. 9, 1976	Do.
Region V					
Illinois:					
Effingham	Altamont, city of	170228C	Jan. 28, 1976, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Mar. 22, 1974, June 11, 1976 and June 22, 1979.	Do.
Grundy	Carbon Hill, village of	170257B	Aug. 21, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Mar. 8, 1974 and Oct. 17, 1975	Do.
Clinton	Carlyle, city of	170047B	Sept. 8, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Dec. 7, 1973 and Jan. 23, 1976	Do.
Vermilion	Catlin, village of	170661B	Aug. 21, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	June 28, 1974 and Feb. 20, 1976	Do.
Tazewell	DeLavan, city of	170648B	June 10, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	May 24, 1974 and Dec. 5, 1974	Do.
McHenry	Lakewood, village of	170805B	Mar. 25, 1974, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Oct. 18, 1974 and May 14, 1976	Do.
Sangamon	Loami, village of	170795B	July 29, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Mar. 29, 1974 and Dec. 12, 1975	Do.
LaSalle	Oglesby, city of	170404B	July 2, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	May 24, 1974 and July 16, 1976	Do.
Richland	Olney, city of	170581D	July 18, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Feb. 22, 1974, Mar. 26, 1976, June 25, 1976 and Sept. 24, 1976.	Do.
Bureau	Princeton, city of	170014B	Mar. 24, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	June 7, 1974 and July 30, 1976	Do.
Knox	Wataga, village of	170354C	July 15, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	July 7, 1974, May 28, 1976 and June 22, 1979.	Do.
Indiana: Kosciusko	Wiona Lake, town of	180124B	Oct. 14, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	May 3, 1974 and Apr. 30, 1976	Do.
Michigan: Washtenaw	Augusta, township of	260627B	Aug. 12, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Apr. 15, 1977	Do.
Minnesota: Carlton	Barnum, city of	270040B	Aug. 20, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Aug. 23, 1974 and Apr. 11, 1975	Do.
Ohio: Greene	Yellow Springs, village of	390640B	July 31, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Oct. 18, 1975 and Aug. 1, 1975	Do.
Wisconsin:					
Clark	Loyal, city of	550052B	Aug. 22, 1974, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	May 17, 1974 and Apr. 9, 1976	Do.
Walworth	Genoa City, village of	550465B	Mar. 5, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Jan. 9, 1974 and May 15, 1976	Do.
Clark	Greenwood, city of	550051C	Nov. 11, 1974, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Jan. 9, 1974, Apr. 23, 1976 and Mar. 30, 1979.	Do.
Shawano	Bowler, village of	550415B	July 21, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Nov. 30, 1973 and May 28, 1976	Do.
Columbia	Fall River, village of	550060B	Apr. 17, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Apr. 15, 1974 and June 4, 1976	Do.
Sauk	Lake Delton, village of	550394C	Feb. 19, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Dec. 17, 1973, Apr. 30, 1976 and July 23, 1976.	Do.
Waupaca	Iola, village of	550497B	Sept. 29, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	June 7, 1974 and May 14, 1976	Do.
Fond Du Lac	Fairwater, village of	550135D	Apr. 30, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Nov. 8, 1974	Do.
Region VII					
Iowa:					
Cedar	Bennett, city of	190051A	Apr. 24, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Dec. 27, 1974	Do.
Tama	Gladbrook, city of	190516A	June 30, 1976, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	July 25, 1974	Do.
Pottawattamie	Carson, city of	190234B	July 29, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Aug. 9, 1974 and Jan. 16, 1976	Do.
Harrison	Persia, city of	190150A	Apr. 6, 1976, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Dec. 13, 1974	Do.
Mills	Silver City, city of	190207B	Jan. 2, 1976, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Nov. 8, 1974 and Mar. 19, 1976	Do.

State and county	Location	Community No.	Effective dates of authorization/cancellation of sale of flood insurance in community	Special flood hazard area identified	Date[1]
Cedar	Tipton, city of	190057B	July 2, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Mar. 29, 1974 and Aug. 13, 1976	Do.
Tama	Traer, city of	190668A	Oct. 28, 1976, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Sept. 19, 1975	Do.
Harrison	Woodbine, city of	190152B	May 29, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	June 28, 1974 and Jan. 16, 1976	Do.
Kansas:					
Hodgeman	Hanston, city of	200136A	Oct. 9, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Dec. 27, 1974	Do.
Meade	Meade, city of	200219B	Apr. 1, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Feb. 1, 1974 and Oct. 10, 1975	Do.
Hodgeman	Jetmore, city of	200139B	Aug. 1, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Mar. 1, 1974 and Aug. 20, 1976	Do.
Missouri:					
Worth	Denver, village of	290453A	Jan. 25, 1977, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Nov. 22, 1974	Do.
Camden	Macks Creek, village of	290054B	Aug. 25, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Oct. 18, 1974 and Nov. 28, 1975	Do.
Washington	Potosi, city of	290447B	Aug. 7, 1974, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Dec. 28, 1973 and Dec. 26, 1975	Do.
Newton	Saginaw, village of	290466B	Sept. 2, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Aug. 30, 1974 and June 4, 1976	Do.
Mississippi	Bertrand, city of	290230B	May 6, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Apr. 12, 1974 and Nov. 7, 1975	Do.
Nebraska: Otoe	Unadilla, village of	310168B	Sept. 16, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Aug. 23, 1974 and Nov. 14, 1975	Do.
Region VIII					
South Dakota: Moody	Unincorporated areas	460235B	Sept. 12, 1974, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Apr. 15, 1977	Do.
Region X					
California: Inyo	Unincorporated areas	060073B	Dec. 19, 1975, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Jan 10, 1975 and Jan 10, 1978	Do.
Nevada: Humboldt	Winnemucca, city of	320012A	Apr. 9, 1984, Emerg.; Sept. 4, 1985, Reg.; Sept. 4, 1985, Susp.	Apr. 23, 1976	Do.

[1] Certain Federal assistance no longer available in special flood hazard areas.

Code for reading 4th column:
Emerg.—Emergency.
Reg.—Regular.
Susp.—Suspension.

Jeffrey S. Bragg,
Administrator, Federal Insurance Administration.

[FR Doc. 85-20746 Filed 8-29-85; 8:46 am]

BILLING CODE 6718-03-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

46 CFR Part 5

[CGD 82-002]

Actions Against Seamen's Licenses, Certificates or Documents

Correction

In FR Doc. 85-18810, beginning on page 32179, in the issue of Friday, August 9, 1985, make the following corrections:

1. On page 32181, third column, *Section 5.201(5.10-1)*, fifth line, "state the" should read "state that".

2. On page 32182, first column, *Section 5.515(5.20-30)*, fourth line, "not" should read "no".

3. On page 32183, third column, fourteenth line from the bottom of the page, "understand that" should read "understand than".

4. On page 32188, second column, **SUBPART Q,** § 5.401(a), second line, "then" should read "than".

5. On page 32193:

a. In the first column, § 5.571(b), twelfth line, "person" should read "personal".

b. In the second column, **SUBPART I,** § 5.601(b), second line, "stay in" should read "stay an".

BILLING CODE 1505-01-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 25

Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service; Memorandum Opinion and Order

AGENCY: Federal Communications Commission.

ACTION: Memorandum Opinion and Order.

SUMMARY: This action assigns orbital locations to each of the domestic satellites authorized to be launched, including previously authorized satellites and satellites newly authorized by individual orders adopted on July 25, 1985. This action was prompted by the Commission's *1983 Processing Order*, 93 FCC 2d 1260 (1983), which established a procedure for the filing of satellite applications to be considered in the next processing group.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Cecily C. Holiday, Fern J. Jarmulnek or Rosalee C. Gorman, Satellite Radio Branch, (202) 634-1624.

SUPPLEMENTARY INFORMATION:

List of Subjects in 47 CFR Part 25

Satellite radio communication, Satellites.

Memorandum Opinion and Order

In the matter of Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service.

Adopted: July 25, 1985.
Released: August 27, 1985.

By the Commission.

I. Summary

1. By separate orders adopted today,[1] we are authorizing the construction of 23

[1] *See* Alascom, Inc., FCC 85-404; American Satellite Company, FCC 85-405; Comsat General

Continued

additional domestic fixed-satellites and the launch of 20 additional domestic-fixed satelites to be placed in 22 orbital locations. In addition, we are authorizing the construction and launch of 3 replacement satellites.[2] These newly authorized in-orbit satellites will constitute a substantial increase by 1990 in the domestic satellite capacity that will be available to users. To accommodate this growth, we are now implementing the reduced orbital spacing criteria that were adopted in 1983[3] in the 4/6 GHz bands, and continuing to apply these criteria in the 12/14 GHz bands. The purpose of this order is to assign an orbital location to each of the domestic satellites authorized to be launched.[4]

II. Background

2. In our *1983 Orbit Assignment Order*[5] we adopted a tentative plan of orbital assignments intended to govern the positioning of all authorized domestic satellites until the next group of domestic fixed-satellite applications was processed and authorizations granted. We emphasized in both the *1983 Orbit Assignment Order* and the individual authorizations that all assigned orbital locations were temporary and subject to change by summary order of the Commission.[6] Concurrent with the grant of these assignments, the Commission determined that 2° spacing was feasible in both the 4/6 and 12/14 GHz bands. Uniform 2° spacing at 12/14 GHz was implemented immediately, while an average spacing of 2.5° at 4/6 GHz was adopted as a transition mechanism.[7] This was possible because all qualified applicants could then be accommodated with these larger spacings. Operators were placed on notice, however, that uniform 2° separations at 4/6 GHz were to be implemented within the next few years when necessary to accommodate increased demand for satellite services.[8] Today, this demand and the number of qualified applicants proposing to provide these services require moving to a uniform 2° spacing environment. Because satellites authorized today may not be launched for several years, some licensees will be required to operate at 2° spacing sooner than others. However, in order to accommodate the maximum number of satellites feasible with current technology, we are adopting an orbit assignment order based on uniform 2° spacing at both 4/6 GHz and 12/14 GHz.

3. Our previous orbital assignment orders have summarized the policies and procedures applied in assigning orbital locations to domestic satellites.[9] We have consistently held that applicants' requests for particular orbital locations do not limit our flexibility to assign orbital locations that best serve the public interest.[10] As we have stated, any variations in the characteristics of different orbital locations in the same portion of the geostationary orbital arc are not significant; nor do requests by different applicants for the same orbital location give rise to comparative hearing rights.[11] In general, assignments of orbital locations balance applicants' requests with several competing factors. These include the volume and distribution of traffic requirements, contraints imposed by satellite design, plans of other countries for their satellites, and equitable treatment of existing and new domestic satellite operators. Additionally, when possible, we seek to minimize the number of relocations of in-orbit satellites and the resulting disruption of service to domestic satellite users.

4. This process has allowed the authorization of new domestic satellite facilities without the cost or delays associated with comparative hearings. We recognize that it is impossible to satisfy fully the preferences of each applicant. The best that can be expected from any approach is a practical accommodation of the interests of the parties, without compromising our ultimate objective of ensuring that the public is served in a timely and efficient manner. The orbital assignment plan adopted in this order is a reasonable exercise of our administrative discretion to resolve these concerns.[12]

III. Discussion

A. General Approach

5. The following table summarizes the number of orbital locations previously assigned and today authorized to each qualified domestic satellite licensee.[13] These applicants were found to satisfy the Commission's rules governing financial qualifications and the number of orbital locations to be assigned to domestic satellite applicants adopted today in a companion *Report and Order*.[14]

Company name	Numbers of orbital locations (authorized) by Frequency band (GHz)					
	Previous		Additional		Total	
	4 to 6	12 to 14	4 to 6	12 to 14	4 to 6	12 to 14
Alascom	1		1		2	
Am. Sat. Co. (H)	2	2	1	1	3	3
AT&T (CGC)	4				4	
Comsat				2		2
Fed. Ex.				2		2
Ford (H)			2	2	2	2
GTE					4	6
a. GSAT		2		[1] 1		
b. Spacenet (H)	3	3	1	[1] 1		
Hughes	2		1	2	3	2
Martin Marietta				2		2
RCA	6	3	1		7	3
SBS		5		1		6
Western Union	4		([2])	[2] 2	4	2
Total	22	15	7	15	29	30

(H)—Hybrid
[1] GSAT and Spacenet are being given one additional orbital location at 12/14 GHz.
[2] *See Western Union Authorization Order*, FCC 85-423

As in our previous assignment orders, the orbital assignments we are making here will form the basis for conducting the necessary international frequency coordination procedures.

6. We will assign orbital locations today between 62° and 146° West

Corporation, FCC 85-409; Federal Express Corporation, FCC 85-412; Ford Aerospace Satellite Satellite Services Corporation, FCC 85-413; GTE Satellite Corporation/GTE Spacenet Corporation, FCC 85-414; Hughes Communications Galaxy, Inc., FCC 85-415; Martin Marietta Communications Systems, Inc., FCC 85-416; RCA American Communications, Inc., FCC 85-419; Satellite Business Systems, FCC 85-420; The Western Union Telegraph Company, FCC 85-423.

[2] In addition, one applicant has been given the option of constructing and launching two of its four requested satellites, including one replacement satellite.

[3] Licensing of Space Stations in the Domestic Fixed-Satellite Service, 54 Rad. Reg. 2d 577, 589 (P&F) (1983) (hereinafter *Reduced Orbital Spacing*).

[4] We also identify in the Appendix several unassigned orbital locations. They will be available for assignment to qualified applicants in future proceedings.

[5] Domestic Fixed-Satellite Service, 94 FCC 2d 129 (1983), *recon.* FCC 84-32 (February 2, 1984), *further recon.* FCC 84-181 (May 15, 1984) (hereinafter *1983 Orbit Assignment Order*). Petitions for further reconsideration of the *1983 Orbit Assignment Order* have been filed by several parties. Our decision in this order renders these petitions moot and they will therefore be dismissed.

[6] *Id.* at 140.

[7] While we decided that 2° orbital spacing was the appropriate long term objective at 4/6 GHz, we decided to delay implementation in order to minimize the costs involved in upgrading or replacing existing antennas.

[8] *1983 Orbit Assignment Order, supra* note 5, at 131.

[9] *Id.*; Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 84 FCC 2d 584 (1981) (hereinafter *1980 Assignment Order*).

[10] *1983 Orbit Assignment Order, supra* note 5, at 130.

[11] *Id.* at 130-131. We therefore reject SBS's contention that a comparative hearing should be afforded to all applicants requesting the 101° West Longitude (W.L.) location. *See also* Western Union Telegraph Company, 47 FCC 2d 274 (1974).

[12] *See, e.g., United States* v. *FCC*, 652 F. 2d 72 (D.C. Cir. 1980).

[13] *Supra* note 1.

[14] Licensing of Space Stations in the Domestic Fixed-Satellite Service, FCC 85-395.

Longitude (W.L.) at 4/6 GHz,[15] and between 62° and 136° W.L. at 12/14 GHz.[16] A few locations have been specifically identified as "unassigned" in the Appendix and may be assigned at a later date. In the central portion of this arc, agreements have been reached among the Administrations of Canada, Mexico and the United States on the placement of Canadian and Mexican domestic satellites. The requirement to accommodate these other satellites divides the usable orbital arc into an eastern sector and a western sector for domestic satellites of the United States.

7. In assigning orbital locations to the newly authorized domestic satellites, we begin with our 1983 decision to adopt orbital spacing criteria of 2° in both the 4/6 GHz and 12/14 GHz bands.[17] The progress made to date by our industry advisory group on reduced orbital spacing[18] indicates that uniform 2° spacings can be routinely implemented by the time the new satellites are placed into service. Assignments at 4/6 GHz will provide for adjacent satellites to be cross-polarized.[19] While a cross-polarized assignment plan will necessitate some relocations of in-orbit satellites, we will minimize the number of relocations of in-orbit satellites, as well as the number of reassignments to satellites assigned an orbital location but not yet launched. These considerations will be balanced with our policy of affording new entrants at least one initial orbital location in the portion of the orbital arc that allows 50-state coverage.

B. Available Orbital Assignments at 4/6 GHz

8. In *Reduced Orbital Spacing*, the Commission recognized that uniform 2° orbital spacings at 4/6 GHz would require adjacent satellites to be cross-polarized. However, our *1983 Orbital Assignment Order* provided transitional orbital separations of 3° and 2.5° at 4/6 GHz to allow time for ground equipment, particularly earth station antennas with good off-axis cross-polarization isolation, to become widely available. We also intended to provide time for an industry advisory committee to develop recommendations for the numerous technical details that should be addressed to ensure that operations of satellites at 2° orbital separations will be conducted as efficiently as possible. Because requirements have grown to the point where uniform 2° orbital separations are now required to be implemented in the 4/6 GHz bands, the orbital assignments being made today in these bands will require the cross-polarization of adjacent satellites. While there are differences in the designs of certain satellites,[20] we will treat each 4/6 GHz space station as falling into one of two groups, each with a standard transponder which is cross-polarized with respect to the other.[21] To the extent that any particular satellite does not conform to the standard transponder frequency plan, the space station licensee shall be responsible for performing any necessary coordination with other space station licensees to ensure that operation of its satellite will not cause unacceptable interference to adjacent satellites.

9. For the purposes of identifying available orbital locations under a uniform 2° spacing criteria at 4/6 GHz, we will establish 120° W.L. and 101° W.L. as endpoints of the orbital arc available for assignment to U.S. domestic satellites. We can then generally assume that orbital locations spaced at 2° intervals to the west of 120° W.L. and to the east of 101° W.L. are available for assignment.[22] The limits of these arcs are determined by visibility constraints.[23]

10. Once a sense of polarization is selected for the 101° W.L. and 120° W.L. locations at 4/6 GHz, the polarizations for the other assignments are automatically determined since they must alternate to provide the necessary cross-polarization isolation. Thus, we will select one of two possible orbital structures for the western arc sector and one of two possible structures for the eastern sector based on the polarization plan chosen for the 120° W.L. location and the polarization plan chosen for the 101° W.L. location. We will choose those structures that minimize the overall amount of relocation of in-orbit satellites from the orbital assignments contained in the *1983 Orbit Assignment Order*.

11. In the western sector, if the satellite to be located at 120° W.L. were to have vertical polarization, the amount of in-orbit relocations would total 9.5° or 10.5°, with the largest single satellite move being 3.5 or 6.°[24] On the other hand, if horizontal polarization were chosen, the total amount of relocations is reduced to 7.5°, with the largest relocation being 2°. Thus a horizontal polarization will be selected for the 120° W.L. location at 4/6 GHz.[25]

12. A similar analysis for the eastern arc sector results in the choice of vertical polarization for the satellite located at 101° W.L. In this case, two orbital assignments between 101° W.L. and 75° W.L. remain unchanged, the largest change is 2.5° and a total of 7.5° in relocations is required. This is compared to the choice of horizontal polarization for the 101° W.L. location, which requires a largest relocation of 3 to 5°, a total of 11° of relocations, and leaves no orbital assignments unchanged.

13. Several adjustments to uniform 2° separations between 4/6 GHz orbital assignments are needed to provide 1° of satellite separation between U.S. and certain South American satellites. We find these adjustments necessary to fulfill our long-standing commitment to accommodate the requirements of other countries through the international

[15] Orbital locations between about 53° and 143° W.L. generally provide an earth station elevation angle of at least 5° throughout the contiguous states.

[16] Orbital locations between about 60° and 135° W.L. provide a minimum 10° earth station elevation angle throughout the contiguous states. This higher elevation angle is desirable at 12/14 GHz to reduce the impact of increased propagation impairments at these higher frequencies.

[17] *Reduced Orbital Spacing*, *supra* note 3. While we have yet to consider in detail the orbital separations to be used in the 18/30 GHz bands, we shall apply a 2° spacing policy in the higher bands on an interim basis.

[18] Establishment of an Advisory Committee on Implementation of Reduced Orbit Spacing Between Domestic Fixed-Satellites, FCC 84-488 (released January 15, 1985).

[19] *See Reduced Orbital Spacing*, *supra* note 3, at paras. 32-36, *reconsideration*, FCC 84-487, at para. 6 (released January 9, 1985).

[20] For example, one satellite has a number of wideband 72 MHz transponders. Another satellite design uses the same polarization for both uplink and downlink transmissions rather than the usual design of using opposite polarizations for uplinks and downlinks.

[21] The standard transponder plan consists of 24 transponders with a bandwidth of 36 MHz each. The polarization plan of a satellite is determined by the downlink polarization of the 36 MHz transponder centered at 3720 MHz. *See, e.g., Reduced Orbital Spacing*, *supra* note 3, at Appendix B.

[22] Orbital locations between 104.5° W.L. and 117.5° W.L. are used by Canadian and Mexican satellites in both the 4/6 GHz and 12/14 GHz bands. However, the orbital locations of 105° W.L. and 1030 W.L. are available for U.S. domestic satellites in the 12/14 GHz bands.

[23] We have previously indicated that coverage of the 48 contiguous states is available from orbital locations between about 53° W.L. and 143° W.L., although propagation conditions at 12/14 GHz may reduce the desirable portion of this arc to between about 60° W.L. to 135° W.L. *1983 Orbit Assignment Order* at notes 11 and 12. However, orbital locations outside these portions of the orbital arc are still usable to provide domestic satellite services.

[24] The principal difficulty with this alternative arises from the fact that the two easternmost in-orbit satellites, Spacenet-1 and Westar-5, both have horizontal polarizations. The choice of vertical polarization for the 120° W.L. location requires one of them to be moved a relatively long distance to the next available horizontally polarized location.

[25] This alternative also retains the currently assigned location for the unlaunched ASC-2 and permits a longer period of time for in-orbit satellites to continue operations at their currently occupied locations.

coordination process.[26] Based on available information, a 1° separation for satellites serving the northern part of South America, i.e., Brazil and Colombia, should be sufficient to complete international frequency coordination successfully.[27] As a result, 3° separations are provided between 79° W.L. and 76° W.L., between 72° W.L. and 69° W.L., and between 67° and 64° W.L.

14. To summarize, we have identified a set of orbital locations at uniform 2° intervals with alternating polarizations at contiguous locations.[28] The orbital locations specified in the *1983 Orbital Assignment Order* are adjusted to conform to the new structure of orbital assignments, with required relocations of in-orbit satellites minimized on an overall basis. The remaining unassigned orbital locations at 4/6 GHz are available to accommodate the new in-orbit satellites we are authorizing today.

C. Available Orbital Assignments at 12/14 GHz

15. The 12/14 GHz orbital assignments made in our *1983 Orbital Assignment Order* were based on uniform 2° orbital separations.[29] These assignments coincide with the orbital locations that are available at uniform 2° intervals beginning at 120° W.L. and proceeding westward, and at uniform 2° intervals beginning at 105° W.L. and proceeding eastward. Apart from potential problems in accommodating hybrid 4/6 GHz and 12/14 GHz space stations, relocation of in-orbit 12/14 GHz satellites is neither necessary nor desirable. Thus, we will generally retain the 12/14 GHz orbital assignments specified in the *1983 Orbital Assignment Order*, and the unassigned orbital locations at uniform 2° intervals are available for assignment to the satellites being authorized today.

D. Hybrid Orbital Assignments

16. Under conditions of uniform 2° orbital separations, available orbital assignments generally overlap in the 4/6 GHz and 12/14 GHz bands.[30] However, hybrid satellites operating at both 4/6 GHz and 12/14 GHz still pose significant difficulties in making orbital assignments today. We have previously discussed the difficulties that arise when orbital spacings differ in the two sets of bands.[31] While our decision to implement uniform 2° spacings eliminates this problem, a new difficulty arises in accommodating hybrid satellites. The orbital location assigned to a hybrid satellite must be compatible with the space station polarization at 4/6 GHz while the orbital location must also be unoccupied at 12/14 GHz. This difficulty is compounded by the fact that seven of the nine hybrid satellites authorized today are designed with a horizontal polarization at 4/6 GHz, while only two are designed with a vertical polarization. Because all in-orbit hybrids are horizontally polarized and concentrated in the central portion of the orbital arc, the only horizontally polarized hybrid orbital locations usable for U.S. service and available for assignment are at the edges of the orbital arc.

E. 1985 Orbital Assignments

17. Attached is the new set of orbital assignments. After adjusting the 1983 orbit assignments to the uniform 2° spacing criteria and accommodating hybrid satellites as described above, the remaining locations are assigned to the newly authorized satellites. In general, each new entrant is assigned one of the locations capable of 50-state coverage as its first assignment, particularly where new 12/14 GHz entrants propose Alaskan and Hawaiian coverage. Second assignments to new entrants and third assignments to currently authorized operators are generally in the next most desirable available locations, with remaining expansion satellites assigned the remaining locations. As a result, it has generally not been possible to accommodate applicants' requests for the assignment of contiguous locations. Finally, at 12/14 GHz we have attempted, consistent with other considerations, to group together the highest e.i.r.p. spot beam satellites, as well as the lowest e.i.r.p. coverage satellites, to minimize potential interference.

IV. Implementation

18. At 4/6 GHz, more orbital locations are available than authorized satellites. Thus, we will continue to delay the implementation of uniform 2° separations in this band in the orbital arc between 120° W.L. and 134° W.L. In *Reduced Orbital Spacing* and the *1983 Orbital Assignment Order*, we recognized the desirability of retaining existing spacings for a longer period of time to allow users to more fully amortize their ground equipment and upgrade it for operations at 2° spacings.[32] However, we restate our intention to implement 2° separations when it becomes necessary to accommodate new satellites in the future, and the assignments listed in the Appendix are based on uniform 2° spacings. However, licensees may continue to operate at the locations specified in the *1983 Assignment Order* until it is necessary to move the satellite to its assigned location to accommodate another satellite.

19. In developing this plan of current orbital assignments, we do not intend to preclude operators from identifying alternatives. For example, if an operator is required to relocate an in-orbit satellite because it is incompatible with the polarization assigned to the location, it may wish to replace that satellite with one that is compatible with the assigned polarization plan adopted. Alternatively, frequency coordination may allow co-polarized satellites to operate at 2° separations. We will entertain requests for changes in the assignments made today if they are consistent with the basic structure of the assignment plan, and are agreed to by all, or at least most, of the satellite operators affected by the change. If all operators do not agree, the burden is on the operator proposing the change to demonstrate that its alternative is preferable to the adopted plan. Any alternative orbital arrangement must be presented to the Commission for approval within 30 days of the release of this order. In any event, we expect all operators to cooperate fully in the course of implementing this plan. All satellite operators are also required to coordinate their orbital maneuvers with other affected satellite operators. If particular problems cannot be resolved by the parties, they may be brought to the Commission for resolution.

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[26] *See, e.g., Reduced Orbital Spacing, supra* note 3; *1980 Assignment Order, supra* note 9.

[27] We recognize that several additional South American satellites have recently been advance published by the International Frequency Registration Board. However, the service areas of the systems and U.S. domestic satellites are separated widely enough that coordination of these satellites should be possible with satellite separations of 1° or less.

[28] We note that polarizations do not have to alternate when orbital separations greater than 2° are provided at 4/6 GHz. Because a greater number of horizontally polarized satellites have to be accommodated in the orbital assignments being made today, additional 4/6 satellites will generally have to be vertically polarized in the future.

[29] At 12/14 GHz, the implementation of 2° orbital spacings did not depend on adjacent satellites being cross-polarized.

[30] Because of the need to provide 1° separations between U.S. and certain South American satellites, available orbital locations at 12/14 GHz between 77° W.L. and 71° W.L. do not coincide with available orbital locations at 4/6 GHz. *See* paragraph 13, *supra*.

[31] *1980 Assignment Order, supra* note 9, at 607

[32] This issue was commented on by several parties in this proceeding who argued for further delay in implementing uniform 2° separations.

V. Conclusion

20. We find, upon review of the applications and record before us, that the public interest, convenience and necessity will be served by the adoption of the orbital location assignments specified in the Appendix.

21. Accordingly, it is ordered that the orbital locations specified in the Appendix is adopted and the grantees of these space station authorizations shall promptly undertake all actions as are necessary to implement this orbital location plan, including coordination with other satellite operators, in accordance with the policies, terms, conditions and procedures specified above.

22. It is further ordered that the orbital location assignments specified in *Domestic Fixed-Satellite Service*, 94 FCC 2d 129 (1983), *recon.* FCC 84–32 (February 2, 1984), *further recon.* FCC 84–181 (May 15, 1984), ARE MODIFIED in accordance with the orbital location assignment plan as specified.

23. It is further ordered that the temporary assignment of any orbital location is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbit or spectrum. Such a change may be ordered *inter alia* to implement uniform 2° separations, or to implement any of the objectives or policies set forth in today's *Report and Order* in CC Docket No. 85–135, FCC 85–395, or this decision. No space station authorization, nor any right granted by such authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding the authorization, to any person, except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

24. It is further ordered that the Secretary of the Federal Communications Commission shall cause this order to be published in the **Federal Register.**

25. It further ordered that these orbital assignments are effective immediately upon adoption.

Federal Communications Commission.
William J. Tricarico,
Secretary.

Appendix

ORBITAL ASSIGNMENTS

Degrees west longitude		Gigahertz
146	Aurora-1	4/6
144	Westar-7	4/6
142	Aurora-1	4/6
140	Galaxy-4	4/6
138	Satcom-1R	4/6
136	Spacenet-4/GSTAR-3	4/6/12/14
134	Unassigned-vertical	4/6
134	Comsat General-B	12/14
132	Galaxy-1	4/6
132	Westar-B	12/14
130	Satcom-3R	4/6
130	Galaxy-B	12/14
128	ASC-2	4/6/12/14
126	Telstar-1	4/6
126	Martin Marietta-B	12/14
124	Westar-5	4/6
124	Fedex-B	12/14
122	Unassigned-vertical	4/6
122	SBS-5	12/14
120	Spacenet-1	4/6/12/14
105	GSTAR	12/14
103	GSTAR	12/14
101	Ford-1	4/6/12/14
99	Westar-4	4/6
99	SBS-1	4/6
97	Telstar-2	4/6
97	SBS-2	12/14
95	Galaxy-3	4/6
95	SBS-3	12/14
93	Ford-2	4/6/12/14
91	Westar-3/6S	4/6
91	SBS-4	12/14
89	Unassigned-vertical	4/6
89	Unassigned	12/14
87	Spacenet-3	4/6/12/14
85	Telstar-3	4/6
85	RCA-A	12/14
83	ASC-2	4/6/12/14
81	Satcom-4	4/6
81	RCA-B	12/14
79	Westar-3	4/6
79	Martin Marietta-A	12/14
77	Fedex-A	12/14
76	Comstar	4/6
75	Comsat General-A	12/14
74	Galaxy-2	4/6
73	Westar-A	12/14
72	Satcom-2R	4/6
71	Galaxy-A	12/14
69	Spacenet-2	4/6/12/14
67	Satcom-6	4/6
67	RCA-C	12/14
64	ASC-3/4	4/6/12/14
62	Satcom-7	4/6
62	SBS-6	12/14

[FR Doc. 85–20727 Filed 8–29–85; 8:45 am]
BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 85–54; RM–4862]

TV Broadcast Station in Duncan, OK

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: Action taken herein assigns UHF TV Channel 40 to Duncan, Oklahoma, as that community's first local television service, at the request of #52 Broadcasting Group, Inc.

EFFECTIVE DATE: October 2, 1985.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT:
Leslie K. Shapiro, Mass Media Bureau, (202) 634–6530

SUPPLEMENTARY INFORMATION:

List of Subjects in 47 CFR Part 73

Television broadcasting.

The authority citation for Part 73 continues to read:

Authority: Secs. 4 and 303, 48 Stat. 1066, as amended, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply secs. 301, 303, 307, 48 Stat. 1081, 1082, as amended, 1083, as amended, 47 U.S.C. 301, 303, 307. Other statutory and executive order provisions authorizing or interpreted or applied by specific sections are cited to text.

Report and Order (Proceeding Terminated)

In the matter of Amendment of § 73.606(b), Table of Assignments, Television Broadcast Stations. (Duncan, Oklahoma), MM Docket No. 85–54, RM–4862.

Adopted: August 13, 1985.
Released: August 26, 1985.

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 50 FR 9070, published March 6, 1985, proposing the assignment of UHF TV Channel 40 to Duncan, Oklahoma, as that community's first local television service, at the request of #52 Broadcasting Group, Inc. ("petitioner"). The petitioner filed comments reiterating its intention to apply for the channel, if assigned. No other comments were received.

2. We believe the public interest would be served by assigning the channel, as proposed. Channel 40 can be assigned in conformance with the Commission's minimum distance separation requirements and provide Duncan with its first local television service. Accordingly, pursuant to the authority contained in sections 4(i), 5(c)(1), 303 (g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's rules, it is ordered, That effective October 2, 1985, the Television Table of Assignments, § 73.606(b) of the rules, is amended with respect to the community listed below, to read as follows:

City	Channel No.
Duncan, Oklahoma	40+

3. It is further ordered, That this proceeding IS TERMINATED.

4. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634–6530.

Federal Communications Commission.

Charles Schott,

Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 85–20728 Filed 8–29–85; 8:45 am]

BILLING CODE 6712-01-M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. 74–14; Notice 40]

Federal Motor Vehicle Safety Standards; Occupant Crash Protection

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Response to Petitions for Reconsideration.

SUMMARY: On July 11, 1984, the Secretary of Transportation issued a final rule requiring automatic occupant protection in all passenger cars based on a phased-in schedule beginning on September 1, 1986, with full implementation being required by September 1, 1989, unless, before April 1, 1989, states covering two-thirds of the population of the United States have enacted mandatory safety belt use laws meeting specified criteria, with such laws becoming effective by September 1, 1989. Subsequently, sixteen interested parties filed petitions for reconsideration of the final rule. This final rule responds to the issues raised in those petitions.

EFFECTIVE DATE: The amendment made by this final rule will become effective on: October 15, 1985.

FOR FURTHER INFORMATION CONTACT: Mr. Barry Felrice, Associate Administrator for Rulemaking, Room 5401, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, D.C. 20590. Telephone (202) 426–1810.

SUPPLEMENTARY INFORMATION:

Background

On July 11, 1984 (49 FR 28962), the Secretary of Transportation issued a final rule requiring automatic occupant protection in all passenger cars based on a phased-in schedule beginning on September 1, 1986, with full implementation being required by September 1, 1989, unless, before April 1, 1989, states covering two-thirds of the population of the United States have enacted mandatory safety belt use laws (MULs) meeting specified criteria, with such laws becoming effective by September 1, 1989.

More specifically, the rule requires:

- Front outboard seating positions in passenger cars manufactured on or after September 1, 1986, for sale in the United States, will have to be equipped with automatic restraints based on the following schedule:
- Ten percent of all cars manufactured on or after September 1, 1986.
- Twenty-five percent of all cars manufactured on or after September 1, 1987.
- Forty percent of all cars manufactured on or after September 1, 1988.
- One hundred percent of all cars manufactured on or after September 1, 1989.
- During the phase-in period, each car that is manufactured with a system that provides automatic protection to the driver without automatic belts will be given an extra credit equal to one-half car toward meeting the percentage requirement.
- The requirement for automatic restraints will be rescinded if MULs meeting specified conditions are passed by a sufficient number of states before April 1, 1989, to cover two-thirds of the population of the United States.

Sixteen interested parties subsequently petitioned for reconsideration of the standard. The issues raised by the petitioners and the agency's response are discussed below.

Rescind the Standard

One petitioner asked the agency to reconsider the decision not to rescind the automatic restraint requirements of Standard No. 208. He argued that the Secretary's decision was apparently based on belief that rescission was not a possible result under the Supreme Court decision in *Motor Vehicle Manufacturer's Association* v. *State Farm Mutual Automobile Insurance Co.* (State Farm). The petitioner further argued that the record in the Standard No. 208 proceeding in fact supports rescission. In particular, the petitioner argued that the rulemaking record shows that air bag technology is not an effective automatic restraint alternative. Quoting from portions of the July 1984 final decision, the petitioner specifically argued that air bag systems require the use of a lap belt and do not provide protection at less than 10–12 mph, the disposal problem related to the gas generation agent in air bag systems needs more action, air bag systems may cause injury to out-of-position occupants, the cost of air bag systems is a major disadvantage, and the use of air bag systems in small cars requires more leadtime. The petitioner concluded that few manufacturers will use air bag systems, thus leaving automatic belts as the only automatic restraint alternative. As to automatic belts, the petitioner argued that the record does not show that detachable automatic belts would increase usage. The petitioner specifically argued that there has been no showing that the combination of motorist inertia and automatic belts will increase belt usage.

NHTSA's position is that the *State Farm* decision allows the agency to make a reasoned choice between rescinding or retaining the standard. However, the agency stated in the July 1984 final rule, and still believes, that the rulemaking record does not justify rescission—unless there is a very substantial increase in the use of manual safety belts in the future. The data set forth in the July 1984 final rule demonstrate the dramatic reductions in deaths and injuries that widespread usage of the safety belt systems would achieve. Thus, if two-thirds or more of the American people are covered by mandatory use laws, that would increase usage of safety belts, the need for an automatic occupant restraint requirement would be obviated and the rule would be rescinded.

The agency believes that the rulemaking record, taken as a whole, shows that air bag systems are an effective automatic restraint technology. The discussion in the final rule concerning the need to use a safety belt with an air bag system and the ability of such systems to provide protection at low speeds concerned the relative advantages and disadvantages of different restraint technologies. As noted in that discussion, air bag systems have an advantage over other occupant restraints in that they ensure a usage rate of nearly 100 percent for both drivers and passengers. Even without use of a lap belt, an air bag system will offer protection; however, to equal the effectiveness of a manual lap-shoulder belt, air bag systems must be used with a lap belt.

Likewise, while air bag systems do not inflate in low speed crashes, other standards, such as those on energy-absorbing steering columns and instrument panel padding, ensure that occupants will still be provided with protection in low speed collisions. In addition, research data indicate that air bag systems will provide protection at higher speeds than safety belts.

As to potential problems with the disposal of the gas generator, the July 1984 final rule pointed out that as long as appropriate procedures are followed by vehicle recyclers and scrappers, disposal should not pose a problem. Subsequent to issuance of the rule, the agency has had discussions with recyclers and scrappers concerning the joint NHTSA-General Services Administration air bag fleet demonstration program to discuss safe and reasonable disposal procedures. We believe that this effort will lead to further improvements in the safe disposal of the chemical agents in air bag systems.

The July final rule acknowledged concerns about the effects of air bag systems on out-of-position occupants; however, it also explained that technical solutions are available to address the out-of-position occupant problem. The final rule also acknowledged the higher costs of air bag systems in comparison to automatic belts; the high cost of replacing an air bag system, which could lead to its not being replaced after deployment; public uncertainty and concern associated with air bag systems; and the longer leadtime needed for air bag systems, particularly in small cars. It was a balancing of those factors, plus the factors discussed above, that led to the decision that air bag systems should not be mandated for all cars. However, as discussed in the final rule, the agency believes that air bag systems are an effective restraint technology which, along with other types of automatic restraint technology will provide demonstrable safety benefits. The provision in the final rule providing manufacturers that use non-belt automatic restraints with extra credit in complying with the phase-in requirements was intended to encourage alternative technologies, including enhanced availability of air bag systems.

As to detachable automatic belts, as discussed in the July 1984 final rule, the agency cannot project either widespread usage for detachable automatic belts or a widespread refusal to use such systems. As discussed by the Supreme Court in the *State Farm* decision, it is reasonable to expect that inertia will work to increase usage, since once an automatic belt is connected, it continues to function automatically until it is disconnected. However, using even the lowest level of the range for the effectiveness of automatic belts and a very little increase in usage (only a 7½ percentage point increase), automatic belts will result in a significant incremental annual reduction in deaths and injuries.

For the above reasons, the agency concluded in July 1984 that automatic restraint systems are reasonable in cost, feasible, and practicable, and the potential benefits in lives saved and injuries reduced in severity are substantial. At that time, the agency stated that rescission, in the absence of a substantial increase in manual belt usage, has not been justified. Since the petitioner has not provided any new data to support rescission, the petition is denied.

Require Automatic Restraints

Several petitioners urged the agency to reconsider the decision to rescind the automatic restraint requirements if two-thirds of the population of the United States is covered by State MULs. They urged the agency to retain the automatic restraint requirement, regardless of what action the States take in adopting MULs.

The petitioners have offered no new evidence to justify modifying the July 11 final rule. As explained in that rule, the Secretary determined that if enough people are covered by State mandatory belt use laws, usage rates will be sufficiently high so that the additional requirement for automatic restraints should not be required. The evidence from Canada and other countries with MULs supports the conclusion that state belt use laws will bring higher usage rates and immediate and inexpensive benefits. The petitioners' requests to mandate automatic restraints even if two-thirds of the population is covered by MULs is therefore denied.

Phase-In Requirements

A number of petitioners asked for several modifications of the phase-in requirements of the standard. Each of the modifications sought by the petitioners is addressed in the following discussions.

Change September 1st Effective Date

One modification was to change the September 1 effective date used for each part of the phase-in. The petitioners argued that they would be precluded from applying any portion of their vehicles produced prior to that date to meet the required percentage of automatic restraint equipped cars. The agency has already, in effect, proposed to grant a portion of the petitioners' request in another notice (Docket 74–14; Notice 38; 50 FR 14602) issued on Standard No. 208. The agency proposal would not change the September 1 effective date, but it does propose that manufacturers be allowed to count any automatic restraint vehicle produced during the one year preceding the first year of the phase-in. In addition, the agency proposes, in Notice 38, to permit manufacturers which exceed the minimum percentage phase-in requirements in the first or second years to count those extra vehicles toward meeting the requirement in the second or third year.

Several petitioners sought a change in the provision of the final rule specifying that the computation of the minimum vehicle production to be equipped with automatic restraints must be based on the average of the production for the three preceding model years. The petitioners argued that if car sales were to drop drastically during the phase-in period, then the number of vehicles that they would have to equip with automatic restraints based on their prior three year sales volume would be a significantly greater percentage of their actual production than intended by the final rule. The agency has already responded to this request in Notice 38 by proposing to adopt an alternative that would permit a manufacturer to equip the required percentage of its vehicles with automatic restraints based on its actual production of passenger cars during each affected year.

Manufactured for Sale in U.S.

Several petitioners asked the agency to amend the rule to clarify that the rule applies only to cars manufactured for sale in the United States. As discussed in the preamble to the final rule, the determination of the base years' production figures and the calculation of the number of vehicles that must comply with the percentage phase-in requirements of the standard is to be based on vehicles manufactured for sale in the United States. Since all of the agency's safety standards apply only to vehicles manufactured for sale in the United States, the agency does not believe that an amendment to the rule is necessary. Nevertheless, today's preamble should serve as the clarification requested; that the rule applies only to vehicles manufactured for sale in the United States.

Carry-Forward/Carry-Back

A number of petitioners urged the agency to provide manufacturers more flexibility in meeting the phase-in requirements. They proposed that manufacturers be able to carry-forward credits for the number of automatic-restraint equipped vehicles they produce in excess of the required percentage. One petitioner also asked that manufacturers be permitted to carry-

back credits earned in the second and third year to the first year.

The agency agrees that it would be appropriate to permit manufacturers that exceed the minimum percentage phase-in requirements in earlier years to count those extra vehicles toward meeting the minimum percentage requirements of later years and has proposed such a carry-forward credit in Notice 38. Such a credit would encourage early introduction of larger numbers of automatic restraints and provide increased safety to the public and flexibility for manufacturers. The agency has decided to deny requests for any carry-back credits because their use would delay the safety benefits of the rule and undermine the purpose of the phase-in, which is to introduce automatic restraints on a prompt and orderly basis.

Definition of Manufacturer

Several petitioners asked the agency to further define the term "manufacturer." The agency has responded to this request in Notice 38 by proposing to permit manufacturers to determine, by contract, which of them will count passenger cars as its own for the purposes of meeting the percentage goals set forth in the phase-in. Notice 38 proposes two rules of attribution in the absence of such a contract. First, a passenger car which is imported for purposes of resale would be attributed to the importer. Second, a passenger car manufactured in the United States by more than one manufacturer, one of which also markets the vehicle, would be attributed to the manufacturer which markets the vehicle. Readers are referred to Notice 38 for a more detailed discussion of the proposed attribution rules.

Credits for Non-Belt Technology

The July 11 final rule provided that manufacturers that used non-belt technology, such as air bags or passive interiors, to meet the automatic restraint requirement for the driver's seating position and any type of automatic restraint at the passenger's seating position during the phase-in period, would receive additional credit. For each car in which they use a non-belt system, they will receive credit for an extra one-half car toward meeting their percentage requirement. One petitioner said that the text of the rule does not achieve the agency's intention, as stated in the July 1984 final rule, to encourage the use of automatic restraints other than automatic belts, since the rule precludes giving the additional credit for a system that requires the use of a safety belt, whether automatic or manual, to enable the non-belt technology to provide full protection. That petitioner pointed out that all current air bag systems must also use safety belts for full protection; belts are permitted by the standard to be used as an alternative to the use of automatic restraints to meet the lateral and rollover tests. It was not the agency's intention to deny the extra credits to air bag or other systems that also use such safety belt systems to ensure protection in other than frontal crashes. Therefore, the agency is amending the rule to ensure that those systems are eligible for the additional credit.

The agency was also petitioned for another modification to the credit provision. It was asked that manufacturers be allowed, during the phase-in, to receive a one vehicle credit for vehicles which are equipped with non-belt technology at the driver's position and manual safety belts at the front outboard position. The petitioner argued that this would encourage manufacturers to produce driver-side air bag systems or other non-belt system technology sooner than if they had to complete development of passenger-side automatic restraint systems as well, significantly advancing the Secretary's goal in this regard.

The agency has decided to modify the credit provision as requested by the petitioners. The purpose of the phase-in period is to provide a rapid introduction of the lifesaving benefits of automatic restraints and to facilitate the earliest possible introduction of such restraints to permit the public to become familiar with their operation and benefits. The purpose of the credit provision is to encourage the production of a wide variety of such restraints especially in the early years. The agency believes that permitting manufacturers to receive a 1.0 car credit for driver-only non-belt systems with manual belts on the passenger side will encourage the introduction of non-belt technologies into passenger cars, earlier than would otherwise occur.

The agency is aware that one company is currently offering driver side air bags to the public. Other manufacturers have indicated that they may offer driver-side air bags to the public within the next few years. The agency is aware neither of any manufacturers that currently plan to offer a passenger-side air bag system nor of any firm plans for other types of non-belt automatic protection on the passenger side of vehicles. The longer leadtime estimated in the Final Rule to be required for non-belt automatic protection on the passenger side, coupled with the advanced stage of design of vehicles that will be available at the early stage of the phase-in period, mitigates against such full-front non-belt protection being available. Increasing public awareness of the benefits of a variety of automatic protection techniques is one of the primary objectives of the phase-in and credit provisions. Achieving this objective will depend, therefore, on the availability of an adequate number of cars equipped with non-belt protection of the driver's side. We now believe that there are a number of factors that might discourage manufacturers from making such equipment available in significant numbers.

Under the current rule, cars equipped with non-belt driver's side automatic protection would qualify for credit only if passive protection were made available on the passenger side. As noted above, such protection is most likely to be provided by automatic belts. Some models in which driver's side air bags are being considered by manufacturers, however, are at an advanced stage of design. It is unlikely the redesign required to equip these cars with automatic belts will be undertaken. Even if these cars could be modified to incorporate automatic belts, manufacturers would be faced with a complex, and expensive, marketing task. Not only would they have to convince customers of the safety and utility of automatic belts, but they must also perform this task for the more expensive air bag. Unwillingness on the part of manufacturers to assume this added task may create a serious disincentive to the prompt offering of air bag technology.

Alternatively, these manufacturers considering driver-side air bags might also elect to meet phase-in requirements by producing sufficient number of automatic belt equipped cars. Under these circumstances, it is likely that the marketing efforts of the manufacturers during the phase-in will concentrate on marketing the automatic belts, possibly to the detriment of the public's acceptance of the driver-side air bags. As the agency learned in recent research studying the marketing efforts used by General Motors to sell its air bag equipped cars in the mid-1970's effective, affirmative marketing of an air bag system is essential to overcome consumer concerns about such things as the fear of inadvertent deployment, price and post-crash replacement cost. ("A Retrospective Analysis of the General Motors Air Cushion Restraint System Marketing Effort, 1974 to 1976") If cars equipped with driver-only air

bags do not count toward compliance with the phase-in, the manufacturers will have less incentive to market the air bags aggressively, and these circumstances may even lead to decisions to drop the early offering of air bags. The agency's goal of encouraging significant public exposure to alternative protection technologies may not be realized. Therefore, the agency has determined that permitting manufacturers to receive a 1.0 car credit during the phase-in by installing driver-only non-belt automatic protection systems in their vehicles will encourage earlier introduction of alternative automatic protection technologies, wider public availability of such technologies, and more effective marketing of such technologies than would be achieved by the original decision. The final rule is amended to permit such vehicles to be counted toward the phase-in requirements.

The agency has fully considered the safety implication of this amendment. An important safety consideration is the number of occupants at the risk of injury at each seating position, not just the number of seating positions that are covered by the automatic restraint requirement. Accident data, presented in the agency's Final Regulatory Impact Analysis, show that there are approximately 2½ to 3 times as many driver injuries and fatalities as there are to front right seat passengers. Therefore, the agency believes that it is reasonable to encourage manufacturers to provide automatic restraint protection as soon as possible to the driver—the person who is most at risk.

Convertibles

Several petitioners asked that convertibles be exempted from the automatic restraint requirements. They argued, for example, that the installation of automatic lap and shoulder belts is not feasible in convertibles, thus air bag systems must be used in those cars. The result, according to the petitioners, is a design standard for convertibles. They also stated that an exemption would be appropriate since convertibles are already exempt from the requirement in Standard No. 208 that all front outboard seating positions have lap and shoulder belts. The agency has already responded to these petitions in Notice 38 by proposing that manufacturers have the option of installing manual lap belts instead of automatic restraints in convertibles. Readers are referred to Notice 38 for a more detailed discussion of the petitions and the reasons for the agency's proposed alternative requirements for convertibles.

Oblique Crash Test

A number of petitioners requested the agency to delete the oblique barrier crash test of Standard No. 208. They argued, among other things, that the test is unnecessary since it generates a lower crash pulse than the frontal crash test. As discussed in detail in Notice 38, the agency is also concerned that the oblique test may not be necessary and has therefore requested commenters to provide additional data on the safety and cost effects of deleting the tests. Readers are referred to Notice 38 for a more detailed discussion of the issues involved in the proposed deletion of the oblique test.

Leadtime

One petitioner requested a change in the two year leadtime for the automatic restraint standard. Citing the table on leadtime requirements included with the July 11 final rule, the petitioner argued that only one manufacturer, Renault, has said that it can comply in 24 months. The table showed that most companies have said they needed at least 30 to 48 months. The petitioner asked for the leadtime to be extended.

The table cited by the petitioner reflects the leadtime required by a manufacturer to equip its entire fleet with automatic restraints. The agency agrees that a longer leadtime would be necessary if the automatic restraint requirement were simultaneously applied to the entire vehicle fleet. The final rule, however, phases-in the automatic restraint requirement so that only a portion of a manufacturer's fleet must be equipped initially. Based on a study of current automatic restraint equipped vehicles and manufacturers' comments, the agency has determined that automatic belt system can be added on to existing vehicle designs with approximately 24 months of leadtime. The manufacturers generally agreed with that estimate. For example, GM said that leadtime for models for which detachable belts had previously been designed would be 21 months and Ford said that a driver side air bag system could be in production for some of its cars within the allotted leadtime. The agency therefore does not believe that additional leadtime is necessary for the percentage requirements during the phase-in period and the petition is denied.

AIA raised a separate leadtime issue. It said that the July 1984 final rule identified a number of issues, primarily related to test procedures, that would be the subject of further rulemaking. AIA argued that the implementation schedule for automatic restraints should not begin until those issues are resolved. Any changes due to the unresolved issues are not expected to increase leadtime and, indeed, should relieve some burdens associated with preparing for compliance. At this time, the agency believes that the resolution of the remaining issues, which does not involve the imposition of more stringent performance requirements, should be accomplished shortly and therefore is denying AIA's petition.

Repeatability

One petitioner raised arguments about the repeatability of the test procedures used in Standard No. 208 compliance testing. The petitioner's fundamental argument is that the agency's Repeatability Test Program found what the petitioner says is an unacceptable level of variability in the test results and thus, the petitioner argues, the agency has failed to demonstrate that the test procedures can be reproduced, car-to-car and test site-to-test site. The petitioner noted that for a manufacturer to certify its vehicles, it must meet maximum limits for each of eight separate requirements: HIC for driver and passenger dummy heads, "g" loads for driver and passenger chests; and femur loads for each dummy's right and left leg. Because of the test variability, the petitioner said that it cannot confidently predict that its vehicles will comply with the standard. It urged the agency to develop an alternative method of determining compliance with the standard.

The petitioner did not, however, provide any new data which demonstrate that the crash test procedures and the test dummy pose significant repeatability problems. More importantly, the petitioner did not provide new data indicating that the test procedure and the dummy are incapable of measuring compliance with Standard No. 208.

The agency believes that the test procedure, test dummy, and test instrumentation are repeatable within the statutory requirements of objectivity and practicability. The agency does recognize that because of the complexity of the requirements of Standard No. 208, manufacturers are concerned about certifying compliance with each of the requirements of the standard. To address this concern, the agency has proposed in Notice 38 that the rule be amended to state that a vehicle shall not be deemed in noncompliance if its manufacturer establishes that it did not have reason to know in the exercise of due care that the vehicle is not in conformity with the standard.

Comfort and Convenience

Several petitioners asked the agency to answer promptly the pending petitions for reconsideration of the comfort and convenience requirements of Standard No. 208. The agency has already issued a separate notice (Docket 74-14, Notice 37; 50 FR 14580) proposing changes to the comfort and convenience requirements in response to the petitions for reconsideration. Readers are referred to that notice for a detailed discussion of the proposed revisions.

Judicial Review

One petitioner asked the agency to clarify the extent to which a challenge to the legality of the final rule must be made now, rather than when the Secretary makes a determination that two-thirds of the U.S. population is covered by a mandatory belt use law. The reviewability of the final rule and any subsequent agency action is a matter for the courts, not the agency, to decide.

Mandatory Seat Belt Use Law Criteria

A number of petitioners sought reconsideration of the minimum criteria for mandatory safety belt use laws. The agency is still considering the issues raised in those petitions and will respond to them at a later date.

Corrections

MVMA pointed out two miner errors in the text of the final rule. First, in section 4.1.2 of the rule, the word "before" should be used instead of the word "after." Likewise in section 4.1.2.2(b), the word "outboard" is misspelled. Both of those errors are corrected by this notice.

In addition, the agency wants to clarify a conflict between the preamble to the MUL provisions of the final rule and the text of the final rule's provisions on MULs. The preamble to the rule stated that one of the minimum criteria for a MUL was that each front outboard occupant of a passenger car be required to wear a safety belt. The text of the final rule provides that each front seat occupant, which would include the outboard and the center seating positions, would have to be covered by a MUL. The text of the final rule, requiring a MUL to cover all the front seating positions, is the correct version.

Cost and Benefits

NHTSA has examined the impact of this rulemaking action and determined that it is not major within the meaning of Executive Order 12291 or significant within the meaning of the Department of Transportation's regulatory policies and procedures. A Preliminary Regulatory Evaluation has been prepared on the changes proposed in Notice 38 and discussed in this notice. A copy of that evaluation is available for public inspection and copying in the agency's docket section. The agency has determined that the economic and other effects of the rulemaking action in this notice are so minimal that a full regulatory evaluation is not required. The changes adopted in this action concern minor adjustments to the phase-in requirements, which will give manufacturers more flexibility without imposing any economic costs.

Regulatory Flexibility Act

NHTSA has also considered the effects of this rulemaking action under the Regulatory Flexibility Act. I hereby certify that it will not have a significant economic impact on a substantial number of small entities. Accordingly, the agency has not prepared a regulatory flexibility analysis.

Few, if any motor vehicle manufacturers would qualify as small entities. The suppliers of webbing and other manual or automatic restraint components will not likely be significantly affected, since this notice is not making a change in the performance requirements of the standard. Small organizations and governmental units will not be significantly affected since there are no price increases associated with this action.

Environmental Effects

NHTSA has analyzed this rulemaking action for the purposes of the National Environmental Policy Act. The agency has determined that implementation of this action will not have any significant impact on the quality of the human environment.

List of Subjects in 49 CFR 571

Imports, Motor vehicle safety, Motor vehicles, Rubber and rubber products, Tires.

PART 571—FEDERAL MOTOR VEHICLE SAFETY STANDARDS

In consideration of the foregoing, § 571.208, Occupant Crash Protection, of Part 571 of Title 49 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 571 continues to read as follows:

Authority: 15 U.S.C. 1392, 1401, 1403, 1407; delegation of authority at 49 CFR 1.50.

§ 571.208 [Amended]

2. Section 4.1.3.4 is revised to read as follows:

S4.1.3.4 For the purposes of calculating the numbers of cars manufactured under S4.1.3.1.2, S4.1.3.2.2, or S4.1.3.3.2 to comply with S4.1.2.1:

(a) Each car whose driver's seating position will comply with the requirements of S4.1.2.1(a) by means not including any type of seat belt and whose front right seating position will comply with the requirements of S4.1.2.1(a) is counted as 1.5 vehicles.

(b) Each car whose driver's seating position will comply with the requirements of S4.1.2.1(a) by means not including any type of seat belt and whose front right seating position is equipped with a Type 2 seat belt is counted as a vehicle conforming to S4.1.2.1.

3. The first sentence of section 4.1.2 is revised to read as follows:

S4.1.2 Passenger cars manufactured on or after September 1, 1973, and before September 1, 1986. Each passenger car manufactured on or after September 1, 1973, and before September 1, 1986, shall meet the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. * * *

4. Section 4.1.2.2(b) is amended to change the word "outbord" to the word "outboard."

Issued on August 27, 1985.

Diane K. Steed,

Administrator.

[FR Doc. 85-20745 Filed 8-27-85; 11:50 am]

BILLING CODE 4910-59-M

Proposed Rules

Federal Register
Vol. 50, No. 169
Friday, August 30, 1985

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 910

[Docket No. AO-144-A14-R01]

Lemons Grown in California and Arizona; Extension of Time for Filing of Exceptions to Recommended Decision

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Extension of time for filing exceptions.

SUMMARY: This extension of time is necessary to allow interested persons additional opportunity to prepare and file exemptions to the recommended decision with respect to proposed amendments of the California-Arizona lemon marketing order.

DATE: The date by which written exceptions must be postmarked is extended to October 7, 1985.

ADDRESS: Interested persons may send written exceptions to the Hearing Clerk, Room 1077-South Building, U.S. Department of Agriculture, Washington, DC 20250, where they will be available for inspection during business hours (7 CFR 1.27 (b)).

FOR FURTHER INFORMATION CONTACT: William J. Doyle, Chief, Fruit Branch, Fruit and Vegetable Division, USDA, AMS, Washington, DC 20250, telephone 202 447-5975.

SUPPLEMENTARY INFORMATION: Notice was given of the filing with the Hearing Clerk of a recommended decision with respect to proposed further amendment of Marketing Order No. 910, as amended, regulating the handling of lemons grown in California and Arizona, and of an opportunity to file written exceptions thereto in the August 7, 1985, issue of the **Federal Register** (50 FR 31850).

The recommended decision gave interested persons an opportunity to file written exceptions until September 6, 1985. Two requests for extension of the comment period were filed; on request was for at least 30 days, and the other request was for an additional 60 days. After considering the various factors involved in this matter, it is determined that an additional 30-day extension of the comment period is sufficient and will not unnecessarily prolong the rulemaking proceeding. Therefore, the time for the filing of exceptions is extended to October 7, 1985.

List of Subjects in 7 CFR Part 910:

Marketing agreements and orders, California, Arizona, Lemons.

Dated: August 27, 1985.

James C. Handley,

Administrator.

[FR Doc. 85-20846 Filed 8-29-85; 8:45 am]

BILLING CODE 3410-02-M

FEDERAL RESERVE SYSTEM

12 CFR Part 211

[Reg. K; Docket No. R-0550]

Regulation K; International Banking Operations; Restriction on Affiliate Transactions of Edge Corporations

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Proposed rule.

SUMMARY: The Board is publishing for comment a proposed change to Subpart A of Regulation K, the Board's regulation on international banking operations. The Board proposes to restrict affiliate transactions of Edge corporations that are not subsidiaries of insured banks in order to help ensure the safe and sound operation of Edge corporations.

DATE: Written comments must be received on or before October 28, 1985.

ADDRESS: Comments should be mailed to William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, Washington, D.C. 20551, or delivered to the C Street entrance, 20th & C Streets, NW., Washington, D.C., between the hours of 8:45 a.m. and 5:15 p.m. weekdays. Comments should include a reference to Doc. No. R-0550. All comments received will be available for inspection in room B-1122 between 8:45 a.m. and 5:15 p.m. weekdays.

FOR FURTHER INFORMATION CONTACT: Ricki Rhodarmer Tigert, Assistant General Counsel (202/452-3428); Kathleen M. O'Day, Senior Counsel (202/452-3786), Legal Division; Frederick R. Dahl, Associate Director (202/452-2726); James S. Keller, Manager, International Banking Applications (202/452-2523), Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System; or Joy W. O'Connell, Telecommunication Device for the Deaf (202/452-3244).

SUPPLEMENTARY INFORMATION: Edge corporations are specialized banking companies that are chartered by the Board to engage in international banking or financial operations (12 U.S.C. 611 *et seq.*). Edge corporations may not engage in activities in the United States except as may be incidental to foreign business. Until recently, these organizations were held, almost without exception, by U.S. banks, and in every case by a U.S. banking organization that is subject to federal banking supervision. Since 1978, however, foreign banks have been authorized by law to acquire Edge corporations with the prior approval of the Board. Nonbank companies in the United States have also recently acquired existing Edge corporations.

In light of the increase in the number of owners of Edge corporations that are not subject to federal banking supervision, the Board has become concerned about the potential for adverse effects that might result from such affiliations. These adverse effects include potential conflicts of interest, undue concentration of resources, impairment of the ability of an Edge corporation to be an impartial arbiter of credit, and other safety and soundness concerns. Of particular concern is the issue of affiliate lending. The Board has not previously placed restrictions on loans and extensions of credit by Edge corporations to affiliates because, as noted, Edge corporations have generally been held by U.S. banking organizations that themselves are restricted in their activities and are subject to supervision. Indeed, most Edge corporations are subsidiaries of U.S. insured banks and are indirectly subject to the restrictions imposed by section 23A of the Federal Reserve Act (12 U.S.C. 371c) restricting transactions with affiliates.

Nonbank owners of the Edge corporations are not subject to the supervisory authority of the Federal Reserve Board. As a result, they may engage, to an unlimited degree, in activities that are not permissible for banking organizations. Because an Edge corporation that is not owned by an insured bank is not itself subject to the restrictions on transactions with affiliates imposed by section 23A of the Federal Reserve Act, a nonbank-owned Edge corporation may lend 10 percent of its capital and surplus to any number of its affiliates, none of which is regulated by banking authorities and a number of which may engage in a broad range of nonbanking activities. Because affiliation with a nonbank company could create pressures to lend to affiliates regardless of creditworthiness and thus undermine the safety and soundness of the Edge corporation, the Board is proposing to prohibit all lending to affiliates by Edge corporations that are not subsidiaries of U.S. insured banks.

The proposal is designed to preserve the safety and soundness of Edge corporations, entities for which the Board has exclusive supervisory responsibility, the proposal would also result in more equitable treatment for all categories of owners of Edge corporations [1] because all Edge corporations would be subject to some level of restriction on affiliate lending.

The Board is requesting comment on (1) the effect of the proposal, if any, on the operations of existing Edge corporations, including the lending transactions with affiliates that may be hindered, and, in particular, how it would affect the operations of Edge corporations controlled by foreign banks; (2) whether any exceptions or exemptions are appropriate to the prohibition on affiliate lending, specifically (i) how such exemptions would address the concerns about the potential for conflicts of interest and safety and soundness that prompted the Board to propose the prohibition on affiliate lending and (ii) whether there should be exemptions for Edge corporations that are owned by companies that only conduct activities permitted to bank holding companies; and any other comments that would be useful in the Board's consideration of the issue.

List of Subjects in 12 CFR Part 211

Banks, Banking, Federal Reserve System, Foreign banking, Investments, Reporting and recordkeeping requirements, Export trading companies, Allocated transfer risk reserve, Reporting and disclosure of international assets, Accounting for fees on international loans.

Regulatory Flexibility Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601 *et seq.*), the Board of Governors of the Federal Reserve System certifies that the rule adopted will not have a significant economic impact on a substantial number of small entities.

PART 211—[AMENDED]

The Board proposes to amend 12 CFR Part 211 as follows:

1. The authority citation for Part 211 continues to read as follows:

Authority: Federal Reserve Act (12 U.S.C. 211 *et seq.*); Bank Holding Company Act of 1956, as amended (12 U.S.C. 1841 *et seq.*); International Banking Act of 1978 (12 U.S.C. 3101 *et seq.*); International Lending Supervision Act (12 U.S.C. 3901 *et seq.*).

2. In Part 211, it is proposed that § 211.6(d) be added to read as follows:

§ 211.6 Lending limits and capital requirements.

(d) *Transactions with affiliates.* An Edge corporation that is not a subsidiary of an insured bank in the United States may not engage in lending transactions with any affiliate of the corporation. For purposes of this subsection, "affiliate" shall have the meaning set forth in section 23A of the Federal Reserve Act (12 U.S.C. 371c) as if the Edge corporation were a member bank.

* * * * *

By order of the Board of Governors of the Federal Reserve System, August 28, 1985.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 85-20733 Filed 8-29-85; 8:45 am]

BILLING CODE 6210-01-M

[1] These include U.S. insured banks, U.S. bank holding companies, foreign banks, and U.S. nonbank companies.

FEDERAL HOME LOAN BANK BOARD

12 CFR Part 563

[No. 85-754]

FSLIC Insurance Premiums

August 23, 1985.

AGENCY: Federal Home Loan Bank Board.

ACTION: Proposed rule.

SUMMARY: The Federal Home Loan Bank Board ("Board"), as operating head of the Federal Savings and Loan Insurance Corporation ("FSLIC" or "Corporation"), is proposing to amend its regulations to provide a procedure for the payment of premiums for insurance on a semiannual basis.

DATE: Comments must be received by September 27, 1985.

ADDRESS: Director, Information Services Section, Office of the Secretariat, Federal Home Loan Bank Board, 1700 G Street NW., Washington, D.C. 20552. Public comments received on this proposal will be available for public inspection at this address.

FOR FURTHER INFORMATION CONTACT: Lawrence W. Hayes, Deputy General Counsel for FSLIC, Office of General Counsel, (202) 377-6428; Nancy M. Stiles, Associate General Counsel, (202) 377-6436; William Boyer, Deputy Director, Office of Administration, (202) 377-6666, Federal Home Loan Bank Board, at the above address.

SUPPLEMENTARY INFORMATION: Pursuant to section 404(b)(1) of the National Housing Act, as amended ("NHA"), 12 U.S.C. 1727(b)(1), as implemented by § 563.15(a) of the Regulations of the FSLIC ("Insurance Regulations"), 12 CFR 563.15(a) (1985), each institution whose accounts are insured in the Federal Savings and Loan Insurance Corporation ("insured institution") must pay "a premium for insurance equal to one-twelfth of one percent of the total amount of all accounts of the insured members of such institution." The statute provides that the first such premium is to be paid by each institution at the time a certificate of insurance is issued by the Corporation to such institution pursuant to § 403 of the NHA, 12 U.S.C. 1726, and subsequent premiums are to be paid annually. Section 404(b)(1) of the NHA further provides that "under regulations prescribed by the Corporation such premium may be paid semiannually."

The losses sustained by the insurance reserves of the Corporation in recent years have caused the Board, as operating head of the Corporation, to explore various methods of ensuring an appropriate flow of various collections to the insurance reserves. One method available to the Board, under existing statutory authority, is through the assessment of additional insurance premiums to meet losses and expenses of the Corporation pursuant to 404(c) of the NHA, 12 U.S.C. 1727(c). The Board has implemented such assessment authority through Resolution No. 85-142, dated February 22, 1985, and Resolution No. 85-437, dated June 5, 1985. An additional way to improve the flow of premiums, by improving the process of premium assessment and collection,

would be to provide for payment of regular premiums on a semiannual basis rather than on the annual basis currently being used. The Board today is preparing to adopt this approach.

Current Procedure

Currently, each insured institution is billed on the anniversary date of the issuance of its certificate of insurance for a premium equal to one-twelfth of one percent of the total amount of all accounts of the insured members of such institution, determined on the basis of the most recent report filed by such institution with the Board as of its anniversary date. Since an insured institution now pays no further regular premiums until its next anniversary date, under the current system there is no mechanism by which growth in accounts during the year, and consequent growth in the insurance risk of the Corporation, may be compensated for by any corresponding growth in the insurance reserves nor is there a way to reflect reduced account-risk exposure for institutions whose deposit base has decreased, perhaps because of a change in liability mix.

Proposed Procedure

The procedure proposed by the Board contemplates payment of regular premiums for insurance on a semiannual basis as follows. Each insured institution would be billed on the anniversary of the issuance of its certificate of insurance for an amount equal to one-twelfth of one percent of the total amount of all accounts of the insured members of such institution, determined on the basis of the most recent monthly or quarterly report filed by such institution with the Board as of the anniversary date. Six months after its anniversary date, each institution would either be billed for a premium in an amount equal to one-twelfth of one percent of the increase in the reported total amount of all accounts of the insured members of such institution, or given a credit for such institution's next anniversary billing in an amount equal to one-twelfth of one percent of the decrease in the reported total amount of all accounts of the insured members of such institution. Both the semi-annual premium and credit would be determined on the basis of the most recent monthly or quarterly report filed by such institution with the Board as of such semiannual date.

The provisions of section 404(h) make it clear that the premium year of each insured institution begins on the anniversary of the issuance of a certificate of insurance. Congress requires payment of a premium annually, but has permitted the FSLIC to prescribe regulations providing for semiannual payment. The legislative history of section 404 does not suggest any limitations to the broad scope of regulatory authority or to the flexibility permitted to the Corporation in determining the way in which premium payments shall be made, pursuant to its regulations. Under the proposed procedures, the amount of the annual premium of any institution will not exceed one twelfth of one percent of its accounts for any single year, but the use of a semiannual "catchup" payment or credit will bring premium payments closer to the actual growth or decline in an institution's accounts measured over a shorter, semiannual period.

Initial Regulatory Flexibility Analysis.

Pursuant to Section 3 of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980), the Board is providing the following regulatory flexibility analysis:

1. *Reasons, objectives, and legal basis underlying the proposed rule.* These elements are incorporated above in the supplementary information regarding the proposal.

2. *Small institutions to which the proposed rule would apply.* The proposed rule would apply to all institutions the accounts of which are insured by the FSLIC.

3. *Impact of the proposed rule on small institutions.* The proposed rule would not have a disproportionate impact on small institutions, since the cost of premiums assessed and credits given pursuant to the proposed rule would continue to be a function of the amount of an institution's accounts. Further, the proposal would not involve any significant new reporting or compliance costs that could impose a disproportionate burden on small institutions.

4. *Overlapping or conflicting Federal rules.* There are no known Federal rules that may duplicate, overlap, or conflict with this proposal.

5. *Alternatives to the proposed rule.* There are no alternatives that would have less impact on small institutions, consistent with the intended result and existing statutory requirements concerning the assessment of premiums.

The Board has determined to provide less than a sixty day comment period because (1) a thirty day period is fully adequate for comment on a proposal of this nature and (2) the public and the Board would be better served by prompt consideration of this proposal in the immediate future so that the Board's necessary financial and supervisory planning may proceed without undue delay.

List of Subjects in 12 CFR Part 563

Bank deposit insurance, Savings and loan association.

Accordingly, the Board hereby proposes to amend Part 563, Subchapter D, Chapter V of Title 12, Code of Federal Regulations, as set forth below.

SUBCHAPTER D—FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

PART 563—OPERATIONS

1. The authority for 12 CFR part 563 would continue to read as follows:

Authority: Secs. 401–405, 48 Stat. 1255–1260, as amended (12 U.S.C. 1724–1728); Reorg. Plan No. 3 of 1947, 3 CFR 1943–1948 Comp., p. 1071.

2. Amend § 563.15 by redesignating existing paragraphs (a), (b), and (c) as (b), (c), and (d), respectively; adding a new paragraph (a); and revising newly designated paragraph (b); as follows:

§ 563.15 Insurance premiums

(a) *Definitions.* For purposes of this section:

(1) "Annual payment date" means the date on which a certificate of insurance is issued by the Corporation to an institution, and each anniversary of the issuance of such certificate.

(2) "Semiannual payment date" means a date six months after an insured institution's annual payment date.

(b) *General provisions.* (1) Pursuant to section 404(b) of the NHA, except as provided in paragraph (c) of this section, each institution whose application for insurance is approved by the Corporation shall pay to the Corporation as follows:

(i) On each annual payment date, each insured institution shall pay an amount equal to one-twelfth of one percent of the total amount of all accounts (except note accounts) of the insured members of such institution.

(ii) On each semiannual payment date, each insured institution shall pay, or receive credit against its next annual payment for, an amount equal to one-twelfth of one percent of the amount by which the total amount of all accounts (except note accounts) of the insured members of such institution, is more or less than the total amount of all accounts (except note accounts) of the insured members of such institution as determined for assessment of the immediately preceding annual payment.

(2) The amount of the premium to be paid by each insured institution on each annual payment date, and the amount of the premium to be paid by, or the credit

to be provided for, each insured institution on each semiannual payment date, shall be determined on the basis of the most recent report filed by such institution with the Corporation as of each such payment date; but any insured institution that has not filed such a report within 60 days of any annual payment date or semiannual payment date shall provide more recent information if requested to do so by the Corporation. Any amount contained in any such report covering interest accrued, but not due and payable, or dividends declared, but not due and distributable, as of any annual payment date or semiannual payment date will not be included by the Corporation in the computation of either premiums due on such annual payment date or semiannual payment date, or credits given on such semiannual payment date. For purposes of this section, the total amount of a tax and loan account, a United States Treasury General Account, and a United States Treasury Time Deposit-Open Account shall be the average daily balance in such account since the institution's last annual or semiannual payment date, whichever is more recent, unless the account has been established after such date, in which case the average shall be calculated from the date of establishment of such account.

* * * * *

By the Federal Home Loan Bank Board.

Jeff Sconyers,

Secretary.

[FR Doc. 85-20861 Filed 8-29-85; 8:45 am]

BILLING CODE 6720-01-M

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Ch. II

Requirements of Chain Saws and Their Components and Replacement Parts; Termination of Proceeding To Develop a Consumer Product Safety Standard

AGENCY: Consumer Product Safety Commission.

ACTION: Termination of rulemaking proceeding.

SUMMARY: The Commission terminates the proceeding it had instituted to develop a consumer product safety standard for chain saws and their components and replacement parts. The proceeding is being terminated because an effective voluntary standard addressing rotational kickback of chain saws has been developed that is expected to be universally adopted by the chain saw industry.

DATE: The termination is effective September 30, 1985.

FOR FURTHER INFORMATION CONTACT: Mr. Carl Blechschmidt, Office of Program Management, Consumer Product Safety Commission, Washington, D.C. 20207; telephone (301) 492-6554.

SUPPLEMENTARY INFORMATION:

A. Background

A chain saw is a familiar wood-cutting tool in which a number of cutting elements are linked into a chain that is driven around the outer edge of a guide bar by a powerhead that incorporates a gasoline engine or electric motor.

In 1978, approximately 100,000 persons required medical attention after they were injured by chain saws. An estimated 23,000 of these injuries occurred when the user experienced a phenomenon known as "kickback," which is a sudden and potentially violent rearward and/or upward movement of the chain saw that can be caused by interference with the movement of the chain. This sudden and often unexpected kickback can propel the moving saw chain into contact with the operator, often with serious results. The great majority of kickback accidents are believed to be caused by the chain striking wood or another object in the upper quadrant of the tip of the bar. This type of kickback is caused by a tendency for the chain to catch or dig into the wood as the chain links travel around the radius at the end of the bar. Since this type of kickback causes a rotational movement of the chain saw, it is often referred to as rotational kickback.

A number of devices have been developed in attempts to reduce the risk of kickback occurring or to reduce the likelihood of injury if it occurs. For example, one way to help prevent nose-tip kickback is to provide a guard to cover the chain at the upper quadrant of the tip of the blade, thereby protecting the chain from contact in this area.

Another mechanism that may provide protection is a chain brake intended to stop the chain when kickback occurs. Some chain brakes are designed to be actuated by contact of the operator's hand with a hand guard as the saw rotates or moves back, while other types of chain brakes are designed to be actuated automatically by an intertial sensing device.

There also are features that can be provided in the design of the saw chain or guide bar that will reduce the amount of energy the chain saw will develop during kickback. There are a number of chain designs intended to reduce the degree of kickback that can occur when contact takes place at the tip of the bar. A cutting link of a saw chain usually includes a "depth gauge" which partially shields the cutting element so it will not dig in too deeply. Chain designs used to minimize kickback include (1) guard links to partially shield the depth gauge and cutting element, (2) modification of the shape or contour of the depth gauge, (3) modification of the overall shape and dimensioning of the cutter, and (4) combinations of the above. It has also been found that reducing the radius of curvature at the end of the guide bar will reduce the energy developed during rotational kickback.

By a letter dated March 21, 1977, John Purtle, Esq., of Batesville, Arkansas, petitioned the Commission (Petition CP 77-10) to begin proceedings under section 7 of the Consumer Product Safety Act (CPSA) to develop a mandatory consumer product safety standard to "minimize and prevent chain saw kickback." Mr. Purtle suggested that every chain saw incorporate "a chain saw brake, a nose-tip guard, a kill switch or other safety device."

While the Commission's staff was evaluating this petition, the Chain Saw Manufacturers Association (CSMA), now the Portable Power Equipment Manufacturers Association (PPEMA), recommended that the petition be denied on the ground that a mandatory standard was not needed because the industry was taking significant voluntary steps to address the chain saw kickback hazard.

In December, 1977, CSMA proposed a joint 18-month effort with the Commission to develop a voluntary performance standard.

Subsequently, the Commission denied petition CP 77-10 (43 FR 26103; June 16, 1978) and, later the same month, formally agreed to participate with CSMA in a joint effort to develop a voluntary performance standard to reduce chain saw kickback injuries.

On December 21, 1978, CSMA submitted a draft standard to the Commission. That standard provided for a specified test apparatus to measure the maximum energy generated at the tip of the chain bar at the initial moment of kickback. The 1978 draft standard proposed a computer model to translate the maximum energy measurement into the angle that the saw would rotate toward an operator. In making this translation, the model used (1) the energy measurement, (2) information decribing certain key characteristics of

the saw being tested, (3) rules for converting the measured total energy into horizontal, vertical, and rotational energy components, and (4) formulas intended to describe the influence of the operator's hands on the handles during kickback. The result was a "Derived Angle of Rotation," which would be compared to acceptance criteria to determine whether the saw met or failed the requirements.

The Commission's preliminary evaluation of CSMA's draft standard and rationale left serious doubts that the standard as submitted would adequately reduce injuries associated with chain saw kickback. Perhaps the most significant of these doubts were caused by the lack of data on how well the angle of rotation calculated by the computer program would correlate to actual situations where a chain saw was tested for kickback while being held by a user and on whether the test procedure was reproducible and repeatable. Because of the doubts about the effectiveness of the standard submitted by CSMA, the Commission decided to begin a proceeding to develop a chain saw standard itself. As provided in section 9 of the Consumer Product Safety Act as it existed at that time, the Commission published a **Federal Register** notice announcing its determination to develop a standard itself and requesting public comment on the determination. 45 FR 62392; September 18, 1980. After considering the 36 comments received on that notice, the Commission commenced the proceeding to develop a standard by publishing a Notice of Proceeding in the **Federal Register** of May 11, 1981. 46 FR 26262.

In August of 1981, the Omnibus Budget Reconciliation Act of 1981 amended the Consumer Product Safety Act to require that a proceeding to develop a consumer product safety rule be commenced by publication of an advance notice of proposed rulemaking ("ANPR"), which differed from the previously-required Notice of Proceeding. Therefore, the Commission, on May 5, 1982, published an ANPR addressing chain saw kickback and withdrew the Notice of Proceeding. 47 FR 19369. The ANPR addressed rotational kickback from both electric and gasoline-powered chain saws.

In the meantime, CSMA had continued to develop the draft voluntary standard that it had previously submitted to the Commission. In December of 1981, CSMA submitted an improved version of this standard to the Commission and to the American National Standards Institute (ANSI). This 1981 version of the standard contained a completely new computer program for calculating the kickback angle.

ANSI began the process of reviewing the CSMA standard for consideration as an amendment to ANSI's voluntary standard for chain saws that was then in effect. In the ANPR published on May 5, 1982, the Commission acknowleged the progress that had been made toward developing a voluntary standard and affirmed that the Commission's staff had been directed to participate in the ANSI review process.

Since publication of the ANPR, the Commission's staff has continued to participate in industry's effort to upgrade its voluntary standard to address chain saw kickback. The Commission staff's effort has contributed to several significant changes in the original kickback standard submitted to ANSI by CSMA. On May 20, 1985, the ANSI B175 Committee submitted the standard it has developed to ANSI's Board of Standards Review for its review and approval. The Board's approval became final on July 18, 1985.

B. Statutory Framework for Consumer Product Safety Standards

Section 9 of the Consumer Product Safety Act (the "CPSA"), 15 U.S.C. 2058, as amended, incorporates procedures that favor voluntary standards under certain defined circumstances where the voluntary standard will adequately reduce the risk and it is expected that substantial compliance with the voluntary standard will be achieved. Under the procedures established by section 9 of the CPSA, a proceeding for the development of a consumer product safety rule is commenced by the publication in the **Federal Register** of an advance notice of proposed rulemaking ("ANPR") which shall:

1. Identify the product and the risk of injury;

2. Include a summary of each of the regulatory alternatives under consideration (including voluntary standards);

3. Include information with respect to any relevant existing standard and a summary of the reasons the Commission believes preliminarily that such standard does not adequately reduce the risk;

4. Invite interested persons to submit comments on the risk of injury and on possible alternatives for addressing the risk;

5. Invite persons to submit all or part of an existing standard as a proposed consumer product safety standard; and

6. Invite persons to submit a statement of intention, and a plan, to modify or develop a voluntary consumer product safety standard to address the risk.

If the Commission determines that an existing standard submitted to it in response to the ANPR would adequately reduce the risk, it may publish such standard as a proposed consumer product safety rule. On the other hand, if the Commission determines that a plan to develop a voluntary standard, submitted to it in response to the ANPR, will result in a voluntary standard that will adequately reduce the risk and that it is likely that there will be substantial compliance with such voluntary standard, the Commission is required to terminate the rulemaking proceeding.

Before the Commission may publish a proposed mandatory safety rule, it must prepare a preliminary regulatory analysis containing:

1. A preliminary description of the potential benefits and costs of the rule.

2. A discussion of the reasons any standard submitted to the Commission in response to the ANPR was not published by the Commission as a proposed rule;

3. A discussion of the reasons for the Commission's determination that any plan to develop a voluntary standard, submitted in response to the ANPR, would not, within a reasonable time, be likely to result in the development of a voluntary standard that would adequately reduce the risk; and

4. A description of any reasonable alternatives to the proposed rule and a summary of their costs and benefits, together with a brief explanation of why such alternatives should not be published as a proposed rule.

With regard to a risk that is addressed by a voluntary standard that has been adopted and implemented by persons that would be subject to a Commission rule concerning the same risk of injury, the Commission may not issue a final mandatory standard unless it finds that compliance with the voluntary standard is not likely to result in the adequate reduction of the risk or that it is unlikely that there will be substantial compliance with the voluntary standard.

Among the other findings the Commission is required to make before it can issue a final safety standard for a product are: That the rule is reasonably necessary to reduce an unreasonable risk; that the rule is in the public interest; that the benefits of the rule bear a reasonable relationship to its costs; and that the rule imposes the least burdensome requirement that adequately reduces the risk.

Thus, it can be seen that the Commission's enabling legislation embodies a strong preference for voluntary standards in those instances where the voluntary standard can be expected to adequately reduce the risk. In fact, at two points in the statutory procedures described above, the Commission is required to terminate a proceeding in favor of voluntary standards activities that apparently will adequately reduce the risk of injury associated with the product in question.

C. The ANSI Kickback Standard

The kickback standard developed by ANSI, with the participation of industry and the Commission's staff, establishes a 45 degree maximum Computed Kickback Angle or Chain Stop Angle for gasoline-powered chain saws below 3.8 cubic inch displacement (c.i.d.). It requires all saws below 3.8 c.i.d. to have at least two separate features to reduce the risk of injury from kickback, such as a bar-tip guard, chain brake, low- or reduced-kickback saw chain, reduced-kickback guide bar, or other feature demonstrated to reduce significantly the risk of injury from kickback. In addition, among other provisions, the standard:

—Requires all chain saws to have a hand guard;
—Requires chain saws 3.8 c.i.d. and above that do not meet the 45 degree acceptance criteria to be equipped with a feature to reduce the risk of injury from kickback, such as a bar tip guard, chain brake, etc.;
—Defines performance requirements for replacement saw chain and defines low-kickback saw chain;
—Establishes label requirements for power heads and replacement saw chain; and
—Requires owners' manuals to contain improved safety instructions.

The Commission's staff has evaluated the computer program in the ANSI standard and concluded that the computer program provides a reasonable means to predict the "Computed Kickback Angle" and that the computer model can substitute for hand-held tests as a means to determine the kickback capability of a saw. See "Evaluation of the Chain Saw 'Kickback' Computer Program," Lynda Santelli, February 1985.

The ANSI standard applies only to gasoline-powered chains saws, and the data available to the Commission indicate that about 10 percent of chain saws sold are powered by electric motors. However, the Commission concludes that the safety features required by the ANSI standard will be incorporated in electric chain saws as well. Underwriters Laboratory ("UL") has indicated that it will issue a new standard for electric chain saws, UL 1662, to adopt the requirements that are in the ANSI standard for gasoline-powered saws. UL expects that work on UL 1662 will be completed by January 1986. In the discussions in this notice concerning the effectiveness of the ANSI standard, however, it is assumed that such devices have not been incorporated in electric chain saws.

Based on the kickback performance of chain saws currently on the market that comply with the proposed ANSI standard and on the Commission's staff's analysis of injury data, the staff estimates that there might be a 70–80 percent reduction in rotational kickback injuries with chain saws that comply with the ANSI standard, compared to chain saws that do not provide the elements of kickback protection that are required by the ANSI standard. These CPSC staff estimates of the injury reduction that can be expected from the ANSI standard were arrived at in the following manner. The Commission's staff examined reports of a number of actual incidents where rotational kickback injuries occurred, to determine the angle that saws had to kick back to produce the injuries. From these data, the staff estimated that a hand guard plus the 45-degree limitation in the ANSI standard might have prevented about 67 percent of the injuries in the sample of injuries studied. However, since some of the saws that are being manufactured in compliance with the ANSI standard produce kickback angles of less than 45 degrees, the Commission's staff also computed the percentage of injuries that might be reduced if chain saws were limited to maximum kickback angles of 35, 25, or 15 degrees. The staff concluded that these lower kickback angles would reduce injuries by about 73, 81, and 87 percent, respectively. After considering these latter figures, the Commission's staff concluded that the ANSI standard might reduce rotational kickback injuries by 70–80 percent. For a more detailed explanation of the basis for the Commission's estimates of the effectiveness of the ANSI standard, see "Chain Saw Rotational Kickback Injuries—A Baseline Study and Evaluation of the Revised ANSI B175 Standard (1985)," Rae Newman and Leonard Schachter, September 1984, and "Potential Effectiveness of the Rotational Kickback Amendment to the Voluntary Chain Saw Standard (ANSI B175, Revised 1985)," Rae Newman, February 14, 1985.

The Commission's staff has also estimated that the kickback standard may increase the average price of chain saws by about $5 per saw, or less than two percent of the average price of a chain saw. It may also increase the average price of a loop of replacement chain by about two dollars, or 10 percent of the average price of a replacement chain. The staff estimates that the standard's benefits from injury reduction will exceed the costs even when the lives expected to be saved by the safety features of the standard are not taken into consideration. (The staff estimates that about ten deaths per year would be avoided if all of the chain saws currently used by consumers conformed to the ANSI kickback standard.) For a more detailed discussion of the economic ramifications of the ANSI standard, see "Preliminary Economic Assessment of the Chain Saw Standard," Gregory Rodgers, March 1985.

The Commission also believes that virtually all of the gasoline-powered chain saws sold in the United States will conform to the ANSI kickback standard. This prediction is based largely on the fact that the manufacturers of chain saws voting for the standard on the ANSI B175 committee account for over 90 percent of the chain saws shipped in the United States. In addition, several small manufacturers that are not members of the ANSI committee have indicated that they already conform or intend to conform to the standard. Further, the five major saw chain manufacturers, which account for over 90 percent of the original equipment and replacement saw chain sold in the United States, have saw chain in production that is expected to be designated "low-kickback" chain under the criteria established by the standard. Lastly, the Commission has not been informed by any chain saw manufacturer that it does not intend to comply with the standard.

For more information concerning the background of this proceeding and the issues involved in it, see the previously published ANPR and Notice of Proceeding and the staff's "Briefing Package on Termination of the Proceeding to Develop a Consumer Product Safety Rule for Chain Saws," July 1985. Copies of these and other relevant documents can be obtained from the Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207; telephone (301) 492–6800.

D. Comments on the ANPR

The Commission received 28 comments on the ANPR. In the discussion below, the Commission addresses the comments that raised significant issues relevant to the

Commission's determination to defer to the ANSI standard and to terminate its rulemaking proceeding.

Opinions About a Mandatory Standard

Several of the comments expressed approval of the possibility of issuing a mandatory rule addressing chain saw kickback. A number of other comments expressly or impliedly opposed a mandatory standard. Where the commenters gave specific reasons for their opinions, the reasons and the Commission's reaction to them are discussed under the particular topics noted below.

Professional Saws

Two of the commenters indicated that they believed that the Commission should not regulate chain saws used by professionals. The stated reason was that the cutting performance of such saws should not be reduced.

The issue of whether it was feasible to exempt chain saws intended for the use of professionals from the scope of the standard was considered by the participants in the development of the ANSI standard. This consideration was at least part of the basis for the limitation of the scope of the standard's performance requirements to saws below 3.8 cubic inch displacement (c.i.d.), since professionals could be expected to comprise a larger portion of the users of such large saws than of the smaller saws more typically used by consumers. In addition, it was recognized that professionals also use many of the same models of chain saws that consumers use. During development of the ANSI standard, it was decided that it was not feasible for the seller of a chain saw to determine who might be a professional user. Therefore, the ANSI standard does not specifically exempt "professional" saws under 3.8 c.i.d. from the standard's requirements. However, the standard does allow the sale of saw chain that is not of the low-or reduced-kickback types and the sale of other chain saw components that are not specifically designed to reduce kickback. Therefore, a professional (or other) user who wishes to do so may obtain (either by purchase or by substitution of components) a chain saw that does not incorporate any particular safety features that are perceived as detracting from the performance of the saw. Thus, the ANSI standard addresses the concerns raised by these commenters about reducing the performance of saws used by professionals.

Performance of Chain Saws

In a related comment, a commenter contended that purchasers would not buy chain saws that incorporated features that detracted from the performance of the chain saw. In considering this commnent, it should be kept in mine that none of the requirements of the ANSI standard requires that performance be reduced. In addition, the use of low- or reduced-kickback chains and guide bars is not expected to greatly decrease the cutting efficiency of the chain saws using such devices. In any event, manufacturers are in the best position to judge whether any performance penalty associated with their antikickback devices is warranted in view of alternative ways to comply with the ANSI standard. Lastly, since the performance requirements of the ANSI standard are applicable to the majority of chain saws suitable for consumer use, the limited alternatives should make it unlikely that consumers will forego the purchase of a chain saw as the result of any perception that the performance of the device is not optimum.

Particular Features of Chain Saws

A number of comments concerned particular features of chain saws. These comments are discussed below.

1. *Chain.* One comment suggested that low-kickback chain should be required for chain saws (along with low-kickback guide bars). The intent of this suggestion, however, is addressed by the performance requirement of the standard that limits the tendency of the chain saw to rotate during kickback or that stops movement of the chain before a 45 degree rotation is achieved. The goal of this commenter's suggestion is also furthered by the standard's requirement that at least two features must be provided to address the risk of kickback.

During the development of the standard, it was decided that the standard should be as performance-oriented as possible in order to minimize any additional burden on manufacturers and to encourage continued development of safety features across a wide variety of technical approaches to the problem of kickback. For these reasons, no particular safety feature other than a handguard is required by the standard. As a practical matter, however, the Commission believes that virtually all chain saw manufacturers will use low- or reduced-kickback chain as one of the two features to address kickback that are required by the standard.

2. *Guide bars.* See the discussion in the preceding paragraph.

3. *Chain brakes.* Several comments addressed the subject of chain brakes. One comment expressed concern that any standard that was developed might not include a chain brake as one of the ways the standard would provide for the reduction of kickback injuries. This commenter was concerned that such a standard would discourage the use of a safety feature that could address modes of injury other than just rotational kickback.

Another commenter stated that, in his view, the state of the art of chain brakes had not advanced to the point that chain brakes should be relied on as the sole means to address the kickback hazard.

The concern raised by the first of these commenters is addressed by the provision of the standard permitting a "stopped chain" method of complying with the standard. The second commenter's concern is addressed by the standard's permitting numerous other ways to comply and, particularly, by the requirement that at least two separate features be provided to protect against kickback.

Another commenter suggested that chain brakes should be required. However, the data available to the Commission do not clearly establish the efficacy of chain brakes as a generic device for protection against rotational kickback injuries. Thus, the data currently available do not seem to support this commenter's suggestion. However, chain brakes meeting the performance requirements of the ANSI standard are allowed as means for reducing kickback under the standard.

On the other hand, the protection to be provided by chain brakes complying with the standard's "stopped chain" requirements would not exceed the protection provided by the requirement of the standard that rotation during kickback be limited to 45 degrees. Thus, a requirement that favors chain brakes over other alternatives as a means of combating rotational kickback would not appear to be justified.

The ANSI committee has indicated that it will address chain saw injuries other than those from rotational kickback in the future. The Committee has established a goal of December 1986 to develop requirements covering these other injuries. The Commission expects that the efficacy of chain brakes to address some of these other types of injuries will be examined during that effort.

Also, see the discussion below concerning two-handed operation for an

additional comment related to chain brakes.

4. *Chain guards.* One commenter stated that guards, which could cover the length of the guide bar and could therefore protect the user from contact with the chain during kickback, should be required. The ANSI standard does not adopt this suggestion, although effective guards would be an acceptable way to comply with the standard's requirement for an additional feature "to reduce the risk of injury from kickback."

In the Commission's view, the standard's approach to kickback protection is superior to single requirement for a guard. The presence of a chain guard that would effectively protect the user from kickback injury could prevent the use of the saw in certain ways, such as where it was desired to cut using the top of the bar. In addition, depending on the design, the use of the guards may involve significant increases in the cost and weight of the saw. For these reasons, it is unlikely that the Commission would have included a requirement for guards, other than a hand guard, had the Commission proceeded to develop a mandatory standard.

5. *Tip guards.* As discussed above, rotational kickback can be prevented by installing a guard at the tip of the guide bar to prevent contact with the chain at the point most likely to cause kickback. However, the presence of a tip guard can prevent the saw from being used for boring cuts or for work that is larger than the length of the guide bar. One commenter noted such practical disadvantages to the presence of a tip guard as one reason why the tip guard should not be relied on as the sole means of kickback protection. This commenter also noted that there can be no assurance that a removable tip guard will be in place when a kickback incident occurs.

Although a tip guard, when in place, can provide virtually complete protection against rotational kickback, the standard does not require its use for the reasons noted by this commenter. Furthermore, saws equipped with a removable bar tip guard must have the guard removed when being tested to determine the energy generated during kickback under the standard. However, because of the high degree of protection available to those consumers who do use a tip guard, the Commission agrees with allowing the tip guard to be one of the required two separate features to reduce the risk of injury from kickback.

6. *Handle position.* One commenter noted the undesirability of having handles that are too close together or too far forward. These factors, which could decrease the resistance of a saw to rotation during kickback, are accounted for in the computer program that predicts the angle through which the saw would rotate as the result of the energy produced in the kickback test apparatus. Thus, this commenter's concern is addressed by the standard.

7. *Bow bars.* One commenter suggested that bow-type guide bars shoud not be allowed because of their allegedly strong kickback characteristics. Bow guide bars are considered to be professional cutting tools and are not addressed in the standard. Similarly, the Commission could not regulate these products by a mandatory standard unless it could be shown that bow guide bars are used more than occasionally by consumers, among other necessary findings.

8. *Two-handed operation.* One comment suggested that there should be a requirement that chain saws have a device that woud require two-handed operation by activating a chain brake when either hand is not in place. While this may be a useful feature to protect against other types of injury associated with one-handed operation, the data available to the Commission do not show that one-handed operation is connected with a significant number of rotational kickback injuries. Accordingly, the Commission does not believe that a requirement that would impose the extra cost, weight, and complexity of such a device would be justified in the context of a proceeding to develop a standard to address rotational kickback. However, as discussed above in the response to comments on chain bracks, the ANSI committee will be addressing injuries other than those from rotational kickback in the future.

9. *Throttle locks.* A commenter suggested that the use of throttle locks, that enable the saw's chain to rotate without the trigger being continuously depressed, should be prohibited. However, the Commission has no data showing that the presence of such a control has contributed significantly to rotational kickback incidents. Whether such a control contributes to other accident scenarios can be examined in the effort that the ANSI committee will take to address injuries other than those caused by rotational kickback.

Service and Maintenance

One commenter noted that safety features that are difficult to maintain can add to the user's risk. Accordingly, the commenter suggested that chain saws should be sold only by dealers who are qualified to service them. In response to this comment, the Commission notes that it does not have the statutory authority to require what the comment suggests. Furthermore, there appear to be few data showing any connection between injury rates and improperly operating or maintained chain saws. In any event, however, the fact that the standard requires the provision of two features to protect against kickback should minimize the effect of any degradation of protection due to lack of, or improperly performed, maintenance.

Education

By far the largest number of commenters pointed out the value of education of the user as a means to reduce kickback injuries. Some of these comments suggested that user education should be the only step taken to address this hazard. Other commenters suggested user education in combination with other remedial steps.

The Commission agrees that consumer education is a critical part of any effort to reduce kickback injuries. The standard addresses this area by requiring labeling of the chain saw powerhead and of replacement chain. Also, extensive instructions for safe operation are required to be included in the owners manual supplied by the chain saw manufacturer. These types of labeling, warnings, and instructions constitute the only types of consumer education that the Commission could require if it proceeded to develop a mandatory rule. However, the Commission will continue to encourage manufacturers of these products to offer additional safety training for purchasers of their products, as some manufacturers, distributors, or retailers now provide.

Voluntary standard

Several commenters urged the Commission to cooperate in the development or adoption of a voluntary standard as the most appropriate way to address the risks from rotational kickback of chain saws.

Some of these commenters urged the pursuit of a voluntary standard because of what they viewed as inherent disadvantages of a mandatory standard. While the Commission would agree with many of the perceived disadvantages of mandatory regulation where, as here, there is an adequate voluntary standard developed that is expected to be substantially complied with by the affected industry, it should be noted that where such conditions do not exist, fulfillment of the Commission's statutory responsibility to reduce unreasonable risks of injury in consumer products

may, in other contexts, require the development and issuance of mandatory regulations.

One chain saw manufacturer, while also opposing mandatory standards, contended that voluntary standards present many of the same disadvantages. In this manufacturer's view, these disadvantages included inhibiting research and development of other ways to reduce the hazard because manufacturers would have a tendency merely to go along with whatever provisions are developed for the standard rather than seeking independent and innovative new solutions. While the relevance of this manufacturer's view for future action by the Commission is obscure, the Commission does not believe that considerations of this nature are significant with respect to the ANSI standard that has been developed to address rotational kickback. First, there has been no indication that the manufacturers involved in the development of the ANSI standard have behaved in the manner speculated by this commenter. In any event, the ANSI standard is a performance-oriented standard that will allow the use of practically any effective solution now in existence or that could reasonably be expected to be developed in the future, either to comply with the rotation limits of the standard or as the second feature to reduce the risk of kickback that the standard requires. Accordingly, the Commission cannot conclude that the ANSI standard will have a chilling effect on the continued development of ways to further reduce the risk of kickback.

This manufacturer also contends that standards, voluntary or mandatory, may prevent consumers from recovering judgments against defendants in product liability cases where the product in question complies with the standard. While the fact that a product complies with a standard may be admissible in some jurisdictions on the questions of whether the product is defective or the manufacturer was negligent, it is but one piece of evidence to be considered. The Commission believes that it is better to take reasonable steps to insure that products are reasonably safe in the first place than to rely solely on the fear of manufacturers of product liability verdicts to provide safe products. Certainly, this view was embodied by Congress in the legislation which created and empowers the Commission.

Comparative Test Data

One comment suggests that, in addition to issuing a mandatory standard, the Commission should make public comparative test data on the relative propensity of various chain saw models to kick back. The Commission does not believe that obtaining and releasing such information would be appropriate. The testing program that would be necessary to ensure that the information given out by the Commission was accurate, current, and fair to all manufacturers, as required by section 6(b) of the Consumer Product Safety Act, 15 U.S.C. 2055(b), would produce a drain on the Commission's resources that would not be commensurate with any benefit that might result from dissemination of the results.

The Commission does intend, however, to test chain saws manufactured after the adoption of the ANSI standard to determine that manufacturers are complying with the provisions of the standard. Where chain saws are found to be out of compliance, the Commission will take appropriate corrective action in cases where there appears to be a substantial risk of injury to the public as a result of the failure to comply with the voluntary safety standards. Such corrective action could, in an appropriate case, include notification of the public concerning the risk associated with the product in question.

CPSC Injury Data

Two comments, one from an industry trade association and one from a chain saw manufacturer, criticized the injury data relied on by the Commission in the ANPR to describe the risk of injury associated with chain saws and to estimate the expected benefits from adoption of the CSMA standard that had been proposed at the time of the ANPR.

One objection articulated in these comments is that the CPSC injury data were not limited to chain saws that were currently on the market and that already incorporated many of the safety features that would be encompassed by any mandatory or voluntary standard to be adopted. However, data collected since the publication of the ANPR have provided a comprehensive analysis of chain saws on the market in 1981 and 1982. The results of that analysis are in agreement with the analysis of older saws discussed in the ANPR.

In determining its final estimates of the effectiveness of the ANSI standard, the Commission staff relied on chain saw injury surveys conducted in October 1981 and October 1982 and on an exposure survey conducted in 1982. The results of these evaluations are contained in "Chain Saw Rotational Kickback Injuries: A Baseline Study and Evaluation of the Revised ANSI B175 Standard (1985)," September 1984, Rae Newman and Leonard Schacter, and in "Potential Effectiveness of the Rotational Kickback Amendment to the Voluntary Chain Saw Standard (ANSI B175, Revised 1985)" February 14, 1985, Rae Newman. These recent data were used by the Commission in making its determination that the ANSI standard will adequately reduce the risk of rotational kickback, and, as mentioned above, these current data do not yield results greatly different from the results based on the data that were available when the ANPR was published.

One of these comments also included a copy of a report that contained a number of criticisms of the data used by the Commission in its ANPR on chain saws. The Commission staff has responded to these criticisms in a 25-page report entitled "Review and Comment on the Paper Entitled *Audit and Critique of Selected Data Developed and Used by the Consumer Product Safety Commission in Its ANPR on Chain Saws,*" August 1982, Kenneth W. Haase, Thomas Hopper, Rae Newman, and Eliane V. Soley-Smith. The staff determined that all of the findings in the report submitted by this commenter were unfounded and based either on faulty statistical knowledge or a misunderstanding of the data systems under review. Copies of this Commission staff report can be obtained from the Office of the Secretary of the Commision.

Characterization of the Risk of Kickback

Some commenters characterized the risk of kickback injury in terms that implied that the risk was not significant and did not warrant regulation or other changes in the product. For example, some comments characterized kickback as "misuse," as not a problem, as an inherent risk of chain saw operation, or as caused by "foolish" operators. However, the estimated 22,000 rotational kickback injuries that occur each year, and the 70–80 percent of these that the Commission estimates can be prevented by the ANSI standard, demonstrate that the injuries are neither unavoidable nor acceptable and that they can be reduced at reasonable cost without an unreasonable reduction in the availability or utility of the products. Thus, while the Commission is not proceeding to issue a mandatory standard for chain saw kickback, it applauds the industry for its responsible effort to ensure that its products are as safe as reasonably possible.

E. Conclusion

For the reasons given above, the Commission has determined that the risk of injury from rotational kickback presented by chain saws can be effectively reduced by compliance with the kickback amendment of the ANSI B175.1 Chain Saw Standard and that there will be a very high degree of compliance with the amended standard's provisions. Therefore, the Commission has determined that it can rely on the voluntary ANSI B175.1 standard to reduce the risk of injury from rotational kickback. Accordingly, the Commission terminates the proceeding to develop a consumer product safety rule that was commenced by the advance notice of proposed rulemaking that was published on May 5, 1982. However, the Commission intends to continue to monitor chain saw injuries and compliance with the voluntary standard to ensure that the risk of injury from rotational kickback is adequately reduced.

Dated: August 27, 1985.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

[FR Doc. 85-20852 Filed 8-29-85; 8:45 am]

BILLING CODE 6355-01-M

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 1, 5, 16, 21 and 33

Domestic Exchange-Traded Commodity Options; Revisions to Pilot Programs for Non-Agricultural Options Contracts

AGENCY: Commodity Futures Trading Commission.

ACTION: Proposed rulemaking.

SUMMARY: In late 1981 the Commission published final rules governing a three-year pilot program for exchange-traded commodity options. Option trading began on October 1, 1982 following the designation of the first option contract markets. That three-year pilot program therefore is currently scheduled to expire on October 1, 1985. The Commission is reevaluating the option rules and requesting comment on proposed rule changes, including whether to make permanent exchange trading of options on non-agricultural futures contracts or to retain the program's current pilot status.

DATE: Comments must be received on or before October 15, 1985.

ADDRESS: Comments should make reference to "Revisions to Pilot Program for Non-Agricultural Options" and, should be sent to the Commodity Futures Trading Commission, 2033 K St., NW., Washington, D.C. Attn.: Secretariat.

FOR FURTHER INFORMATION CONTACT: Paul M. Architzel, Chief Counsel, Division of Economic Analysis, at the above address, Telephone (202) 254-6990; or Kenneth M. Rosenzweig, Associate Director, Division of Trading and Markets, at the above address, Telephone (202) 254-8955.

SUPPLEMENTARY INFORMATION:

I. Background

On November 3, 1981, the Commission published final rules establishing a strictly controlled, three-year pilot program to permit exchange-traded commodity options. 46 FR 54500. The establishment of such a program was the culmination of a long history of Commission efforts to provide for the trading of commodity options in a regulated environment.

Prior to the Commission's 1978 ban on option trading and the 1982 initiation of the pilot program, there were significant difficulties associated with the trading of commodity options. In addition, exchange trading of options on those domestic agricultural commodities regulated under the Commodity Exchange Act ("Act") were prohibited by Congress in 1936 as a result of excessive price movements and severe disruptions in the futures markets attributed to speculative trading in options.[1]

By way of background, massive frauds in the off-exchange offer and sale of options on those commodities not regulated under the Act occurred in the late 1960's and early 1970's. Those frauds were part of the impetus behind the creation of the Commission. Accordingly, the Congress granted the new Commission broad power over option transactions in the previously unregulated commodities.[2] Because of continued abuses in the offer and sale of such off-exchange options, however, effective June 1, 1978, the Commission suspended the offer or sale of all commodity options in the United States. 43 FR 16153 (April 17, 1978). The Congress codified that suspension as part of the 1978 amendments to the Act, but granted the Commission authority to establish a pilot program to permit the trading of such commodity options. Pub. L. No. 95-405, Section 3, 92 Stat. 867; 7 U.S.C. 6c(c) (1982).

In light of these prior abuses in option trading, the Commission reasoned that greater protections for public customers could be provided if the trading of options took place on regulated exchanges. Accordingly, the pilot program for exchange-traded options was based:

> on the assumption of direct and primary regulatory responsibilities by the contract markets for the participation of their member firms. Indeed, the pilot program places significantly greater self-regulatory duties and responsibilities on boards of trade than is presently the case for futures trading, particularly with respect to the protection of the public from sales practice abuses. . . . It is only by placing these regulatory responsibilities on the exchanges that the Commission believes it can presently assure that sufficient regulatory resources will be deployed to prevent a recurrence of the abuses which have characterized commodity options in the past.

46 FR 54502.

The Commission's program to permit the trading of commodity options has resulted in their phased introduction. The initial option rules permitted one option on a commodity futures contract other than on a domestic agricultural commodity to be traded on each exchange. 46 FR 54530. Subsequently, the Commission adopted rules also permitting the trading of one option per exchange on a physical commodity. 47 FR 56996 (Dec. 22, 1982). The pilot program was then modified by permitting two options per exchange whether on futures or physicals. 48 FR 41575 (Sept. 16, 1983). On August 24, 1984, the permitted number of options on futures contracts was expanded from two to five options per exchange, although the previous limit on the number of options on a physical commodity was retained. 49 FR 33641. In addition, following the repeal by Congress of the 1936 statutory ban on options involving domestic agricultural commodities, a separate three-year pilot program for the trading of options on those commodities was adopted on January 23, 1984. 49 FR 2752. This pilot program provided that each exchange

[1] Act of June 15, 1936, ch. 545, section 5, 49 Stat. 1484. See, e.g., Hearings on H.R. 8829 Before the House Committee on Agriculture, 73rd Cong., 2d Sess. 10 (1934) (statement of J. M. Mehl, Assistant Chief, Grain Futures Administration, United States Department of Agriculture); 80 Cong. Rec. 7853-54 (1936) (remarks of Senator Pope).

[2] Commodity Futures Trading Commission Act of 1974, Pub. L. 93-463, section 402(c), 88 Stat. 1412-13 (codified at 7 U.S.C. 6c(b)). See, e.g., 120 Cong. Rec. S34997 (daily ed. Oct. 10, 1974) (remarks of Senator Talmadge); Hearings on the review of the Commodity Exchange Act Before the House Committee on Agriculture, 93rd Cong., 1st Sess. 11 (1973) (statement of Rep. Smith); H.R. Rep. No. 93-975, 93rd Cong., 2d Sess. 37-39, 48-50 (1974).

could be designated for two options on domestic agricultural futures contracts.[3]

With each major expansion of the program, the Commission has justified to the Congress its ability to regulate the trading of exchange-traded commodity options. Major interim evaluations of the pilot option programs were made at the time that the non-agricultural options pilot program was expanded from one option on a futures contract and one on a physical commodity per exchange to two options of any kind, when this program was expanded from two to five options per exchange, and at the time the pilot program for options on domestic agricultural futures contracts was initiated. These interim reports to the Congress noted that few regulatory problems had arisen with respect to the trading of these options. In particular, the Commission noted in its reports to the Congress that it appeared that the exchanges were discharging their responsibilities under the program adequately and that there were no customer complaints of the type which formerly had characterized options trading. Moreover, the Commission had noticed no adverse effects on the underlying futures markets resulting from the option program.

That is not to say, however, that no problems have been identified during the pilot program. Subsequent to those interim reports, in March 1985, Volume Investors Corporation, a clearing member of the Comex Clearing Association, defaulted to the association as a result of three of its customers not meeting margin calls on their uncovered short option positions in the Comex gold option contract. The Commission has reviewed the events that led up to this default and has prepared a separate report on the issues raised by that default. In the interim, Commission staff wrote to each exchange trading options concerning the elements of its financial surveillance program to assure that adequate programs are in place for the assessment of the risks of option positions concentrations and, in particular, uncovered option positions.

In this connection, by separate **Federal Register** notices, the Commission proposed additional capital rules and a guideline with respect to option margins and is requesting comment on potential means for addressing certain of the problems which occurred during the liquidation of Volume Investors' option position. 50 FR 31612; 50 FR 31623; 50 FR 31625 (August 5, 1985). In addition, the Commission is today proposing additional rules and rule amendments which are intended to strengthen further the financial integrity of the options and futures markets. It is expected that after the conclusion of the comment process these proposals will lead to rules and procedures which, if adopted and effectively implemented, will reduce significantly the exposure of the marketplace and customers to losses due to a trader's default.

The Commission also has begun an evaluation of its over-all experience with option trading and has reviewed its regulations governing such trading. Based upon this analysis, and the comments elicited in response to this Notice of Proposed Rulemaking, the Commission will determine whether or not the pilot nature of the program should be terminated and whether any regulatory changes governing the trading of such options should be made.[4] Alternately, the Commission is requesting comment on whether, if the pilot nature of the program is maintained, exchanges should be permitted to trade more than five options on non-agricultural futures contracts.[5]

Changes in the existing rules are being proposed in the following areas: definition of hedging, participation of commercial interests in developing option contracts, definition of deep-out-of-the-money options, the underlying futures volume criterion for initial designation, delisting criteria based on the volume in the underlying futures and in the option contracts, reporting requirements, the requirement for exchange conduct of market-wide surveys, the filing of promotional material, customer complaints, and disciplinary actions with the exchanges, certain financial safeguards, and disclosure rules. As proposed, these regulatory changes also would apply to option trading on domestic agricultural futures contracts. The Commission is seeking comment on whether these proposed changes should apply to trading in such options on domestic agricultural futures contracts.

II. Amendments to Existing Regulations

A. The Pilot Nature of the Program

As adopted, the pilot option program contemplated that the Commission would designate a limited number of option contract markets for a three-year period after which it would determine whether or not those designations should become permanent. Accordingly, Commission Rule 33.5(c), 17 CFR 33.5(c), provides that the effective period for designation of commodity options shall not exceed three years from the effective date of the designation. In addition, Commission Rule 33.4(a)(6), 17 CFR 33.4(a)(6), limits the number of commodity options which may be traded on an exchange.

In light of the experience with the pilot option program, including the apparent use of these markets for risk shifting by commercial users, and the recently proposed capital and margin rules the Commission is requesting comment on deletion of the three-year limitation for designation and the limitation on the number of options on futures contracts on commodities other than domestic agricultural commodities permitted on each exchange. In addition, the Commission is proposing to remove the expiration date that presently exists for options on physicals (but, as discussed above, intends to continue the numerical limits on options on physicals). Insofar as the individual Orders of designation for existing option contracts have a specified termination date, the Commission would propose to amend § 33.5(c) to make possible the granting of permanent designations. Alternately, if the Commission determines that the pilot nature of the option program should be maintained, the Commission will extend the length of the temporary period of designation and will consider increasing the number of options on non-agricultural futures contracts permitted to be traded on an exchange. The Commission seeks comment on this alternative approach as well as the appropriate number of non-agricultural options for an extended pilot program.

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[3] It should be noted that the Commission has received two currently pending petitions for rulemaking to expand the number of options permitted on domestic agricultural futures contracts from two to five per exchange. On April 15, 1985, the Commission requested public comment on such an expansion of the pilot program for options on domestic agricultural commodities. 50 FR 14718. The period for public comment on this proposal ended on June 14, 1985, and the Commission is reviewing the comments it received.

[4] By letter dated July 19, 1985, the Futures Industry Association ("FIA") provided the Commission with certain suggestions as to how the Commission's pilot program regulations could be modified. The Commission's present proposal already addresses a number of these matters and the Commission will consider the FIA letter to be a comment on its proposal.

[5] The Commission is not contemplating increasing the number of options on physical commodities for which an exchange may be designated as a contract market because the first option on a physical commodity was designated only on February 12, 1985 and began trading on April 26, 1985. Permission to trade additional options on physicals will be considered by the Commission at a later time.

Moreover, although these proposed rule changes will generally apply to the pilot program for the trading of options on futures contracts in domestic agricultural commodities, trading in such options only began in October 1984. Accordingly, the Commission will consider the possible termination of that pilot program at a later time.

B. Definition of Bona Fide Hedging

Options are not currently included within the definition of hedging under Commission Rule 1.3(z). At the time that the initial option rules were adopted, the Commission was concerned that the use of options to shift risk might not fit fully within the definition of "hedging" as it applied to futures contracts. Accordingly, the option rules convey this risk-shifting concept through the use of other terms. For example, in Commission Rule 1.61(b)(2), 17 CFR 1.61(b)(2), the term "economically appropriate to the reduction of risk in the conduct and management of a commercial enterprise" is used with respect to option contracts. In addition, in Commission Rule 33.6(c), 17 CFR 33.6(c), this concept is conveyed by the terms "for other than speculative purposes by producers, processors, merchants or commercial users engaged in handling or utilizing the commodity. . . ."

After gaining experience with the trading of options under these rules, the Commission believes that the application of the term "hedging" to these *bona fide* risk-shifting activities is appropriate. For example, in writing their rules governing speculative position limits for option positions, the exchanges have uniformly adopted by direct reference, or by use of equivalent language, the Commission's general definition of "hedging" (Commission Rule 1.3(z)(1), 17 CFR 1.3(z)(1)). This application of the Commission's definition apparently has had no adverse effects.

Moreover, the uniform use of the term "hedging" with respect to both options and futures trading would simplify the option regulations. In this connection, for example, the Rule 33.4(a)(5)(i), 17 CFR 33.4(a)(5)(i), designation requirement that a proposed option contract market demonstrate that it is likely to serve an economic purpose would be interpreted identically to the economic purpose test for futures designation—*i.e.*, that the proposed instrument be used on more than an occasional basis for hedging or price basing.

The Commission, therefore, is proposing to amend Commission Rule 1.3(z)(1) to include within the general definition of hedging certain option transactions and to amend those Commission rules, including in particular Commission Rules 1.46 and 1.61,[6] 17 CFR 1.46, 1.61, which refer to the concept of hedging with options but which do not use that term.

The Commission notes, however, that the remainder of the Commission's definition of hedging, the specific, enumerated examples found in Commission Rule 1.3(z)(2) and (3), applies only to those futures contracts governed by direct Federal speculative limits and therefore does not apply to options. Accordingly, whether particular types of option transactions should be classified as hedging under Commission Rule 1.3(z) must be determined on a case-by-case basis by applying only the general definition. Nevertheless, the Commission notes that generally option grantors cannot meet the Commission's definition of hedging and that this proposed amendment is not intended to imply that covering speculative futures (or options) with options (or futures) positions can be considered hedging within the meaning of Commission Rule 1.3(z)(1).

C. Designation Criteria

Commission Rule 33.4 provides several criteria which must be met in order to be designated as an option contract market. The Commission has reviewed these criteria in light of its experience and is of the opinion that two of these can now be eliminated and that others should be modified.

1. Participation of Commercial Interests

First, the Commission is proposing to delete the requirement in Commission Rule 33.4(a)(5)(ii) that an exchange applying for designation demonstrate that commercial interests have participated in formulating the option contract. This requirement was necessary initially in light of the lack of any commodity option trading on exchanges when the pilot program began. The provision ensured that exchanges would seek a wide spectrum of expertise in constructing their first option contracts. After gaining experience in the pilot program many, if not all, exchanges have expertise with options sufficient so that a separate provision requiring involvement by commercial interests is unnecessary. Of course, exchanges may wish to continue including commercial interests when formulating new option contracts as a matter of their own policy.

2. Definition of Deep-Outs

One of the concerns in option trading before the advent of the Commission's program for exchange-traded options was in connection with the offer and sale of options which were deep-out-of-the-money. These are options in which the strike price is significantly above, in the case of a call, or significantly below, in the case of a put, the current price of the underlying futures contract. In addition, the premium for these options is relatively inexpensive, but the likelihood of such options' becoming profitable is remote. However, grantors of such options may face substantial liability if there are sudden, adverse movements in the price of the underlying commodity.

Accordingly, as part of the pilot program the Commission required that exchanges have rules to identify and to govern deep-out-of-the money options. Commission Rule 33.4(d)(2), 17 CFR 33.4(d)(2). In addition, as part of their sales practices audits, contract markets are required to ascertain whether the offer or sale by futures commission merchants ("FCMs") of such deep-out-of-the money options is consistent with exchange rules. Commission Rule 33.4(c), 17 CFR 33.4(c). Finally, the required disclosure document informs the customer of the risks associated with deep-out-of-the money options. Commission Rule 33.7(b), 17 CFR 33.7(b).

The Commission maintains its belief that the offer and sale of such options is an area of potenital abuse which must be carefully monitored. In particular, the offer and sale of deep-out-of-the-money options poses financial risks as well as raising issues concerning customer protection. The Commission believes that these issues are most effectively addressed by the recently proposed net capital and other financial rules and by greater emphasis on front office audits. For example, under the proposed guideline on option margins, margin is expected to be assessed on all option positions, including those that are deep-out-of-the-money.

The Commission is therefore proposing to eliminate the requirement in Commission Rule 33.4(b)(2) that exchanges have rules identifying deep-out-of-the-money options, since in many applications such specific definitions tend to be less encompassing and appropriate than a case-by-case evaluation of particular option series. However, the Commission would maintain the requirement that exchanges, as part of their sales practice audits, review their member's offer and sale of options with low premiums and strike prices considerably away from the money. A pattern of such trading would be considered an abusive sales practice. Thus, rather than relying on

[6] The Commission also is proposing to delete from Commission Rule 1.61 the provision for the application of that rule to then-existing contract markets which had no speculative position limits. This provision is no longer needed because the phase-in period for such speculative position limits has passed.

rules specifically defining and governing deep-out-of-the-money options, exchanges would be required to conduct sales practice audits pursuant to more general rules, such as those which require their members to observe high standards of commercial honor and just and equitable principles of trade, regarding the relative appropriateness or inappropriateness of the particular series of options offered or sold. Thus, the Commission is not proposing to delete from Commission Rule 33.4(c) the existing requirement that the Exchanges' sales practice audit programs include provisions for the review of member FCMs' sales of deep-out-of-the-money options.

Separately, the Commisison notes that Commission Rule 33.4(b)(11), 17 CFR 33.4 (b)(11), already requires each board of trade applying for designation as a contract market for the trading of commodity options to "[e]stablish appropriate criteria which are reasonably designed to secure performance, upon exercise, of the option contracts." Although the Commission has indicated that this rule is intended "particularly" to assure performance by grantors of call options on physicals, the rule applies equally to all exchange-traded options transactions. 47 FR 28401, 28404 (June 30, 1982). Thus, while the potential financial problems that may arise for grantors of deep-out-of-the-money options when there are sudden market moves are addressed in the proposed financial rules recently published in the **Federal Register**, the Commission reminds the self-regulatory organizations of their existing obligations under Commission regulations with respect to performance of options contracts.

3. Volume of the Underlying Futures Market

In adopting the initial rules for the pilot program, the Commission established a requirement that options could be designed only on futures contracts having a specified trading volume. That specified volume was an average of at least one thousand contracts per week in all contract months during the preceding twelve months, or a sufficiently liquid cash and future market to prevent option trading from disrupting those markets.

The Commission has reviewed this issue and is concerned that an initial volume of one thousand contracts per week generally may not be adequate to ensure that a trader would be able to exercise an option into a sufficiently liquid market so that the resulting futures position could be offset without suffering a substantial loss of the option's true economic value. In addition, the Commission is concerned that large positions resulting from option exercises into futures markets trading an average of one thousand contracts per week might have an adverse effect on the underlying futures market. Further, because all of the options so far designated have had average volumes far in excess of the 1,000 contract per week level, the Commision has no firm evidence that trading at such levels would not exhibit the above weaknesses. Accordingly, if the current limitation on the number of contracts permitted per exchange is removed or expanded, a higher volume level appears necessary to ensure that options will be traded only on those contract markets which can best support such a derivative market.

In light of these concerns, the Commisison is proposing to raise the volume level of the underlying futures market necessary for designation of an option on that futures contract and to delete the alternative test which permits a demonstration of sufficient liquidity in the underlying cash and futures markets to prevent disruption of those markets. The Commission believes that the alternative test does not address adequately the ability of a trader to offset a position in the underlying futures market upon exercise and thus realize the option's full ecomonic value. With the ending of the pilot program and the associated limitations on the number of options permitted, the Commission believes that a more objective liquidity test is necessary to ensure that options are designated only on those futures markets which will not be adversely affected by option trading.[7]

The Commission has reviewed the recent data for trading volume for all designated contract markets. Those contract markets designated to date for inclusion in the pilot program for options on futures generally have exhibited trading volume far in excess of the average 1,000 weekly level. Indeed, all except one of the designated contracts have average volumes at least in the range of 5,000 contracts per week. From the Commission's data it appears that the 3,000 contract level separates low volume futures contracts from the higher volume contracts comparable to those now included in the pilot program. Accordingly, the commision is proposing an average weekly volume of 3,000 contracts in the underlying futures contract for designation of options on futures.

D. Delisting Criteria

In light of the limited number of designations under the pilot program and their temporary nature, an automatic delisting procedure was unnecessary. Such an automatic delisting procedure would have halted trading in any options on a futures contract where the futures contract failed to maintain the requisite volume level or for any option market that itself failed to trade over a specified volume for a period of time. With permanent designations permitted, however, it is more likely that an underlying futures market may not continue to meet the requisite volume criteria or that trading in an option contract market may cease.

1. Underlying Futures Market

Although an underlying futures contract initially must meet the volume requirement for designation of an option, every futures contract may not continue to exhibit sufficient liquidity to support option trading. In those cases, where the objective criterion for continued trading is no longer being met, an automatic procedure to bring trading to an orderly halt is appropriate.

Commission Rule 5.4, as proposed, requires that where the total trading volume for all trading months in the underlying future falls below an average of 1,000 contracts per week for the preceding six months, no new option expirations may be listed for trading. However, new strike prices could be added, as specified in exchange rules, to the remaining expirations as they trade out. In such cases where the listing of additional option expiration has been suspended, expirations could be added only when trading volume in the underlying futures contract were to rise above an average of 2,000 contracts per week for a period of three months.[8]

The level at which options are subject to the delisting rule is proposed to be set at the 1,000 contract per week level, which is the current designation requirement. The Commission believes that this 1,000 contract per week requierment is the minimum acceptable level, below which the individual trader and the underlying futures market may be adversely affected by the existence of a derivative market. Setting the delisting level lower than the proposed

[7] Of course, in the unique circumstance, as with any Commision rule, a board of trade could petition the Commission for relief from this particular requirement.

[8] The objective volume criterion should be computed by averaging together the total weekly volumes over a six or three month period, as appropriate. Accordingly, although some weeks may fall below the required volme level, the average weekly volume may meet this requirement.

volume level required for initial designation is appropriate in light of the disruption which otherwise might be caused by the required cessation of trading due to minor fluctuations in volumes. Thus, where a futures market meets the initial designation criterion, the lower delisting volume level assures that any disruption of trading will occur only where the reduced volume is simply not a minor, temporary decrease in volume relating to specific market conditions, but a generalized reduction in trading volume. This is particularly true in light of the method of calculation which permits the averaging of weekly volume levels. Similarly, the higher level needed to resume trading which has been suspended, an average volume of two thousand contracts per week, will also help to assure that the increase in volume is sufficiently high that the trading volume is unlikely immediately to fall back below the delisting level.

2. Option Market

In addition to the possibility that the underlying futures contract may fail to continue to trade at the prescribed level, a designated option market may cease to trade or it may trade at chronically low levels. Commission Rule 5.2 provides a delisting mechanism for futures contracts which become dormant, and Rule 5.3 sets forth a special reporting requirement for futures contracts which trade at chronically low volumes. Option contracts were not included under Rules 5.2 and 5.3 during the pilot program because those rules provide for grace periods of three years from the time of initial designation before having an effect on the listing or trading of contracts. Thus, in anticipation of permanent option designations, the Commission is now proposing delisting requirements for option markets which are analogous to those which apply to futures contracts.

The rationale for delisting criteria with respect to futures contracts is that contract terms and conditions may become out-dated once trading has ceased in a contract and that an opportunity for reassessment of such a contract is necessary before trading is resumed. 47 FR 29515, 29517 (July 7, 1982). Similarly, with respect to low-volume futures contracts, the Commission was concerned that chronically low trading volumes might indicate failure of such contracts to attract commercial participants and thus to fulfill an economic purpose, and that such markets exhibited a heightened susceptibility to trading abuses. *ID.* at 29520.

In light to these concerns, the Commission is proposing an amendment to Commission Rule 5.2 to require that option markets in which no trading has occurred for all expiration months listed for trading for a period of six months shall be deemed dormant within the meaning of Commission Rule 5.2. The Commission is also proposing that the three-year grace period for newly designated contract markets also apply to options. With regard to all existing options, the three-year grace period would be counted from the date of initial designation but in no case would the grace period be less than six months from the effective date of the final rule.[9]

Unlike low-volume futures contracts, reports for option contracts which exhibit chronically low trading volumes are not being proposed. These reports for futures contracts having a volume of less than 1,000 contracts per month require, among other information, identification of commercial participants in the market and a statement explaining additional surveillance procedures instituted to monitor trade practices. However, special reports of commercial participation are unnecessary for options because information regarding all commercial participants in the option markets is already provided by the exchanges under Commission Rule 16.04. Morever, contract markets are expected as a matter of diligent self-regulation to institute adequate surveillance procedures for all contract markets and to increase such efforts where appropriate.

E. Reporting Requirements

The Commission is proposing to amend Rule 16.01 to require that where a delta factor is used for margining positions, for evaluating compliance with speculative position limits or for evaluating the financial exposure of its members, the exchange report the delta factor to the Commission on a daily basis in machine readable form. Such information was not required under the initial rules because delta systems were introduced by certain exchanges as part of their speculative limit and margining rules as the pilot program progressed. Moreover, the Commission finds that the use of deltas is important in its general surveillance of the markets and that the Commission should know the particular delta factors used by each exchange which trades options. Such information is similar to that otherwise required under Rule 16.01 and is important to the financial operations of the option market, as well as to inter-and intra-market relationships. In view of this, the Commission also is proposing that this information be made available to the public in printed form on a daily basis.

The Commission is proposing two amendments to rule 16.02. These proposed changes to Rule 16.02 will provide the Commission and the exchanges with specific, additional information necessary for the conduct of market surveillance. First, the Commission is proposing to amend Rule 16.02 to require that reportable positions in each option expiration be reported by strike price. Each exchange that has been designated by the Commission as a contact market in options has adopted speculative position limit rules which allow exemptions for certain "riskless positions" (*i.e.*, conversions, reverse conversions, boxes, etc.). In order to determine whether such an exemption is justified, data must be examined by option expiration month and strike price. Under existing Commission Rule 16.02, exchanges currently provide these data only for the option which is next to expire or which will expire within six weeks. However, position data by strike price is necessary for all expirations to check for compliance with exchange speculative position limits.

Moreover, certain exchange have adopted a delta system for purposes of exchange speculative position limits. For those exchanges, the Commission is proposing the additional requirement under Rule 16.02 that the relevant position information also be provided in hard copy form on a delta-equivalent basis in a form and manner approved by the Director of the Division of Economic Analysis. This reporting procedure is already being used by those contract markets currently having such a delta system. This proposal therefore merely would codify existing practice.

In addition, the Commission has not found it effective to use Commission Rule 16.05 which requires exchanges to conduct market-wide surveys. Rather,

[9] The Commission also is proposing to delete from Commission Rule 5.2 (c) the requirement that the exchange rule or resolution to resume trading be approved by the Commission within thirty days, unless the exchange is notified otherwise. Although the Commission will continue to endeavor to review these exchange rules on an expedited basis, the specific time limit in the rule is no longer needed.

Subsequent to the adoption of Commission Rule 5.2(c), the Futures Trading Act of 1982 amended the Act to include a statutory deadline of 180 days for Commission review of exchange rule amendments. In addition, the Commission has virtually eliminated its backlog of exchange rules to be reviewed. Accordingly, expeditions treatment of these submissions is likely without a separate time limit, and the existing rule created the need for additional procedures to extend the time limit if it were necessary to publish the proposal in the **Federal Register**. Thus, deleting this provision will streamline the Commission's review procedures without an affect on the timeliness of Commission considereation of exchange proposals to resume trading in a dormant contract.

the Commission has itself conducted such surveys in order to ensure better the timeliness and integrity of the survey process. In this respect, the Commission sees little benefit to maintaining the requirement that the contract markets conduct such surveys if the Commission itself can obtain most of this information in machine readable form directly from the FCMs. It should be noted that receipt of most of this information in machine readable form will yield the Commission savings similar to those garnered by requiring the exchanges to gather all of such information and also provide the Commission with the ability to verify directly the survey results. On the other hand, there will not be a net increase in information that FCMs are required to provide because, in the absence of a Commission-conducted special call, the exchanges would be gathering the same informatin from the FCMs. Accordingly, the Commission is proposing to delete Commission Rule 16.05 and to amend Commission Rule 21.02a so that most of the special call information on options which was required under Commission Rule 16.05 will be provided by the FCMs in machine readable form directly to the Commission, whether or not for purposes of sample surveys.

The Commission has previously adopted Rule 21.02a, 49 FR 1335 (January 11, 1984), providing that special calls for population data be provided in machine readable form in order that more extensive information could be collected on a sample of the population. This regulation includes a format for reporting certain information in machine readable form. This enables FCMs to develop computer programs to answer a special call and to be assured that subsequent requests for information will use the same format. Reporting in machine readable form provides a savings for both the reporting entities and for the Commission.

Under Commission Rule 21.02a as proposed, the Commission would call for certain information in machine readable form whether or not on a sample or a population-wide basis. Thus, the Commission could pre-select the sample and obtain the necessary information in one call, rather than in a two-step process. The Commission's experience with obtaining machine readable responses to both types of special calls—population and sample—on a voluntary basis has been good. It is anticipated that although total enumerations of the market would be permitted under the rule as proposed, the use of survey techniques would be encouraged.

It should be noted that the Commission is requiring FCMs to provide a machine readable response only for that information which is currently required to be reported in machine readable form.[10] Additional information which generally is not now carried in the FCMs' ADP systems, such as the type of account, the commercial or non-commercial classification, and for options, the occupation code of the trader, will continue to be subject to special call under Commission Rule 21.02.[11] Commission Rule 21.02 does not provide for a specific reporting medium. Thus, information required under Commission Rule 21.02 can be reported either manually or in machine readable form. Of course, the Commission would encourage FCMs voluntarily to report all required information in machine readable form.[12]

F. Changes in Sales Practice Program Requirements

The Commission also is proposing to amend Commission Rule 33.4, 17 CFR 33.4, to eliminate certain essentially repetitious filings which futures commission merchants and introducing brokers are currently required to make under certain provisions of the pilot program regulations. In particular, Commission Rules 33.4(b)(4) and 33.4(b)(6) respectively require FCMs which are members of an exchange which has been designated as a contract market for option trading to file with that exchange virtually all option customer complaints, regardless of whether the underlying conduct even involves that particular exchange, as well as notice of any disciplinary action taken against the FCM or any of its associated persons by any other self-regulatory organization. Commission Rule 33.4(b)(8) similarly requires FCMs "to submit to the board of trade all promotional material pertaining to option trading on that board of trade," even where that material has been submitted to other exchanges where the FCM is also a member, including the FCM's designated self-regulatory organization.

These provisions were adopted by the Commission at a time when an FCM could solicit or accept orders from option customers only for commodity options traded on those exchanges where the FCM was itself a member and were intended to ensure that each of the contract markets would receive information sufficient to enable them to conduct sales practice audits of their member firms. *See* 46 FR 54500, 54502–03; 48 FR 4650 (February 2, 1983). The contract markets and National Futures Association ("NFA") have since entered into joint audit agreements which, in effect, extend the sales practice audit requirements of the Commission's option regulations to all FCMs which engage in the solicitation or acceptance of option customers' orders. *See generally* 48 FR 9682, 9683 (March 8, 1983).[13] The Commission therefore believes that it is no longer necessary to require that all customer complaints, promotional material and notices of disciplinary action be filed with any exchange of which an FCM happens to be a member and is, accordingly, proposing to amend its regulations to provide explicitly that these materials need be supplied routinely only to an FCM's (or introducing broker's) designated self-regulatory organization ("DSRO"). The Commission's proposal is, of course, predicated upon the assumption that the DSRO which is in receipt of such information will not only act promptly upon any evidence that one of its members may be in violation of applicable rules but also that the DSRO will expeditiously share that information with the other exchanges of which an FCM or introducing broker may be a member and with NFA so that

[10] Accordingly, the ADP format remains the same as currently set forth with the exception of four technical corrections.

[11] Paragraph (d) of Commission Rule 21.02 requires that respondents to a Commission call provide the name, address the principal business or occupation of each account. 17 CFR 21.02(d) (1984). The Commission is not proposing to amend this paragraph specifically to set forth in the regulation that occupation codes for option traders be provided in any Commission call. However, the Commission anticipates that when issuing calls under Commission Rule 21.02 for information on option positions it will include in the call a requirement that respondents identify the principal business or occupation of traders in accordance with the list of occupational codes that the Commission from time to time publishes.

[12] The Commission also is proposing to amend Rules 21.02 and 21.02a by clarifying that where positions are carried for an originating futures commission merchant on a fully disclosed basis by another futures commission merchant, the originating futures commission merchant is not to report the positions. This proposed revision codifies current practice.

[13] By comparison, while the Commission's option regulations also permit an introducing broker to solicit and accept option customers' orders where a self-regulatory organization has assumed responsibility for the option sales practices of that introducing broker (*see* § 33.3(b)(1)(ii)), not all introducing brokers are so authorized at this time. *See* Division of Trading and Markets Interpretive Letter 85–1, Comm. Fut. L. Rep. (CCH) ¶ 22,473. The Coffee, Sugar & Cocoa Exchange, Inc. ("CSC") has since joined the inter-exchange agreement described in that Interpretive Letter, and its option contract (as well as any introducing broker guaranteed by a CSC-member FCM) now has the same status as the option contracts (and guaranteed introducing brokers) of the other exchanges described in that Interpretive Letter.

those organizations can also take whatever action may be appropriate under their rules.

The Commission is separately proposing to eliminate the requirement that FCMs and introducing brokers make and file with the Exchanges and NFA a record of oral complaints where the complaint could result in an adjustment to an option customer's account of $1,000 or more. The Commission has observed little evidence of oral customer complaints of the type contemplated by the rule and thus believes that the elimination of this requirement will not materially diminish the special customer protections afforded by the pilot program.[14]

The Commission also is proposing to amend the option disclosure requirements contained in Commission Rule 33.7, 17 CFR 33.7 in order to clarify further the extent to which the terms and conditions of the futures contract or physical commodity underlying an option must be discussed in the required disclosure statement. Specifically, paragraph (2) of the disclosure statement (§ 33.7(b)(2) of the regulations) currently provides that an FCM or introducing broker is required to provide "a description of . . . [t]he futures contract or the physical commodity which is the subject of the option . . . [and the] quantity of the underlying futures contact or underlying physical commodity. . . ." As a result, when these requirements first became effective, FCMs and introducing brokers endeavored to provide prospective option customers with a comprehensive and detailed listing of the terms and conditions of all of the options (and their corresponding underlyng futures contracts) that had thus far been designated by the Commission for trading.

The Commission soon recognized, however, that insofar as the regulation was being interpreted to require the dissemination to all existing and prospective option customers of the terms and conditions of all new option contracts as well as of every amendment to the terms and conditions of either existing options or their underlying futures contracts, the regulations was creating significant operational and compliance burdens. The Commission accordingly clarified those requirements by reiterating its intention that the terms and conditions of these contracts need not be disclosed to a potential option customer in advance of a decision to trade and that the requirements of its regulation would be satisfied if an FCM or introducing broker provided "the specific details of a particular option contract intended to be purchased or sold by a customer . . . prior to the entry of the first order for such contract." 49 FR 44891, 44893 (November 13, 1984).

The Commission is aware, however, that many FCMs and introducing brokers have chosen to continue to provide *all* terms and conditions to existing and prospective option customers in recognition of the difficulties inherent in assuring that individual customers have received the particularized disclosures that would otherwise be necessary every time an option customer chose to trade a new option contract.

The Commission has, therefore, further evaluated the utility and effectiveness of this portion of its disclosure requirements. In particular, the Commission recognizes that the information which is disclosed under this portion of its regulations is freely available upon request by an interested customer from any FCM, introducing broker, or the exchange on which the option is traded. Moreover, the Commission does not otherwise deem it necessary to require FCMs and introducing brokers routinely to disclose the terms and conditions of *futures* contracts which, as the option contracts they underlie, are also freely available to interested customers. The Commission is, therefore, proposing to amend § 33.7(b)(2) of its regulations to require an FCM or introducing broker instead to identfiy the futures or physical commodity which may be purchased or sold upon exercise of an option or, if applicable, whether exercise of the option will be settled in cash. The Commission believes that such a requirement should be sufficient to identify for potential option customers the underlying instrument upon which the option premium will be based as well as any unique or atypical attributes of a particular contract of which an option customer should be aware. The Commission is nonetheless interested in obtaining specific information and comments on how FCMs and introducing brokers currently fulfill their disclosure obligations to option customers with respect to the required description of exchange-traded options and their underlying futures contracts and physical commodities and, in particular what other alternatives may exist to the Commission's proposal.[15]

Finally, the Commission is proposing to expand the discussion in Commission Rule 33.7 of two items: the effect of limit moves in certain underlying futures and the nature of overnight risk of commodity price change to those who have exercised options. The additional disclosure of the effects of limit moves would clarify that price limits in certain underlying futures may not exist in the associated option and, as a result of this, there may be instances when an option may experience greater price change than its underlying futures contract. The disclosure also indicates that those obtaining positions in the underlying future as a result of option exercise may not be able to offset that position if there is a halt in trading due to a limit price change in the future.

The disclosure of exercise risk would clarify the trader's possible exposure to price change in the underlying future or physical commodity which may occur before the position resulting from option exercise can be offset. For example, the risk of a significant difference between the closing futures price on the day of exercise and the opening price the next trading day may make a profitable exercise of an option unprofitable. Also, in options on physicals that are cash settled, the difference in the cash settlement price for the underlying physical from that which prevailed at the time of option exercise may result in an unforeseen loss if cover activities are not undertaken.

G. Financial Requirements

The Commission has recently proposed capital rule amendments, margin guidelines, and related proposals in response to the failure of Volume

[14] The Commission has previously authorized the contract markets and NFA to delegate within a joint audit plan the responsibility for the review of promotional material. 49 FR 28906 (July 17, 1984). For these purposes, an introducing broker's designated self-regulatory organization would be deemed to be NFA except where the introducing broker is guaranteed by an FCM whose designated self-regulatory organization is one of the contract markets, in which case the introducing broker's DSRO would be that contract market.

[15] Thus, this change, if adopted by the Commission, would not in any way modify an FCM's or introducing broker's obligation to: acquaint itself sufficiently with the personal circumstances of each option customer to determine what further facts, explanations and disclosures are needed in order for that particular option customer to make an informed decision whether to trade options. The procedures to be followed by the prudent FCM [or introducing broker] to make an inquiry into an option customer's sophistication for purposes of determining to what extent risk disclosure above and beyond the disclosure statement itself might be avisable.

46 FR 5400, 54507 (November 3, 1981).

Similarly, this change would not in any way affect an FCM's or introducing broker's duty under Commission Rule 33.7(f) to "disclose all material information to existing or prospective option customers even if the information is not specifically required" by the Commission's option disclosure rule.

Investors Corporation. 50 FR 31612; 50 FR 31623; 50 FR 31625 (August 5, 1985). In addition, the Commission is now proposing to strengthen further its financial early warning system for FCMs. Specifically, the Commission believes that the problems at Volume Investors might have been detected earlier, and perhaps mitigated, had immediate notice of very substantial margin calls made by Volume to a group of accounts under common financial control been given to exchange or Commission personnel. The Commission believes that, in a similar situation, where an account is undermargined by such a magnitude that a default thereon would cause the FCM to be undercapitalized, the DSRO and the Commission should be made aware of the undermargined status as soon as possible and has proposed a rule which would address such a situation.[16]

This proposed rule would apply generally to individual accounts unless there were a group of accounts which was dependent on one person's financial resources. The rule would not otherwise apply, however, to all of a firm's accounts on a cumulative basis. The proposed amendment to Rule 1.12, a proposed new paragraph (f)(3), is in keeping with the overall goal of the financial early warning system which is, as the Commission has stated on several occasions, to afford the Commission and the appropriate industry self-regulatory organizations advance notice of an FCM's problems to allow the necessary protective action to be taken to insure the safety of the FCM itself, the FCM's customer funds and the integrity of the marketplace.

Proposed Rule 1.12(f)(3) would require an FCM to give notice to its designated self-regulatory organization and the Commission when it determines an account to be undermargined by an amount which exceeds its excess adjusted net capital. This notice is to be given immediately upon making the determination of the undermargined amount.

An immediate telephone call would be encouraged, followed by telegraphic notice. The DSRO and the Commission can then heighten their surveillance of the firm and be prepared to take appropriate action if there is a default which would cause the FCM to be undercapitalized. The proposed rule would apply individually to all accounts carried by the FCM. The proposal also provides, however, that if any person has an interest of 10 percent or more in ownership or equity in, or guarantees, more than one account, or guarantees an account in addition to his own account, the undermargined amounts of such accounts must be combined and notice must be given to the DSRO and the Commission if the undermargined amounts exceed the firm's excess adjusted net capital. The Commission wishes to emphasize that its proposal is designed to allow protective action to be taken, and should not cause a firm to delay issuing a margin call. The Commission also wishes to emphasize, however, that the triggering event would be the determination of undermargined status, not the issuance of a margin call and thus, an FCM could not circumvent the rule merely by postponing the issuance of a call.

In its letter of July 19, 1985, the Futures Industry Association requests that the Commission eliminate or modify the safety factor charge (or "haircut") set forth in Commission Rule 1.17(c)(5)(iii), which requires an FCM to deduct four percent of the market value of exchange-traded commodity options granted (sold) by option customers from the FCM's net capital in computing its adjusted net capital. In support of this position, FIA states that the risks of short option positions are no greater than futures positions and should be accorded the same treatment. The Commission notes that FIA made the same argument when the Commission proposed Rule 1.17(c)(5)(iii) [17] and the Commission rejected it at that time. Nothing that has happened in the last three years has indicated to the Commission that the capital requirements for an FCM based on the size of the short customer option position which it is carrying should be decreased; on the contrary the recent financial failure of Volume Investors Corporation would appear to suggest precisely the opposite.

Further, the Commission notes that the September 1982 capital rule amendments,[18] including Rule 1.17(c)(5)(iii), provide for equivalent treatment of future and short options positions in that the impact on an FCM's excess adjusted net capital will be the same in both instances, four percent of the margin required under rules of the applicable board of trade. If the FIA's suggestion were adopted, options would not be given preferential treatment over futures. The contract markets have generally established option customer margin levels for granted options of an amount equal to the underlying futures contract margin level plus the market value of the option. If this results in a higher required margin for a short option position than for a short or long futures position, this is the result of the fact that the contract markets have established different margin requirements for such positions based on their assessment of the risks involved.[19]

The Commission's September 1982 capital rule amendments prevented the imposition of an additional financial burden on an FCM for carrying long option customer positions (which are essentially riskless since the option premium is to be paid in full at the outset) and instead placed any such additional capital requirement on an FCM carrying a riskier granted (short) option customer positions. Because Division of Trading and Markets Financial and Segregation Interpretation No. 8 [20] established greater FCM segregation requirements for a long option customer position than for a short option customer position—with the market value of purchased options included in, and the market value of granted options excluded from, segregation requirements—the capital rule amendments were necessary to reflect more accurately the risks to an FCM carrying an option position.[21] Thus, the Commission continues to believe that there should be no capital impact on an FCM for a purchased (long) customer option, since there is no margining of the premium, but that the capital impact for a granted customer option should be the same as for any other margined position, such as a long or short futures position, which is four percent of the margin amount. The FIA has advanced no new arguments which would convince the Commission otherwise.

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[16] The Commission believes that an adequate program of financial surveillance can, in certain circumstances, depend upon the ability of the contract markets and their associated clearing organizations to obtain intra-day position information. In this regard, the Commission anticipates that the enhancements to exchange operations that would likely result if the Commission's "audit trail" proposal (49 FR 50190 (December 27, 1984)) were to be adopted would also materially improve the exchanges' ability to obtain position information on an intra-day basis.

[17] 47 FR 30261 (July 13, 1982).

[18] 47 FR 41513 (September 21, 1982).

[19] FIA also makes reference to combined short option/futures positions. To the extent such combination positions are deemed to be less risky and have lower margin requirements, this will be reflected in the FCM's capital requirements.

[20] 1 Comm. Fut. L. Rep. (CCH) ¶7116 (August 12, 1982).

[21] Detailed discussions of the mechanics of the September 1982 capital rule changes are set forth in the releases containing the proposed and final rule and in Interpretation No. 8, all cited above. *See also* CFTC Form 1-FR, Schedule of Segregation Requirements and Funds in Segregation, 1 Comm. Fut. L. Rep. (CCH) ¶3505, at 3579-3.

H. Request for Comments

The Commission also requests that commentors suggest any other changes to the options rules that their past experience with option trading would indicate are appropriate. In particular, the Commission is interested in learning whether additional or different customer protection rules are advisable, whether any of the protections now offered could be achieved as well with reduced regulatory burdens, and whether commentors agree that the overall options experience supports making the program permanent.[22]

III. Related Matters

A. The Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 et seq., requires that agencies, in proposing rules, consider the impact of these rules on small businesses. The Commission has previously determined that contract markets are not "small entities" for purposes of the RFA. 47 FR 18618 (April 30, 1982). These proposed rules would permit and govern the trading of options on various contract markets and therefore, if promulgated, would not have significant economic impact on a substantial number of small entities. Accordingly, for the above reason and pursuant to section 3(a) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Chairman, on behalf of Commission, hereby certifies that these regulations will not have a significant economic impact on a substantial number of small entities. However, the Commission particularly invites comments from any firms or other persons which believe the promulgation of these rule amendments might have a significant impact upon their activities.

B. Paperwork Reduction Act

The Commission has submitted to the Director of the Office of Management and Budget ("OMB") pursuant to the provisions of the Paperwork Reduction Act (44 U.S.C. Ch. 35), an expanation and details of the information collections required under these proposed rules. Because these rules amend existing rules which already have been assigned an OMB control number, the Commission assumes that the amended rules will be assigned the same OMB control number. Interested members of the public may obtain a complete copy of the information collection proposal relating to the proposed rules contained herein by contacting Joseph Salazar at (202) 254-9735. Persons wishing to comment on the Paperwork Reduction Act implications of these proposals are asked to send a copy of their comments to Mr. Salazar at the Commodity Futures Trading Commission, 2033 K Street NW., Washington, D.C. 20581, and to the OMB desk officer for the agency, Katie Lewin, Office of Management and Budget, Washington, D.C. 20503 (202) 395-4814.

List of Subjects

17 CFR Part 1

Consumer protection, Reporting and recordkeeping requirements.

17 CFR Part 5

Commodity futures, Reporting and recordkeeping requirements.

17 CFR Part 16

Commodity futures, Reporting and recordkeeping requirements.

17 CFR Part 21

Brokers, Commodity futures, Reporting and recordkeeping requirements.

17 CFR Part 33

Commodity exchange, Commodity exchange designation procedures, Commodity exchange rules, Commodity futures, Commodity options, Customer protection, Contract markets, Disclosure requirements, Financial rules, Fraud, Reporting and recordkeeping requirements.

In consideration of the foregoing, and pursuant to the authority contained in the Commodity Exchange Act and in particular, sections 2(a)(1)(A), 4c(b), 4c(c), 4c(d), 5, 5a, 6 and 8a thereof, 7 U.S.C. 2, 4, 6c(a), 6c(b), 6c(c), 6c(d), 7, 7a, 8 and 12a, the Commission hereby proposes to amend Chapter I of title 17 of the Code of Federal Regulations as follows:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

1. The authority citation for Part 1 is proposed to be revised as follows:

Authority: 7 U.S.C. 2, 2a, 4, 4a, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6j, 6k, 6l, 6m, 6n, 6o, 7, 7a, 8, 12a, 13a, 13a-1, 19, and 21, unless otherwise noted.

2. Section 1.3 is proposed to be amended by revising paragraphs (z)(1) introductory text, (z)(1)(iii) and the undesignated text at the end of (z)(1) to read as follows:

§ 1.3 Definitions.

* * * * *

(z) *Bona fide hedging transactions and positions.*—(1) *General definition.* Bona fide hedging transactions and positions shall mean transactions or positions in a contract for future delivery on any contract market, or in a commodity option, where such transactions or positions normally represent a substitute for transactions to be made or positions to be taken at a later time in a physical marketing channel, and where they are economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise, and where they arise from:

* * * * *

(iii) The potential change in the value of services which a person provides, purchases, or anticipates providing or purchasing.

Notwithstanding the foregoing, no transactions or positions shall be classified as bona fide hedging unless their purpose is to offset price risks incidental to commercial cash or spot operations and such positions are established and liquidated in an orderly manner in accordance with sound commercial practices and, for transactions or positions on contract markets subject to trading and position limits in effect pursuant to section 4a of the Act, unless the provisions of paragraphs (z) (2) and (3) of this section and §§ 1.47 and 1.48 of the regulations have been satisfied.

* * * * *

3. Section 1.12 is proposed to be amended by adding paragraph (f)(3) to read as follows:

§ 1.12 Maintenance of minimum financial requirements by futures commission merchants and introducing brokers.

* * * * *

[22] In this connection, the Futures Industry Association has suggested in its letter of July 19, 1985 that much of the information now contained in the Options Disclosure Statement provided in accordance with Commission Rule 33.7 could be "imparted in a more meaningful manner," thereby increasing the usefulness of that document. The Commission has been willing in the past to modify the Disclosure Statement in order to simplify the disclosures required under Rule 33.7 where those modifications have not diminished the effectiveness and usefulness of the required disclosures. *See, e.g.*, 46 FR 56996, 57000-01 (December 22, 1982); 49 FR 44891, 44893 (November 13, 1984). The Commission is, therefore, willing to consider particularized suggestions as to how the Options Disclosure Statement can be further improved. The Commission asks that persons responding to this portion of the Commission's proposal address, among other items, changes and improvements to the Commission's disclosure requirements that were suggested during the Commission's 1982 reauthorization hearings. *See, e.g.*, SEC/CFTC Jurisdictional Issues and Oversight: Hearings on H.R. 5447, H.R. 5515, and H.R. 6156 Before the Subcommittee on Telecommunications, Consumer Protection, and Finance and the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce (Part 1), 97th Cong., 2d Sess. 377-80, 419-20 (1982).

(f) * * *

(3) Whenever a registered futures commission merchant determines that an account which it is carrying is undermargined by an amount which exceeds the futures commission merchant's excess adjusted net capital determined in accordance with § 1.17, the futures commission merchant must give immediate telegraphic notice of such a determination to the designated self-regulatory organization and the principal office of the Commission at Washington, DC. This paragraph (f)(3) shall apply to any account carried by the futures commission merchant, whether a customer, noncustomer, omnibus or proprietary account. For purposes of this paragraph (f)(3), if any person has an interest of 10 percent or more in ownership or equity in, or guarantees, more than one account, or has guaranteed an account in addition to his own account, all such accounts shall be combined.

* * * * *

4. Section 1.46 is proposed to be amended by revising paragraph (d)(1) to read as follows:

§ 1.46 Application and closing out of offsetting long and short positions.

* * * * *

(d) * * *

(1) Purchases or sales of commodity options constituting "bona fide hedging transactions" pursuant to rules of the contract market which have been adopted in accordance with the requirements of § 1.61(b) and approved by the Commission pursuant to section 5a(12) of th Act; *Provided,* that no contract market or futures commission merchant shall permit such option positions to be offset other than by open and competitive execution in the trading pit or ring provided by the contract market, during the regular hours prescribed by the contract market for trading in such commodity option.

* * * * *

5. Section 1.61 is proposed to be amended by revising paragraphs (b)(2) and (c) to read as follows:

§ 1.61 Speculative position limits.

* * * * *

(b) * * *

(2) No bylaw, rule, regulation or resolution adopted pursuant to paragraph (b)(1) of this section shall apply to positions held by commercial interests in the underlying commodity which are determined by a contract market in accordance with § 1.3(z)(1) of this chapter; *Provided,* that the contract market may limit bona fide hedging positions which it determines are not in accord with sound commercial practices or exceed an amount which may be established and liquidated in an orderly fashion.

(c) *Time of filing.* Boards of trade seeking designation as a contract market in options or futures shall submit rules, bylaws, regulations or resolutions pursuant to this section with their application for designation.

* * * * *

PART 5—DESIGNATION OF AND CONTINUING COMPLIANCE BY CONTRACT MARKETS

6. The authority citation for Part 5 is proposed to be revised to read as follows:

Authority: 7 U.S.C. 7, 7a, 8 and 12a(5), unless otherwise noted.

7. Section 5.2 is proposed to be revised to read as follows:

§ 5.2 Dormant contracts.

(a) *Definitions.* For purposes of this section:

(1) The term "dormant contract market" means any commodity futures or option contract market:

(i) In which no trading has occurred in any future or option expiration for a period of six complete calendar months; or

(ii) Which has been certified by a futures contract market to the Commission to be a dormant contract market.

(b) *Listing of additional futures trading months or option expirations.* No dormant contract market may list additional months or expirations for trading, or otherwise permit trading to recommence in such a dormant contract market, until such time as the Commission approves, pursuant to section 5a(12) of the Act and § 1.41(b) of these regulations, the bylaw, rule, regulation or resolution of the contract market submitted to the Commission pursuant to paragraph (c) of this section.

(c) *Bylaws, rule, regulation or resolution to list additional trading months or expirations.* (1) Any bylaw, rule, regulation or resolution of a contract market to list additional trading months or expirations in a dormant contract market or to otherwise recommence trading in such a contract market shall be submitted to the Commission under section 5a(12) of the Act and § 1.41(b) of these regulations.

(2) Each submission shall include the information required to be submitted pursuant to § 1.41(b) of these regulations, and also shall:

(i) Clearly designate the submission as filed pursuant to Commission Rule 5.2.

(ii) Contain an economic justification for the listing of additional months or expirations in the dormant contract market, which shall include an explanation of those economic conditions which have changed subsequent to the time the contract became dormant and an explanation of how any new terms and conditions which are now being proposed by the contract market, or which have been proposed for an option market's underlying futures contract market, would make it reasonable to expect that the futures or option contract will be used on more than an occasional basis for hedging or price basing.

(d) *Exemptions.* No contract market shall be considered dormant until the end of thirty-six (36) complete calendar months:

(1) Following designation;

(2) Following notice to the contract market that the Commission has reviewed the economic purpose and the terms and conditions of the contract and has determined in its discretion to permit this exemption; or

(3) Following Commission approval of the contract market bylaw, rule, regulation, or resolution submitted pursuant to paragraph (c) of this section; *Provided, however,* that for option contract markets, in no event shall this period be less than six months from the effective date of this amendment to this section.

8. Part 5 is proposed to be amended by adding a new section 5.4 to read as follows:

§ 5.4 Delisting criteria for options.

For options on a designated futures contract market, where the trading volume of the underlying futures contract market falls below an average of 1,000 contracts per week for all trading months listed during the preceding six month period, no new expiration months may be listed for trading. New expiration months may be added in accordance with rules of the contract market when trading volume in the underlying designated futures contract market rises above an average of 2,000 contracts per week for all trading months listed for a period of three consecutive months.

PART 16—REPORTS BY CONTRACTS MARKETS

9. The authority citation for Part 16 is revised to read as follows:

Authority: 7 U.S.C. 6a, 6c, 6g, 6i, 7, and 12a, unless otherwise noted.

10. Section 16.01 is proposed to be amended by revising paragraphs (a)(5) and (a)(6), adding (a)(7) and revising the

undesignated text at the end of (a) to read as follows:

§ 16.01 Trading volume, open contracts and prices.

(a) * * *

(5) The total number of option contracts exercised;

(6) The total number of option contracts that expired unexercised; and

(7) The option delta, where a delta system is used.

This information shall be made readily available to the news media and the general public in printed form and without charge at the office and trading floor of the contract market no later than the business day following the day for which publication is made.

* * * * *

11. Section 16.02 is proposed to be amended by revising paragraphs (a) introductory text, (a)(1)(i) (A), (B) and (C), removing (a)(1)(i) (D) and (E), revising (a)(1)(ii) (A) through (D), removing (a)(1)(ii)(E), and by adding paragraph (a)(1)(iv) to read as follows:

§ 16.02. Large option trader reports.

(a) *Information required.* Each contract market shall submit to the Commission a weekly report for options on futures and for options on physicals that are settled in cash and, unless otherwise determined by the Commission, a daily report on all other options on physicals, containing the following information for each option trader controlling a reportable option position.

(1)(i) * * *

(A) All reportable positions by expiration month and by strike price;

(B) The total reportable position controlled by the option trader by expiration month, regardless of strike prices; and

(C) The total reportable position controlled by the option trader in all option expiration dates, regardless of strike prices.

(ii) * * *

(A) All reportable positions by expiration month and by strike price;

(B) The total reportable position controlled by the option trader by expiration month regardless of strike prices;

(C) The total reportable position controlled by the option trader in all option expiration dates, regardless of strike prices; and

(D) The number of contracts exercised.

* * * * *

(iv) For those option contract markets which have adopted an option delta system for purposes of enforcing exchange speculative position limits pursuant to §§ 1.41 and 1.61 of this Chapter, the information required by paragraph (a) of this section shall also be submitted in hard copy form on a delta-equivalent basis in a form and manner approved by the Director of Economic Analysis.

* * * * *

§ 16.05 [Removed]

12. Part 16 is proposed to be amended by removing and reserving § 16.05.

PART 21—SPECIAL CALLS

13. The authority citation for Part 21 is proposed to be added and reads as follows:

Authority: 7 U.S.C. 2, 2a, 4, 6a, 6c, 6g, 6i, 6n, 7, 12a, and 19 (1982).

14. Section 21.02 is proposed to be amended by revising the introductory paragraph as follows:

§ 21.02 Special calls for information on open contracts in accounts carried or introduced by futures commission merchants, members of contract markets, introducing brokers, and foreign brokers.

Upon special call by the Commission for information relating to futures and/or option positions held or introduced on the dates specified in the call, each futures commission merchant, member of a contract market, introducing broker, or foreign broker, and, in addition, for options information, each contract market, shall furnish to the Commission the following information concerning accounts of traders owning or controlling such futures and/or option positions, except for accounts carried on a fully disclosed basis by another futures commission merchant, as may be specified in the call:

* * * * *

15. Section 21.02a is proposed to be amended by revising the section heading and revising paragraphs (a) introductory text, (b)(3), (b)(4)(iv) and (b)(4)(x) as follows. The introductory text of (b)(4) is shown for the convenience of the reader.

§ 21.02a Special calls for machine readable information.

(a) Upon special call by the Commission for information relating to futures and/or option positions held on the dates specified in the call, each futures commission merchant, member of a contract market and foreign broker shall furnish to the Commission in accordance with paragraph (b) below the following information concerning accounts of traders owning or controlling such futures and/or option position, except for accounts carried by another futures commission merchant on a fully disclosed basis, as may be specified in the call:

(b) * * *

(3) The required record description is as follows:

```
01  O-T-400A.
    05  O-T-Record-Type, PIC X(4) Value
        400A.
    05  O-T-Report-Date, PIC X(6).
    05  O-T-Reporting-Firm-Name, PIC X(55).
    05  Filler, PIC X(7).
    05  O-T-Sequence, PIC 9(8).
01  O-T-410B.
    05  O-T-Record-Type, PIC X(4) Value 410B.
    05  O-T-Account-Number, PIC X(48).
    05  Filler, PIC X(20).
    05  O-T-Sequence, PIC 9(8).
01  O-T-411C.
    05  O-T-Record-Type, PIC X(4) Value
        411C.
    05  O-T-Account-Name-Street-Address,
        PIC X(68).
    05  O-T-Sequence, PIC 9(8).
01  O-T-520E.
    05  O-T-Record-Type, PIC X(4) Value 520E.
    05  O-T-Commodity-ID, PIC X(6).
    05  O-T-Delivery-or-Expiration-Month, PIC
        X(4).
    05  O-T-Put-or-Call-Option, PIC X.
    05  O-T-Strike-Price, PIC 9(8).
    05  O-T-Open-Long-Position, PIC 9(8).
    05  O-T-Open-Short-Position, PIC X(8).
    05  Filler, PIC X(33).
    05  O-T-Sequence, PIC 9(8).
```

(4) Field Definitions. Field definitions for each record are as follows:

* * * * *

(iv) *Account Number.* A unique identifier for each account reported to the Commission under the 21.02a call. This can be any sequence of alphanumeric characters not to exceed 48 characters which are left justified in the field.

* * * * *

(x) *Open Long (Short) Positions.* Total number of long (short) contracts in the commodity specified in the call that are open on the firm's books for a particular account as of the end of the trading day specified in the call. The field should be zero filled with right justified integers from 0 to 99999999.

* * * * *

PART 33—REGULATION OF DOMESTIC EXCHANGE-TRADED COMMODITY OPTION TRANSACTIONS

16. The authority citation for Part 33 continues to read as follows:

Authority: 7 U.S.C. 2, 2a, 4, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6j, 6k, 6l, 6m, 6n, 6o, 7, 7a, 7b, 8, 9, 11, 12a, 12c, 13a, 13a-1, 13b, 19, and 21 unless otherwise noted.

17. Section 33.4 is proposed to be amended by removing and reserving paragraph (a)(5)(ii), revising paragraphs (a)(5)(iii) and (a)(6)(ii), removing and reserving paragraph (b)(2), and revising paragraphs (b) (4) introductory text,

(b)(4)(i), (b)(4)(iii), (b)(6) and (b)(8) to read as follows:

§ 33.4 Designation as a contract market for the trading of commodity options.

* * * * *

(a) * * *

(5) * * *

(ii) [Reserved]

(iii) For options on futures contracts, the volume of trading in all contract months for future delivery of the commodity for which the option designation is sought has averaged at least 3,000 contracts per week on such board of trade for the 12 months preceding the date of application for contract market designation; and

* * * * *

(6) * * *

(ii) For commodities not specifically enumerated in section 2(a)(1)(A) of the Act, is not designated as a contract market for more than one other option on a physical.

(b) * * *

(2) [Reserved]

* * * * *

(4) Require, with respect to all written option customer complaints, that each member futures commission merchant which engages in the offer or sale of commodity options regulated under this Part:

(i) Retain all such complaints;

* * * * *

(iii) Immediately send a copy of any such complaint to the member's designated self-regulatory organization and, upon final disposition thereof, immediately send a copy of the record of such disposition to the member's designated self-regulatory organization.

* * * * *

(6) Require each member futures commission merchant which engages in the offer or sale of option contracts regulated under this Part to give to the member's designated self-regulatory organization prompt notice of any disciplinary action taken against the futures commission merchant or any of its associated persons by the Commission or by another self-regulatory organization.

* * * * *

(8) Require each member futures commission merchant which engages in the offer or sale of option contracts regulated under this Part promptly to submit to the member's designated self-regulatory organization all promotional material (as defined in § 33.1). Such promotional material must be promptly reviewed by the designated self-regulatory organization to determine that such material is not fraudulent.

* * * * *

18. Section 33.5 is proposed to be amended by revising paragrpah (c) to read as follows:

§ 33.5 Application for designation as a contract market for the trading of commodity options.

* * * * *

(c) For options on a futures contract on a commodity specifically enumerated in section 2(a)(1)(A) of the Act, the effective period for designation as a contract market for a particular commodity option under this Part shall be for a period not to exceed three years from the effective date of the designation, or such shorter period as the Commission may specify at the time the designation is granted, and in any event shall be of no further force or effect should the Commission, by rule or regulation, repeal the provisions of this Part under which such designation is granted. Except as may be specifically authorized by the Commission, no board of trade which has been designated as a contract market for the trading of commodity options may authorize or allow the trading of any commodity option which will expire after the termination of the effective period of such designation or where the delivery month of the futures contract underlying such option is later than the termination of the effective period of such designation or where the delivery month for the underlying futures contract has not been enlisted.

19. Section 33.7 is proposed to be amended by revising paragraphs (b)(2) introductory text and (b)(2)(i), by removing and reserving paragraph (b)(2)(ii) and by revising paragraphs (b)(3) and (b)(5) to read as follows:

§ 33.7 Disclosure.

* * * * *

(b) * * *

(2) *Description of commodity options.* Prior to entering into any transaction involving a commodity option, an individual should thoroughly understand the nature and type of option involved and the underlying futures contract or physical commodity. The futures commission merchant or introducing broker is required to provide, and the individual contemplating an option transaction should obtain:

(i) An indentification of the futures contract or physical commodity underlying the option which may be purchased or sold upon exercise of the option or, if applicable, whether exercise of the option will be settled in cash;

(ii) [Reserved]

* * * * *

(3) *The mechanics of option trading.* Before entering into any exchange-traded option transaction, an individual should obtain a description of how commodity options are traded.

Option customers should clearly understand that there is no guarantee that option positions may be offset by either a closing purchase or closing sale transaction on an exchange. In this circumstance, option grantors could be subject to the full risk of their positions until the option position expires, and the purchaser of a profitable option might have to exercise the option to realize a profit.

For an option on a futures contract, an individual should clearly understand the realtionship between exchange rules governing option transactions and exchange rules governing the underlying futures contract. For example, an individual should understand what action, if any, the exchange will take in the option market if trading in the underlying futures market is restricted or the futures prices have made a "limit move."

The individual should understand that the option may not be subject to daily price fluctuation limits while the underlying future may have such limits, and, as a result, normal pricing relationships between options and the underlying future may not exist when the future is trading at its price limit. Also, underlying futures positions resulting from exercise of options may not be capable of being offset if the underlying future is at a price limit.

* * * * *

(5) *Profit potential of an option position.* An option customer should carefully calculate the price which the underlying futures contract or underlying physical commodity would have to reach for the option position to beome profitable. This price would include the amount by which the underlying futures contract or underlying physical commodity would have to rise above of fall below the strike price to cover the sum of the premium and all other costs incurred in entering into and exercising or closing (offsetting) the commodity option position.

Also, an option customer should be aware of the risk that the futures price prevailing at the opening of the next trading day may be substantially different from the futures price which prevailed when the option was exercised. Similarly, for options on physicals that are cash settled, the physicals price prevailing at the time the option is exercised may differ substantially from the cash settlement price that is determined at a later time. Thus, if a customer does not cover the position against the possibility of underlying commodity price change, the realized price upon option exercise may differ substantially from that which existed at the time of exercise.

* * * * *

Issued in Washington, D.C. on August 22, 1985, by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 85-20498, Filed 8-29-85; 8:45 am]

BILLING CODE 6351-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 314

[Docket No. 84N-0101]

New Drug and Antibiotic Application Review; Proposed User Charge; Extension of Comment Period

AGENCY: Food and Drug Administration.

ACTION: Proposed rule; extension of comment period.

SUMMARY: The Food and Drug Administration (FDA) is extending to November 4, 1985, the comment period for the proposed rule that would impose user charges to recover the cost of reviewing new drug and antibiotic applications for marketing and certain supplemental applications. FDA is taking this action in response to requests that the original 30-day comment period be extended.

DATE: Comments by November 4, 1985.

ADDRESS: Written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Eileen R. Hodkinson, Center for Drugs and Biologics (HFN-364), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-6490.

SUPPLEMENTARY INFORMATION: In the Federal Register of August 6, 1985 (50 FR 31726), FDA proposed to amend its regulations governing the approval for marketing of new drugs and antibiotic drugs for human use by initiating a program that would impose charges upon a person (the applicant) who seeks FDA's approval for marketing a new drug or antibiotic drug for human use and who seeks FDA's approval to make certain changes in the labeling of an approved new drug or antibiotic drug. In that notice, public comments were requested by September 5, 1985.

In response to the proposal, FDA has received requests from two pharmaceutical trade associations and the U.S. Small Business Administration asking for an extension of the comment period. These parties claimed that an extended comment period was needed to evaluate the proposal more fully.

The agency has reviewed these requests and agrees that a 60-day extension of the comment period to November 4, 1985, would be in the public interest. Accordingly, the comment period for submissions by interested persons is extended to November 4, 1985.

Interested persons may, on or before November 4, 1985, submit to the Dockets Management Branch (address above) written comments on the proposed rule. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments should be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: August 27, 1985.

Joseph P. Hile,

Acting Commissioner of Food and Drugs.

[FR Doc. 85-20897 Filed 8-28-85; 10:27 am]

BILLING CODE 4160-01-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Housing—Federal Housing Commissioner

24 CFR Part 200

[Docket No. R-85-1247; FR-2109]

Use of Materials Bulletin No. 38i—HUD Building Product Standards and Certification Program for the Grademarking of Lumber

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

ACTION: Proposed rule.

SUMMARY: This rule would adopt as part of HUD's Minimum Property Standards (MPS), a Use of Materials Bulletin (UM) that references a standard issued by the U.S. Department of Commerce, National Bureau of Standards, for the grademarking of lumber. It would also supplement HUD's Building Product Standard and Certification Program by requiring that certain additional information be included on the label or grademark.

DATE: Comments due: October 29, 1985.

ADDRESS: Interested persons are invited to submit comments regarding this rule to the Office of General Counsel, Rules Docket Clerk, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, D.C. 20410-5000. Comments should refer to the above docket number and title. A copy of each comment submitted will be available for public inspection and copying during regular business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Mr. Leslie H. Breden, Office of Manufactured Housing and Regulatory Functions, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, D.C. 20410-8000; telephone (202) 755-5929. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: In response to industry request, HUD is proposing new grademarks for lumber and finger jointed lumber. In doing so, the Department follows the provisions of 24 CFR 200.935 regarding administrator qualifications and procedures under the HUD Building Product Standards and Certification Program, and the Technical Suitability of Products Program, HUD Handbook 4950.1, REV-1. This proposed rule would augment labeling requirements of § 200.935(d)(6) to include:

1. The registered symbol which identifies the grading agency;
2. Species or species combination;
3. Grade;
4. Identification of applicable grading rules when not indicated by the species identification or agency symbol;
5. Mill or grader;
6. For members which are less than five inches nominal thickness, whether the lumber was green or dry at the time of dressing; and
7. Finger joints present.

Because these added requirements only relate to this particular certification program, they are set out in a new § 200.943, and not as amendments to the existing § 200.935. Thus, § 200.943 augments § 200.935; it would not supplant it. The Department originally initiated this Use of Materials Bulletin because of complaints about lumber concerning dimensional variability, use of green lumber, and counterfeiting of grade marks. Fraudulent stamps on lumber were being used to indicate compliance to a standard when, in fact, the lumber did not comply with the standard. In addition, the counterfeit marks were misleading builders who were using design criteria with regard to safety considerations.

A soft wood lumber standard was developed by the national Bureau of Standards in 1969 after a request by a subcommittee of the House of Representatives' Select Committee on Small Business. This standard, which related the moisture content of wood to the dimensions of lumber, was referenced in the original Use of Materials Bulletin UM 38, along with a list of grade marking organizations acceptable to HUD. The proposed UM 38i references a new revised standard and also provides for procedures and

tests for finger jointed lumber as well as listing the current accepted grade marking organizations.

The Department is not considering whether to revise and update the current Use of Materials Bulletin for the grade marking of lumber. However, in conformance with the general deregulatory policies of this Administration, the Department is seeking information concerning any possible consequences, should the Department choose some other possible option—one of which would be to eliminate UM 38. We request that industry, consumers, and other members of the public comment concerning whether it would be appropriate to eliminate all standards relating to lumber and that such commenters suggest other alternatives available to the Department.

The primary purpose of this proposed rule is to insure that the specified grade of lumber gets to the job site and that the product continues to conform to the existing standard. For lumber procedures, the program removes the likelihood of unfair competition based on spurious claims and promotes a fair and equitable basis for marking lumber, while allowing consumers the ability to make value judgments by providing accurate information about the product. The Department seeks comments on whether these objectives will be met.

Section 200.943 embodies the substance of UM 38i and, therefore, the text is not set forth. However, a copy of UM 38i is available for public inspection during regular business hours in the Office of Manufactured Housing and Regulatory Functions, Room 9151, and in the Office of the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, Washington, D.C. 20410–5000.

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 implements section 102(2)(C) of the National Environmental Policy Act of 1969. 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, at the above address.

This rule does not constitute a "major rule" as that term is defined in section 1(b) of Executive Order 12291 on 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; (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.

Pursuant to the provisions of 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the Undesigned hereby certifies that this rule would not have a significant economic impact on a substantial number of small entities. UM 38i adopts a product standard that is nationally recognized throughout the affected industry and will not create a burden on manufacturers currently meeting the standard.

This rule was listed as Item No. 19 under the Office of Housing in the Department's Semiannual Agenda of Regulations published on April 29, 1985 (50 FR 17287, 50 FR 17298) under Executive Order 12291 and the Regulatory Flexibility Act.

List of Subjects in 24 CFR Part 200

Administrative practice and procedure, Claims, Equal employment opportunity, Fair housing, Housing standards, Loan programs, Housing and community development, Mortgage insurance, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Minimum property standards, and Incorporation by reference.

PART 200—INTRODUCTION

Accordingly, 24 CFR Part 200 is proposed to be amended as follows:

1. The Authority citation for 24 CFR Part 200 Part 200 is proposed to be revised to read as set forth below, and any authority citation following any section in Part 200 is proposed to be removed.

Authority: Titles I and II of the National Housing Act, (12 U.S.C. 1701 thru 1715z–18); Section 7(d) Department of Housing and Urban Development Act, (42 U.S.C. 3535(d)).

2. A new § 200.943 is proposed to be added, to read as follows:

§ 200.943 Supplementary Specific Procedural Requirements Under HUD Building Product Standards and Certification Program for the Grademarking of Lumber.

(a) *Applicable Standards.* (1) Lumber shall be grademarked in accordance with the following standard:

U.S. Department of Commerce Voluntary Product Standard PS 20–70 "American Softwood Lumber Standard"

(2) This Standard has been approved by the Director of the Federal Register for incorporation by reference. It is available from the National Bureau of Standards, Gaithersburg, Maryland 20143. The Standard is also available for inspection at the Office of the Federal Register, 1100 L Street, NW., Room 8401, Washington, D.C. 20408.

(b) *Labeling or Marking.* (1) Under the procedures set forth in § 200.935(d)(6), concerning labeling or marking of a product, the administrator's validation mark and the manufacturer's certification of compliance with the applicable standard is required on the certification label issued by the administrator to the manufacturer. However, in the case of grademarking of lumber, the following information shall be included on the certification label or mark:

(i) The registered symbol which identifies the grading agency;

(ii) Species or species combination;

(iii) Grade;

(iv) Identification of applicable grading rules when not indicated by the species identification or agency symbol;

(v) Mill or grader;

(vi) For members which are less than 5" nominal thickness, indication that the lumber was green or dry at the time of dressing; and

(vii) Finger jointed where applicable.

(2) The certification mark shall be affixed to each piece of lumber.

(c) *Periodic Tests and Quality Control Inspections.* Periodic tests and quality control inspections shall be carried out by the Board of Review of the American Lumber Standards Committee as defined in PS 20–70.

Dated: August 14, 1985.

Janet Hale,

Acting General Deputy Assistant Secretary for Housing—Deputy Federal Housing Commissioner.

[FR Doc. 85–20743 Filed 8–29–85; 8:45 am]

BILLING CODE 4210–27–M

POSTAL SERVICE

39 CFR Part 10

Proposed Express Mail International Service to Iceland

AGENCY: Postal Service.

ACTION: Proposed rule.

SUMMARY: Pursuant to an agreement with the postal administration of Iceland, the Postal Service intends to begin Express Mail International Service with Iceland at postage rates indicated in the tables below. The proposed

service is scheduled to begin on November 7, 1985.

DATE: Comments must be received on or before October 3, 1985.

ADDRESS: Written comments should be directed to the General Manager, Rate Development Division, Office of Rates, Rates and Classification Department, U.S. Postal Service, Washington, D.C. 20260–5350. Copies of all written comments will be available for public inspection and photocopying between 9 a.m. and 4 p.m., Monday through Friday, in room 8620, 475 L'Enfant Plaza West SW., Washington, D.C. 20260–5350.

FOR FURTHER INFORMATION CONTACT: Leon W. Perlinn, [202] 245–4414.

SUPPLEMENTARY INFORMATION: The International Mail Manual is incorporated by reference in the Code of Federal Regulations, 39 CFR 10.1. Additions to the manual concerning the proposed new services, including the rate tables reproduced below, will be made in due course. Accordingly, although 39 U.S.C. 407 does not require advance notice and the opportunity for submission of comments on international service, and the provisions of the Administrative Procedure Act regarding proposed rulemaking (5 U.S.C. 553) do not apply (39 U.S.C. 310) [a], the Postal Service invities interested persons to submit written data, views or arguments concerning the proposed Express Mail International Service to Iceland at the rates indicated in the table below.

List of Subjects in 39 CFR Part 10

Postal Service, Foreign relations.

PART 10—[AMENDED]

The authority citation for Part 10 continues to read as follows:

Authority: 5 U.S.C. 552[a], 39 U.S.C. 401, 404, 407, 408.

ICELAND—EXPRESS MAIL INTERNATIONAL SERVICE

Custom Designed Service [1] [2] Up to and including		On Demand Service [3] Up to and including	
Pounds	Rate	Pounds	Rate
1	$31.00	1	$23.00
2	35.90	2	27.90
3	40.80	3	32.80
4	45.70	4	37.70
5	50.60	5	42.60
6	55.50	6	47.50
7	60.40	7	52.40
8	65.30	8	57.30
9	70.20	9	62.20
10	75.10	10	67.10
11	80.00	11	72.00
12	84.90	12	76.90
13	89.80	13	81.80
14	94.70	14	86.70
15	99.60	15	91.60
16	104.50	16	96.50
17	109.40	17	101.40

ICELAND—EXPRESS MAIL INTERNATIONAL SERVICE—Continued

Custom Designed Service [1] [2] Up to and including		On Demand Service [3] Up to and including	
Pounds	Rate	Pounds	Rate
18	114.30	18	106.30
19	119.20	19	111.20
20	124.10	20	116.10
21	129.00	21	121.00
22	133.90	22	125.90
23	138.80	23	130.80
24	143.70	24	135.70
25	148.60	25	140.60
26	153.50	26	145.50
27	158.40	27	150.40
28	163.30	28	155.30
29	168.20	29	160.20
30	173.10	30	165.10
31	178.00	31	170.00
32	182.90	32	174.90
33	187.80	33	179.80
34	192.70	34	184.70
35	197.60	35	189.60
36	202.50	36	194.50
37	207.40	37	199.40
38	212.30	38	204.30
39	217.20	39	209.20
40	222.10	40	214.10
41	227.00	41	219.00
42	231.90	42	223.90
43	236.80	43	228.80
44	241.70	44	233.70

[1] Rates in this table are applicable to each piece of International Custom Designed Express Mail shipped under a Service Agreement providing for tender by the customer at a designated Post Office.

[2] Pickup is available under a Service Agreement for an added charge of $5.60 for each pickup stop, regardless of the number of pieces picked up. Domestic and International Express Mail picked up together under the same Service Agreement incurs only one pickup charge.

An appropriate amendment to 39 CFR 10.3 to reflect these changes will be published when the final rule is adopted.

Fred Eggleston,

Assistant General Counsel, Legislative Division.

[FR Doc. 85–20786 Filed 8–29–85; 8:45 am]

BILLING CODE 7710–12–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 280

[SWH–FRL 2891–S]

Notification Requirements for Owners of Underground Storage Tanks

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: On May 28, 1985 (50 FR 21772), EPA proposed notification requirements for owners of underground storage tanks under Section 9002 of the Resource Conservation and Recovery Act, as amended. The proposed rulemaking also prescribed two notification forms to be used by owners of underground storage tanks that are subject to the Section 9002 notification provisions. In response to public comment, EPA has developed a notification form that has been reformatted for clarity and usability. This form will be available for public viewing, and comments are solicited from the public within the next two weeks.

DATE: Comments must be received on or before September 13, 1985.

ADDRESS: Comments should be addressed to the Docket Clerk, Attention: Docket Number 9002, Office of Solid Waste (WH–562), U.S. Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460.

Copies of the reformatted notification form and materials relevant to this rulemaking are available for viewing at the EPA Library Public Information Reference Unit (Room 2904) and the Underground Storage Tank docket (Room S–212C), both located at 401 M Street SW., Washington, D.C.

This information is available for viewing from 9:00 a.m. to 4:00 p.m. Monday through Friday, excluding holidays. The revised notification form is also available for viewing at all Regional Office Libraries, Monday through Friday during the hours of 9:00 a.m. to 4:30 p.m.

FOR FURTHER INFORMATION CONTACT: The RCRA/Superfund Hotline at (800) 424–9346 (toll free) or (202) 382–3000 in Washington, D.C., or Virginia Garelick, Office of Solid Waste (WH 565A), U.S. Environmental Protection Agency, Washington, D.C. 20460, (202) 382–7925.

SUPPLEMENTARY INFORMATION: Section 9002 of Subtitle I of the Resource Conservation and Recovery Act (RCRA), as amended, requires owners of underground tanks that store, or have stored, petroleum or hazardous substances to notify designated State or local agencies of the existence of their tanks. Section 9002 also requires EPA, in consultation with State and local officials, to prescribe a notification form and the information it must contain by November 8, 1985.

EPA proposed two notification forms in the **Federal Register** on May 28, 1985. The Agency requested comments on the proposed rulemaking by July 15, 1985. In response to comments, EPA has developed a notification form that has been reformatted and plans to do sample testing of the form within the next two weeks. The formatting takes two forms and combines them into one. There are no substantive changes in the information required in the form. EPA has decided to reopen the comment period (on the notification form only) for two weeks to give all members of the public adequate time to review and comment fully on the revised form.

Dated: August 28, 1985.
Jack W. McGraw,
Deputy Assistant Administrator.

[FR Doc. 85-20920 Filed 8-29-85; 8:45 am]
BILLING CODE 6560-50-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[Gen. Docket No. 84-533; 64-193]

Rules To Implement Section 504 of the Rehabilitation Act of 1973

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This proposed regulation provides for the enforcement of Section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap, as it applies to programs or activities conducted by the Federal Communications Commission.

DATES: To be assured of consideration, comments must be in writing and must be received on or before November 18, 1985 and reply comments on or before December 18, 1985.

Comments should refer to specific sections in the regulation.

ADDRESSES: Comments should be sent to: Office of the Secretary, Federal Communications Commission, located at 1919 M Street NW., Washington, DC 20554.

Comments received will be available for public inspection in the Public Reference Room of the Federal Communications Commission. Copies of this Notice are available on tape for those with impaired vision and may be obtained from the Consumer Assistance Office at the above address.

FOR FURTHER INFORMATION CONTACT:

Sharon B. Kelley, Office of General Counsel, (202) 632-6990.
Consumer Assistance Office, Office of Public Affairs, (202) 632-6999 (TDD), (202) 632-7260 (VOICE).

SUPPLEMENTARY INFORMATION:

List of Subjects in 47 CFR Part 1

Administrative practice and procedures, Blind, Civil rights, Deaf, Disabled, Discrimination against handicapped, Equal Employment Opportunity, Federal buildings and facilities, Handicapped, Nondiscrimination, Physically handicapped.

Notice of Proposed Rule Making

In the matter of amendment of part 1 of the Commission's rules to implement section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794; Gen. Docket No. 84-533.

Adopted: May 7, 1984.[1]
Released: August 19, 1985.
By the Commission:

1. This *Notice of Proposed Rule Making* commences a proceeding directed at promulgating rules to implement section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794. Members of the public are requested to comment on all aspects of this proposal.[2]

2. As originally enacted in 1973, Section 504 of the Rehabilitation Act prohibited discrimination on the basis of handicap in federally assisted programs.[3] The Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 extended the nondiscrimination mandate of Section 504 to programs and activities conducted by agencies of the Federal Government and the United States Postal Service.[4]

3. Under Executive Order 12250,[5] the Attorney General has authority to coordinate the implementation and enforcement of various nondiscrimination statutes, including Section 504. To assist agencies in developing rules to implement the 1978 Amendments, the Department of Justice drafted a prototype regulation which was distributed to affected agencies on April 15, 1983.[6] As authorized by Executive Order 12067,[7] the Equal Employment Opportunity Commission has also reviewed this prototype. The rules that we propose to adopt are contained in *Appendix A* attached hereto and are an adaptation of the Department of Justice prototype. *Appendix A* also contains a section-by-section analysis of the proposed rules. Briefly, the rules prohibit discrimination on the basis of handicap in programs or activities conducted by the Federal Communications Commission in five major categories: (1) Employment; (2) facilities; (3) procurement; (4) agency processes; and (5) licensing policies.

4. Authority for the rule making proposed herein is contained in sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

5. Pursuant to Section 605 of the Regulatory Flexibility Act, § 601 *et seq.*, the Commission certifies that the action proposed will not have a significant impact on a substantial number of small entities. The proposal imposes no obligations or requirements upon private entities but places substantive obligations upon the Federal Communications Commission to prohibit discrimination on the basis of handicap in programs or activities it conducts.

6. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are not permitted from the time the Commission adopts a *Notice of Proposed Rule Making* 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

[1] Subsequent to its adoption by the Commission, this *Notice of Proposed Rule Making* was forwarded to the Department of Justice for review in accordance with Executive Order 12250. *See* discussion in ¶ 3, *infra*. Public release of this document was therefore held in abeyance pending completion of the Department's review. *See* Letter of July 22, 1985 from William Bradford Reynolds, Assistant Attorney General, Department of Justice to Jack D. Smith, General Counsel, Federal Communications Commission.

[2] Although certain aspects of this proposal are not subject to the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, we have decided to exercise our discretionary authority and solicit comments from the public on all aspects of this proposal.

[3] It should be noted that in *Community Television of Southern California* v. *Gottfried*, 103 S. Ct. 885, 892 (1983), the Supreme Court held that the Federal Communications Commission is not a funding agency and therefore has no responsibility to enforce the Section 504 nondiscrimination mandate with respect to federally assisted programs.

[4] Pub. L. No. 95-602, Section 119, 92 Stat. 2982 (1978). Although the Federal Communications Commission is an independent regulatory agency, it appears from the legislative history of the 1978 Amendment that Congress intended that all federal agencies should have the same Section 504 nondiscrimination obligations as recipients of federal financial assistance. Thus, the Federal Communications Commission falls within the scope of agencies affected by this statute. *See* 124 Cong. Rec. 13,901 (1978) (remarks of Rep. Jeffords, the sponsor); 124 Cong. Rec. E 2668, E 2670 (daily ed. May 17, 1978) *id.*; 124 Cong. Rec. 13,897 (remarks of Rep. Brademas) *id.* at 36,552 (remarks of Rep. Sarasin). Nevertheless, it should be clearly understood that the programs or activities of entities that are licensed or certified by the Commission are not covered by these proposed regulations.

[5] 45 FR 72995, 3 CFR, 1980 Comp., p. 298.

[6] This prototype generally parallels those nondiscrimination obligations established by federal regulation for programs or activities receiving federal financial assistance. *See* 28 CFR Part 41 (Section 504 coordination regulation for federally assisted programs).

[7] 43 FR 28967, 3 CFR, 1978 Comp., p. 206.

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 must prepare a written summary of that presentation; on the day of oral presentation that written summary must be served on 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,* § 1.1241 and 1.1243 of the Commission's Rules and Regulations, 47 CFR 1.11241 and 1.1243.

7. Pursuant to applicable procedures set out in §§ 1.4 and 1.415 of the Commission's Rules and Regulations, 47 CFR 1.4 and 1.415, interested parties may file comments on or before November 18, 1985 and reply comments on or before December 18, 1985.[8] All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Reply comments shall be served on the person(s) who filed comments to which the reply is directed.

8. In accordance with the provisions of § 1.419 of the Commission's Rules and Regulations, 47 CFR 1.419, an original and 5 copies of all comments, reply comments, pleadings, briefs or other documents shall be furnished to the Commission. Members of the general public who wish to participate informally in the proceeding may submit one copy of their comments, specifying the docket number in the heading. All filings in this proceeding will be available for public inspection by interested persons during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, NW., Washington, D.C. Copies of this *Notice* will be available on tape for those with impaired vision and may be obtained from the Consumer Assistance Office at the above address.

9. It is ordered that the Secretary shall cause a copy of this *Notice* to be served upon the Chief Counsel for Advocacy of the Small Business Administration and that the Secretary shall also cause a copy of this *Notice* to be published in the **Federal Register.**

10. For further information on this proceeding, contact Sharon B. Kelley, Office of General Counsel, (202) 632–6990 or the Consumer Assistance Office, Office of Congressional and Public Affairs, (202) 632–6999 (TDD) or (202) 632–7260 (VOICE).

Federal Communications Commission.

William J. Tricarico,

Secretary.

Appendix A

Background

The purpose of this proposed rule is to provide for the enforcement of Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), as it applies to programs and activities conducted by the Federal Communications Commission. As amended by the Rehabilitation, Comprehensive Services, and Development Disabilities Amendments of 1978 (Sec. 119, Pub. L. 95–602, 92 Stat. 2982), section 504 of the Rehabilitation Act of 1973 states that:

> No otherwise qualified handicapped individual in the United States, . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance *or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.*
>
> (29 U.S.C. 794) (amendment italicized).

The substantive nondiscrimination obligations of the Commission, as set forth in this proposed rule, are identical, for the most part, to those established by federal regulations for programs or activities receiving federal financial assistance. *See* 28 CFR Part 41 (Section 504 coordination regulation for federally assisted programs). This general parallelism is in accord with the intent expressed by supporters of the 1978 Amendment in floor debate, including its sponsor, Rep. James M. Jeffords, that the Federal Government should have the same Section 504 obligations as recipients of federal financial assistance. 124 Cong. Rec. 13901 (1978) (remarks of Rep. Jeffords); 124 Cong. Rec. E 2668, E 2670 (daily ed. May 17, 1978) *id.;* 124 Cong. Rec. 13897 (remarks of Rep. Brademas); *id.* at 38552 (remarks of Rep. Sarasin).

Section-By-Section Analysis

Section 1.1801 Purpose.

Section 1.1801 states the purpose of the proposed rule, which is to effectuate, section 119 of the Rehabilitation, Comprehensive Services, and Development Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

Section 1.1802 Application.

The proposed regulation applies to all programs or activities conducted by the Federal Communications Commission to the extent authorized by law and consistent with the Commission's law enforcement responsibilities. The programs or activities of entities that are licensed or certified by the Federal Communications Commission are not covered by these proposed regulations.

Section 1.1803 Definitions.

"Commission." For purposes of this regulation "Commission" means the Federal Communications Commission.

"Assistant Attorney General." "Assistant Attorney General" refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids." "Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in and enjoy the benefits of the Commission's programs or activities. The definition provides examples of commonly used auxiliary aids. Although auxiliary aids are required explicitly only by § 1.1860(a)(1), they may also be necessary to meet other requirements of the regulation.

"Complete complaint." The definition of "complete complaint" enables the Commission to determine the beginning of its obligation to investigate a complaint (*see* § 1.1870(d)).

"Facility." The definition of "facility" is similar to that in the section 504 coordination regulation for federally assisted programs, 28 CFR 41.3(f), except that the term "rolling stock or other conveyances" has been added and the phrase "or interest in such property" has been deleted to clarify its coverage. The phrase, "or interest in such property," is deleted, because the term "facility," as

[8] Under § 1.46(b) of the Commission's rules an extension of time will be granted upon a showing of good cause. 47 CFR 1.46(b).

used in this regulation, refers to structures and not to intangible property rights. It should, however, be noted that the regulation applies to all programs and activities conducted by the Commission regardless of whether the facility in which they are conducted is owned, leased or used on some other basis by the Commission. The term "facility" is used in §§ 1.1849, 1.1850 and 1.1870(f).

"Handicapped person." The definition of "handicapped person" is identical to the definition appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.31).

"Managing Director." "Managing Director" refers to the Managing Director, Federal Communications Commission.

"Qualified handicapped person." The definition of "qualified handicapped person" is a revised version of the definition appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.32).

Paragraph (1) deviates from existing regulations for federally assisted programs because of intervening court decisions. It defines "qualified handicapped person" with regard to any program under which a person is required to perform services or to achieve a level of accomplishment. In such programs a qualified handicapped person is one who can achieve the purpose of the program without modifications in the program that would result in a fundamental alteration in its nature. This definition reflects the decision of the Supreme Court in (*Southeastern Community College* v. *Davis*, 422, U.S. 397 (1979). In that case, the Court ruled that a hearing-impaired applicant to a nursing school was not a "qualified handicapped person" because her hearing impairment would prevent her from participating in the clinical training portion of the program. The Court found that, if the program were modified so as to enable the respondent to participate (by exempting her from the clinical training requirements), "she would not receive even a rough equivalent of the training a nursing program normally gives." *Id.* at 410. It also found that "the purpose of [the] program was to train persons who could serve the nursing profession in all customary ways," *id.* at 413, and that the respondent would be unable, because of her hearing impairment, to perform some functions expected of a registered nurse. It therefore concluded that the school was not required by section 504 to make such modifications that would result in "a fundamental alteration in the nature of the program." *Id.* at 410.

We have incorporated the Court's language in the definition of "qualified handicapped person" in order to make clear that such a person must be able to participate in the program offered by the Commission. The Commission is required to make modifications in order to enable a handicapped applicant to participate, but is not required to offer a program of a fundamentally different nature. The test is whether, with appropriate modifications, the applicant can achieve the purpose of the program offered; not whether the applicant could benefit or obtain results from some other program that the Commission does not offer. Although the revised definition allows exclusion of some handicapped people from some programs, it requires that a handicapped person who is capable of achieving the purpose of the program must be accommodated, provided that the modifications do not fundamentally alter the nature of the program.

The Commission has the burden of demonstrating that a proposed modification would constitute a fundamental alteration in the nature of its program or activity. Furthermore, in demonstrating that a modification would result in such an alternation, the Commission must follow the procedures established in §§ 1.1850(a) and 1.1860(d), which are discussed below, for demonstrating that an action would result in undue financial and administrative burdens. That is, the decision must be made by the Managing Director in writing after consideration of all resources available for the program or activity and must be accompanied by an explanation of the reasons for the decision. If the Managing Director determines that an action would result in a fundamental alteration, the Commission must consider options that would enable the handicapped person to achieve the purpose of the program but would not result in such an alteration.

For programs of activities that do not fall under the first paragraph, paragraph (2) adopts the existing definition of "qualified handicapped person" with respect to service (28 CFR 41.32(b)) in the coordination regulation for programs receiving Federal financial assistance. Under this definition, a qualified handicapped person is a handicapped person who meets the essential eligibility requirements for participation in the program or activity.

"Section 504." This definition makes clear that, as used in this regulation, "Section 504" applies only to programs or activities conducted by the Commission.

Section 1.1810 Self-evaluation.

The Commission shall conduct a self-evaluation of its compliance with section 504 within one year of the effective date of this regulation. The process shall include consultation with interested persons, including consultation with handicapped persons or organizations representing handicapped persons. The self-evaluation requirement is present in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.5(b)(2)). Experience has demonstrated the self-evaluation process to be a valuable means of establishing a working relationship with handicapped persons that promotes both effective and efficient implementation of section 504.

Section 1.1811 Notice.

Section 1.1811 requires the Commission to disseminate sufficient information to employees, applicants, participants, beneficiaries, and other interested persons to apprise them of rights and protections afforded by section 504 and this regulation. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe the Commission's programs and activities; the display of informative posters in service centers and other public places; or the broadcast of information by television or radio.

Section 1.1830 General prohibitions against discrimination.

Section 1.1830 is an adaptation of the corresponding section of the section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.51).

Paragraph (a) restates the nondiscrimination mandate of section 504. The remaining paragraphs in § 1.1830 establish the general principles for analyzing whether any particular action of the Commission violates this mandate. These principles serve as the analytical foundation for the remaining sections of the regulation. Whenever the Commission has violated a provision in any of the subsequent sections, it has also violated one of the general prohibitions found in § 1.1830. When there is no applicable subsequent provision, the general prohibitions stated in this section apply.

Paragraph (b) prohibits overt denials of equal treatment of handicapped persons. The Commission may not refuse to provide a handicapped person with an equal opportunity to participate

in or benefit from its programs simply because the person is handicapped. Such blatantly exclusionary practices often result from the use of irrebuttable presumptions that absolutely exclude certain classes of disabled persons (*e.g.*, epileptics, hearing-impaired persons, persons with heart ailments) from participation in programs or activities without regard to an individual's actual ability to participate. Use of an irrebuttable presumption is permissible only when in all cases a physical condition by its very nature would prevent an individual from meeting the essential eligibility requirements for participation in the activity in question.

Section 504, however, prohibits more than just the most obvious denials of equal treatment. It is not enough to admit persons in wheelchairs to a program if the facilities in which the program is conducted are inaccessible. Paragraph (b)(1)(iii), therefore, requires that the opportunity to participate or benefit afforded to a handicapped person be as effective as that afforded to others. The later sections on program accessibility (sections 1.1849–1.1851) and communications (section 1.1860) are specific applications of this principle.

Despite the mandate of paragraph (d) that the Commission administer its programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons, paragraph (b)(1)(iv), in conjunction with paragraph (d), permits the Commission to develop separate or different aids, benefits, or services when necessary to provide handicapped persons with an equal opportunity to participate in or benefit from the Commission's programs or activities. Paragraph (b)(1)(iv) requires that different or separate aids, benefits, or services be provided only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Even when separate or different aids, benefits, or services would be more effective, paragraph (b)(2) provides that a qualified handicapped person still has the right to choose to participate in the program that is not designed to accommodate handicapped persons.

Paragraph (b)(1)(v) prohibits the Commission from denying a qualified handicapped person the opportunity to participate as a member of a planning or advisory board.

Paragraph (b)(1)(vi) prohibits the Commission from limiting a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

Paragraph (b)(3) prohibits the Commission from utilizing criteria or methods of administration that deny handicapped persons access to the Commission's programs or activities. The phrase "criteria or methods of administration" refers to official written Commission policies and the actual practices of the Commission. This paragraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny handicapped persons an effective opportunity to participate.

Paragraph (b)(4) specifically applies the prohibition enuniciated in § 1.1830(b)(3) to the process of selecting sites for construction of new facilities or existing facilities to be used by the Commission. Paragraph (b)(4) does not apply to construction of additional buildings at an existing site.

Paragraph (b)(5) prohibits the Commission, in the selection of procurement contractors, from using criteria that subject qualified handicapped persons to discrimination on the basis of handicap.

Paragraph (b)(6) prohibits the Commission from discriminating against qualified handicapped persons on the basis of handicap in the granting of licenses or certification. A person is a "qualified handicapped person" with respect to licensing or certification, if he or she can meet the essential eligibility requirements for receiving the license or certification (*see* § 1.1803). For example, the Commission must comply with this requirement when establishing the format for the testing of individuals applying for licenses in the Amateur Radio Service. In that case, the Commission must ensure that the tests that it administers do not discriminate against qualified handicapped persons in an impermissible manner.

In addition, the Commission may not establish requirements for the programs or activities of licensees or certified entities that subject qualified handicapped persons to discrimination on the basis of handicap.

Paragraph (b)(6) does not extend section 504 directly to the programs or activities of licensees or certified entities themselves. The programs or activities of Federal licensees or certified entities are not themselves federally conducted programs or activities nor are they programs or activities receiving Federal financial assistance merely by virtue of the Federal license or certificate. However, as noted above, section 504 may affect the content of the rules established by the agency for the operation of the program or activity of the licensee or certified entity, and thereby indirectly affect limited aspects of their operations.

Paragraph (c) provides that programs conducted pursuant to Federal statute or Executive Order that are designed to benefit only handicapped persons or a given class of handicapped persons may be limited to those handicapped persons.

Section 1.1840 . Employment.

Section 1.1840 prohibits discrimination on the basis of handicap in employment by Executive agencies. This regulation is in accord with a decision of the Fifth Circuit that holds that, despite the resulting overlap of coverage with Section 501 of the Rehabilitation Act of 1973, (29 U.S.C. 791), Congress intended Section 504 to cover the employment practices of Executive agencies. The Court also held that in order to give effect to both section 504 and section 501, the administrative procedures of section 501 must be followed in processing section 504 complaints. *Prewitt* v. *United States Postal Service*, 662 F.2d 292 (5th Cir. 1981).

Consistent with that decision, this section provides that the standards, requirements and procedures of section 501 of the Rehabilitation Act, as established in regulations of the Equal Employment Opportunity Commission (EEOC) at 29 CFR Part 1613, shall be those applicable to employment in federally conducted programs or activities. In addition to this section, § 1.1870(b) of this regulation specifies that the Commission will use existing EEOC procedures to resolve allegations of employment discrimination. Article 35, section 2 E of the Basic Negotiated Agreement Between the Federal Communications Commission and National Treasury Employees Union (effective June 22, 1982) also provides employees with the option of initiating a grievance. Since Subchapter III of the Civil Service Reform Act of 1978, 5 U.S.C. 7121(d), prohibits Federal employees from pursuing both their statutory right and collective bargaining rights to remedy alleged employment discrimination, the employee may either initiate a grievance or process a complaint in accordance with 29 CFR Part 1613, whichever they prefer. Responsibility for coordinating enforcement of Federal laws prohibiting discrimination in employment is assigned to the EEOC by Executive Order 12067 (3 CFR 1978 Comp., p. 206). Under this authority, the EEOC establishes government wide standards on nondiscrimination in employment on the basis of handicap.

Section 1.1849 Program accessibility: Discrimination prohibited.

Section 1.1849 states the general nondiscrimination principle underlying the program accessibility requirements of § 1.1850 and 1.1851.

Section 1.1850 Program accessibility: Existing facilities.

This regulation adopts the program accessibility concept found in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.56–41.58), with certain modifications. Thus § 1.1850 requires that the Commission's program or activity, when viewed in its entirety, be readily accessible to and usable by handicapped persons. The regulation also makes clear that the Commission is not required to make each of its existing facilities accessible (§ 1.1850(a)(1)). However, § 1.1850, unlike 28 CFR 41.56–41.57, places explicit limits on the Commission's obligation to ensure program accessibility (section 1.1850(a)(2)).

Paragraph (a)(2), generally codifies recent case law that defines the scope of the Commission's obligation to ensure program accessibility. This paragraph provides that in meeting the program accessibility requirement the Commission is not required to take any action that would result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens. A similar limitation is provided in § 1.1860(d). This provision is based on the Supreme Court's holding in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), that section 504 does not require program modifications that result in a fundamental alteration in the nature of a program, and on the Court's statement that section 504 does not require modifications that would result in "undue financial and administrative burdens." 442 U.S. at 412. Since *Davis*, circuit courts have applied this limitation on a showing that only one of the two "undue burdens" would be created as a result of the modification sought to be imposed under section 504. *See, e.g., Dopico* v. *Goldschmidt*, 687 F.2d 644 (2d Cir. 1982); *American Public Transit Association* v. *Lewis (APTA)*, 655 F.2d 1272 (D.C. Cir. 1981). Thus, in *APTA* the United States Court of Appeals for the District of Columbia Circuit applied the *Davis* language and invalidated the section 504 regulations of the Department of Transportation. The court in *APTA* noted "that at some point a transit system's refusal to take modest, affirmative steps to accommodate handicapped persons might well violate section 504. But DOT's rules do not mandate only modest expenditures. The regulations require extensive modifications of existing systems and impose extremely heavy financial burdens on local transit authorities." 655 F.2d at 1278.

The inclusion of paragraph (a)(2) is an effort to conform the Commission's regulation implementing section 504 to the Supreme Court's interpretation of the statute in *Davis* as well as to the decisions of lower courts following the *Davis* opinion. This paragraph acknowledges, in light of recent case law, that in some situations, certain accommodations for a handicapped person may so alter the Commission's program or activity, or entail such extensive costs and administrative burdens that the refusal to undertake the accommodations is not discriminatory. The failure to include such a provision could lead to judicial invalidation of the regulation or reversal of a particular enforcement action taken pursuant to the regulation.

This paragraph, however, does not establish an absolute defense; it does not relieve the Commission of all obligations to handicapped persons. Although the Commission is not required to take actions that would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that handicapped persons receive the benefits and services of the federally conducted program or activity.

It is our view that compliance with § 1.1850(a) would in most cases not result in undue financial and administrative burdens on the Commission. In determining whether financial and administrative burdens are undue, all Commission resources available for use in the funding and operation of the conducted program or activity should be considered. The burden of proving that compliance with § 1.1850(a) would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burdens rests with the Commission. The decision that compliance would result in such alteration or burdens must be made by the Managing Director and must be accompanied by a written statement of the reasons for reaching that conclusion. Any person who believes that he or she or any specific class of persons has been injured by the Managing Director's decision or failure to make a decision may file a complaint under the compliance procedures established in § 1.1870.

Paragraph (b)(1) sets forth a number of means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to accessible buildings, and provision of aides. In choosing among methods, the Commission shall give priority consideration to those that will be consistent with provision of services in the most integrated setting appropriate to the needs of handicapped persons. Structural changes in existing facilities are required only when there is no other feasible way to make the Commission's program accessible. The Commission may comply with the program accessibility requirement by delivering services at alternate accessible sites or making home visits as appropriate.

Paragraphs (c) and (d) establish time periods for complying with the program accessibility requirement. As currently required for federally assisted programs by 28 CFR 41.57(b), the Commission must make any necessary structural changes in facilities as soon as practicable, but in no event later than three years after the effective date of this regulation. Where structural modifications are required, a transition plan shall be developed within six months of the effective date of this regulation. Aside from structural changes, all other necessary steps to achieve compliance shall be taken within sixty days.

Section 1.1851 Program accessibility: New construction and alterations.

Overlapping coverage exists with respect to new construction under section 504, section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 792), and the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157). Section 1.1851 provides that those buildings that are constructed or altered by, on behalf of, or for the use of the Commission shall be designed, constructed, or altered to be readily accessible to and usable by handicapped persons in accordance with 41 CFR 101–19.600 to 101–19.607 (1982). This standard was promulgated pursuant to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157). We believe that it is appropriate to adopt the existing Architectural Barriers Act standard for section 504 compliance because new and altered buildings subject to this regulation are also subject to the Architectural Barriers Act and because adoption of the

standard will avoid duplicative and possibly inconsistent standards.

Existing buildings leased by the Commission after the effective date of this regulation are not required to meet the new construction standard. They are subject, however, to the requirements of § 1.1850.

Section 1.1860 Communications.

Section 1.1860 requires the Commission to take appropriate steps to ensure effective communication with personnel of other federal entities, applicants, particpants, and members of the public. These steps shall include procedures for determining when auxiliary aids are necessary under § 1.1860(a)(1) to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits, of, the Commission's program or activity. They shall also include an opportunity for handicapped persons to request the auxiliary aids of their choice. This expressed choice shall be given primary consideration by the Commission (section 1.1860(a)(1)(i)). The Commission shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under § 1.1860(d). That paragraph limits the obligation of the Commission to ensure effective communication in accordance with *Davis* and the circuit court opinions interpreting it (*see* preamble to § 1.1850(a)(2), *supra*). Unless not required by § 1.1860(d), the Commission shall provide auxiliary aids at no cost to the handicapped person.

It is our view that compliance with § 1.1860 would in most cases not result in undue financial and administrative burdens on the Commission. In determining whether financial and administrative burdens are undue, all Commission resources available for use in the funding and operation of the conducted program or acitvity should be considered. The burden or proving that compliance with § 1.1860 would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burdens rests with the Commission. The decision that compliance would result in such alteration or burdens must be made by th Managing Director and must be accompanied by a written statement of the reasons for reaching that conclusion. Any person who believes that he or she or any specific class of persons has been injured by the Managing Director's decision or failure to make a decision may file a complaint under the compliance procedures established in § 1.1870.

In some circumstances, a notepad and written materials may be sufficient to permit effective communication with a hearing-impaird person. In many circumstances, however, they may not be, particularly when the information being communicated is complex or exchanged for a lengthy period of time (*e.g.*, a meeting) where the hearing impaired applicant or participant is not skilled in spoken or written language. Then, a sign language interpreter may be appropriate. For vision-impaired persons, effective communication might be achieved by several means, including readers and audio recordings. In general, the Commission intends to make clear to the public (1) the communications services it offers to afford handicapped persons an equal opportunity to participate in or benefit from its programs or activities, (2) the opportunity to request a particular mode of communication, and (3) the Commission's preferences regarding auxiliary aids if it can demonstrate that several different modes are effective.

The Commission shall ensure effective communication with vision-impaired and hearing-impaired persons involved in hearings conducted by the Commission. Auxiliary aids must be afforded where necessary to ensure effective communication at the proceedings. If sign language interpreters are necessary, the Commission may require that it be given reasonable notice prior to the proceeding of the need for an interpreter. Moreover, the Commission need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature (section § 1.1860(a)(i)(ii)). For example, the Commission need not provide eye glasses or hearing aids to applicants or participants in its programs. Similarly, the regulation does not require the agency to provide wheelchairs to persons with mobility impairments.

Paragraph (b) requires the Commission to provide information to handicapped persons concerning accessible services, activities, and facilities. Paragraph (c) requires the Comission to provide signage at inaccessible facilities that directs users to locations with information about accessible facilities.

Section 1.1870 Compliance procedures.

Paragraph (a) specifies that paragraphs (c) through (l) of this Section establish the procedures for processing complaints other than employment complaints. Paragraph (b) provides that the Commission will process employment complaints according to procedures established in existing regulations of the EEOC (29 CFR Part 1613) pursuant to Section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

The Commission will designate an official responsible for coordinating implementation of this section (section 1.1870(c)). The Commission is required to accept and investigate all complete complaints (section 1.1870(d)). If it determines that it does not have jurisdiction over a complaint, it shall promptly notify the complainant and make reasonable efforts to refer the complaint to the appropriate entity of the Federal Government (section 1.1870(e)).

Paragraph (f) requires the Commission to notify the Architectural and Transportation Barriers Compliance Board upon receipt of a complaint alleging that a building or facility subject to the Architectural Barriers Act or Section 502 was designed, constructed, or altered in a manner that does not provide ready access to and use by handicapped persons.

Paragraph (g) requires the Commission to provide to the complainant, in writing, findings of fact and conclusions of law, the relief granted if noncompliance is found, and notice of the right to appeal (section 1.1870(g)). On appeal within the Commission shall be provided (section 1.1870(i)). The appeal will not be heard by the same person who made the intitial determination of compliance or noncompliance (section 1.1870(i)).

Paragraph (l) permits the Commission to delegate its authority for investigating complaints to other federal agencies. However, the statutory obligation of the Commission to make a final determination of compliance or noncompliance may not be delegated.

Proposed Rules

PART 1—[AMENDED]

Part 1 of Title 47 of the Code of Federal Regulations is amended by adding a Subpart N to read as follows:

Subpart N—Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Federal Communications Commission

Sec.

1.1801 Purpose.
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Authority: 29 U.S.C. 794

Subpart N—Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Federal Communications Commission

§ 1.1801 Purpose.

The purpose of this part is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service. The FCC intends to comply fully with section 504 of the Rehabilitation Act of 1973, as amended, insofar as compliance is within the FCC's authority and does not interfere with the FCC's law enforcement responsibilities in a manner not intended by section 504.

§ 1.1802 Application.

To the extent authorized by law, this part applies to all programs or activities conducted by the Federal Communications Commission. The programs or activities of entities that are licensed or certified by the Federal Communications Commission are not covered by these proposed regulations.

§ 1.1803 Definitions.

For purposes of this part, the term—

"Assistant Attorney General" means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the Commission. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

"Commission" means Federal Communications Commission.

"Complete complaint" means a written statement that contains the complainant's name and address and describes the Commission's actions in sufficient detail to inform the Commission of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

"Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

"Handicapped persons" means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(a) "Physical or mental impairment" includes—

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(b) "Major life activities" includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(c) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(d) "Is regarded as having an impairment" means—

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the Commission as constituting such a limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (a) of this definition but is treated by the Commission as having such an impairment.

"Qualified handicapped person" means—

(a) With respect to any Commission program or activity under which a person is required to perform services or to achieve a level of accomplishment, a handicapped person who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the Commission can demonstrate would result in a fundamental alteration in its nature; and

(b) With respect to any other program or activity, a handicapped person who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.

"Section 504" means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93–516, 88 Stat. 1617), and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95–602, 92 Stat. 2955). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

§ 1.1804–1.1809 [Reserved]

1.1810 Self-evaluation.

(a) The Commission shall, within one year of the effective date of this part, evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the

Commission shall proceed to make the necessary modifications.

(b) The Commission shall, for at least three years following completion of the evaluation required under paragraph (a) of this section, maintain on file and make available for public inspection—

(1) A list of the interested persons consulted;

(2) A description of areas examined and any problems identified; and

(3) A description of any modifications made.

§ 1.1811 Notice.

The Commission shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the Commission, and make such information available to them in such manner as the Managing Director finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§ 1.1812–1.1829 [Reserved]

§ 1.1830 General prohibitions against discrimination.

(a) No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subject to discrimination under any program or activity conducted by the Commission.

(b) (1) The Commission, in providing any aid, benefit, or service, may not directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to particpate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The Commission may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissably separate or different programs or activities.

(3) The Commission may not, directly or through contractual or other arrangments, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified handicapped persons to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to handicapped persons.

(4) The Commission may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude handicapped persons from, deny them the benefits of, or otherwise subject them to dscrimination under any program or activity conducted by the Commission; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to handicapped persons.

(5) The Commission, in the selection of procurement contractors, may not use criteria that subject qualified handicapped persons to discrimination on the basis of handicap.

(6) The Commission may not administer a licensing or certification program in a manner that subjects qualified handicapped persons to discrimination on the basis of handicap, nor may the Commission establish requirements for the programs or activities of licensees or certified entities that subject qualified handicapped persons to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the Commission are not, themselves, covered by this part.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by federal statute or Executive Order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or Executive order to a different class of handicapped persons is not, prohibited by this part.

(d) The Commission shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

§ 1.1831–1.1839 [Reserved]

§ 1.1840 Employment.

No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the Commission. The definitions, requirements and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR Part 1613, as well as the procedures set forth in the Basic Negotiations Agreement Between the Federal Communications Commisison and National Treasury Employees Union (effective June 22, 1982) and Subchapter III of the Civil Service Reform Act of 1978, 5 U.S.C. 7121(d), shall apply to employment in federally conducted programs or activities.

§ 1.1841–1.1848 [Reserved]

§ 1.1849 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 1.1850 no qualified handicapped person shall, because the Commission's facilities are inaccessible to or unusable by handicapped persons, be denied the benfits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the Commission.

§ 1.1850 Program accessibility: Existing facilities.

(a) *General.* The Commission shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not—

(1) Necessarily require the Commission to make each of its existing facilities accessible to and usable by handicapped persons;

(2) Require the Commission to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where Commission personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the Commission has the burden of proving that compliance with § 1.1850(a) would result

insuch alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Managing Director after considering all Commission resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the Commisison shall take any other action that would not result in such an alteration or such a burden but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity.

(b) *Methods.* The Commission may comply with the requirements of this Section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by handicapped persons. The Commission is not required to make structural changes in existing facilities where other methods are effective in achiving compliance with this Section. The Commission, in making alterations to existing buildings, shall meet acessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this Section, the Commission shall give priority to those methods that offer programs and activities to qualified handicapped persons in the most integrated setting appropriate.

(c) *Time period for compliance.* The Commission shall comply with the obligations established under this Section within sixty (60) days of the effective date of this part except that where structural changes in facilities are undertaken, such changes shall be made within three (3) years of the effective date of this part, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the Commission shall develop, within six (6) months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the Commission's facilities that limit the accessibility of its programs or activities to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this Section and if the time period of the transition plan is longer than one (1) year, identify steps that will be taken each year of the transition period;

(4) Indicate the official responsible for implementation of the plan; and

(5) Identify the persons or groups with whose assistance the plan was prepared.

§ 1.1851 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the Commission shall be designed, constructed, or altered so as to be readily accessible to and usable by handicapped persons. The definitions, requirements and standards of the Architectural Barriers Act, 42 U.S.C. 4151–4157, as established in 41 CFR 101–19.600 to 101–19.607 (1982), apply to buildings covered by this Section.

§ 1.1852–1.1859 [Reserved]

§ 1.1860 Communications.

(a) The Commission shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other federal entities, and members of the public.

(1) The Commission shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the Commission.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the handicapped person.

(ii) The Commission need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the Commission communicates with applicants and beneficiaries by telephone, telecommunications devices for deaf persons (TDD's) or equally effective telecommunications systems shall be used.

(b) The Commission shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The Commission shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities to the extent required by law. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This Section does not require the Commission to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where Commission personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the Commission has the burden of proving that compliance with § 1.1860 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Managing Director after considering all Commission resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this Section would result in such an alteration or such burdens, the Commission shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

§ 1.1861.1–1869 [Reserved]

§ 1.1870 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the Commission.

(b) The Commission shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR Part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) Responsibility for implementation and operation of this section shall be vested in the Handicapped Coordinator, Office of Managing Director, Federal Communications Commission.

(d) The Commission shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within one hundred eighty (180) days of the alleged act of discrimination. The Commission may extend this time period for good cause.

(e) If the Commission receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The Commission shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), or section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 792), is not readily accessible to and usable by handicapped persons.

(g) Within one hundred eighty (180) days of the receipt of a complete complaint for which it has jurisdiction, the Commission shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within ninety (90) days of receipt from the Commission of the letter required by § 1.1870(g). The Commission may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the Office of the Secretary, Federal Communications Commission, 1919 M Street NW., Washington, D.C. 20554.

(j) The Commission shall notify the complainant of the results of the appeal within sixty (60) days of the receipt of the request. If the Commission determines that it needs additional information from the complainant, it shall have sixty (60) days from the date it receives the additional information to make its determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The Commission may delegate its authority for conducting complaint investigations to other federal agencies, except that the authority for making the final determination may not be delegated.

§ 1.1871–1.1899 [Reserved]

[FR Doc. 85–20365 Filed 8–29–85; 8:45 am]
BILLING CODE 6712–01–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Proposed Critical Habitat for the Key Largo Woodrat and Cotton Mouse

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Reopening of comment period.

SUMMARY: The Service gives notice that the comment period on the proposal to designate critical habitat for the Key Largo woodrat and Key Largo cotton mouse is reopened. Both of these federally-listed endangered species are restricted to Key Largo, Monroe County, Florida. The extended comment period will allow interested parties sufficient time to present their information.

DATES: The comment period reopens on August 30, 1985. Comments must be received by November 1, 1985.

ADDRESS: Comments and materials should be sent to the Supervisor, Endangered Species Field Station, U.S. Fish and Wildlife Service, 2747 Art Museum Drive, Jacksonville, Florida 32207. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Mr. David J. Wesley, Field Supervisor, at the above address (904/791–2580; FTS 946–2580).

SUPPLEMENTARY INFORMATION:

Background

The Key Largo woodrat (*Neotoma floridana smalli*) and the Key Largo cotton mouse (*Peromyscus gossypinus allapaticola*) are small mammals native to the tropical hardwood forests of Key Largo, Monroe County, Florida. The range of both species on Key Largo has been reduced by commercial and residential development, and projected future development jeopardizes much of the remaining habitat of these rodents.

In the Federal Register of September 21, 1983 (48 FR 43040), the Service issued an emergency rule determining endangered status for the Key Largo woodrat and cotton mouse, pursuant to the Endangered Species Act of 1973, as amended. The emergency designation expired on May 18, 1984. On February 9, 1984 (49 FR 4951), the Service proposed endangered status and critical habitat for both species under the usual procedures of the Act. A public hearing on the proposal was held April 24, 1984, in Tavernier, Monroe County, Florida. On August 31, 1984 (49 FR 34504), the Service published a final rule determining endangered status for the Key Largo woodrat and cotton mouse. The critical habitat designation was deleted from the final rule to expedite the listing process, as provided for by section 4(b)(6)(C) of the Act, as amended in 1982. Section 4(b)(6)(C) requires, however, that critical habitat be designated within 2 years of its proposal, if not designated concurrently with the final regulation listing the species.

On July 20, 1984, Mr. Lindell Marsh, an attorney representing several landowners on North Key Largo, requested the Service to attend a meeting to begin development of a habitat conservation plan (HCP) pursuant to section 10(a) of the Act. The purpose of the plan would be to resolve conflicts between development and endangered species on North Key Largo. Participants in the plan would include appropriate State and local agencies, landowners, and conservation groups. The approval of a permit pursuant to section 10(a) of the Act would allow incidental take of federally endangered species on North Key Largo, provided that such take was mitigated by conservation measures and would not appreciably reduce the likelihood of the survival and recovery of any such species in the wild. On November 21, 1984, the Service announced the proposed planning and reopened the comment period on the critical habitat proposal until May 8, 1985 (49 FR 45887).

Monroe County, Florida, within which Key Largo is located, is in the process of preparing a Comprehensive Plan for development of the County under the Florida Area of Critical State Concern process, Florida Statutes, Chapter 380. Any successful HCP for North Key Largo must be consistent with the requirements of the Monroe County Comprehensive Plan. In addition, Congress has allocated $98,000, to be matched with non-Federal funds, for the development of an HCP for North Key Largo. The Service has subsequently entered into a grant agreement with the Florida Department of Community Affairs (DCA) under which the County, in cooperation with the DCA, will prepare an HCP for North Key Largo. In

preparing the HCP, the County and its staff will work with the North Key Largo Habitat Conservation Plan Study Committee to explore the possibilities for allowing reasonable levels of development on North Key Largo, while meeting the goals of section 10(a), which include ensuring the long term conservation of any affected listed species. Pursuant to the FWS–DCA grant agreement, the County will prepare the EIS for the Service for the possible incidental take permit in conjunction with its preparation of the HCP.

Biological studies of the Key Largo woodrat and cotton mouse are being carried out in development of the HCP. Studies of the federally endangered Schaus swallowtail butterfly, funded by Florida's Nongame Wildlife Program, are also underway. A prototype HCP is scheduled for completion by September 21, 1985; information from the biological studies should also be available by that date.

In order to allow the above information to be considered in making a final decision regarding critical habitat, as required by Section 4(b)(2) of the Endangered Species Act, the FWS reopens the comment period. All interested parties, whether or not involved with the conservation plan, are invited to submit comments and substantive information concerning the impacts of critical habitat designation until November 1, 1985, to the FWS office in the **ADDRESSES** section.

Author

The primary author of this notice is Dr. Michael M. Bentzien, U.S. Fish and Wildlife Service, 2747 Art Museum Drive, Jacksonville, Florida 32207.

Authority

The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.; 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).

List of Subjects in 50 CFR Part 17

Endangered and threatened wildlife, Fish, Marine mammals, Plants (agriculture).

Dated: August 22, 1985.

David B. Allen,

Acting Regional Director.

[FR Doc. 85–20675 Filed 8–29–85; 8:45 am]

BILLING CODE 4310–55–M

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Notice of Findings on Two Petitions, and of Review of Two Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of Petition findings and review.

SUMMARY: The Service announces finding that a petition requesting that those populations of the Lahontan cutthroat trout in the main stem of the Truckee River, and in Pyramid Lake, Nevada, be removed from the List of Endangered and Threatened Wildlife, and that a petition to determine endangered status for the Florida Keys marsh rabbit have presented substantial information indicating that such actions may be warranted. The Service announces reviews of the status of both of the involved species.

DATE: Relevant information or comments may be submitted until further notice.

ADDRESSES: Information, comments, or questions should be submitted to the Associate Director—Federal Assistance (OES) Room 3024, Department of Interior, U.S. Fish and Wildlife service, Washington, D.C. 20240. The petitions, findings, supporting data, and comments are available for public inspection, by appointment, during normal business hours at the Service's Office of Endangered Species, Suite 500, 1000 North Glebe Road, Arlington, Virginia.

FOR FURTHER INFORMATION CONTACT: Mr. John L. Spinks, Jr., Chief, Office of Endangered Species, U.S. Fish and Wildlife Service, Washington, D.C. 20240 (703/235–2771 or FTS 235–2771).

SUPPLEMENTARY INFORMATION: Section 4(b)(3)(A) of the Endangered Species Act of 1973, as amended in 1982, requires the Service to make a finding on whether a petition to add a species to the Lists of Endangered and Threatened Wildlife and Plants, or to remove or reclassify a species, presents substantial scientific or commercial information indicating that the petitioned action may be warranted. To the maximum extent practicable, such a finding is to be made within 90 days of receipt of the petition, and the finding is then to be promptly published in the **Federal Register**. If the finding is positive, the Service is also required to promptly commence a review of the status of the involved species. Recently, the Service received and made findings on the following two petitions.

1. A petition from Ms. Laura B. Ahearn of Lionel, Sawyer & Collins, Attorneys for the City of Reno and the City of Sparks, dated February 28, 1985, and received by the Service on March 19, 1985, requests that those populations of the Lahontan cutthroat trout (*Salmo clarki henshawi*) that occur in the main stem of the Truckee River and in Pyamid Lake, Nevada, be removed from the List of Endangered and Threatened Wildlife. The petition contains documentation suggesting that the numbers of this fish have increased substantially in recent years. The Service has made the finding that this petition does present substantial information indicating that the requested action may be warranted.

2. A petition from Ms. Joel L. Beardsley, Mariposa, RR 2 Box 441, Summerland Key, Florida 33042, dated April 11, 1985, and received by the Service on April 27, 1985, requests determination of endangered status for the Florida Keys marsh rabbit (*Sylvilagus palustris hefneri*). This mammal, which was named and described in 1984, is known to occur only in a few locations in the lower (or western) Florida Keys. The petition contains documentation suggesting that the marsh rabbit's restricted habitat is jeopardized by development, and that it has become very scarce in recent years. The Service has made the finding that this petition does present substantial information indicating that the requested action may be warranted.

As required in the case of a positive finding, the Service hereby initiates status reviews of the indicated populations of the Lahontan cutthroat trout and the of the Florida Keys marsh rabbit. The Service also plans to include the latter species in a forthcoming revised Review of Vertebrate Wildlife.

Section 4(b)(3)(B) of the Act requires that within 12 months of receipt of a petition found to present substantial information, a finding be made as to whether the petitioned action is not warranted, warranted, or warranted but precluded by other listing activity. All comments and information received in response to the status reviews of the indicated populations of the Lahontan cutthroat trout and of the Florida Keys marsh rabbit will be considered in making such findings regarding these species.

The authors of this notice are Ronald M. Nowak and James D. Williams, Office of Endangered Species, U.S. Fish and Wildlife Service, Washington, D.C. 20240 (703/235–1975 or FTS 235–1975).

Authority

Endangered Species Act (16 U.S.C. 1531 *et seq.*; 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).

List of Subjects in 50 CFR Part 17

Endangered and threatened wildlife, Fish, Marine mammals, Plants (agriculture).

Dated: August 22, 1985.

P. Daniel Smith,

Acting Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 85–20768 Filed 8–29–85; 8:45 am]

BILLING CODE 4310–55–M

Notices

Federal Register
Vol. 50, No. 169
Friday, August 30, 1985

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

Office of the Secretary

Rescheduling of Meeting of the Agriculture Structure Planning Advisory Committee

On August 16, 1985, notice was published that the first meeting of the Agriculture Structure Planning Advisory Committee would be held on September 4–5, 1985, at the Shoreham Hotel in Washington, D.C. Notice is hereby given that the time and place of the meeting has been changed. The Committee will hold its first meeting on September 16–17, 1985, at the Sheraton National Hotel, Columbia Pike and Washington Boulevard, Arlington, Virginia. The meeting will begin at 8:00 a.m. and end at 5:30 p.m. on September 16 and begin at 8:00 a.m. and end at 4:30 p.m. on September 17.

Dated: August 26, 1985.

George Marianthal,

Deputy Assistant Secretary for Administration.

[FR Doc. 85-20754 Filed 7-29-85; 8:45 am]

BILLING CODE 3410-01-M

Federal Crop Insurance Corporation

[Doc. No. 2717S]

Board of Directors Meeting

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Notice of meeting.

SUMMARY: The Board of Directors of the Federal Crop Insurance Corporation (FCIC) herewith gives notice of a meeting to be held on September 4–5, 1985, for the purpose of providing insurance industry and agricultural interests an informal hearing on two matters relating to FCIC's policies of crop insurance; the method of issuing crop insurance based on Actual Production History (APH) whereby crop insurance is based on the individual farmers proven historic production records, and the insurance unit as a means of identifying all of the insured crop grown within a county, with no further division.

FOR FURTHER INFORMATION CONTACT: Peter F. Cole, Secretary, Federal Crop Insurance Corporation, U.S. Department of Agriculture, Washington, D.C., 20250, telephone (202) 447–3325.

Date: September 4–5, 1985.

Place: Interstate Commerce Commission Building 12th and Constitution Avenue, NW., Washington, D.C. Hearing Room "B" (First Floor)

Time: 1:30 P.M. to 4:30 P.M., September 4. and 8:30 A.M. to 10:30 A.M., September 5.

SUBJECTS:

Crop Insurance based on Actual Production History (APH)

Unit determination as all insured crop grown within a county with no further unit division.

Done in Washington, D.C., on August 26, 1985.

Merritt W. Sprague,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 85-20832 Filed 8-29-85; 8:45 am]

BILLING CODE 3410-08-M

Federal Grain Inspection Service

Designation Renewal of Kansas State Grain Inspection Department (KS)

AGENCY: Federal Grain Inspection Service (FGIS) USDA.

ACTION: Notice.

SUMMARY: This notice announces the designation renewal of Kansas State Grain Inspection Department (Kansas), as an official agency responsible for providing official services under the U.S. Grain Standards Act, as Amended (Act).

EFFECTIVE DATE: September 1, 1985.

ADDRESS: James R. Conrad, Chief, Regulatory Branch, Compliance Division, Federal Grain Inspection Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Room 1647 South Building, Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: James R. Conrad, telephone (202) 447–8525.

SUPPLEMENTARY INFORMATION: This action has been reviewed and determined not to be a rule or regulation as defined in Executive Order 12291 and Departmental Regulation 1512–1; therefore, the Executive Order and Departmental Regulation do not apply to this action.

FGIS announced that Kansas designation terminates on August 31, 1985, and requested applications for official agency designation to provide official services within the specified geographic area in the March 1, 1985, **Federal Register** (50 FR 8351). Applications were to be postmarked by April 1, 1985. Kansas was the only applicant and applied for designation renewal.

FGIS announced the applicant name and requested comments on same in the May 1, 1985, **Federal Register** (50 FR 18542). Comments were to be postmarked by June 17, 1985; one was received from the Kansas Grain and Feed Dealers Association, a 900-member trade group, recommending the designation renewal of Kansas.

FGIS evaluated all available information regarding the designation criteria in section 7(f)(1)(A) of the Act, and in accordance with section 7(f)(1)(B), determined that Kansas is able to provide official services in the geographic area for which FGIS is renewing its designation. Effective September 1, 1985, and terminating August 31, 1988, Kansas will provide official inspection services in its specified geographic area, which is the entire area previously described in the March 1 **Federal Register**.

A specified services point, for the purpose of this notice, is a city, town, or other location specified by an agency for the performance of official inspection or Class X or Class Y weighing services and where the agency and one or more of its inspectors or weighers is located. In addition to the specified service points within the assigned geographic area, an agency will provide official services not requiring an inspector or weigher to all locations within its geographic area.

Interested persons may contact the Regulatory Branch, specified in the address section of this notice, to obtain a list of an agency's specified service points. Interested persons also may obtain a list of the specified service points by contacting the agency at the

following address: Kansas State Grain Inspection Department, 235 South Topeka Avenue, P.O. Box 1918, Topeka, KS 66601.

Dated: August 21, 1985.

Pub. L. 94–582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*)

J.T. Abshier,

Director, Compliance Division.

[FR Doc. 85–20753 Filed 8–29–85; 8:45 am]

BILLING CODE 3410-EN-M

Designation Renewal of Louisville Grain Inspection Services, Inc. (KY), Minot Grain Inspection Service, Inc. (ND), and Tri-State Grain Inspection Service, Inc. (OH)

AGENCY: Federal Grain Inspection Service (FGIS), USDA.

ACTION: Notice.

SUMMARY: This notice announces the designation renewal of Louisville Grain Inspection Services, Inc. (Louisville), Minot Grain Inspection Service, Inc. (Minot), and Tri-State Grain Inspection Service, Inc. (Tri-State), as official agencies responsible for providing official services under the U.S. Grain Standards Act, as Amended (Act).

EFFECTIVE DATE: October 1, 1985.

ADDRESS: James R. Conrad, Chief, Regulatory Branch, Compliance Division, Federal Grain Inspection Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Room 1647 South Building, Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: James R. Conrad, telephone (202) 447–8525.

SUPPLEMENTARY INFORMATION: This action has been reviewed and determined not to be a rule or regulation as defined in Executive Order 12291 and Departmental Regulation 1512–1; therefore, the Executive Order and Departmental Regulation do not apply to this action.

FGIS announced that Louisville's, Minot's, and Tri-State's designations terminate on September 30, 1985, and requested applications for official agency designation to provide official services within specified geographic areas in the April 1, 1985, **Federal Register** (50 FR 12842). Applications were to be postmarked by May 1, 1985. There were two applicants for the Louisville designation. Louisville Grain Inspection Services, Inc., applied for designation renewal and Grain Inspection Services of America (GISA), an unincorporated subsidiary of Woodson-Tenent Laboratories, Inc., Memphis, Tennessee, also applied for designation as the agency to provide official services in the geographic area presently assigned to Louisville. Minot and Tri-State were the the only applicants for their respective designations and each applied for designatioin renewal.

FGIS announced the applicant names and requested comments on same in the June 3, 1985, **Federal Register** (50 FR 23322). Comments were to be postmarked by July 18, 1985; three favorable comments were received recommending Louisville's designation renewal; no comments were received regarding GISA's application for designation or Minot's and Tri-State's designation renewals. Subsequent to the request for comments, GISA was determined to be not qualified as an applicant and was notified in writing as to the determination.

FGIS evaluated all available information regarding the designation criteria in section 7(f)(1)(A) of the Act, and in accordance with section 7(f)(1)(B, determined that Louisville, Minot, and Tri-State are able to provide official services in the geographic area for which FGIS is renewing their designation. Effective October 1, 1985, and terminating September 30, 1988, Louisville, Minot, and Tri-State will provide official inspection services in their specified geographic areas, which are the entire areas previously described in the April 1 **Federal Register**.

A specified service point, for the purpose of this notice, is a city, town, or other location specified by an agency for the performance of official inspection or Class X or Class Y weighing services and where the agency and one or more of its inspectors or weighers is located. In addition to the specified service points within the assigned geographic area, an agency will provide official services not requiring an inspector or weigher to all locations within its geographic area.

Interested persons may contact the Regulatory Branch, specified in the address section of this notice, to obtain a list of an agency's specified service points. Interested persons also may obtain a list of the specified service points by contacting the agency at the following address:

Louisville Grain Inspection Services, Inc., 1400 Oldham Street, P.O. Box 10115, Louisville, KY 40210

Minot Grain Inspection Service, Inc., 601 Third Avenue, S.W., Box B, Minot, ND 58701

Tri-State Grain Inspection Service, Inc., 3906 River Road, Cincinnati, OH 45204

Dated: August 21, 1985.

Pub. L. 94–582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq*)

J.T. Abshier,

Director, Compliance Division.

[FR Doc. 85–20755 Filed 8–29–85; 8:45 am]

BILLING CODE 3410-EN-M

Request for Comments on Designation Applicants in the Geographic Areas Currently Assigned to Minnesota Department of Agriculture (MN) and Mississippi Department of Agriculture and Commerce (MS)

AGENCY: Federal Grain Inspection Service (FGIS).

ACTION: Notice.

SUMMARY: This notice requests comments from interested parties on the applicants for official agency designation in the geographic areas currently assigned to the Minnesota Department of Agriculture (Minnesota), and Mississippi Department of Agriculture and Commerce (Mississippi).

DATE: Comments to be postmarked on or before October 15, 1985.

ADDRESS: Comments must be submitted, in writing, to Lewis Lebakken, Jr., Information Resources Management Branch, Resources Management Division, Federal Grain Inspection Service, U.S. Department of Agriculture, Room 0667 South Building, 1400 Independence Avenue, SW., Washington, DC 20250. All comments received will be made available for public inspection at the above address during regular business hours (7 CFR 1.27(b)).

FOR FURTHER INFORMATION CONTACT: Lewis Lebakken, Jr., telephone (202) 382–1738.

SUPPLEMENTARY INFORMATION: This action has been reviewed and determined not to be a rule or regulation as defined in Executive Order 12291 and Departmental Regulation 1512–1; therefore, the Executive Order and Departmental Regulation do not apply to this action.

FGIS requested applications for official agency designation to provide official services within specified geographic areas in the July 1, 1985, **Federal Register** (50 FR 20734). Applications were to be postmarked by July 31, 1985. Minnesota and Mississippi were the only applicants, and each applied for designation renewal in the areas currently assigned to those agencies.

This notice provides interested persons the opportunity to present their

comments concerning the designation applicants. All comments must be submitted to the Information Resources Management Branch, Resources Management Division, specified in the address section of this notice.

Comments and other available information will be considered in making a final decision. Notice of the final decision will be published in the **Federal Register**, and the applicants will be informed of the decision in writing.

Dated: August 21, 1985.

Pub. L. 94–582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*)

J.T. Abshier,

Director, Compliance Division.

[FR Doc. 85–20756 Filed 8–29–85; 8:45 am]

BILLING CODE 3410-EN-M

Request for Designation Applicants to Provide Official Services in the Geographic Areas Currently Assigned to Frankfort Grain Inspection, Inc. (IN), Jinks Grain Weighing Service (IL), and Paris Illinois Grain Inspection (IL)

AGENCY: Federal Grain Inspection Service (FGIS).

ACTION: Notice.

SUMMARY: Pursuant to the provisions of the U.S. Grain Standards Act, as Amended (Act), official agency designations shall terminate not later than triennially and may be renewed according to the criteria and procedures prescribed in the Act. This notice announces that the designation of three agencies will terminate, in accordance with the Act, and requests applications from parties, including the agencies currently designated, interested in being designated as the official agency to provide official services in the geographic area currently assigned to each specified agency. The official agencies are the Frankfort Grain Inspection, Inc., Jinks Grain Weighing Service, and Paris Illinois Grain Inspection.

DATE: Applications to be postmarked on or before September 30, 1985.

ADDRESS: Applications must be submitted to James R. Conrad, Chief, Regulatory Branch, Compliance Division, Federal Grain Inspection Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Room 1647 South Building, Washington, DC 20250. All applications received will be made available for public inspection at the above address during regular business hours.

FOR FURTHER INFORMATION CONTACT: James R. Conrad, telephone (202) 447–8525.

SUPPLEMENTARY INFORMATION: This action has been reviewed and determined not to be a rule or regulation as defined in Executive Order 12291 and Departmental Regulation 1512–1; therefore, the Executive Order and Departmental Regulation do not apply to this action.

Section 7(f)(1) of the Act specifies that the Administrator of FGIS is authorized, upon application by any qualified agency or person, to designate such agency or person to provide official services after a determination is made that the applicant is better able than any other applicant to provide official services in an assigned geographic area.

Frankfort Grain Inspection, Inc. (Frankfort), R.R. #2, Frankfort, IN 46041, was designated under the Act as an official agency to provide inspection and weighing functions. Jinks Grain Weighing Service (Jinks), R.R. 1, Box 81, Homer, IL 61849, was designated under the Act as an official agency to provide weighing functions. Paris Illinois Grain Inspection (Paris), 1020 North Central Avenue, Paris, IL 61944, was designated under the Act as an official agency to provide inspection functions. Each agency was designated on March 1, 1983.

Each official agency's designation terminates on February 28, 1986. Section 7(g)(1) of the Act states, generally, that official agencies' designations shall terminate not later than triennially and may be renewed according to the criteria and procedures prescribed in the Act.

The geographic area presently assigned to Frankfort, in the State of Indiana, pursuant to section 7(f)(2) of the Act, which may be assigned to the applicant selected for designation, is as follows:

Bounded on the North by the northern Fulton County line;

Bounded on the East by the eastern Fulton County line sough to State Route 19; State Route 19 south to State Route 114; State Route 114 southeast to the eastern Fulton and Miami County lines; the northern Grant County line east to County Highway 900E; County Highway 900E south to State Route 18; State Route 18 east to the Grant County line; the eastern and southern Grant County lines; the eastern Tipton County line; the eastern Hamilton County line south to State Route 32;

Bounded on the South by State Route 32 west to the Boone County line; the eastern and southern Boone County lines; the southern Montgomery County line; and

Bounded on the West by the western and northern Montgomery County lines; the western Clinton County line; the western Carroll County line north to State Route 25; State Route 25 northeast to Cass County; the western Cass and Fulton County lines.

Exceptions to the described geographic area are the following locations situated inside Frankfort's area which have been and will continue to be serviced by Titus Grain Inspection, Inc.:

1. The Andersons, Delphi, Carroll County;

2. Buckeye Feed and Supply Company, Leiters Ford, Fulton County;

3. Cargill, Inc., Linden, Montgomery County.

The geographic area presently assigned to Jinks, in the States of Illinois and Indiana, pursuant to section 7(f)(2) of the Act, which may be assigned to the applicant selected for designation, is as follows:

Bounded on the North by the Iroquois County line east of Illinois State Route 1; Illinois State Route 1 south to U.S. Route 24; U.S. Route 24 east into Indiana, to U.S. Route 41;

Bounded on the East by U.S. Route 41 south to the southern Fountain County line; the Fountain County line west to Vermillion County (in Indiana); the eastern Vermillion County line south to U.S. Route 36;

Bounded on the South by U.S. Route 36 west into Illinois, to the Douglas County line; the eastern Douglas and Coles County lines; the southern Coles County line; and

Bounded on the West by the western Coles and Douglas County lines; the western Champaign County line north to Interstate 72; Interstate 72 southwest to the Piatt County line; the western Piatt County line; the southern McLean County line west to a point 10 miles west of the western Champaign County line; a straight line running north and south from this point north to U.S. Route 136; U.S. Route 136 east to Interstate 57; Interstate 57 north to the Champaign County line; the northern Champaign County line; the western Vermillion (in Illinois) and Iroquois County lines.

The following locations, outside of the foregoing conteguous geographic area, are presently assigned to Jinks and are part of this geographic area assignment:

1. Multrie Grain Association, Cadwell, Moultrie County, Illinois;

2. Tabor and Company, Weedman Grain Company, and Pacific Grain Company, Farmer City, Dewitt County, Illinois;

3. Moultrie Grain Association, Lovington, Moultrie County, Illinois;

4. Monticello Grain Company, Monticello, Piatt County, Illinois;

5. Gillespie Grain Company, Pittwood, Iroquois County, Illinois.

Exceptions to the described geographic area are the following locations situated inside Jinks' area which have been and will continue to be serviced by the following official agencies:

Paris Illinois Grain Inpsection:

1. Miller Grain Company, Newman, Douglas County, Illinois;

2. Miller Grain Company, Oakland, Coles County, Illinois;

3. Cargill, Inc., Dana, Vermillion County, Indiana;

Schneider Inspection Service, Inc.:

Tidewater Grain Company, Ford Iroquois Supply and Service, and Summer Elevator, Sheldon, Iroquois County, Illinois.

Titus Grain Inspection:

1. Boswell Grain Company, Boswell, Benton County, Indiana;

2. Dunn Grain, Dunn, Benton County, Indiana;

3. York Richland Grain Elevator, Inc., Earl Park, Benton County, Indiana;

4. Raub Grain Company, Raub, Benton County, Indiana.

The geographic area presently assigned to Paris, in the States of Illinois and Indiana, pursuant to Section 7(f)(2) of the Act, which may be assigned to the applicant selected for designation, is as follows:

Bounded on the North by U.S. Route 36 east across the Illinois-Indiana State line to the western Parke County line; the northern Parke and Putnam County lines;

Bounded on the East by the eastern Putnam, Owen, and Greene County lines;

Bounded on the South by the southern Greene County line; the southern Sullivan County line west to U.S. Route 41(150); U.S. Route 41(150) south to U.S. Route 50; U.S. Route 50 west across the Indiana-Illinois State line to Illinois State Route 33; Illinois State Route 33 north and west to the western Crawford County line; and

Bounded on the West by the western Crawford and Clark County lines; the western Edgar County line north to U.S. Route 36.

The following locations, outside of the foregoing contiguous geographic area, are presently assigned to Paris and are part of this geographic area assignment:

1. Miller Grain Company, Newman, Douglas County, Illinois;

2. Miller Grain Company, Oakland, Coles County, Illinois;

3. Cargill, Inc., Dana, Vermillion County, Indiana.

Interested parties, including Frankfort, Jinks, and Paris, are hereby given opportunity to apply for official agency designation to provide the official services in the geographic areas, as specified above, under the provisions of section 7(f) of the Act and section 800.196(d) of the regulations issued thereunder. Designation in each specified geographic area is for the period beginning March 1, 1986, and ending February 28, 1989. Parties wishing to apply for designation should contact the Regulatory Branch, Compliance Division, at the address listed above for forms and information.

Applications and other available information will be considered in determining which applicant will be designated to provide official services in the geographic area.

Dated: August 21, 1985.

Pub. L. 94-582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*)

J.T. Abshier,

Director, Compliance Division.

[FR Doc. 85-20757 Filed 8-29-85; 8:45 am]

BILLING CODE 3410-EN-M

Designation of Hutchings, Inc., d.b.a. Denver Grain Inspection (CO)

AGENCY: Federal Grain Inspection Service (FGIS).

ACTION: Notice.

SUMMARY: This notice announces the designation of Hutchings, Inc., doing business as Denver Grain Inspection (Hutchings), as an official agency responsible for providing official services under the U.S. Grain Standards Act, as Amended (Act).

EFFECTIVE DATE: October 1, 1985.

ADDRESS: James R. Conrad, Chief, Regulatory Branch, Compliance Division, Federal Grain Inspection Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Room 1647 South Building, Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: James R. Conrad, telephone (202) 447-8525.

SUPPLEMENTARY INFORMATION: This action has been reviewed and determined not to be a rule or regulation as defined in Executive Order 12291 and Departmental Regulation 1512-1; therefore, the Executive Order and Departmental Regulation do not apply to this action.

FGIS requested applications for official agency designation to provide official services in the State of Colorado and portions of the States of Nebraska and Wyoming in the April 5, 1985, **Federal Register** (50 FR 13641). Applications were to be postmarked by May 6, 1985; Hutchings was the only applicant. Hutchings has been providing official inspection services in the area on an interim basis since April 1, 1985.

FGIS announced the applicant name and requested comments on same in the June 3, 1985, **Federal Register** (50 FR 23323). Comments were to be postmarked by July 18, 1985; none were received.

FGIS evaluated all available information regarding the designation criteria in section 7(f)(1)(A) of the Act, and in accordance with Section 7(f)(1)(B), determined that Hutchings is able to provide official services in the geographic area for which it is being designated. Effective October 1, 1985, and terminating August 31, 1988, Hutchings will provide official inspection services in its specified geographic area, which is the entire area previously described in the April 5 **Federal Register.**

A specified service point, for the purpose of theis notice, is a city, town, or other location specified by an agency for the performance of official inspection or Class X or Class Y weighing services and where the agency and one or more of its inspectors or weighers is located. In addition to the specified service points within the assigned geographic area, an agency will provide official services not requiring an inspector or weigher to all locations within its geographic area.

Interested persons may contact the Regulatory Branch, specified in the address section of this notice, to obtain a list of an agency's specified service points. Interested persons also may obtain a list of the specified service points by contacting the agency at the following address: Denver Grain Inspection, 6210 Brighton Blvd., Commerce City, CO 80022.

Dated: August 21, 1985.

(Pub. L. 94-582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*))

J.T. Abshier,

Director, Compliance Division.

[FR Doc. 85-20758 Filed 8-29-85; 8:45 am]

BILLING CODE 3410-EN-M

DEPARTMENT OF COMMERCE

Bureau of the Census

Annual Surveys In Manufacturing Area; Consideration

Notice is hereby given that the Bureau of the Census is considering a proposal to initiate or to continue the annual surveys listed below for the year 1985 and for each year thereafter under the authority of Title 13, United States Code,

sections 131, 182, 224, and 225. These surveys, most of which have been conducted for many years, are significant in the manufacturing area. On the basis of information and recommendations received by the Bureau of the Census, the data have significant application to the needs of the public and industry and are not available from nongovernmental or other governmental sources.

The establishments covered by these surveys directly account for the bulk of all manufacturing employment. The information to be developed from these surveys is necessary for an adequate measurement of total industrial production. Government agencies need production data on these industries. Manufacturers in the industries involved, as well as their suppliers and customers and the general public, have requested such data in the interest of business efficiency and stability.

These surveys, if conducted, shall begin not earlier than 60 days after publication of this notice in the Federal Register.

Annual Current Industrial Reports

Most of the following commodity or product surveys provide data on shipments or production; some provide data on stocks, unfilled orders, orders booked, consumption, and so forth. Reports will be required of all or a sample of establishments engaged in the production of the items covered by the following list of surveys. These surveys are arranged under major group headings based on the Standard Industrial Classification Manual (1972 edition) promulgated by the Office of Management and Budget for the use of Federal Government statistical agencies.

Major Group 20—Food and Kindred Products

Confectionery

Major Group 22—Testile Mill Products

Broadwoven fabrics finished
Narrow fabrics
Yarn production
Knit fabric production
Stocks of wool and related fibers

Major Group 23—Apparel and Other Finished Products Made From Fabrics and Similar Materials

Men's and boys' outerwear
Women's and children's outerwear
Underwear and nightwear
Gloves and mittens

Major Group 24—Lumber and Wood Products, Except Furniture

Hardwood polywood
Softwood plywood
Lumber production and mill stocks

Major Group 25—Furniture and Fixtures

Office furniture

Major Group 26—Paper and Allied Products

Selected office supplies and accessories
Pulp, paper, and board

Major Group 27—Printing, Publishing, and Allied Industries

Business forms, binders, carbon paper, and inked ribbon

Major Group 28—Chemicals and Allied Products

Industrial gases
Inorganic chemicals
Pharmaceutical preparations, except biologicals
Sulfuric acid
Paints, varnish, and lacquer

Major Group 29—Petroleum Refining and Related Industries

Asphalt and tar roofing and siding products

Major Group 30—Rubber and Miscellaneous Plastics Products

Rubber
Plastics bottles
Rubber and plastic hose and belting
Mechanical rubber goods

Major Group 31—Leather and Leather products

Footwear

Major Group 32—Stone, Clay, and Glass

Consumer, scientific technical, and industrial glassware
Fibrous glass

Major Group 33—Primary Metal Industries

Steel mill products
Insulated wire and cable
Magnesium mill products
Nonferrous castings
Ferrous castings

Major Group 34—Fabricated Metal Products, Except Machinery and Transportation Equipment

Selected heating equipment

Major Group 35—Machinery, Except Electrical

Internal combustion engines
Farm Machinery and lawn and garden equipment
Mining machinery and mineral processing equipment
Air-conditioning and refrigeration equipment, including warm air furnaces
Computers and office and accounting machines
Pumps and compressors
Selected industrial air pollution control equipment
Construction machinery
Anti-friction bearings
Fluid power products (including aerospace)
Coin-operated vending machines
Robots

Major Group 36—Electrical Machinery, Equipment, and Supplies

Radios, televisions, and phonographs
Motors and generators
Wiring devices and supplies
Switchgear, switchboard apparatus, relays, and industrial controls
Communication equipment
Semiconductors and printed circuit boards
Electromedical equipment
Electric housewares and fans
Electric lighting fixtures
Major household appliances
Transformers

Major Group 37—Transportation Equipment

Aircraft propellers
Aerospace orders

Major Group 38—Professional, Scientific, and Controlling Instruments; Photographic and Optical goods; Watches and Clocks

Selected instruments and related products

Major Group 39—Miscellaneous Manufacturing Industries

Pens, pencils, and marking devices

The following surveys represent an annual supplement of a monthly survey and will cover the same establishments canvassed monthly. There will be no duplication of reporting, however, since the type of data collected on the annual supplement will be different from that collected monthly.

Major Group 32—Stone, Clay, and Glass

Glass containers
Refractories

The following list of surveys represents annual conterparts of monthly and quarterly surveys and will cover only those establishments that are not canvassed or do not report in the more frequent surveys. Accordingly, there will be no duplication in reporting. The content of these annual reports will be identical with that of the monthly and quarterly reports.

Major Group 20—Food and Kindred Products

Flour milling products

Major Group 22—Textile Mill Products

Broadwoven fabric (gray)
Consumption of wool and other fibers, and production of tops and noils
Carpet and rugs

Major Group 23—Apparel and Other Finished Products Made From Fabrics and Similar Materials

Sheets, pillowcases, and towels

Major Group 32—Stone, Clay, and Glass

Glass containers
Refractories
Clay construction products
Flat glass

Major Group 33—Primary Metal Industries

Inventories of steel mill shapes

Major Group 34—Fabricated Metal Products, Except Machinery and Transportation Equipment

Plumbing fixtures
Steel shipping drums and pails
Closures for containers

Major Group 35—Machinery, Except Electrical

Construction machinery
Metalworking machinery

Major Group 36—Electrical Machinery, Equipment, and Supplies

Fluorescent lamp ballasts
Electric lamps

Major Group 37—Transportation Equipment

New complete aircraft and aircraft engines, except military
Truck trailers

Annual Survey of Manufactures

The annual survey of manufactures collects industry statistics such as total value of shipments, employment, payroll, work hours, capital expenditures, cost of materials consumed, gross book value of assets, retirements, and depreciation of fixed assets, rental payments, supplemental labor costs, and so forth. This survey, while conducted on a sample basis, covers all manufacturing industries, including data on plants under construction but not yet in operation.

Annual Survey of Research and Development

A survey of research and development (R&D) activities is conducted. The major data obtained in this survey will include total R&D expenditures by source of funds, the number of scientists and engineers employed, the amounts spent for pollution abatement and energy R&D, and, for comparative purposes, the total net sales and receipts and the total employment of the company.

Annual Survey of Shipments to Federal Government Agencies

A survey of shipments to the Federal Government is conducted to provide information on the effect of Federal procurement on selected industries by Federal Government agencies.

Annual Survey of Pollution Abatement Costs and Expenditures

The annual survey of pollution abatement expenditures is designed to collect from manufacturers the total expenditures by industry and geographic area to abate pollutant emissions. The survey covers current operating costs and capital expenditures to abate air and water pollution and solid waste. This survey also will obtain the costs recovered from abatement activities and quantities of pollutants abated.

Annual Survey of Plant Capacity

The annual survey of plant capacity obtains information such as the amount of time a plant is in operation; operating rates as related to prefered levels and practical capacity; the value of production and other statistics for actual, preferred, and practical capacity operating levels; and the reasons for operating at less than capacity.

Copies of the proposed forms are made available on request to the Director, Bureau of the Census, Washington, D.C. 20233.

Any suggestions or recommendations concerning the subject of these proposed surveys should be submitted in writing to the Director of the Bureau of the Census within 60 days after the date of this publication in order to receive consideration.

Dated: August 26, 1985.

John G. Keane,

Director, Bureau of the Census.

[FR Doc. 85-20772 Filed 8-29-85; 8:45 am]

BILLING CODE 3510-07-M

Defining Urbanized Areas Between Decennial Censuses

Introduction

Until now, decennial census results were the only basis for defining urbanized areas. The Census Bureau proposes to designate urbanized areas on the basis of local censuses conducted by this agency, usually at the request and expense of the local area. (See 15 CFR Part 50.10, Fee Structure for Special Population Censuses.) The purpose of defining urbanized areas between decennial censuses is to give areas that meet the criteria an opportunity to obtain the urbanized area designation without waiting until the next decennial census.

Comments relating to the proposal of the Census Bureau to designate urbanized areas between decennial censuses are welcome. The comment period will be open until September 30, 1985. Persons wishing to comment or obtain additional information should contact Mr. Robert W. Marx, Chief, Georgraphy Division, Bureau of the Census, U.S. Department of Commerce, Washington, D.C. 20233. The criteria for designating urbanized areas between 1980 and 1990 are consistent with those used for determining urbanized areas based on results from the 1980 Decennial Census.

Definition

The Census Bureau will use the following criteria to determine the eligibility for definition of an urbanized area.

An urbanized area comprises an incorporated place [1] and adjacent densely settled surrounding area that together have a minimum population of 50,000.[2] The densely settled surrounding area consists of:

1. Contiguous incorporated or census designated places having:

a. A population of 2,500 or more; or,

b. A population of less than 2,500 but having either a population density of 1,000 persons per square mile, closely settled area containing a minimum of 50 percent of the population, or a cluster of at least 100 housing units.

2. Contiguous unincorporated area that is connected by road and has a population density of at least 1,000 persons per square mile.[3]

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[1] In Hawaii and Puerto Rico, incorporated places do not exist in the sense of functioning local governmental units. In Hawaii, the Census Bureau uses census designated places in defining a central place and for applying urbanized area criteria. In Puerto Rico, the Census Bureau uses zonas urbanas and aldeas.

[2] The Census Bureau excludes from the urbanized area the rural portions of extended cities, as defined in the Census Bureau's extended city criteria. In addition, for an urbanized area to be recognized, it must include a population of at least 25,000 that does not reside on a military base.

[3] The Census Bureau Excludes the area of extensive nonresidential urban land uses, such as railroad yards, airports, factories, parks, golf courses, and cemeteries, in computing the population density.

3. Other continguous incorporated area with a density of less than 1,000 persons per square mile, provided that it:

a. Eliminates an enclave of less than 5 square miles that is surrounded by built-up area.

b. Closes an indentation in the boundary of the densely settled area that is no more than 1 mile across the open end and encompasses no more than 5 square miles.

c. Links an outlying area of qualifying density, provided that the outlying area is:

(1) Connected by road to, and is not more than 1½ miles from, the main body of the urbanized area; or is

(2) Separated from the main body of the urbanized area by water or other undevelopable area, is connected by road to the main body of the urbanized area, and is not more than 5 miles from the main body of the urbanized area.

4. Large concentrations of nonresidential urban area (such as parks, office areas, and major airports) that have at least one-quarter of their boundaries contiguous to the main body of the urbanized area.

Urbanized Area Titles

1. The Census Bureau will retain unchanged the titles of previously existing urbanized areas except for possible mergers and for those areas meeting titling criteria 4 and/or 5.

2. The Census Bureau will determine the titles of new urbanized areas qualifying as follows:

a. The title of the urbanized area always will include the name of the incorporated place with the largest population in the urbanized area.

b. The title of the urbanized area may include the names of up to two additional incorporated places, with eligibility determined as follows:

(1) Those with a population of at least 250,000.

(2) Those with a population of 15,000 to 250,000 provided that they are at least one-third the population of the largest place in the urbanized area.

3. Area titles that include the names of more than one incorporated place will start with the name of the largest and list the others in descending order of their population.

4. In addition to incorporated place names, the titles contain the name of each state into which the urbanized area extends. The first named state is the state in which the largest central city is located, with additional states named in the order of population size within the urbanized area.

5. The Census Bureau may use regional titles to identify urbanized areas with populations over 1 million, in which case only the largest city of the urbanized area is included in the title.

Urbanized Area Central Cities

The central cities of urbanized areas are those named in the titles except where the urbanized area title is a regional title. In such cases, the central cities are those that qualify under items 1 or 2 of the titling criteria.

Dated: August 26, 1985.

John G. Keane,

Director, Bureau of the Census.

[FR Doc. 85-20773 Filed 8-29-85; 8:45 am]

BILLING CODE 3510-07-M

[Case No. 669]

Anton Elzar et al.; Order Modifying Temporary Denial of Export Privileges

In the matter of: Anton Elzar, individually and doing business as DEVELOPMENT AND CONSULTANT ELZAR ECO AB; Grinnekullegatan 160, Goteborg, Sweden; Helmut Keck, individually and doing business as OTC MESS-UND VIDEOTEKNIK GmbH Eifferstra 598, Hamburg Federal Republic of Germany; Paul Nurminen OY, Posylank 2, Helsinki, Finland; and METAB, MELLEN TRADING AB Fridkullagatan 19 Goteborg, Sweden, Respondents.

By Order of July 11, 1985, 50 Fed. Reg. 29244 (July 18, 1985), John Nurminen Oy (Nurminen)[1], Pasilankatu 2, 00240 Helsinki 24, Finland, was temporarily denied, pursuant to § 388.19 of the Export Administration Regulations (15 CFR Parts 368-399 (1985)), all privileges of participating in any manner or capacity in the export or reexport of U.S.-origin commodities or technical data under the jurisdiction of the United States Department of Commerce (Department).

The Department and respondent Nurminen have moved jointly to modify the order temporarily denying export privileges (Order), by deleting Nurminen from the respondents named therein.

In support of their motion, the parties stated that Nurminen had provided information to the Department, the Nurminen had made certain representations to the Department, and that the Department had reviewed additional information newly available to it.

Based on the representations made by the Department and by Nurminen, I find that the requested motion is justified, and that granting it will not jeopardize the purposes of the Order.

[1] The Order inadvertently identified John Nurminen Oy as Paul Nurminen Oy and incorrectly listed the company's address as Posylank 2, Helsinki, Finland.

Accordingly, it is hereby Ordered:

That, effective immediately, the Order of July 11, 1985, is amended by deleting: John Nurminen Oy, Pasilankatu 2, 00240 Helsinki 24, Finland.

Which respondent was misidentified in the Order as: Paul Nurminen Oy, Posylank 2, Helsinki, Finland.

From the respondents named therein.

A copy of this amendment shall be delivered to Nurminen and shall be published in the Federal Register.

Dated: August 23, 1985, 2:50 pm E.D.T.

Thomas W. Hoya,

Hearing Commissioner.

[FR Doc. 85-20752 Filed 8-29-85; 8:45 am]

BILLING CODE 3510-DT-M

International Trade Administration

[C-351-504]

Extension of the Deadline for Final Countervailing Duty Determination; Certain Heavy Iron Construction Castings from Brazil

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: Based upon the request of petitioners, the Municipal Castings Fair Trade Council and its individually-named members, the Department of Commerce is extending the deadline for its final determination in the countervailing duty investigation of certain heavy iron construction castings from Brazil. Pursuant to section 703(a)(1) of the Tariff Act of 1930, as amended by section 606 of the Trade and Tariff Act of 1984 (Pub. L. 98-573), this case deadline is being extended from October 21, 1985, to January 6, 1986, which corresponds to the date of the final determinations in the antidumping investigations of the same products from Brazil, Canada, India and the People's Republic of China. In keeping with Article 5, paragraph 3 of the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (the Subsidies Code), the Department will terminate the suspension of liquidation in the countervailing duty investigation 120 days after the date of publication of the preliminary determination in this case.

EFFECTIVE DATE: August 30, 1985.

FOR FURTHER INFORMATION CONTACT: Thomas Bombelles or Barbara Tillman, 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) 377–3174 or 377–2438.

SUPPLEMENTARY INFORMATION:

Case Histories

On May 13, 1985, we received a countervailing duty petition filed by the Municipal Castings Fair Trade Council and its individually-named members against certain iron construction castings from Brazil. We also received antidumping petitions against the same products from Brazil, Canada, India and the People's Republic of China.

In compliance with the filing requirements of § 353.36 of our regulations (19 CFR 353.36), the antidumping petitions alleged that imports of certain iron construction castings from Brazil, Canada, India and the People's Republic of China 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 Tariff Act of 1930, as amended (the Act), and that these imports cause or threaten material injury to a U.S. industry.

In compliance with the filing requirements of § 355.26 of our regulations (19 CFR 355.26), the countervailing duty petition alleged that manufacturers, producers, or exporters in Brazil of certain iron construction castings directly or indirectly receive benefits which constitute subsidies within the meaning of section 701 of the Act, and that these imports cause or threaten material injury to a U.S. industry.

We found that the petitions contained sufficient grounds on which to initiate antidumping and countervailing duty investigations, and on June 3, 1985, we initiated such investigations (50 FR 24269, 50 FR 24264, 50 FR 24008, 50 FR 24014 and 50 FR 24014). Since Brazil is a "country under the Agreement" within the meaning of section 701(b) of the Act, an injury determination is required for this investigation. Therefore we notified the ITC of our initiation. On June 27, 1985, the ITC preliminarily determined that there is a reasonable indication that imports of certain heavy iron construction castings from Brazil cause or threaten material injury to a U.S. industry (50 FR 27498). The ITC also determined that there is no reasonable indication that imports of certain light iron construction castings which were alleged to be subsidized by the government of Brazil cause or threaten material injury to a U.S. industry. Therefore, our countervailing duty investigation is limited to certain heavy iron construction castings, as defined in the "Scope of Investigation" section of our preliminary determination issued on August 6, 1985 (50 FR 32462), and we changed the title of the investigation accordingly.

On August 8, 1985, the petitioners filed a request for extension of the deadline date for the final determination in the countervailing duty investigation of certain heavy iron construction castings from Brazil to correspond with the date of the final determinations in the antidumping investigations of the same products.

Section 705(a)(1) of the Tariff Act of 1930, as amended by section 606 of the Trade and Tariff Act of 1984, provides that when a countervailing duty investigation is "initiated simultaneously with an [antidumping] investigation . . . which involves imports of the same class or kind of merchandise from the same or other countries, the administering authority, if requested by the petitioner, shall extend the date of the final determination [in the countervailing duty investigation] to the date of the final determination" in the antidumping investigation (19 U.S.C. 1671d(a)(1)). Pursuant to this provision, the Department is granting an extension of the deadline for the final determination in the countervailing duty investigation of certain heavy iron construction castings from Brazil from October 21, 1985, to January 6, 1986, the current deadline for the final determinations in the antidumping duty investigations. To comply with the requirements of Article 5, paragraph 3 of the Subsidies Code, the Department will direct the U.S. Customs Service to terminate the suspension of liquidation in the countervailing duty investigation on December 10, 1985, which is 120 days from the date of publication of the preliminary determination in this case. No cash deposits or bonds for potential countervailing duties will be required for merchandise which enters after December 10, 1985. The suspension of liquidation will not be resumed unless and until a final affirmative ITC determination is published in this case. We will also direct the U.S. Customs Service to hold the entries suspended prior to December 10, 1985, until the conclusion of this investigation.

Public Comment

The public hearing in this case, originally scheduled for September 6, 1985, has been postponed and will be rescheduled if a request for a public hearing is received by the Department.

Gilbert B. Kaplan,

Acting Deputy Assistant Secretary for Import Administration.

August 23, 1985.

[FR Doc. 85–20825 Filed 8–29–85; 8:45 am]

BILLING CODE 3510-DS-M

[C–122–507]

Initiation of Countervailing Duty Investigation; Certain Fresh Atlantic Groundfish from Canada

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: On the basis of a petition filed in proper form with the U.S. Department of Commerce, we are initiating a countervailing duty investigation to determine whether the producers or exporters in Canada of certain fresh Atlantic groundfish, as described in the "Scope of Investigation" section below, receive benefits which constitute subsidies within the meaning of the countervailing duty law. We are notifying the U.S. International Trade Commission (ITC) so that it may determine whether imports of the subject merchandise materially injure or threaten material injury to a U.S. industry. If our investigation proceeds normally, we will make our preliminary determination on or before October 29, 1985.

EFFECTIVE DATE: August 30, 1985.

FOR FURTHER INFORMATION CONTACT: Rick Herring or Mary Martin, 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) 377–0187 or 377–3464.

SUPPLEMENTARY INFORMATION:

Petition

On August 5, 1985, we received a petition from the North Atlantic Fisheries Task Force on behalf of the United States groundfish industry which harvests and produces for sale Atlantic groundfish in fresh form. The North Atlantic Fisheries Task Force is an unincorporated association representing fishermen, fishermen's cooperatives, and processors located in the northeastern United States. A majority of the members of the Task Force are producers, wholesalers, or trade or business associations of producers or wholesalers who produce or wholesale

fresh Atlantic groundfish. In compliance with the filing requirements of § 355.26 of the Commerce Regulations (19 CFR 355.26), the petition alleges that producers or exporters in Canada of fresh Atlantic groundfish receive, directly or indirectly, benefits which constitute subsidies within the meaning of section 701 of the Tariff Act of 1930, as amended (the Act). Since Canada is a "country under the Agreement" within section 701(b) of the Act, Title VII of the Act applies to this investigation, and the ITC is required to determine whether imports of the subject merchandise from Canada materially injure, or threaten injury to, the U.S. industry.

We have received telephone calls and telexes from certain domestic processors objecting to the petition. We have also received telexes from domestic processors and fishermen supporting this petition. Neither the Act nor the regulations require a petitioner to establish affirmatively that it has the majority support of a particular industry. Thus, the Department relies on petitioner's representation that it has, in fact, filed on behalf of the domestic industry, until it is affirmatively shown that this is not the case. We have not yet been able to assess the extent to which the opposition we have received to this petition contradicts petitioner's claims that it has filed "on behalf of" U.S. industries. We will continue to examine this question.

On August 20, 23, and 26, 1985, the government of Canada exercised its right to consultation pursuant to Article 3:1 of the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade.

Initiation of Investigation

Under section 702(c) of the Act, we must determine, within 20 days after a petition is filed, whether the petition sets forth the allegations necessary for the initiation of a countervailing duty investigation and whether it contains information reasonably available to the petitioner supporting the allegations. We have examined this petition and we have found that the petition meets these requirements. Therefore, we are initiating a countervailing duty investigation to determine whether the producers or exporters in Canada of certain fresh Atlantic groundfish, as described in the "Scope of Investigation" section of this notice, receive benefits which constitute subsidies. If our investigation proceeds normally, we will make our preliminary determination on or before October 29, 1985.

Scope of Investigation

The products covered by this investigation are fesh whole and fresh fillets of Atlantic groundfish, including cod, haddock, pollack, hake, and flatfish (including flounder and sole). These species are generally referred to collectively as "groundfish" because they live on or near the seabed. The term "fresh" includes fish that are chilled, but excludes fish taht have been frozen. Whole fish include fish which are whole, or processed by removal of heads, viscera, fins, or any combination thereof, but not otherwise processed. Fillets (including fish steaks) include fish, other than frozen blocks, which are otherwise processed (whether or not heads, viscera, fins, scales, or any combination thereof have been removed). These products are currently provided for in items 110.1585, 110.1593, 110.3560, 110.5000, 110.5545, 110.5565, and 110.7033 of the *Tariff Schedules of the United States, Annotated* (TSUSA).

Allegations of Subsidies

The petition alleges that producers or exporters in Canada of fresh Atlantic groundfish receive benefits which constitute subsidies. We are initiating on the following allegations:

A. Federal Programs

- Fishing Vessel Assistance Program
- Fisheries Improvement Loans Program
- Special Recovery Capital Projects Program
- Fishing Vessel Insurance Plan
- Import Duty Remission
- Unemployment Insurance Act of 1971
- Industrial and Regional Development Program
- Enterprise Development Program
- Investment Tax Credit
- Government Equity Infusions
- Program for Export Market Development
- Department of Fisheries and Oceans Marketing Services
- Assistance for the Construction of Icemaking and Fish Chilling Facilities
- Atlantic Fishery Management Program
- Federal Assistance for Bait

B. Joint Federal-Provincial Programs

- Economic and Regional Development Agreements Program
- Newfoundland and Labrador Development Corporation

C. Province of New Brunswick

- New Brunswick Fisheries Development Board
- The Fish Unloading Systems and Icemaking Facilities Board
- Fish Chilling Assistance Program
- Assistance for the Construction of Icemaking and Fish Chilling Facilities.
- Insurance Premium Prepayment Program
- Winterization of Fish Plants Program
- Marketing and Export Promotion

D. Province of Newfoundland

- Fishing Ships Bounty Program
- Fishing Vessel Assistance Plan
- Vessel Rebuilding Grant Program
- Loans and Loan Guarantees from the Newfoundland Fisheries Loan Board
- Newfoundland Bait Services Program
- Sales Tax Exemptions for Fishermen
- Newfoundland and Labrador Development Corporation
- Loan Deficiency Guarantee Program
- Secondary Processing Interest Subsidy Program
- Rural Development Loan Program
- Production Machinery and Processing Technology Program
- Market Development Information

E. Province of Nova Scotia

- Vessel Subsidy Plan
- Loans from the Nova Scotia Fisheries Loan Board
- Assistance from the Industrial Development Division
- Assistance for the Construction of Icemaking and Fish Chilling Facilities
- Gutting Machine Program
- Plant Development Program
- Marketing and Export Assistance

F. Province of Prince Edward Island

- Vessel Assistance Program
- The Near and Offshore Vessel Assistance Program
- Engine Conversion Program
- Commercial Fishermen's Investment Incentive Program
- Assistance for the Construction of Icemaking and Fish Chilling Facilities
- Fish Chilling Assistance Program
- Fisherman's Holding Unit Program
- Fish Box Pool Program

G. Province of Quebec

- Vessel Construction Assistance
- Gear Subsidy Program
- Insurance Premium Subsidy Program
- Technological Assistance Services for Business Program

We are not initiating on the following programs:

- *Shipbuilders Assistance Program*

This program grants to shipbuilding companies for vessels 75 feet or longer, built or converted in Canada. Grants are given both to fishing and other

commercial vessels which meet certain minimum weight requirements, depending on the vessel class. The grants are provided to the shipbuilders and not to the purchaser and, according to information in the petition, the program is designed to enable Canadian shipyards to offer internationally competitive prices and maintain economic viability. Petitioner has not provided us with any evidence that grants provided to shipbuilders confer benefits, directly or indirectly, to Canadian fishermen.

• *Capital Cost Allowance*

Revenue Canada permits taxpayers, in determining their taxable income, to deduct the capital cost of 37 specific classes of depreciable assets (including processing machinery and equipment and Canadian-built vessels). Petitioner alleges this program provides preferential treatment to fishermen. In *Certain Softwood Products from Canada* (48 FR 24159), we deterined that this program was not counteravailable because it was not limited to a specific industry, group of industries, or to companies in specific regions. Petitioner has not provided us with additional information or evidence of changed circumstances to cause us to reexamine this program at this time.

• *Tax Exemption on Fuel*

Canadian fishermen are exempt from both the federal gasoline sales taxes paid on gasoline purchases and from the federal excise tax on diesel fuel. In *Certain Softwood Products from Canada* (48 FR 24159), we determined that the fuel tax exemption was not counteravailable because it did not provide benefits to a specific industry or group of industries. Petitioner has not provided us with additional information or evidence of changed circumstances to cause us to reexamine this program at this time. We are, however, initiating an investigation on the sales tax exemption for fuel for fishermen under a program administered by the province of Newfoundland since we did not investigate fuel tax exemptions in that province in *Certain Softwood Products from Canada* and since petitioner has alleged that the Newfoundland program is specifically for fishermen.

• *Sales Tax Exemptions*

Petitioner alleges that fishermen may be exempted from paying certain federal sales taxes. Because the government of Canada does not limit sales tax exemptions to a specific industry, group of industries, or to companies in specific regions, we are not initiating an investigation of this program.

Notification of ITC

Section 702(d) of the Act requires us to notify the ITC of this action, and to provide it with the information we used to arrive at this determination. We will notify the ITC and make available to it all nonprivileged and nonconfidential information. We will also allow the ITC access to all privileged and confidential information in our files, provided it confirms that it will not disclose such information, either publicly or under administrative protective order, without the written consent of the Deputy Assistant Secretary for Import Administration.

Preliminary Determination by ITC

The ITC will determine by September 19, 1985, whether there is a reasonable indication that imports of certain fresh Atlantic groundfish from Canada materially injure, or threaten material injury to, a U.S. industry. If its determination is negative, this investigation will terminate; otherwise, this investigation will continue according to the statutory procedures.

Gilbert B. Kaplan,

Acting Deputy Assistant Secretary for Import Administration.

August 26, 1985.

[FR Doc. 85-20824 Filed 8-29-85; 8:45 am]

BILLING CODE 3510-DS-M

[A-455-502]

Certain Steel Wire Nails from Poland; Termination of Antidumping Duty Investigation

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice.

SUMMARY: In a letter dated July 25, 1985, petitioners withdrew their antidumping duty petition, filed on June 5, 1985, on certain steel wire nails (wire nails) from Poland. Based on the withdrawal, we are terminating the investigation.

EFFECTIVE DATE: August 30, 1985.

FOR FURTHER INFORMATION CONTACT: Mary Jenkins, 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) 377-1756.

SUPPLEMENTARY INFORMATION:

Case History

On June 5, 1985, we received a petition from Atlantic Steel Company, Atlas Steel and Wire Corp., Continental Steel Corp., Davis Walker Corp., Dickerson Weatherproof Nail Co., Florida Wire and Fabric Co., Keystone Steel and Wire Co., Northwestern Steel and Wire Co., Virginia Wire and Nail Co., and Wire Products Co., on behalf of the U.S. industry producing steel wire nails.

After reviewing the petition, we determined that it contained sufficient grounds upon which to initiate an antidumping duty investigation. We notified the International Trade Commission (ITC) of our action and initiated the investigation on June 25, 1985 (50 FR 27475). On July 31, 1985, the ITC published in the **Federal Register** its preliminary determination that there was a reasonable indication that imports of wire nails from Poland materially njure, or threaten material injury to, a U.S. industry (50 FR 31057).

Scope of Investigation

The merchandise covered by the petition consists of one-piece steel wire nails from Poland as currently provided for in the *Tariff Schedules of the United States Annotated* under item numbers 646.25 and 646.26, and similar steel wire nails of one-piece construction, whether at, over or under .065 inch in diameter as currently provided for in item number 646.3040; two-piece steel wire nails provided for in item number 646.32; and steel wire nails lead heads provided for in item number 646.36.

Withdrawal of Petition

In a letter dated July 25, 1985, petitioners notified us that they were withdrawing their June 5, 1985, antidumping duty petition, and requested that the investigation be terminated (A copy of petitioners' letter is appended to this notice).

Under section 734(a) of the Tariff Act of 1939, as amended by section 604 of the Trade and Tariff Act of 1984 (the Act), upon withdrawal of a petition, the administering authority may terminate an investigation after giving notice to all parties to the investigation and after assessing the public interest as required by the statute. This withdrawal is based on a bilateral arrangement with the Government of Poland to limit the volume of imports of this product. We have assessed the public interest factors set out in section 734(a) of the Act and consulted with potentially affected producers, workers, consuming industries, and with the ITC. On the basis of our assessment of the public interest factors and our consultations, we have determined that termination would be in the public interest.

We have notified all parties to the investigation and the ITC of petitioners'

withdrawal and our intention to terminate.

For these reasons, we are terminating our investigation.

Gilbert B. Kaplan,

Action Deputy Assistant Secretary for Import Administration.

August 23, 1985.

Contains No Confidential Information, A-455-502, Total Number of Pages: 4

July 25, 1985.

Mr. Gilbert B. Kaplan,

Acting Deputy Assistant, Secretary for Import Administration, U.S. Department of Commerce, Washington, D.C. 20230

Attention: Central Records Unit, B-099

Re: Certain Steel Wire Nails from Poland; Investigation No. A-455-502

Dear Mr. Kaplan: We have been advised by the United States Trade Representative ("USTR") that an Arrangement concerning trade in certain steel products has been entered into between the governments of Poland and the United States. Pursuant to this Arrangement, the government of Poland has agreed to restrain exports of certain steel wire nails for the period of the Arrangement.

The Arrangement requires the withdrawal of the antidumping petitions described in paragraph 1 of Appendix A to the Arrangement, including the antidumping duty (A-455-502) petition filed on June 4, 1985 by Atlantic Steel Co., Atlas Steel & Wire Corp., Continental Steel Corp., Davis Walker Corp., Dickson Weatherproof Nail Co., Florida Wire & Fabric Co., Keystone Steel & Wire Co., Northwestern Steel & Wire Co., Virginia Wire & Nail Co., and Wire Products Co. concerning certain steel wire nails.

Based on the stated purposes of the President's Steel Program, it is the present expectation of the Petitioners that the export ceilings in the Arrangement with Poland will be the functional equivalent of a suspension of an investigation under Section 734(c) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979. This expectation assumes that the Arrangement, by removing "unfairly traded" Polish steel wire nails, will ameliorate the effect of less than fair value sales as alleged in the petition and ensures that there will be no undercutting of domestic price levels by the authorized imports of steel wire nails from Poland.

With the foregoing considerations in mind, and in reliance on the understandings and conditions expressly set forth herein, you are hereby notified that the Petitioners withdraw the antidumping duty petition described in paragraph 5 of Appendix A. Please be advised that this withdrawal is subject to the following conditions:

1. Published assurance that the Polish Arrangement is in full force and effect and subject to no contingency (whether expressed in the Arrangement or any modifications thereof by side letter or otherwise) that would revise, delay or impair the implementation of the specific restraints concerning steel wire nails.

2. The publication of this letter in the **Federal Register**, together with the termination notice and the assurances required as a condition to withdrawal.

3. Confirmation that the Arrangement with Poland is a "bilateral arrangement" within the meaning of section 804 of the Steel Import Stabilization Act of 1984 and that the President is authorized to enforce the Arrangement pursuant to section 805(a) of said Act. Pursuant to those provisions and the requirements in the terms of the Arrangement, Petitioners further understand that the United States will prohibit entry into this country of steel wire nails from Poland that (i) are not accompanied by an export certificate and (ii) are not consistent with the quantitative limitations specifically applicable to Poland as defined by the Arrangement.

Petitioners expect that the Arrangement with Poland will achieve the stated purpose of being an equivalent or better alternative to the antidumping investigation that is being withdrawn as a consequence of the entry in force of the Arrangement. For so long as this expectation is realized, Petitioners do not intend to file petitions seeking import relief with respect to steel wire nails from Poland during the period the Arrangement with Poland is effective. Should that expectation fail to be realized, then Petitioners will consider it their perogative to file such petitions as they may determine under the trade laws. In any event, Petitioners expressly do not waive any statutory right under the trade laws or take such other steps as may be provided by law.

Respectfully submitted,

David E. Birenbaum,

Counsel for Petitioners.

[FR Doc. 85-20823 Filed 8-29-85; 8:45 am]

BILLING CODE 3510-DS-M

[A-307-505]

Carbon Steel Wire Rod From Venezuela; Termination of Antidumping Duty Investigation

August 27, 1985.

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice.

SUMMARY: In a letter dated July 19, 1985, petitioners withdrew their antidumping duty petition, filed on April 8, 1985, on carbon steel wire rod (wire rod) from Venezuela. Based on the withdrawal, we are terminating the investigation.

EFFECTIVE DATE: August 30, 1985.

FOR FURTHER INFORMATION CONTACT: Arthur Simonetti, 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) 377-4198.

SUPPLEMENTARY INFORMATION:

Case History

On April 8, 1985, we received a petition from Atlantic Steel Company, Continental Steel Corp., Georgetown Steel Corp., North Star Steel Texas, Inc., and Raritan River Steel Company, on behalf of the U.S. industry producing wire rod.

After reviewing the petition, we determined that it contained sufficient grounds upon which to initiate an antidumping duty investigation. We notified the International Trade Commission (ITC) of our action and initiated the investigation on April 29, 1985 (50 FR 18901). On May 15, 1985, the ITC found that there was a reasonable indication that imports of wire rod from Venezuela materially injure, or threaten material injury to, a United States industry.

Scope of Investigation

The product under investigation is carbon steel wire rod, 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, not partly manufactured, and valued over 4 cents per pound. Wire Rod is currently classifiable under item 607.17 of the *Tariff Schedules of the United States* (TSUS).

Withdrawal of Petition

In a letter dated July 19, 1985, petitioners notified us that they were withdrawing their April 8, 1985 petition, and requested that the investigation be terminated. A copy of petitioners' letter is appended to this notice. Under section 734(a) of the Tariff Act of 1930, as amended by section 604 of the Trade and Tariff Act of 1984 (the Act), upon withdrawal of a petition, the administering authority may terminate an investigation after giving notice to all parties to the investigation. This withdrawal is based on a bilateral arrangement with the Government of Venezuela to limit the volume of imports of this product. We have assessed the public interest factors set out in section 734(a) of the Act and consulted with potentially affected producers, workers, consuming industries, and with the ITC. On the basis of our assessment of the public interest factors and our consultations, we have determined that termination would be in the public interest.

We have notified all parties to the investigation and the ITC of petitioners' withdrawal and our intention to

terminate. For these reasons, we are terminating our investigation.

August 21, 1985

Gilbert B. Kaplan,

Acting Deputy Assistant Secretary for Import Administration.

Contains No Confidential Information, Dockets C-307-506 and A-307-505, Page 1 of 4

July 19, 1985.

Mr. Gilbert B. Kaplan

Acting Deputy Assistant Secretary for Import Administration, U.S. Department of Commerce, Washington, DC 20230

Attention: Central Records Unit, Room B-099

Re: Carbon Steel Wire Rod from Venezuela; C-307-506 and A-307-505

Dear Mr. Kaplan: We have been advised by the United States Trade Representative ("USTR") that an Arrangement concerning trade in certain steel products has been entered into between the governments of Venezuela and the United States. Pursuant to this Arrangement, the government of Venezuela has agreed to restrain exports of carbon steel wire rod for the period of the Arrangement.

The Arrangement requires the withdrawal of the countervailing duty and antidumping petitions described in paragraph 1 of Appendix A to the Arrangement, including the countervailing duty (C-307-506) and antidumping duty (A-307-505) petitions filed on April 8, 1985, by Atlantic Steel Company, Continental Steel Corporation, Georgetown Steel Corporation, North Star Steel Texas, Inc., and Raritan River Steel Company concerning carbon steel wire rod.

At present, the Department has reached a preliminary affirmative countervailing duty determination that carbon steel wire rod from Venezuela was subsidized during the period of investigation at a rate of 70.98 percent *ad valorem*. The antidumping order is due for decision on September 16, 1985. In these circumstances, Petitioners' reasonable expectation is that, should these investigations lead to final orders, there would be substantial relief provided in the form of countervailing and/or antidumping duties that would alleviate the conditions that led to Petitioners' allegations in the antidumping and countervailing duty petitions that unfairly traded wire rod from Venezuela was being sold at injuriously low prices.

Petitioners have demonstrated in numerous proceedings that even the smallest volumes of unfairly traded steel wire rod can have an injurious effect in the marketplace. Wire rod is fungible within grade and is generally sold through brokers to customers that have current and sophisticated market knowledge. A single ton of wire rod is often offered to numerous potential customers before a sale is made with the result that the offering price becomes the litmus for price formation. Therefore, volume reduction alone will not eliminate injurious effect. This was acknowledged by Ambassador Lighthizer in testimony before the House Committee on Energy and Commerce on March 19, 1985, when he stated that a "level playing field" requires that "unfairly traded steel [be] removed from the system."

Based on the stated purposes of the President's Steel Program, it is the present expectation of the Petitioners that the export ceilings in the Arrangement with Venezuela will be the functional equivalent of a suspension of an investigation under section 734(c) of the 1979 Trade Agreements Act. This expectation assumes that the Arrangement, by removing "unfairly traded" Venezuelan wire rod, will ameliorate the effect of subsidies and less than fair value sales as alleged in the petitions and ensure that there will be no undercutting of domestic price levels by the authorized imports of wire rod from Venezuela.

With the foregoing considerations in mind, and in reliance on the understandings and conditions expressly set forth herein, you are hereby notified that the Petitioners (i) withdraw the countervailing duty petition described in paragraph 1 of Appendix A to the Venezuelan Arrangement and (ii) withdraw the antidumping duty petition described in paragraph 1 of Appendix A. Please be advised that this withdrawal is subject to the following conditions:

1. Published assurance that the Venezuelan Arrangement is in full force and effect and subject to no contingency (whether expressed in the Arrangement or any modifications thereof by side letter or otherwise) that would revise, delay or impair the implementation of the specific restraints concerning wire rod. Petitioners also understand that the United States does not plan to agree to any modifications of the Arrangement (including increases in the annual export ceiling by reason of exception or otherwise) during its term that would change the Venezuelan obligations concerning wire rod adversely to the domestic industry.

2. The publication of this letter in the **Federal Register**, together with the termination notice and the assurances required as a condition to withdrawal.

3. Confirmation that the Arrangment with Venezuela is a "bilateral arrangement" within the meaning of section 804 of the Steel Import Stabilization Act of 1984 and that the President is authorized to enforce the Arrangement pursuant to section 805(a) of said Act. Pursuant to those provisions and the requirements in the terms of the Arrangement, Petitioners further understand that the United States will prohibit entry into this country of wire rod from Venezuela that (i) is not accompanied by an export certificate and (ii) is not issued consistent with the quantitative limitations specifically applicable to Venezuela as defined by the Arrangement.

Petitioners expect that the Arrangement with Venezuela will achieve the stated purpose of being an equivalent or better alternative to the countervailing duty and antidumping investigations that are being withdrawn as a consequence of the entry in force of the Arrangement. For so long as this expectation is realized, Petitioners do not intend to file petitions [as specified in paragraph 2(a)(3) of the Arrangment] seeking import relief with respect to wire rod from Venezuela during the period the Arrangement with Venezuela is effective. Should that expectation fail to be realized, then Petitioners will consider it their perogative to file such petitions as they may determine under the trade laws. In any event, Petitioners expressly do not waive any statutory right under the trade laws or to take such other steps as may be provided by law.

Respectfully submitted,

Charles Owen Verrill, Jr., Esq.

Wiley & Rein, 1776 K Street, NW., Washington, D.C. 20006 (202) 429-7000.

Counsel for Petitioners: Continental Steel Corp., Georgetown Steel Corp., North Star Steel Texas, Inc., Raritan River Steel Co.

David E. Birenbaum, Esq.

Fried, Frank, Harris, Shriver & Jacobson, (A Partnership Including Professional Corporations) 600 New Hampshire Ave., NW., Washington, D.C. 20037 (202) 342-3500.

Counsel for Petitioner: Atlantic Steel Co.

Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing letter was sent by first-class mail, postage prepaid, this 22nd day of July 1985, to the following addresses:

William N. Walker, Esquire, David P. Houlihan, Esquire, Julie C. Mendoza, Esquire; Mudge, Rose, Guthrie, Alexander & Ferdon, 2121 K Street, NW., Washington, D.C. 20037.

Robert E. Nielsen

[FR Doc. 85-20821 Filed 8-29-85; 8:45 am]

BILLING CODE 3510-DS-M

[A-570-501]

Natural Bristle Paint Brushes and Brush Heads From the People's Republic of China (PRC) Postponement of Final Antidumping Duty Determination

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice.

SUMMARY: This notice informs the public that the Department of Commerce (the Department) has received a request from the respondent in this investigation to postpone the final determination, as provided for in section 735(a)(2)(A) of the Tariff Act of 1930, as amended (the Act) (19 U.S.C. 1673d(a)(2)(A)). Based on this request, we are postponing our final antidumping duty determination as to whether sales of natural bristle paint brushes and brush heads from the PRC have occurred at less than fair value until not later than December 18, 1985.

EFFECTIVE DATE: August 30, 1985.

FOR FURTHER INFORMATION CONTACT: Paul Tambakis, Office of Investigations, Import Administration, International Trade Administration, Department of Commerce, 14th Street and Constitution

Avenue, NW., Washington D.C. 20230; telephone (202) 377–4136.

SUPPLEMENTARY INFORMATION: On March 11, 1985, we announced the initiation of an antidumping duty investigation to determine whether natural bristle paint brushes and brush heads from the PRC, are being, or are likely to be, sold in the United States at less than fair value (50 FR 10523). We issued our preliminary affirmative determination on July 29, 1985 (50 FR 31636). That notice stated that we would issue a final determination by October 14, 1985. On August 14, 1985, counsel for the sole respondent, the China National Native Produce and Animal By-Products Import-Export Corporation (the Animal-By-Products Corporation), requested that we extend the period for the final determination for 60 days until not later than the 135th day after publication of our preliminary determination in accordance with section 735(a)(2)(A) of the Act. The Animal By-Products Corporation accounts for all exports of the subject merchandise to the United States, and thus is qualified to make this request. If a qualified exporter properly requests an extension after an affirmative preliminary determination, the Department is required, absent compelling reasons to the contrary, to grant the request. Accordingly, we grant the request and postpone our final determination until not later than December 18, 1985.

This notice is published pursuant to section 735(d) of the Act.

Scope of Investigation

The products covered by this investigation are natural bristle paint brushes and brush heads as currently provided for in item 750.65 of the Tariff Schedules of the United States Annotated.

Gilbert B. Kaplan,

Acting Deputy Assistant Secretary for Import Administration.

August 23, 1985.

[FR Doc. 85–20822 Filed 8–29–85; 8:45 am]

BILLING CODE 3510–DS–M

National Oceanic and Atmospheric Administration

Marine Mammals; Issuance of Permit to Dr. Thomas F. Albert

On July 15, 1985, notice was published in the **Federal Register** (50 FR 28604) that an application had bee filed by Dr. Thomas F. Albert, Senior Scientist, Department of Conservation & Environmental Protection, North Slope Borough, P.O. Box 69, Barrow, Alaska 99723, to take specimen materials from dead stranded or subsistence harvested bowhead whale (Balaena Mysticetus), gray whale (Eschrichtius robustus), beluga whale (Delphinapterus Leucas), bearded seal (Erignathus barbatus) and ringed seal (Phoca hispida).

Notice is hereby given that on August 23, 1985 as authorized by the provisions of the Marine Mammal Protection Act (16 U.S.C. 1361–1407) and the Endangered Species Act of 1973 (16 U.S.C. 1531–1543), the National Marine Fisheries Service issued a Permit for the above taking subject to certain conditions set forth therein.

Issuance of this Permit as required by the Endangered Species Act of 1973 is based on a finding that such Permit: (1) Was applied for in good faith; (2) will not operate to the disadvantage of the endangered species which are the subject of this Permit; (3) and will be consistent with the purposes and policies set forth in section 2 of the Endangered Species Act of 1973. This Permit was also issued in accordance with and is subject to Parts 220–222 of Title 50 CFR, the National Marine Fisheries Service regulations governing endangered species permits.

The Permit is available for review by interested persons in the following offices:

Assistant Administrator for Fisheries, National Marine Fisheries Service, 3300 Whitehaven Street, NW., Washington, D.C.;

Regional Director, Alaska Region, National Marine Fisheries Service, P.O. Box 1668, Juneau, Alaska 99802.

Dated: August 27, 1985.

Carmen J. Blondin,

Deputy Assistant Administrator for Fisheries Resource Management, National Marine Fisheries Service.

[FR Doc. 85–20849 Filed 8–29–85; 8:45 am]

BILLING CODE 3510–22–M

Marine Mammals; Issuance of Permit to LGL Limited, Environmental Research Associates

On June 21, 1985, notice was published in the **Federal Register** (50 FR 25734) that an application had been filed by the LGL Limited, Environmental Research Associates (P273C), 22 Fisher St., P.O. Box 280, King City, Ontario, LOG 1 KO, Canada, to take bowhead whales for scientific research.

Notice is hereby given that on August 23, 1985 as authorized by the provisions of the Endangered Species Act of 1973 (16 U.S.C. 1531–1543), the National Marine Fisheries Service issued a Permit for the above taking subject to certain conditions set forth therein.

Issuance of this Permit as required by the Endangered Species Act of 1973 is based on a finding that such Permit: (1) Was applied for in good faith; (2) will not operate to the disadvantage of the endangered species which are the subject of this Permit; (3) and will be consistent with the purposes and policies set forth in section 2 of the Endangered Species Act of 1973. This Permit was also issued in accordance with and is subject to Parts 220–222 of Title 50 CFR, the National Marine Fisheries Service regulations governing endangered species permits.

The Permit is available for review by interested persons in the following offices:

Assistant Administrator for Fisheries, National Marine Fisheries Service, 3300 Whitehaven Street, NW., Washington, D.C.; and

Regional Director, Alaska Region, National Marine Fisheries Service, P.O. Box 1668, Juneau, Alaska 99802.

Dated: August 27, 1985.

Carmen J. Blondin,

Deputy Assistant Administrator for Resource Management, National Marine Fisheries Service.

[FR Doc. 85–20850 Filed 8–29–85; 8:45 am]

BILLING CODE 3510–22–M

Marine Mammals; Issuance of Permit to LGL Limited Environmental Research Associates

On June 21, 1985, notice was published in the **Federal Register** (50 FR 25734) that an application had been filed by the LGL Limited, Environmental Research Associates, P.O. Box, King City, Ontario, LOG 1KO, Canada, to take by harassment up to 400 bowhead whales (*Balaena mysticetus*) per year over a three year period for scientific research.

Notice is hereby given that on August 23, 1965 as authorized by the provisions of the Marine Mammal Protection Act (16 U.S.C. 1361–1407) and the Endangered Species Act of 1973 (16 U.S.C. 1531–1543), the National Marine Fisheries Service issued a Permit for the above taking subject to certain conditions set forth therein.

Issuance of this Permit as required by the Endangered Species Act of 1973 is based on a finding that such Permit: (1) Was applied for in good faith; (2) will not operate to the disadvantage of the endangered species which are the subject of this Permit; (3) and will be

consistent with the purposes and policies set forth in section 2 of the Endangered Species Act of 1973. This Permit was also issued in accordance with and is subject to Parts 220–222 of Title 50 CFR, the National Marine Fisheries Service regulations governing endangered species permits.

The Permit is available for review by interested persons in the following offices:

Assistant Administrator for Fisheries, National Marine Fisheries Service, 3300 Whitehaven Street, NW., Washington, D.C.; and

Regional Director, Alaska Region, National Marine Fisheries Service, P.O. Box 1668, Juneau, AK 99802.

Dated: August 28, 1985.

Carmen J. Blondin,

Deputy Assistant Administrator for Fisheries, Resource Management, National Marine Fisheries Service.

[FR Doc. 85–20851, Filed 8–29–85; 8:45 am]

BILLING CODE 3510-22-M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjusting the Import Limits for Certain Cotton, and Wool Apparel Products Produced or Manufactured in Macau

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 August 27, 1985. For further information contact Ross Arnold, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377–4212.

Background

A CITA directive dated December 10, 1984 (49 FR 48594) established restraint limits of 13,462 dozen for cotton pajamas in Category 351 and 6,667 dozen for wool knit shirts and blouses in Category 438, produced or manufactured in Macau and exported during the twelve-month period which began on January 1, 1985 and extends through December 31, 1985. In the letter to the Commissioner of Customs which follows this notice, these limits are being reduced to account for 1984 overshipments amounting to 1,263 dozen in Category 351 and 185 dozen in Category 438. The adjusted 1985 limit for Category 351 will be 12,199 dozen and for Category 438, 6,482 dozen for goods exported in 1985.

These actions are taken in accordance with the terms of the Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement of December 29, 1983 and January 9, 1984 between the Government of the United States and Macau.

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), December 14, 1983 (48 FR 55607), December 30, 1983 (48 FR 57584), April 4, 1984 (49 FR 13397), June 28, 1984 (49 FR 26622), July 16, 1984 (49 FR 28754), November 9, 1984 (49 FR 44782), and in Statistical Headnote 5, Schedule 3 of the Tariff Schedules of the United States Annotated (1985).

Ronald I. Levin,

Acting Chairman, Committee for the Implementation of Textile Agreements.

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 10, 1984 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 Macau.

Effective on August 27, 1985, you are directed to amend the directive of December 10, 1984 to reduce the restraint limits established for cotton and wool textile products in Categories 351 and 438 to the following:

Category	Adjusted 12-month limit [1] dozen
351	12,199
438	6,482

[1] The levels have not been adjusted to account for any imports exported after December 31, 1984.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553 (a)(1).

Sincerely,

Ronald I. Levin,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 85–18375 Filed 8–29–85; 8:45 am]

BILLING CODE 3510-DR-M

COMMITTEE FOR PURCHASE FROM THE BLIND AND OTHER SEVERELY HANDICAPPED

Procurement List 1985; Additions and Deletion

AGENCY: Committee for Purchase from the Blind and Other Severely Handicapped.

ACTION: Additions to and deletion from Procurement List.

SUMMARY: This action adds to and deletes from Procurement List 1985 commodities and services to be provided by workshops for the blind and other severely handicapped.

EFFECTIVE DATE: August 30, 1985.

ADDRESS: Committee for Purchase from the Blind and Other Severely Handicapped, Crystal Square 5, Suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202–3509.

FOR FURTHER INFORMATION CONTACT: C.W. Fletcher, (703) 557–1145..

SUPPLEMENTARY INFORMATION: On March 29, April 26, May 10 and June 7, 1985 the Committee for Purchase from the Blind and Other Severely Handicapped published notices (50 FR 12605, 50 FR 16532, 50 FR 19777 and 50 FR 24018) of proposed additions to Procurement List 1985, October 19, 1984 (49 FR 41195).

One comment was received in response to the notice proposing the addition to the Procurement List of the Eraser, Blackboard. The commenter, the current contractor, indicated that its contract represented 14% of the firm's total eraser sales. One comment was received in response to the notice proposing the addition to the Procurement List of the Gown, Operating, Surgical, NSN 6532–01–058–2520. The commenter indicated that his firm has been supplying this surgical operating gown to the Government since 1951 and has received six contracts for the gown in the last five years. The Committee considered the comments received as well as other pertinent information and determined that the addition of these commodities to the Procurement List would not cause severe impact on the current contractors.

Additions

After consideration of the relevant matter presented, the Committee has determined that the commodities and services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c, 85 Stat. 77 and 41 CFR 51–2.6.

I certify that the following actions will not have a significant impact on a substantial number of small entities. The major factors considered were:

a. The actions will not result in any additional reporting, recordkeeping or other compliance requirements.

b. The actions will not have a serious economic impact on any contractors for the commodities and services listed.

c. The actions will result in authorizing small entities to produce the commodities and provide the services procured by the Government.

Accordingly, the following commodities and services are hereby added to Procurement List 1985:

Commodities

Fitting Kit
4730-00-470-6625
Gown, Operating Surgical
6532-01-058-2520
6532-01-058-2519
6532-01-058-2523
Cabinet, Storage
7125-00-449-6862
Eraser, Blackboard
7510-00-244-8145
Line, Tent (Manila)
8340-00-252-2280
8340-00-252-2282
8340-00-252-2297
8340-00-252-2293

Services

Janitorial/Custodial
Army Materials and Mechanics Research Center Buildings 36, 37, 39, 43, 97, 131, 292, 311, 312, 313 only
Watertown, Massachusetts
Janitorial/Custodial
Building 1293
Hill Air Force Base, Utah

Deletion

After consideration of the relevant matter presented, the Committee has determined that the service listed below is no longer suitable for procurement by the Federal Government under 41 U.S.C. 46–48c, 85 Stat. 77 and 41 CFR 51–2.6.

Accordingly, the following service is hereby deleted from Procurement List 1985: Repair and Maintenance of Electric Typewriters, Railroad Retirement Board, 844 N. Rush Street, Chicago, Illinois.

E.R. Alley, Jr.,

Acting Executive Director.

[FR Doc. 85-20607 Filed 8-29-85; 8:45 am]

BILLING CODE 6820-33-M

Procurement List 1985; Proposed Additions and Deletion

AGENCY: Committee for Purchase from the Blind and Other Severely Handicapped.

ACTION: Proposed additions to and deletion from procurement list.

SUMMARY: The Committee has received proposals to add to and delete from Procurement List 1985 commodities to be produced by and services to be provided by workshops for the blind and other severely handicapped

Comments must be received on or before: October 2, 1985.

ADDRESS: Committee for Purchase from the Blind and Other Severely Handicapped, Crystal Square 5, Suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202-3509.

FOR FURTHER INFORMATION CONTACT: C.W. Fletcher, (703) 557-1145.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a)(2), 85 Stat. 77 and 41 CFR 51-2.6. Its purpose is to provide interested persons an opportunity to submit comments on the possible impact of the proposed actions.

Additions

If the Committee approves the proposed additions, all entities of the Federal Government will be required to procure the commodities and services listed below from workshops for the blind or other severely handicapped.

It is proposed to add the following commodities and services to Procurement List 1985, October 19, 1984 (49 FR 41195):

Commodities

Bag, Urine Collection
6530-01-074-6600
Paper, Teletypewriter, Roll
7530-00-142-9038
7530-00-935-4183
7530-00-171-9811
7530-00-285-3054
7530-00-286-5030
7530-00-019-7766
7530-00-019-7837
7530-00-019-7849
7530-00-019-7850
7530-00-019-8608
7530-00-019-8810
Strap, Webbing, Frame Attaching
8465-01-151-2891

Services

Commissary Shelf Stocking and Custodial
Rock Island Commissary
Rock Island, Illinois
Commissary Shelf Stocking and Custodial
Seneca Army Depot, New York
Janitorial/Custodial
Low Federal Buildings
Building A—120 Bernard Street
Building B—124 Bernard Street
Building C—100 W. Oglethorpe Avenue
Savannah, Georgia
Janitorial/Custodial
U.S. Department of Agriculture
National Finance Center
NASA Facility
13800 Old Gentilly Road
Building 350
New Orleans, Louisiana
Janitorial/Custodial
Building 2076 (second floor) and Building 2043 (second floor)
Marine Corps Development and Education Command
Quantico, Virginia
Janitorial/Custodial
Building 993, Dental Clinic
Naval Air Station, Whidbey Island, Washington
Janitorial/Custodial
1. Colville Ranger Office, 785 South Main Street, Colville, Washington
2. Computer Office Building, 695 South Main Street, Colville, Washington
3. Newport Administration Site, North Warren Avenue and Highway 20, Newport, Washington

Deletion

It is proposed to delete the following service from Procurement List 1985, October 19, 1984 (49 FR 41195): Microfilming Contract Files, Department of the Navy, OICC Trident, Bremerton, Washington.

E.R. Alley, Jr.,

Acting Executive Director.

[FR Doc. 85-20607 Filed 8-29-85; 8:45 am]

BILLING CODE 6820-33-M

CONSUMER PRODUCT SAFETY COMMISSION

Notification of Request for Approval of All-Terrain Vehicle (ATV) Consumer Exposure Survey

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1981 (44 U.S.C. 3601 *et seq.*), the Consumer Product Safety Commission has submitted to the Office of Management and Budget a request for approval of a survey to determine consumer exposure to the hazards associated with the use of three- and four-wheeled All-Terrain Vehicles (ATVs). This exposure survey will seek information on the characteristics of ATV users, the types of ATVs in use, the amount of time ATVs are used and the various types of ATV usage.

Additional Details About the Requested Approval for Collection of Information

Agency Address: Consumer Product Safety Commission, 1111 18th Street, Washington, D.C. 20207.

Title of Information Collection: Survey to Determine Consumer

Exposure to Hazards Associated With the Use of All-Terrain Vehicles.

Type of Request: Approval of new plan.

Frequency of Collection: One time.

General Description of Respondents: Respondents owning ATVs will be selected from a national consumer panel consisting of households within the United States.

Estimated Number of Respondents: 660.

Estimated Number of Hours for All Respondents: 198 hours.

Comments: Comments on this request for approval for collection of information should be addressed to Andy Velez-Rivera, Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503; telephone (202) 395–7513. Copies of the request for approval of collection of information are available from Francine Shacter, Office of Budget, Program Planning, and Evaluation, Consumer Product Safety Commission, Washington, D.C. 20207; telephone (301) 492–6629.

This is not a proposal to which 44 U.S.C. 3504(h) is applicable.

Dated: August 27, 1985.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

[FR Doc. 85–20857 Filed 8–29–85; 8:45 am]

BILLING CODE 6355–01–M

Notification of Request for Extension of Approval of Information Collection Requirements; Labels and Instructions for Certain Coal and Wood Burning Appliances

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1981 (44 U.S.C. 3501 *et seq.*), the Consumer Product Safety Commission has submitted a request to the Office of Management and Budget for an extension through April 30, 1988, of its approval of collection of information requirements in 16 CFR Part 1406. That rule requires the manufacturers (including importers) of certain wood and coal burning appliances to provide safety labels on, and directions with, the products and to send copies of the labels and directions to the Commission. The manufacturers are also required to send the Commission an explanation of how the appropriate clearance distances stated on the labels and directions were determined. Since the requirement to submit information on clearances and copies of current materials to the Commission is already in effect, the future burden of this requirement applies only to manufacturers introducing new models or making changes to required information in previously submitted materials.

The purposes of these reporting requirements are to reduce the risks associated with the installation, operation, and maintenance of these appliances and to help determine the extent to which manufacturers are complying with 16 CFR Part 1406.

Information About the Requested Extension of Approval of Requirements for Collection of Information

Agency address: Consumer Product Safety Commission, 1111 18th Street, NW., Washington, D.C. 20207.

Title of information collection: Coal and Wood Burning Appliances—Notification of Performance and Technical Data.

Type of request: Extension of approval.

Frequency of collection: One time, plus updates when new models are introduced or previously submitted materials are changed.

General description of respondents: Manufacturers and importers of coal and wood burning fireplace stoves, heaters, and similar appliances.

Estimated number of respondents: 20.

Estimated average number of hours per response: 3.

Estimated number of hours for all respondents: 60 per year.

Comments: Comments on this requested extension of approval of information collection requirements should be addressed to Andy Velez-Rivera, Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503; telephone: (202) 395–7313. Copies of the request for extension of information collection requirements are available from Francine Shacter, Office of Budget, Planning, and Program Evaluation, Consumer Product Safety Commission, Washington, D.C. 20207; telephone: (301) 492–6529.

This is not a proposal to which 44 U.S.C. 3504(h) is applicable.

Dated: August 27, 1985.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

[FR Doc. 85–20858 Filed 8–29–85; 8:45 am]

BILLING CODE 6355–01–M

DEPARTMENT OF DEFENSE

Office of the Secretary

DoD-University Forum, Working Group on Foreign Language and Area Studies; Advisory Committee Meeting

Summary: The Working Group on Foreign Language and Area Studies of the DoD-University Forum will meet in open session on September 16, 1985, from 10:00 a.m. until 4:00 p.m., at the Sheraton Grand Hotel, 525 New Jersey Avenue, NW., Washington, DC

The purpose of the meeting is to examine issues of common concern to the Department of Defense and the university community which affect the national resource base in language and area studies.

Public attendance will be accommodated as space permits. Public attendees are requested to telephone Jeanne Carney or Edward Blake in the DoD Office of Research and Laboratory Management on (202) 694–0205 before COB, September 12, 1985, to be advised of the meeting room and seating accommodations.

Dated: August 27, 1985.

Linda M. Lawson,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 85–20770 Filed 8–29–85; 8:45 am]

BILLING CODE 3810–01–M

Department of the Army

Military Traffic Management Command; Military Personal Property Symposium; Open Meeting

Announcement is made of a meeting of the Military Personal Property Symposium. This meeting will be held on 27 September 1985 at the Hyatt Regency-Crystal City Hotel, Crystal City, Arlington, Virginia, and will convene at 0930 hours and adjourn at approximately 1500 hours.

Proposed Agenda: The purpose of the Symposium is to provide an open discussion and free exchange of ideas with the public on procedural changes to the Personal Property Traffic Management Regulation (DOD 4500.34–R), and the handling of other matters of mutual interest concerning the Department of Defense Property Movement and Storage Program.

All interested persons desiring to submit topics to be discussed should contact the Commander, Military Traffic Management Command, ATTN: MT–PPM, at telephone number 756–1600, between 0700–1530 hours. Topics to be

discussed should be received on or before 13 September 1985.

Joseph R. Marotta,

Colonel GS, Director of Personal Property.

[FR Doc. 85-20834 Filed 8-29-85; 8:45 am]

BILLING CODE 3710-08-M

Department of the Navy

Privacy Act of 1974; Addition of System of Records

AGENCY: Department of the Navy, DOD.

ACTION: Notice of addition of systems of records.

SUMMARY: The Department of the Navy proposes to add three new systems of records in its inventory of systems of records subject to the Privacy Act of 1974.

DATES: The proposed action will be effective without further notice September 30, 1985, unless comments are received which would result in a contrary determination.

ADDRESS: Send any comments to the systems manager identified in the systems notice.

FOR FURTHER INFORMATION CONTACT: Mrs. Gwendolyn R. Aitken, Privacy Act Coordinator, Office of the Chief of Naval Operations (Op-09B30), Department of the Navy, The Pentagon, Washington, DC 20350. Telephone: (202) 697-1459.

SUPPLEMENTARY INFORMATION: The Department of the Navy systems notices for records systems subject to the Privacy Act of 1974 (5 U.S.C. 552a) Pub. L. 93-579 were published in the **Federal Register** as follows:

FR Doc. 85-10237 (50 FR 22735), May 29, 1985.

Linda M. Lawson,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

August 27, 1985.

SYSTEM NAME:

Navy/USMC Family Service Centers Volunteers.

SYSTEM LOCATION:

Navy Family Service Centers (FSCs) located at various Naval and Marine Corps activities.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Any person who volunteers to assist at one of the Navy/USMC Family Service Centers.

CATEGORIES OF RECORDS IN THE SYSTEM:

File contains information such as name, home address, home telephone number, date of birth, age and number of children, experience, education, professional qualifications, interests, hobbies, assignments at the FSC, and any other information essential for placing the volunteer in the most appropriate position at the FSC.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 5031.

PURPOSE(S):

To supervise the performance of individuals who have volunteered to assist in the Navy and Marine Corps Family Service Center (FSC) Program.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

The Blanket Routine Uses that appear at the beginning of the Department of the Navy's compilation apply to this system.

POLICIES AND PRACTICE FOR STORING, RETRIEVING/ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in file folders.

RETRIEVABILITY:

By name or skill of volunteer.

SAFEGUARDS:

Records are maintained in monitored or controlled areas accessible only to authorized personnel that are properly cleared and trained. Building/rooms locked outside regular working hours.

RETENTION AND DISPOSAL:

Records are retained for 15 years from the date the individual departs from the Center, and then destroyed.

SYSTEM MANAGER(S) AND ADDRESS:

Head, Family Support Program Division (NMPC-66), Human Resource Management Department, Naval Military Personnel Command, Washington, DC 20370.

NOTIFICATION PROCEDURE:

Written requests may be addressed to the Naval or Marine Corps activity concerned. Individuals should provide proof of identity, full name, dates of volunteer service, etc.

RECORD ACCESS PROCEDURES:

The agency's rules for access to records may be obtained from the System Manager.

CONTESTING RECORD PROCEDURES:

The agency's rules for contesting contents and appealing initial determinations by the individual concerned may be obtained from the System Manager.

RECORD SOURCE CATEGORIES:

Information is obtained and periodically updated directly from the volunteer FSC employee.

SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

N04064-1

SYSTEM NAME:

Naval Academy Laundry/Drycleaning Charge Account.

SYSTEM LOCATION:

Laundry and Drycleaning Plant, U.S. Naval Academy, Annapolis, MD 21402-5052.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All individuals who have applied for a charge account with the Naval Academy Laundry and Drycleaning Plant.

CATEGORIES OF RECORDS IN THE SYSTEM:

Information is collected on Form NDW-USNA-DMH-4064/14 and includes applicant's name; SSN; rank (if applicable); branch of service; home and work addresses and telephone numbers. Information required to maintain the charge account records is obtained from and/or recorded on accounts receivable ledgers, journals, charge tickets and check listings.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 5031; 44 U.S.C. 3101; Executive Order 9387.

PURPOSE(S):

To establish a charge account at the Naval Academy Laundry and Drycleaning Plant. Information will be used for billing purposes by the officials and employees of the Plant.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

The Blanket Routine Uses that appear at the beginning of the Department of the Navy's compilation apply to this system.

POLICIES AND PRACTICE FOR STORING, RETRIEVING/ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained in hard copy and magnetic minicassette tape form.

RETRIEVABILITY:

Both hard copy and magnetic tape records are accessed alphabetically by name.

SAFEGUARDS:

Access to building is restricted to authorized persons only. Record files are not available to personnel not requiring access in the performance of their official duties. This is routinely limited to the billing clerk processing the application and recording activity on the account. Records are secured within a locked office in a locked building on a military installation when not actually in use.

RETENTION AND DISPOSAL:

Hard copy records are retained in the current file area as long as the charge account is active. These records are then retired and kept in secured storage for two years and then destroyed. Cassette tape records are of two types, daily and journal (monthly recapitulation). These tapes are erased on a daily or monthly basis, respectively, during the preparation of the following day's or month's activity record.

SYSTEM MANAGER(S) AND ADDRESS:

Head, Laundry and Drycleaning Plant, U.S. Naval Academy, Annapolis, MD 21402–5052.

NOTIFICATION PROCEDURE:

Information should be obtained from the systems manager. Requesting individuals should specify their full names. Visitors should be able to identify themselves by any commonly recognized evidence of identity. Written requests must be signed by the requesting individual.

RECORD ACCESS PROCEDURES:

The agency's rules for access to records may be obtained from the systems manager.

CONTESTING RECORD PROCEDURES:

The agency's rules for contesting contents and appealing initial determinations by the individual concerned may be obtained from the systems manager.

RECORD SOURCE CATEGORIES:

Information in this system comes from the individual applying for the charge account, from daily laundry and drycleaning will-call tickets (charges for goods and services provided) and from records of payment by charge account holders (check listings).

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

N04064–2

SYSTEM NAME:

Retail Customer Claim Record.

SYSTEM LOCATION:

Laundry and Drycleaning Plant, U.S. Naval Academy, Annapolis, MD 21402–5052.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All individuals who have filed claims against the Naval Academy Laundry and Drycleaning Plant and appropriation 17X4002 for cash or credit settlement for damage or lost articles.

CATEGORIES OF RECORDS IN THE SYSTEM:

Information is collected on Form NDW–USNA–DMH–4064/15 and includes claimant's name; SSN; rank (if applicable); home and work addresses and telephone numbers; description, original cost and date of purchase of item(s) for which claim is filed, and circumstances of loss or extent of damage; claim number, disposition, and remarks by approving authority.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 5031; 44 U.S.C. 3101; Executive Order 9397.

PURPOSE(S):

Records are used by officials and employees of the Plant related to investigation of circumstances concerning a claim for cash or credit settlement for damaged or lost articles.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

The Blanket Routine Uses that appear at the beginning of the Department of the Navy's compilation apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained in hard copy form.

RETRIEVABILITY:

Records are maintained in standard office files and may be accessed alphabetically or chronologically.

SAFEGUARDS:

Access to building is restricted to authorized persons only. Record files are not available to personnel not requiring access in the performance of their official duties. This is limited to the official processing of the claim and the clerk who maintains the file and prepares the administrative paperwork. Records are secured within a locked office in a locked building on a military installation when not actually in use.

RETENTION AND DISPOSAL:

An individual's record is retained in the current file area for one calendar year after the close of the individual's claim. The record is then retired and kept in secured storage for one more year.

SYSTEM MANAGER(S) AND ADDRESS:

Head, Laundry and Drycleaning Plant, U.S. Naval Academy, Annapolis, MD 21402–5052.

NOTIFICATION PROCEDURE:

Information should be obtained from the systems manager. Requesting individuals should specify their full names. Visitors should be able to identify themselves by any commonly recognized evidence of identity. Written requests must be signed by the requesting individual.

RECORD ACCESS PROCEDURES:

The agency's rules for access to records may be obtained from the systems manager.

CONTESTING RECORD PROCEDURES:

The agency's rules for contesting contents and appealing initial determinations may be obtained from the systems manager.

RECORD SOURCE CATEGORIES:

Information in this system comes from the individual to whom it applies and from offices processing claims.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

[FR Doc. 85–20719 Filed 8–29–85; 8:45 am]
BILLING CODE 3810–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ID–2208–000]

Joseph K. Tannehill; Application

August 26, 1985.

Take notice that on August 15, 1985, Joseph K. Tannehill filed an application for approval under section 305(b) of the Federal Power Act, to hold concurrently the position of Director of Gulf Power Company and his present positions as president and chief executive officer of Stock Equipment Company.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211

and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such motions or protests should be filed on or before September 9, 1985. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Kenneth F. Plumb,

Secretary.

[FR Doc. 85-20782 Filed 8-29-85; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CP80-164-002, etc.]

Natural Gas Certificate Filings; ANR Pipeline Co. et al.

Take notice that the following filings have been made with the Commission:

1. ANR Pipeline Company

[Docket No. CP80-164-002]

August 23, 1985.

Take notice that on July 26, 1985, ANR Pipeline Company (ANR), 500 Renaisance Center, Detroit, Michigan 48243, filed in Docket No. CP80-164-002 a petition to amend the order issued on April 18, 1980, in Docket No. CP80-164 issuing a certificate of public convenience and necessity pursuant to section 7(c) of the Natural Gas Act so as to add a new receipt point in the transportation of natural gas for United Gas Pipe Line Company (United), all as more fully set forth in the petition to amend which is on file with the Commission and open to public inspection.

Petitioner states that it is currently authorized to transport up to 16,800 Mcf of natural gas per day on a firm basis for United from South Marsh Island Area block 137 (SMI 137) to the interconnection of Petitioner and United at Petitioner's Patterson station in St. Mary Parish, Louisiana. Petitioner states that due to the unitization of SMI blocks 136 and 137 an amendment to the transportation agreement dated December 11, 1979, was executed on October 8, 1984, adding a new receipt point in SMI 136. It is further stated that the potential exists for the acquisition of additional gas supplies by United which would require transportation from areas in proximity to SMI 136 and 137. The gas to be transported would not exceed the authorized 16,800 Mcf, it is stated.

Petitioner also requests blanket authorization to add or delete new points of receipt and/or delivery points, as such changes become necessary. It is stated that Petitioner would file appropirate tariff sheet filings to its Rate Schedule X-124 reflecting such changes no later than January 31 of the year following the change.

Comment date: September 13, 1985, in accordance with the first subparagraph of Standard Paragraph F at the end of this notice.

2. Columbia Gas Transmission Corporation, Columbia Gulf Transmission Company

[Docket No. CP-85-760-000]

August 22, 1985.

Take notice that on August 6, 1985, Columbia Gas Transmission Corporation (Columbia Transmission), 1700 MacCorkle Avenue, SE., Charleston, West Virginia 25314, and Columbia Gulf Transmission Company (Columbia Gulf), 3805 West Alabama Avenue, Houston, Texas 77027, hereinafter referred to jointly as Applicants, filed in Docket No. CP85-760-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to transport natural gas for Allied Corporation (Allied) under their certificates issued in Docket Nos. CP-83-76-000 and CP83-496-000, respectively, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in their request on file with the Commission and open to public inspection.

Applicants propose to transport up to four billion Btu equivalent of natural gas per day on behalf of Allied through October 31, 1985, to Allied's Chesterfield, Virginia, plant to be used as boiler fuel. Columbia Gulf would receive the gas at existing points of receipt in Louisiana from United Gas Pipe Line Company and redeliver to Columbia Transmission which would redeliver to Commonwealth Gas Pipeline Corporation for redelivery to Commonwealth Gas Services, Inc., for ultimate delivery to Allied.

Applicants states that the gas to be transported has been flowing since March 1, 1985, pursuant to § 157.209 of the Commission's Regulations.

Columbia Gulf would charge one of the rates in its Rate Schedule T-2 for its transportation service: Offshore to Kentucky—23.92 cents per dt equivalent of gas and retain 1.69 percent of the total quantity of gas delivered into its system for company-use and unaccounted-for gas; lateral onshore to Kentucky—14.28 cents per dt equivalent of gas and retain 1.50 percent; Rayne, Louisiana, to Kentucky—12.76 cents per dt equivalent of gas and retain 1.50 percent; and Corinth, Mississippi, to Kentucky—6.38 cents per dt equivalent of gas and retain 0.75 percent.

Columbia Transmission would charge one of the rates in its Rate Schedule TS-1 for its transportation service: gas received from Columbia Gulf at Leach, Kentucky—21.16 cents per dt equivalent and gas rfeceived from Columbia Gulf at receipt points other than Leach, Kentucky—29.93 cents per dt equivalent provided the volumes are within Commonwealth Gas Pipeline Corporation's total daily entitlement (TDE). However, Columbia Transmission states it would charge 32.50 cents per dt equivalent for gas it receives from Columbia Gulf at Leach, Kentucky; and 41.27 cents per dt equivalent for gas received from receipt points other than Leach, Kentucky if the volumes are in excess of Commonwealth Gas Pipeline Corporation's TDE. Columbia Transmission would retain 2.43 percent of the total quantity of gas delivered into its system for company-use and unaccounted-for gas. In addition, Columbia Transmission would collect the General R&D Funding Unit of the Gas Research Institute for all gas transported under the transportation arrangement.

Applicants also request flexible authority to add or delete receipt/delivery points associated with soruces of gas acquired by the end-user. The flexible authority requested applies only to points related to sources of gas supply, not to delivery points in the market area. Applicants would file a report providing certain information with regard to the addition or deletion of sources of gas as further detailed in the application and any additional sources of gas would only be obtained to constitute the transportation would only be obtained to constitute the transportation quantities herein and not to increase those quantities.

Comment date: October 7, 1985, in accordance with Standard Paragraph G at the end of this notice.

3. El Paso Natural Gas Company

[Docket No. CP85-765-000]

August 22, 1985.

Take notice that on August 7, 1985, El Paso Natural Gas Company (Applicant), P.O. Box 1492, El Paso, Texas 79978, filed in Docket No. CP85-765-000 a request pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to install and operate a sales meter station for the delivery of natural gas to Southwest Gas Corporation (Southwest)

for resale to consumers in the City of Phoenix, and environs, In Maricopa County, Arizona (Phoenix), under the certificate issued in Docket No. CP82-435-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

Applicant states that it was granted authorization, by order issued January 11, 1944, in Docket No. G-288, to sell natural gas to Central Arizona Light and Power Company, predecessor-in-interest to Arizona Public Service Company (APS), for resale to customers in Phoenix. It is stated that Applicant currently provides natural gas service to Southwest, as successor-in-interest to APS, pursuant to a service agreement (agreement) between Applicant and Southwest dated August 15, 1970.

It is indicated that Applicant has received a request from Southwest for natural gas service at a new point on Applicant's existing 16-inch Ocotillo power plant line in Maricopa County, Arizona. It is stated that the requested quantities of natural gas (up to 782 Mcf per day during the third year of service) would be used to serve additional residential and commercial space heating requirements of consumers in Phoenix. In order to provide this service, Applicant proposes to construct and operate a sales meter station consisting of one American 500B positive displacement meter and one 2⅜-inch tap and valve assembly, to be known as the Arizona meter station, on the Ocotillo power plant line. It is stated that the estimated cost of the facilities is $34,500.

Applicant states that the gas would be used to accommodate Priority 1 and 2(c) load growth requirements.

Comment date: October 7, 1985, in accordance with Standard Paragraph G at the end of this notice.

4. Mississippi River Transmission Corporation

[Docket No. CP85-733-000]

August 23, 1985.

Take notice that on July 24, 1985, Mississippi River Transmission Corporation (Applicant), 9900 Clayton Road, St. Louis, Missouri 63124, filed in Docket No. CP85-733-000 an application pursuant to section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing Applicant to increase its firm deliveries of natural gas to one of its direct sales customers, Mississippi Lime Company (MLC), by 3,200 Mcf of natural gas per day, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Applicant states that it presently supplies MLC a maximum daily volume of 4,300 Mcf of natural gas per day, pursuant to Commission orders issued on July 1, 1966, in Docket No. G-863 and on March 20, 1970, in Docket No. CP70-158. According to Applicant, MLC now seeks to increase the maximum daily volume that it receives in order to accommodate an expansion of its plant facility in Ste. Genevieve County, Missouri, which is scheduled for completion by mid-1986, and in order to meet a general increase in demand for MLC products.

Applicant says that it charges MLC for firm gas volumes a base price of $1.60 per Mcf plus adjustments made periodically to reflect the current cost of purchased gas.

Applicant further states that it would use only its existing facilities to deliver the proposed additional firm volumes to MLC.

Comment date: September 13, 1985, in accordance with Standard Paragraph F at the end of this notice.

5. Northern Natural Gas Company, Division of InterNorth, Inc.

[Docket No. CP85-775-000]

August 23, 1985.

Take notice that on August 12, 1985, Northern Natural Gas Company, Division of InterNorth, Inc. (Northern), 2223 Dodge Street, Omaha, Nebraska 68102, filed in Docket No. CP85-775-000 an application pursuant to section 7 of the Natural Gas Act for a certificate of public convenience and necessity authorizing Northern to implement adjustments to the firm entitlement of certain of Northern's market area utility customers as a result of the stipulation and agreement of settlement (stipulaltion and agreement) filed in resolution of issues in Docket Nos. RP82-71, TA83-1-59, TA84-1-59, and TA85-1-59, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Northern states that as part of the stipulation and agreement, Northern agreed to provide for a firm entitlement adjustment program which would be in effect through November 1986. Northern states that this program would allow each of its market area customers to reduce or realign its respective level of firm entitlement in the following manner:

(1) Effective March 27, 1985, November 27, 1985, and November 27, 1986, each of Northern's market area utility customers would be allowed to reduce its firm entitlement under the CD-1, CDO-1, or PL-1 Rate Schedules up to a maximum of 2 percent of its then currently effective firm entitlement (turnback program).

(2) Any customer not requesting a reduction in its currently effective firm entitlement or who only desires to reduce a portion of the 2 percent limit, may realign from CD-1, CDO-1 or PL-1 to SS-1 up to the maximum 2 percent limit or the balance of the 2 percent limit not reduced.

(3) If a customer does not reduce or realign up to the 2 percent limit in any year, a carryover of the unutilized portion of such 2 percent limit to a subsequent year will not be allowed. A customer would have the option to participate in all or any of the three phases of the turnback program.

Northern indicated that in Docket No. CP85-636-000, it filed an application to implement the first phase of the turnback program.

Northern states that as a result of the implementation of the firm entitlement adjustment program, it now seeks authority to realign and reduce 45,141 Mcf of gas per day of its market area system firm entitlement to be effective November 27, 1985. Northern indicates that the proposed reduction in firm entitlement is the net result of 50,920 Mcf of gas per day decrease in contract demand, 180 Mcf per day decrease in contract demand offsystem, 10,394 Mcf per day increase in seasonal service, and 5,035 Mcf per day decrease in pipe line service.

Northern states that it agreed to file a certificate application under section 7(c) of the Natural Gas Act on or before June 1, 1985, or as soon afterward as possible to implement the second phase of the turnback program to be effective November 27, 1985. Northern also states that no facility modifications are required to implement the proposed adjustments.

Northern also indicates that section VII of the stipulation and agreement provides that upon effectuation of a reduction in the firm entitlement of Northern's customers, each customer's additional demand quantities (ADQ's), as established in Northern's rate settlement in Docket No. RP82-71 and billed during the winter heating months of December through March, would be increased by an increment equal to the daily firm entitlement reduction (CD-1, CDO-1 or PL-1 reduction). Northern also states that this reduction would not apply to any realignment from those same rate schedules to Rate Schedule SS-1 and that through October 26, 1985, the volume to be utilized in computing

the minimum monthly bill volumes for the Rate Schedule PL–1 customers would remain at the level in effect on October 27, 1984.

In addition, Northern states that it would not request authority to adjust its demand rate as of the effective date of each phase in the turnback program but would recover its costs through Commission-approved tracking mechanisms. Finally, Northern indicates that in any general rate proceeding made prior to November 27, 1987, it would not be precluded from filing to recover any demand revenue shortfall resulting from the turnback program.

Comment date: September 13, 1985, in accordance with Standard Paragraph F at the end of this notice.

6. Northwest Central Pipeline Corporation

[Docket No. CP72–15–006]

August 23, 1985.

Take notice that on August 5, 1985, Northwest Central Pipeline Corporation (Northwest Central), P. O. Box 3288, Tulsa, Oklahoma 74101, filed in Docket No. CP72–15–006 a petition to amend the Commission's order issued November 1, 1971, in Docket No. CP72–15, as amended,[1] pursuant to section 7(c) of the Natural Gas Act, all as more fully set forth in the petition to amend which is on file with the Commission and open to public inspection.

It is stated that Northwest Central seeks authorization to utilize the existing Jane, Missouri, exchange point not only as a delivery point from Northwest Central to Arkansas Louisiana Gas Company (Arkla) but also as a delivery point from Arkla to Northwest Central, so that Arkla would be authorized to deliver gas to Northwest Central at this point under its jurisdictional exchange Rate Schedule XE–34, as well as under its jurisdictional sale Rate Schedule X–6.

Northwest Central states that the instant proposal would benefit both parties since it would permit the Jane, Missouri, delivery point to be used as a delivery and balancing point for both parties.

Comment date: September 13, 1985, in accordance with the first subparagraph of Standard Paragraph F at the end of this notice.

[1] As amended by orders issued July 17, 1972 (48 FPC 102); April 20, 1973 (unreported); January 21, 1974 (51 FPC 296); January 9, 1975 (53 FPC 55); March 26, 1976; June 25, 1979; and April 28, 1982.

7. Southern Natural Gas Company

[Docket No. CP82–276–008]

August 23, 1985.

Take notice that on August 7, 1985, Southern Natural Gas Company (Southern), P. O. Box 2563, Birmingham, Alabama 35202–2563, filed in Docket No. CP82–276–008 a petition to amend the Commission's order issued July 15, 1982, in Docket No. CP82–276–000 pursuant to section 7(c) of the Natural Gas Act so as to authorize the transportation of natural gas, from a new source of gas supply from offshore Louisiana, for Transcontinental Gas Pipe Line Corporation (Transco), all as more fully set forth in the petition to amend which is on file with the Commission and open to public inspection.

By Commission order issued July 15, 1982, in Docket No. CP82–276–000, Southern was authorized, among other things, to transport up to 45 billion Btu equivalent of natural gas per day for Transco from Mississippi Canyon Area Blocks 150, 151, 194 and 195, (Block 194 Field) offshore Loisiana, to an interconnection of Transco's facilities and Southern's 20-inch Duck Lake-Franklinton Pipeline in Livingston Parish, Louisiana. Southern rendered the subject transportation pursuant to an agreement dated February 24, 1982. By an amendment, dated November 9, 1984, to the agreement, Southern states it has agreed to transport gas purchased by Transco from Mississippi Canyon Area Block 20 in addition to the gas produced from the Block 194 Field. It is asserted that the receipt points and redelivery points, the quantity of gas transported and the rate charged for the transportation service would remain unchanged as originally set forth in the original gas transportation agreement.

Southern states that it currently transports Block 20 gas for Transco under the terms of a letter agreement dated November 9, 1984, pursuant to Southern's blanket certificate issued April 16, 1980, in Docket No. CP80–219–000. The self-implementing transportation service was reported to the Commission in Docket No. ST85–1218–000.

By the instant petition, Southern requests the Commission amend its order in Docket No. CP82–276–000, by authorizing the transportation of this new gas supply source, from Block 20 offshore, Louisiana, to be included in the gas volumes presently being transported for Transco.

Comment date: September 13, 1985, in accordance with the first subparagraph of Standard Paragraph F at the end of this notice.

Standard Paragraphs

F. Any person desiring to be heard or make any protest with reference to said filing should on or before the comment date file with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to jurisdiction conferred upon the Federal Energy Regulatory Commission by sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this filing if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for the applicant to appear or be represented at the hearing.

G. Any person or the Commission's staff may, within 45 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for

authorization pursuant to section 7 of the Natural Gas Act.

Kenneth F. Plumb,

Secretary.

[FR Doc. 85-20656 Filed 8-29-85; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. ER85-690-000, etc.]

Electric Rate and Corporate Regulation Filings; Commonwealth Edison Co. et al.

August 26, 1985.

Take notice that the following filings have been made with the Commission:

1. Commonwealth Edison Company

[Docket No. ER85-690-000]

Take notice that Commonwealth Edison Company, on August 14, 1985, tendered for filing proposed changes in its FERC Electric Tariff. The proposed changes revise the Electric Service Contract between Commonwealth Edison Company and the City of Naperville, Illinois, to provide a temporary point of electric supply to the City by the Company.

A copy of the filing has been served upon the City of Naperville, Illinois.

Comment date: September 9, 1985, in accordance with Standard Paragraph E at the end of this notice.

2. Allegheny Power Service Corporation

[Docket No. ER85-694-000]

Take notice that on August 15, 1985, Allegheny Power Service Corporation (APSC) on behalf of West Penn Power Company, tendered for filing Amendment No. 10 to its Interchange Agreement dated February 1, 1968 with Duquesne Light Company, West Penn Power Company Rate Schedule FPC No. 24. A Certficate of Concurrence by Duquesne Light Company was also filed. Amendment No. 10 terminates two interconnection points between the parties, clarifies the application of an exhibit to the Interchange Agreement, and amends two sections of the Short-Term Power and Energy to reflect Duquesne Light Company's application of an up to 10% energy adder. West Penn Power Company does not anticiapte any significant revenue effects as a result of Amendment No. 10.

Copies of this filing were served upon Duquesne Light Company and the Pennsylvania Public Utility Commission.

Comment date: September 9, 1985, in accordance with Standard Paragraph E at the end of this notice.

3. Allegheny Power Service Corporation

[Docket No. ER85-698-000]

Take notice that on August 19, 1985, Allegheny Power Service Corporation (APSC) on behalf of West Penn Power Company, tendered for filing Amendment No. 11 to its Interchange Agreement dated February 1, 1968 with Duquesne Light Company, West Penn Power Company Rate Schedule FPC No. 24. A Certficate of Concurrence by Duquesne Light Company was also filed. Amendment No. 11 establishes two new interconnection points between the parties, institutes a new service at those points, places a $.002/kWh cap on West Penn Power Company's 10% adder to the out-of-pocket cost of providing Non-Displacement Operating Capacity and Energy, and applies Duquesne Light Company's up to 10% adder. West Penn Power Company does not anticipate any significant revenue effects as a result of Amendment No. 11.

Copies of this filing were served upon Duquesne Light Company and the Pennsylvania Public Utility Commission.

Comment date: September 9, 1985, in accordance with Standard Paragraph E at the end of this notice.

4. Columbus & Southern Ohio Electric Company

[Docket No. ER85-684-000]

Take notice that American Electric Power Service Corporation (AEP) on August 9, 1985 tendered for filing on behalf of its affiliate Columbus & Southern Ohio Electric Company (CSOE), Supplement No. 1 dated June 1, 1985 to the Agreement dated June 1, 1983 between CSOE and the City of Columbus, Ohio (Columbus). The Commission has previously designated the 1983 Agreement as CSOE's Rate schedule FERC No. 33.

Supplement No. 1 increases the transmission demand rate for Transmission Service from $1.50 per kilowatt per month to $2.00 per kilowatt per month when CSOE is the supplying party. This proposed rate for Transmission Service is the same as in other AEP filings presently on file with the Commission.

Copies of this filing were served upon Columbus and the Public Utilities Commission of Ohio.

It is requested that the Commission permit this Supplement to become effective immediately. This will allow AEP to charge similar rates to electric utility systems interconnected with AEP affiliated operating subsidiaries since the rates included in this filing would coincide with the rates previously filed and accepted for filing by the Commission.

Comment date: September 9, 1985, in accordance with Standard Paragraph E at the end of this notice.

5. Green Mountain Power Corporation

[Docket No. ER85-688-000]

Take notice that Green Mountain Power Corporation ("GMP") on August 15, 1985 tendered for filing as a rate schedule an executed agreement dated as of November 10, 1982, between GMP and Masschusetts Municipal Wholesale Electric Co. (MMWEC). The proposd rate schedule provides for the sale of interruptible energy by GMP to MMWEC.

GMP states that a copy of the filing was served on MMWEC and the Vermont Public Service Board.

Comment date: September 9, 1985, in accordance with Standard Paragraph E at the end of this notice.

6. Commonwealth Electric Company

[Docket No. ER85-685-000]

Take notice that on August 12, 1985 Commonwealth Electric Company ("Commonwealth") filed pursuant to section 205 of the Federal Power Act and the implementing provisions of § 35.13 of the Commission's Regulations, a proposed change in rate under its currently effective Rate Schedule FERC No. 34.

Said change in rate under Commonwealth's Rate Schedule FERC No. 34 has been computed according to the provisions of section 6(b) of its Rate Schedule FERC No. 34. Such change is proposed to become effective January 1, 1984, thereby superseding the 23 KV Wheeling Rate in effect during calendar 1983. Commonwealth has requested that the Commission's notice requirements be waived pursuant to § 35.11 of the Commission's Regulations in order to allow the tendered rate change to become effective as of January 1, 1984.

Copies of the filing have been served upon Edison Company and the Massachusetts Department of Public Utilities.

Comment date: September 9, 1985, in accordance with Standard Paragraph E at the end of this notice.

7. Holyoke Water Power Company, Holyoke Power and Electric Company

[Docket No. ER85-689-000]

Take notice that Holyoke Water Power Company ("HWP") on August 16, 1985, tendered for filing an amendment to its RESALE SERVICE RATE CD-1 with the City of Chicopee, Massachusetts Municipal Lighting Plant ("Chicopee"). In addition, take notice that Holyoke Power and Electric

Company ("HP&E") on the same day tendered for filing RESALE SERVICE RATE CD-2 which supersedes its FULL REQUIREMENTS RATE F-1 under which it presently provides firm wholesale electric service to the Town of South Hadley, Massachusetts Electric Light Department ("South Hadley"). HWP, and its wholly-owned subsidiary, HP&E, have requested that both rate schedule changes be treated on a consolidated basis.

HWP and HP&E state that the proposed rate schedule amendments are required because of the higher level of costs to be incurred by them due to the expected commercial operation on or about May 1, 1986 of the Millstone Unit 3 nuclear generating station in Waterford, Connecticut.

HWP and HP&E propose an effective date of October 15, 1985 (60 days after filing) for both sets of rate schedule changes. However, in order to synchronize the effectiveness of the filed changes with the expected commercial operation of Millstone Unit 3 on or about May 1, 1986, the companies request that the effectiveness of both filings be suspended until the later of a five-month suspension beyond the requested effective date or the commercial operation of Millstone Unit 3.

HWP and HP&E state that the proposed increases to Chicopee and South Hadley would increase total revenues from jurisdictional sales and service by $5,509,000 based on the 12 month period ending December 31, 1986 (Period II). After taking into account anticipated fuel savings which will result from replacing fossil-fired generation with nuclear-powered generation when Millstone Unit 3 enters commercial operation, the total revenue increases during Period II are estimated by HWP and HP&E to be $4,301,000 or 30.2% for the two customers.

The companies state that copies of the filings were served upon Chicopee, South Hadley and the Department of Public Utilities of Massachusetts.

Comment date: September 9, 1985, in accordance with Standard Paragraph E at the end of this notice.

8. Louisiana Power and Light Company

[Docket No. ER85-683-000]

Take notice that on August 9, 1985, Louisiana Power and Light Company tendered for filing six copies of an Electric System Interconnection Agreement between the City of Winfield Louisiana and Louisiana Power and Light Company (LP&L) dated August 2, 1985.

LP&L said this agreement supersedes LP&L Supplement No. 2 to Rate Schedule FERC No. 70 which was approved in FERC Docket No. ER84-464-000 and made effective on May 7, 1984.

Comment date: September 9, 1985, in accordance with Standard Paragraph E at the end of this notice.

9. Kansas City Power & Light Company

[Docket No. ER85-695-000]

Take notice that on August 16, 1985, Kansas City Power & Light Company ("KCPL") tendered for filing an initial rate schedule for System Participation Power Service provided to the City of Osawatomie, Kansas—service Schedule H-MPA (KCPL Rate Schedule FERC No. 77). KCPL states that the rates for the service covered by the above-mentioned schedule are similar to rates based upon KCPL's incremental energy cost.

Comment date: September 9, 1985, in accordance with Standard Paragraph E at the end of this notice.

10. Kansas City Power & Light Company

[Docket No. ER85-696-000]

Take notice that on August 16, 1985, Kansas City Power & Light Company ("KCPL") tendered for filing an initial rate schedule for System Capacity Power Service provided to the City of Independence, Missouri—service Schedule G-MPA-1 (KCPL Rate Schedule FPC No. 56). KCPL states that the rates for the service covered by the above-mentioned schedule are similar to rates based upon KCPL's incremental energy cost.

Comment date: September 9, 1985, in accordance with Standard Paragraph E at the end of this notice.

11. Niagara Mohawk Power Corporation

[Docket No. ER85-697-000]

Take notice that Niagara Mohawk Power Corporation (Niagara), on August 15, 1985 tendered for filing as a rate schedule, an agreement between Niagara and the Power Authority of the State of New York (PASNY) dated May 29, 1985.

Niagara presently has on file an agreement with PASNY dated January 15, 1963. This agreement is designated as Niagara Mohawk Power Corporation Rate Schedule F.E.R.C. No. 22. This new agreement is being transmitted as a supplement to the existing agreement.

The original January 15, 1963 agreement states that Niagara will provide backup power when requested by PASNY so that PASNY can maintain an uninterrupted supply of interruptible power and energy to its aluminum reduction customers in the St. Lawrence Area. Niagara will supply the energy at a power rate not to exceed 80,000 kilowatts at any time prior to January 1, 1993 and at the rate of 40,000 kilowatts for the remainder of the agreement when and if Niagara can supply the power and energy from its generating facilities, contract resources or its interconnections without necessitating an interruption to its customers. This supplement revises the rate for emergency power as provided for in terms of the original agreement. Niagara requests waiver of the Commission's prior notice requirements in order to allow said agreement to become effective as of September 1, 1985.

Copies of the filing were served upon the following:

Power Authority of the State of New York, 10 Columbus Circle, New York, NY 10019

Public Service Commission, State of New York, Three Rockefeller State Plaza, Albany, NY 12223

Comment date: September 9, 1985, in accordance with Standard Paragraph E at the end of this notice.

12. Southwestern Electric Power Company

[Docket No. ER85-692-000]

Take notice that Southwestern Electric Power Company ("SWEPCO") on August 16, 1985, tendered for filing rates applicable to service to Cajun Electric Power Cooperative, Inc. ("Cajun") for the period February 1, 1985 to December 31, 1985. Such rates were calculated pursuant to the Contract for Electric Service between SWEPCO and Cajun, FERC Rate Schedule No. 85. SWEPCO asks that the rates be made effective as of February 1, 1985 and, accordingly, requests waiver of the notice requirements under the Federal Power Act. Copies of the filing have been served on Cajun and on the Louisiana Public Service Commission.

Comment date: September 9, 1985, in accordance with Standard Paragraph E at the end of this notice.

13. South Carolina Electric & Gas Company

[Docket No. ER85-686-000]

Take notice that South Carolina Electric & Gas Company on August 12, 1985, tendered for filing proposed cancellation of FERC Schedule No. 35 dated April 12, 1984, agreement between South Carolina Electric & Gas Company and Carolina Power & Light Company.

The cancellation is proposed to be effective 60 days after filing. South

Carolina Electric & Gas Company has sent copies of this filing to Carolina Power & Light Company.

Comment date: September 9, 1985, in accordance with Standard Paragraph E at the end of this notice.

14. Southern California Edison Company

[Docket No. ER85-691-000]

Take notice that on August 14, 1985, Southern California Edison Company (Edison) tendered for filing a notice of change of rates for the purchase of Replacement Capacity by the Cities of Anaheim (Anaheim) and Riverside (Riverside) from Edison for San Onofre Nuclear Generating Station, Unit No. 2 (SONGS Unit No. 2), under the provisions of the following rate schedules:

	Rate [1]
City of Anaheim	95
City of Riverside	94

[1] Schedule FERC No.

Edison requests waiver of the Commission's prior notice requirement and an effective date of February 26, 1985, for these rate changes.

Comment date: September 9, 1985, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Kenneth F. Plumb,

Secretary.

[FR Doc. 85-20855 Filed 8-29-85; 8:45 am]

BILLING CODE 6717-01-M

Office of Hearings and Appeals

Cases Filed Week of July 12 Through July 19, 1985

During the Week of July 12 through July 19, 1985, the appeals and applications for other relief listed in the Appendix to this Notice were filed with the Office of Hearings and Appeals of the Department of Energy. Submissions inadvertently omitted from earlier lists have also been included.

Under DOE procedural regulations, 10 CFR Part 205, any person who will be aggrieved by the DOE action sought in these cases may file written comments on the application within ten days of service of notice, as prescribed in the procedural regulations. For purposes of the regulations, the date of service of notice is deemed to be the date of publication of this Notice or the date of receipt by an aggrieved person of actual notice, whichever occurs first. All such comments shall be filed with the Office of Hearings and Appeals, Department of Energy, Washington, D.C. 20585.

Dated: August 16, 1985.

George B. Breznay,

Director, Office of Hearings and Appeals.

LIST OF CASES RECEIVED BY THE OFFICE OF HEARINGS AND APPEALS

[Week of July 12 Through July 19, 1985]

Date	Name and location of applicant	Case No.	Type of submission
June 26, 1985	Gordon K. Walz, et al., Washington, DC	HRZ-0261	Interlocutory. If granted: The law firm of Chamberlain, Hrdlicka, White, Johnson and Williams, counsel for Revere Petroleum Corporation, would be disqualified form continuing to represent the original parties in connection with the Proposed Remedial Order issued to Revere Petroleum Corporation (Case No. HRO-0125).
July 15, 1985	San Antonio Light, San Antonio, TX	HFA-0301	Appeal of a Freedom of Information Request Denial. If granted: The June 17, 1985 Freedom of Information Request Denial issud by the DOE Executive Secretariat would be rescinded, and the San Antonio Light would receive access to documents relating to an explosion that occurred at Medina Air Force Base in San Antonio, Texas.
July 17, 1985	Revere Petroleum Corporation, Houston, TX	HRZ-0262	Interlocutory. If granted: Mr. William Mutryn and his law firm, Casson, Calligaro & Mutryn, common counsel for Gordon K. Walz, John K. Walz, John Woolsey, James J. Cross, Milton F. Walz and Corum Energy Corporation would be disqualified from continuing to represent the joined parties in connection with the Proposed Remedial Order issued to Revere Petroleum Corporation (Case No. HRO-0125).
July 18, 1985	Cities Service Oil & Gas Corporation, Washington, DC	HRS-0048	Request for Stay. If granted: All proceedings involving a Proposed Remedial Order issued to Cities Service Oil & Gas Corporation (Case No. HRO-0265) would be stayed pending a determination regarding the propriety of the counsel representing the firm in this matter.
Do	Pacific Lighting Energy Systems, Commerce, CA	HFA-0302	Appeal of a Freedom of Information Request Denial. If granted: Pacific Lighting Energy Systems would receive access to certain DOE documents which were withheld by the Assistant Secretary for Policy, Safety and the Environment.
July 19, 1985	Winston Refining Company, Washington, DC	HEF-0589	Implementation of Special Refund Procedures. If granted: The Office of Hearings and Appeals would implement Special Refund Procedures pursuant to 10 C.F.R. Part 205, Subpart V, in connection with the December 20, 1983 Consent Order entered into with Winston Refining Company.

REFUND APPLICATIONS RECEIVED

[Week of July 12 to July 19, 1985]

Date received	Name of refund proceeding/name of refund applicant	Case No.
July 5, 1985	Inland/City of Fulton	RF176-1.
Do	F.O. Fletcher/Forsberg Heating Oils.	RF172-1.
July 8, 1985	Glaser/Arkansas Valley Co-op Assoc.	RF174-1.

REFUND APPLICATIONS RECEIVED—Continued

[Week of July 12 to July 19, 1985]

Date received	Name of refund proceeding/name of refund applicant	Case No.
Do	Field/Vern's Midtown Amoco Service.	RF173-1.
Do	Receive Orders/ Commonwealth Oil Refining Co.	RF171-3.

REFUND APPLICATIONS RECEIVED—Continued

[Week of July 12 to July 19, 1985]

Date received	Name of refund proceeding/name of refund applicant	Case No.
July 9, 1985	Independent Oil/Daichler Tire Center.	RF175-1.
July 12, 1985	F.O. Fletcher/Thrifty Oil Heat.	RF172-4.
July 15, 1985	Hertz/United Airlines	RF176-162.

REFUND APPLICATIONS RECEIVED—Continued

[Week of July 12 to July 19, 1985]

Date received	Name of refund proceeding/name of refund applicant	Case No.
Do	McCarty/Darke Landmark, Inc.	RF143-13.
Do	Aminoil/Lutz LP gas Company.	RF139-40.
Do	Aminoil/W. George Watkins.	RF139-41.
Do	Aminoil/Lowe's Pellets & Granin, Inc.	RF139-42.
Do	F.O. Fletcher/Save Way	RF172-2.
Do	F.O. Fletcher/Vernon Pratt.	RF172-3.
Do	Cosby-World Oil Co	RF170-6.
Do	Cosby-Auto Mat Oil Company.	RF170-5.
Do	Ayers/Morrow Service Station.	RF177-1.
Do	Aminoil/Baughman Tile Co., Inc.	RF139-45.
July 16, 1985	Husky/Montana Petroleum Marketing Co., Inc.	RF161-3.
Do	Aminoil/Terhune L.P. Gas Co.	RF139-43.
Do	Nielsen-Lueders Oil Company.	RF141-10.
Do	Red Triangle/Gennuso's Service.	RF178-1.
July 17, 1985	Aminoil/Tru-Gas of Florida, Inc.	RF139-44.
Do	Aminoil/L.H. Osting & Sons, Inc.	RF139-46.
July 18, 1985	Amoco/Kansas	RQ21-204.
Do	Receive Orders/Gulf States Oil & Refining Company.	RF171-4.
July 19, 1985	LARCO/Reimann Oil Co., Inc.	RF112-167.
Do	LARCO/Matthews, Inc	RF112-166.
Do	LARCO/Finest Oil Company.	RF112-165.
Do	Aminoil/Wilder & Son, Inc.	RF139-47.

[FR Doc. 85-20774 Filed 8-29-85; 8:45 am]

BILLING CODE 6450-01-M

Implementation of Special Refund Procedures; Budget Airport Associates, Inc. et al.

AGENCY: Office of Hearings and Appeals, DOE.

ACTION: Notice of Implementation of Special Refund Procedures.

SUMMARY: The Office of Hearings and Appeals of the Department of Energy announces the procedures for disbursement of $72,235.09 (plus accrued interest) obtained as a result of four separate consent orders which the DOE entered into with Budget Airport Associates, Inc. (Case No. HEF-0044), Consolidated Leasing Corp. (Case No. HEF-0054), Grand Rent-A-Car Corp. (Case No. HEF-0083), and Traveler's Rental, Inc. (Case No. HEF-0182). The fund will be available to customers who purchased motor gasoline from one of the consent order firms during the applicable consent order period.

DATE AND ADDRESS: Applications for Refund of a portion of the consent order funds must be postmarked within 90 days of publication of this notice in the Federal Register and should be addressed to the applicable consent order fund and sent to: Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C. 20585. All applications should conspicuously display a reference to the appropriate case number.

FOR FURTHER INFORMATION CONTACT: Richard W. Dugan, Associate Director, Office of Hearings and Appeals, 1000 Independence Avenue, S.W., Washington, D.C. 20585, (202) 252-2860.

SUPPLEMENTARY INFORMATION: In accordance with § 205.282(c) of the procedural regulations of the Department of Energy, 10 CFR 205.282(c), notice is hereby given of the issuance of the Decision and Order set out below. The Decision and Order relates to four separate consent orders entered into by the DOE and Budget Airport Associates, Inc. d/b/a Budget Rent-A-Car, Consolidated Leasing Corp., Grand Rent-A-Car Corp., and Traveler's Rental, Inc. d/b/a Dollar Rent-A-Car. The consent orders settled possible pricing violations with respect to the firms' sales of motor gasoline to customers during the applicable consent order periods. The consent order periods and consent order amounts are set forth below:

Budget: 8/1/79-8/31/80—$13,688.26
CLC: 8/1/79-8/31/80—$16,500.00
Grand: 8/1/79-1/28/81—$34,177.86
Dollar: 8/1/79-5/31/80—$7,868.97

The Office of Hearings and Appeals previously issued a Proposed Decision and Order which tentatively established a two-stage refund procedure and solicited comments from interested parties concerning the proper disposition of the consent order funds. The Proposed Decision and Order discussing the distribution of the consent order funds was issued on December 4, 1984. 49 FR 48362 (December 12, 1984).

As the Decision and Order indicates, applications for refunds from the consent order funds may now be filed. Applications will be accepted provided they are postmarked no later than 90 days after publication of this Decision and Order in the Federal Register.

Applications will be accepted from customers who purchased motor gasoline from one of the consent order firms during the relevant consent order period. The specified information required in an application for refund is set forth in the Decision and Order. The Decision and Order reserves the question of the proper distribution of any remaining consent order funds until the first-stage claims procedure is completed.

Dated: August 20, 1985.

George B. Breznay,

Director, Office of Hearings and Appeals.

Decision and Order of the Department of Energy

Special Refund Procedures

August 20, 1985.

Names of Firms: Budget Airport Associates, Inc., Consolidated Leasing Corporation, Grand Rent-A-Car Corporation, Traveler's Rental, Inc.

Date of Filings: October 13, 1983.

Case Numbers: HEF-0044, HEF-0054, HEF-0083, HEF-0182.

Pursuant to the provisions of 10 CFR Part 205, Subpart V, on October 13, 1983, the Economic Regulatory Administration (ERA) filed a Petition for the Implementation of Special Refund Procedures with the Office of Hearings and Appeals (OHA) in connection with consent orders entered into with four motor vehicle rental companies: Budget Airport Associates, Inc. d/b/a Budget Rent-A-Car (Budget), Consolidated Leasing Corp. (CLC), Grand Rent-A-Car (Grand), and Traveler's Rental, Inc. d/b/a Dollar Rent-A-Car (Dollar).[1] The Petition requests that the OHA formulate and implement procedures for the distribution of the funds received pursuant to the consent orders.

I. Background

Each of these companies is engaged in the business of renting motor vehicles. In the course of rental transactions, the firms levy a refueling charge when a customer returns a vehicle with less motor gasoline than when the vehicle was rented. According to the ERA, the firms were therefore "retailers" of motor gasoline as that term was defined in 10 CFR 212.31 and were subject to the DOE Mandatory Petroleum Price Regulations. ERA audits of the firms' operations revealed possible pricing violations of the regulations set forth in 10 CFR Part 212, Subpart F. In order to settle all claims and disputes between the firms and the DOE regarding their resale of motor gasoline during the audit periods from the audit locations, the firms entered into consent orders with the DOE. The consent orders refer to the ERA'S characterization of the firms as retailers and allegations of overcharges, and the firms' objections to the ERA's position on those issues, but note that the issues were not adjudicated. The

[1] The Budget, CLC, Grand, and Dollar consent orders were signed on July 7, 1981, March 16, 1981, March 13, 1981, and December 31, 1980 respectively.

audit periods (which are the same as the consent order periods), consent order amounts, and locations covered by the consent orders are set forth below:

Budget: 8/1/79–8/31/80—$13,688.26; L.A. Airport
CLC: 8/1/79–8/31/80—$16,500.00; L.A. Airport
Grand: 8/1/79–1/28/81—$34,177.86; L.A. Airport
Dollar: 8/1/79–5/31/80—$7,868.97; [2] Boston Airport

The ERA audits encompassed *only* the Los Angeles International Airport operations of Budget, CLC and Grand, and the Boston Logan Airport operations of Dollar.

On December 4, 1984, the OHA issued a Proposed Decision and Order (Proposed Decision) tentatively setting forth procedures to distribute refunds to parties who were injured by the firms' alleged violations in sales of motor gasoline during the consent order periods. 49 Fed. Reg. 48362 (December 12, 1984). In the Proposed Decision, we described a two-stage process for distribution of the funds made available pursuant to the consent orders. Specifically, we proposed to disburse funds in the first stage to eligible claimants who were injured by the firms' alleged overcharges. We stated that the money available after payment of refunds to eligible claimants in the first stage would be distributed during a second-stage process, and we pointed out that the ultimate disposition of those second-stage funds would not be determined until after the completion of the first stage.

The purpose of this Decision is to establish procedures to be used for filing and processing claims in the first stage of this refund proceeding. This Decision sets forth the information that a purchaser of motor gasoline from one of the consent order firms should submit in order to establish eligibility for a portion of the consent order funds. We will not, however, determine procedures for the second stage of the refund process in this Decision. Our determination concerning the final disposition of remaining funds will necessarily depend on the size of the fund. *Marion Corp.*, 12 DOE ¶ 85,014 (1984) *(Marion)*. It would therefore be premature for us to address the issues raised by a commenter concerning the disposition of funds remaining after all the meritorious first stage claims have been paid.[3]

II. Jurisdiction

The procedural regulations of the DOE set forth general guidelines to be used by the OHA in formulating and implementing a plan of distribution for funds received as a result of an enforcement proceeding. 10 CFR Part 205, Subpart V. It is DOE policy to use the Subpart V process to distribute such funds. For a more detailed discussion of Subpart V and the authority of the OHA to fashion procedures to distribute refunds obtained as a part of settlement agreements, *see Office of Enforcement*, 9 DOE ¶ 82,508 (1981); *Office of Enforcement*, 8 DOE ¶ 82,597 (1981). As we stated in the Proposed Decision, we have determined that a Subpart V proceeding is an appropriate mechanism for distributing the four consent order funds. We will therefore grant the ERA's petition and assume jurisdiction over these funds.

III. First-Stage Refund Procedures

As we indicated in the Proposed Decision, it is likely that all claimants in this proceeding will be consumers (end-users) of the motor gasoline which the consent order firms supplied. In view of the fact that the consent orders covered only the Los Angeles International Airport operations of Budget, CLC, and Grand, and the Boston Logan Airport operations of Dollar, only claimants who returned rental vehicles to those locations will be eligible for refunds in this proceeding.

In previous special refund proceedings, we have found that end-users did not pass through increased costs resulting from alleged overcharges and found that they therefore incurred injury as a result of purchases made from the consent order firm. *See Marion; Thornton Oil Corp.*, 12 DOE ¶ 80,105 (1984). Consistent with these precedents, we have determined that the vehicle rental customers who are eligible to apply in this proceeding were injured by any alleged overcharges which occurred. To be eligible for a refund, claimants must only document the specific quantities of motor gasoline for which they paid a refueling charge to the consent order firm during the applicable consent order period.[4]

In the Proposed Decision, we noted that many customers' receipts do not indicate the number of gallons purchased from the rental company, but instead merely state the dollar amount of the refueling fee. By dividing the total refueling dollar amount by the price per gallon, applicants will be able to calculate the gallonage which they purchased from the company. In the case of Dollar, the records indicate that during the period August 1, 1979 through November 21, 1979, the firm charged $1.09 per gallon. From November 22, 1979, through May 31, 1980, Dollar charged $1.30 per gallon. (These amounts were also used for a one gallon "top off" fee charged by Dollar to all customers. Claimants who paid this "top off" charge will also be eligible for a refund.)

In the cases of Budget, CLC, and Grand, however, we have no records that would indicate the prices charged by the firms. In the Proposed Decision, we proposed that customers of these rental companies use the price data that we have for Dollar to calculate their refueling gallonage. Since we have received no objection to this proposal, we will adopt it in this proceeding. We believe that the Dollar figure closely approximates the charges levied by other firms since not only were the business operations similiar, but also the consent order periods overlap. Therefore, applicants should apply the $1.09 per gallon amount on purchases made between August 1, 1979 and November 21, 1979, and the $1.30 per gallon amount for purchases made after November 21, 1979 through the period covered by the applicable consent order.

We will also adopt our proposal that refunds be calculated according to a volumetric method. Under this method, refunds will be computed by multiplying an applicant's total purchase volumes by a per gallon volumetric amount derived by dividing the applicable consent order firm's settlement amount by the total volume of motor gasoline sold by the firm during the consent order period. While we do not know the precise amount of motor gasoline sold by each of the rental companies from its audited location during the consent order period, each firm has provided a reasonable estimate of the volume of motor gasoline it sold. Based upon these figures, we have established a volumetric amount for each case.[5] The

[3] Comments on the second-stage refund procedures were filed by the State of New Mexico. The State argues that any funds remaining in the consent order fund after refunds are distributed to meritorious claimants should be distributed to the states for use in energy-related projects.

[4] This showing will also be sufficient for any claimant who is a petroleum refiner or reseller and whose refund calculated under the volumetric presumption amounts established in this proceeding is $5,000 or less. *See The Hertz Corp./Conoco Inc.*, 13 DOE ¶85,041 at 88,097 n.1 (1985).

[5] Claimants may seek to establish that the volumetric refund presumption should not be applied in their cases. In order to do so, they must demonstrate that the alleged overcharges resolved by the consent order were disproportionately borne by them, resulting in a level of probable injury in excess of the volumetric presumption. *See Office of Special Counsel*, 10 DOE ¶85,048 at 88,199 (1982).

per gallon volumetric amount for each proceeding is set forth below:

Budget: $0.01239—($13,668.26 divided by 1,105,000)
CLC: $0.01269—($16,500.00 divided by 1,300,000)
Grand: $0.00774—($34,177.86 divided by 4,413,200)
Dollar: $0.03319—($7,868.97 divided by 237,070)

An eligible applicant will also receive a proportionate share of the interest which has accrued on the respective consent order fund since its remittance to the DOE.

We recognize that it is likely that many of the affected customers were individual motorists who purchased very small amounts of gasoline in isolated transactions. As a result, the amount of refunds to which most individual customers will be entitled will be very small. As in prior special refund cases, we will not approve refunds for less than $15.00 (the approximate cost to the government of issuing refund checks) because the cost to the public of issuing such small refunds exceeds the restitutionary benefits which may be achieved. *See e.g., Uban Oil Co.*, 9 DOE ¶82,541 at 85,225 (1982).

V. Application for Refund Procedures

We have determined that the procedures described above are the most equitable and efficacious for purposes of distributing the consent order funds. Accordingly, we shall now accept applications for refunds from customers who rented motor vehicles from one of the consent order frims and incurred refueling charges during the consent order period.

Each application should contain the following information:

1. The refund applicant's name and reference to the applicable case number: Budget, HEF-00444; Consolidated Leasing Corp., HEF-0054; Grand, HEF-0083; or Dollar, HEF-0182.

2. The name and telephone number of a person who may be contacted by this Office for additional information concerning the application.

3. The location where the rental transactions occurred.

4. The *total gallons* of motor gasoline for which a refund is claimed as a result of payment of refueling charges, including Dollar's "top off" charges.

5. If the total gallonage is extrapolated from refueling fees, indicate the total refueling charges incurred.

6. If an application is based upon estimates, indicate the method used to arrive at those estimates.

7. A brief explanation of the nature of the applicant's business and car rental usage, e.g., sales or field work, company car leasing arrangements. This information will help to support the number of rentals indicated in a refund application.

8. Each application must also include the following statement: "I swear (or affirm) that the information submitted is true and accurate to the best of my knowledge and belief." *See* 10 CFR 205.283(c); 18 U.S.C. ¶ 1001.

All applications should be filed in duplicate and sent to: Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C. 20585. All applications must be received within 90 days after publication of the Decision and Order in the **Federal Register.** A copy of each application will be available for public inspection in the Public Docket Room of the OHA. Any applicant who believes that its application contains confidential information must so indicate and submit two additional copies of its application from which the confidential information has been deleted, together with a statement specifying why any such information is privileged or confidential.

It Is Therefore Ordered That:

(1) Applications for Refund from the funds remitted to the Department of Energy by the Budget Airport Associates, Inc., Consolidated Leasing Corporation, Grand Rent-A-Car Corporation, and Traveler's Rental, Inc. may now be filed.

(2) All applications must be filed no later than 90 days after publication of this Decision and Order in the **Federal Register.**

Dated: August 20, 1985.

George B. Breznay,

Director, Office of Hearings and Appeals.

[FR Doc. 85-20763 Filed 8-29-85; 8:45 am]

BILLING CODE 6450-01-M

Implementation of Special Refund Procedures; Northeast Petroleum Industries

AGENCY: Office of Hearings and Appeals, DOE.

ACTION: Notice of implementation of special refund procedures.

SUMMARY: The Office of Hearings and Appeals of the Department of Energy announces the procedures for the disbursement of $322,748 obtained as a result of a consent order which the DOE entered into with Northeast Petroleum Industries, a reseller of petroleum products located in Chelsea, Massachusetts. The money is being held in escrow following the settlement of enforcement proceedings brought by the DOE's Economic Regulatory Administration.

DATE AND ADDRESS: Applications for refund of a portion of the Northeast consent order funds must be filed in duplicate and must be received within 90 days of publication of this notice in the **Federal Register.** All applications should refer to Case Number HEF-0137 and should be addressed to: Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, SW., Washington, D.C. 20585.

FOR FURTHER INFORMATION CONTACT: Sharon Dennis, Office of Hearings and Appeals, 1000 Independence Avenue, SW., Washington, D.C. 20585 (202) 252-6602.

SUPPLEMENTARY INFORMATION: In accordance with §205.282(c) of the procedural regulations of the Department of Energy, 10 CFR 205.282(c), notice is hereby given of the issuance of the Decision and Order set out forth below. The Decision relates to a consent order entered into by the DOE and Northeast Petroleum Industries, which settled possible pricing violations in Northeast's sales of residual fuel oil to its customers during the consent order period, November 1, 1973, through June 30, 1975. A Proposed Decision and Order tentatively establishing refund procedures and soliciting comments from the public concerning the distribution of the Northeast consent order funds was issued on June 4, 1985. 50 FR 24,819 (June 13, 1985).

The Decision sets forth procedures and standards that the DOE has formulated to distribute the contents of the escrow account funded by Northeast pursuant to the consent order. The DOE has decided that a portion of the consent order funds should be distributed to two first purchasers which the DOE's audit of Northeast indicated may have been overcharged, provided each files an application for refund and demonstrates injury. Applications for refund will also be accepted from purchasers not identified by the DOE audit, as well as downstream customers of the identified purchasers. These purchasers will be required to provide specific documentation concerning the date, place, price, and volume of product purchased, the name of the firm from which the purchase was made, and the extent of any injury alleged.

As the Decision and Order published with this Notice indicates, applications for refunds may now be filed by customers who purchased residual fuel oil from Northeast during the consent order period. Applications will be accepted provided they are filed in

duplicate and are received no later than 90 days after publication of this Decision and Order in the Federal Register. The specific information required in an application for refund is set forth in the Decision and Order.

Dated: August 20, 1985.

George B. Breznay,

Director, Office of Hearings and Appeals.

Decision and Order of the Department of Energy

Special Refund Procedures

August 20, 1985.

Name of Firm: Northeast Petroleum Industries.

Date of Filing: October 13, 1983.

Case Number: HEF-0137.

In accordance with the procedural regulations of the Department of Energy (DOE), 10 CFR Part 205, Subpart V, on October 13, 1983, the Economic Regulatory Administration (ERA) filed a Petition for the Implementation of Special Refund Procedures with the Office of Hearings and Appeals (OHA). The petition requests that the OHA formulate and implement procedures for the distribution of funds received in connection with a consent order that ERA entered into with Northeast Petroleum Industries (Northeast).

I. Background

Northeast is a "reseller" of "covered products" as those terms were defined in 10 CFR 212.31, and is located in Chelsea, Massachusetts. A DOE audit of the firm's records revealed possible violations of the Mandatory Petroleum Price and Allocation Regulations with respect to sales of No. 6 residual fuel oil during the period November 1, 1973 through June 30, 1975 (audit period). In order to settle all claims and disputes between Northeast and the DOE regarding the firm's sales of No. 6 residual fuel during the audit period, Northeast and the DOE entered into a consent order on June 19, 1979. The consent order refers to ERA's allegations of overcharges, but notes that no findings of violation were made. Additionally, the consent order states that Northeast does not admit that it committed any such violations. Finally, according to the Northeast consent order, the alleged overcharges affected two classes of customers, and separate processes were established by which Northeast would make refunds. Initially, Northeast agreed to refund $167,252, including interest, directly to two end-user customers.[1] In addition, the firm agreed to place $322,748, including interest to the date of deposit, into an escrow account for DOE to distribute to its other purchasers. The consent order funds were paid in full on April 30, 1982. This Decision concerns the distribution of the consent order funds that were deposited in the Northeast escrow account, plus accrued interest to date.[2]

On June 4, 1985, a Proposed Decision and Order (PD&O) was issued which set forth a tentative plan for the distribution of the Northeast consent order funds. The PD&O stated that the basic purpose of a special refund proceeding is to make restitution for injuries which were probably suffered as a result of alleged or actual violations of the DOE regulations. In order to effect restitution in this proceeding, we tentatively determined to rely, in part, on the information contained in the ERA audit files. The PD&O stated that this approach is warranted based upon our experience in prior Subpart V cases where all or most of the purchasers of the firm's products are identified in the audit file, *see, e.g., Marion Corp.*, 12 DOE ¶ 85,014 (1984) (*Marion*). Under such circumstances, a more precise determination with respect to the identity of the parties allegedly overcharged in the first instance was possible. At the same time, we recognized that there may have been other purchasers not identified by the ERA audit who may have been injured as a result of Northeast's pricing practices during the audit period that would be entitled to a portion of the consent order funds. Therefore, procedures by which such purchasers could establish a refund claim in this proceeding were also proposed.

A copy of the PD&O was published in the Federal Register and comments were solicited regarding the proposed refund procedures. In addition, a copy of the PD&O was sent to each purchaser identified in the ERA audit file.

II. Refund Procedures

The procedural regualtions of the DOE set forth general guidelines to be used by the OHA in formulating and implementing a plan of distribution for funds received as a result of an enforcement proceeding. 10 CFR Part 205, Subpart V. The Subpart V process may be used in situations where the DOE is unable to identify readily those persons who likely were injured by alleged overcharges or to ascertain readily the amount of such persons' injuries. For a more detailed discussion of Subpart V and the authority of the OHA to fashion procedures to distribute refunds, *see Office of Enforcement*, 9 DOE ¶ 82,508 (1981), *and Office of Enforcement*, 8 DOE ¶ 82,597 (1981).

A. Refunds to Identified Purchasers

In the PD&O we stated that during the Northeast audit, two first purchasers were identified as having allegedly been overcharged. DOE audit files do not necessarily provide conclusive evidence as to the identity of possible refund recipients or the refund that may be appropriate. However, the information contained in the audit files may reasonably be used for guidance. *See Armstrong and Associates/City of San Antonio*, 10 DOE ¶ 85,050 at 88,259 (1983). In *Marion*, we stated that "the information contained in the . . . audit file can be used for guidance in fashioning a refund plan which is likely to correspond more closely to the injuries probably experienced than would a distribution plan based solely on a volumetric approach." *Marion* at 88,031. In previous cases of this type, we have proposed that the funds in the escrow account be apportioned either among the customers identified by the audit or to their downstream purchasers. *See, e.g., Bob's Oil Co.*, 12 DOE ¶ 85,024 (1984); *Brown Oil Co.*, 12 DOE ¶ 85,028 (1984). The first purchasers identified by the audit, along with the share of settlement funds allotted to each by ERA, are listed in the Appendix.

Identification of first purchasers is only the initial step in the distribution process. We must also determine whether these first purchasers were actually injured, or whether any part of the alleged overcharges were passed on. As we stated in the PD&O, we will adopt certain presumptions in order to assist in determining a purchaser's level of injury. Presumptions in refund cases are specifically authorized by applicable DOE procedural regulations. Section 205.282(e) of those regulations states that:

[1] Our records show that these refunds were made to New England Power Service Company and Boston Edison Company.

[2] Northeast has also deposited funds into three other escrow accounts. One account represented alleged overcharges on motor gasoline during the period November 1, 1973 through April 30, 1974, and has already been distributed in first and second stage refund proceedings. *See* Northeast Petroleum Industries, 11 DOE ¶ 85,199 (1983). The two other accounts represent, respectively, Northeast's alleged overcharges on motor gasoline during the period May 1, 1974 through August 31, 1979, *see* Northeast Petroleum Industries, Case No. HEF-0138, and Northeast's alleged overcharges on crude oil and residual fuel oil during the period January 1, 1973 through January 28, 1981, *see* Northeast Petroleum Industries, Case No. HEF-0580. The procedures we are proposing below, however, apply only to the escrow account into which Northeast deposited the $322,748.

[i]n establishing standards and procedures for implementing refund distributions, the Office of Hearings and Appeals shall take into account the desirability of distributing the refunds in an efficient, effective and equitable manner and resolving to the maximum extent practicable all outstanding claims. In order to do so, the standards for evaluation of individual claims may be based upon appropriate presumptions.

10 CFR 205.282(e). We will adopt presumptions in this case in order to permit claimants to participate in the refund process without disproportionate expense, and to enable OHA to consider the refund applications in the most efficient way possible in view of the limited resources available.

As in previous special refund procedures, in this case we will adopt a presumption that claimants seeking small refunds were injured by Northeast's pricing practices. There are a variety of reasons for adopting this presumption. *See, e.g., Uban Oil Co.*, 9 DOE ¶ 82,541 (1982). As we have noted in many previous refund decisions, there may be considerable expense involved in gathering the types of data needed to support a detailed claim of injury. In order to prove such a claim, an applicant must compile and submit detailed facutal information regarding the impact of alleged overcharges which took place many years ago. This procedure certainly can be time-consuming and expensive. In the case of small claims, the cost to the firm of gathering this factual information, and the cost to OHA of analyzing it, may exceed the expected refund amount. Failure to adopt simplified applicaiton procedures for small claims could therefore operate to deprive injured parties of the opportunity to obtain a refund. The use of presumptions is also desirable from an administrative standpoint, because it allows OHA to process a large number of routine refund claims quickly, and to use its limited resources more efficiently. Finally, these small claimants did purchase covered products from Northeast and were in the chain of distribution where the alleged overcharges occurred. Therefore, they were affected by the alleged overcharges, at least initially. The presumption eliminates the need for a claimant to submit, and the OHA to analyze, detailed proof of what happened downstream of that initial impact.

Under the small claim presumption which we will adopt, a claimant who is a reseller or retailer would not be required to submit any additional evidence of injury if its refund claim is based on purchases below a threshold level. Other refund decisions have expressed the threshold either in terms of purchase volumes or dollar amounts. However, in *Texas Oil & Gas Corp.*, 12 DOE ¶ 85,069 (1984), we noted that describing the threshold in terms of a dollar amount rather than a purchase volume figure would more readily facilitate disbursements to applicants seeking relatively small refunds. *Id.* at 88,210. This case merits the same approach. Several factors determine the value of the threshold below which a claimant is not required to submit any further evidence of injury beyond volumes purchased. One of these factors is the concern that the cost to the applicant and the government of compiling and analyzing information sufficient to show injury not exceed the amount of the refund to be gained. In these cases, where the consent order fund is small, the refund amount is fairly low, and the time period of the consent order is many years past, establishing a threshold of $5,000 would be reasonable. *See Texas Oil & Gas Corp.*, 12 DOE ¶ 85,069 (1984); *Office of Special Counsel: In the Matter of Conoco, Inc.*, 11 DOE ¶ 85,226 (1984), and cases cited therein.

The share of the escrow fund which the listed purchasers in the Appendix may receive represents 90 percent of the amount each was allegedly overcharged, and is consistent with the terms of the Northeast consent order, which settled for 90 percent of the total amount of alleged overcharges identified by the audit. In order to actually receive a refund each customer is required to file an application for refund. (*See* discussion *infra*).

However, since the refunds allotted to the Northeast's reseller customers exceed $5,000—and therefore are larger than a "small claim"—these firms are required to make a specific demonstration of injury prior to receiving the full refund allotted to them in the Appendix. As in previous special refund cases, these firms must show that they did not pass the effects of Northeast's alleged regulatory violations through to their own customers. *See, e.g., Office of Enforcement*, 8 DOE ¶ 82,597 (1981). While there are a variety of means by which they could make this showing, these firms should generally demonstrate that at the time they purchased Northeast's products, market conditions would not permit them to pass the alleged overcharged on to their own customers in the form of higher prices. In addition, the firms must show that they maintained a "bank" of unrecovered costs in order to demonstrate that they did not subsequently recover these costs by increasing their prices. The maintenance of a bank will not, however, automatically establish injury. *See Tenneco Oil Co./Chevron U.S.A., Inc.*, 10 DOE ¶ 85,014 (1982); *Vickers Energy Corp./Standard Oil Co.*, 10 DOE ¶ 85,036 (1982); *Vickers Energy Corp./Koch Industries, Inc.*, 10 DOE ¶ 85,038 (1982). To the extent that the alleged overcharges were passed through, downstream customers of these first purchasers may be eligible to apply for refunds in this proceeding.

B. Refunds to Other Purchasers

There may also have been first purchasers other than those identified by the ERA audit, as well as subsequent repurchasers, who may have been injured by the alleged overcharges and who therefore could be entitled to a portion of the consent order funds. In light of this, we will contact Northeast and publish notice of this Decision and Order in the **Federal Register**, in an effort to reach these purchasers. We will accept information regarding the identity and present locations of these purchasers for a period of 90 days following publication in the **Federal Register** of notice of this final Decision and Order.

In addition to the presumptions we are adopting, we are making a finding that end-users or ultimate consumers whose businesses are unrelated to the petroleum indusry were injured by the alleged overcharges settled in the consent order. Unlike regulated firms in the petroleum industry, members of this group generally were not subject to price controls during the consent order period, and they were not required to keep records which justified selling price increases by reference to cost increases. For these reasons, an analysis of the impact of the alleged overcharges on the final prices of non-petroleum goods and services would be beyond the scope of a special refund proceeding. *See Office of Enforcement, Economic Regulatory Administration; In the Matter of PVM Oil Associates, Inc.*, 10 DOE ¶ 85,072 (1983); *see also Texas Oil & Gas Corp.*, 12 DOE ¶ 85,069 (1984), and cases cited therein. We have concluded that end-users of Northeast petroleum products need only document their purchase volumes from Northeast to make a sufficient showing that they were injured by the alleged overcharges. As we indicated in the PD&O, if additional meritorious claims are filed, we will adjust the figures listed in the Appendix accordingly. Actual refunds will be determined only after analyzing all appropriate claims.[3]

[3] Purchasers identified in the ERA audit of Northeast as having allegedly been overcharged

Continued

Finally, as we indicated in the PD&O, we will establish a minimum amount of $15 for refund claims. We have found through our experience in prior refund cases that the cost of processing claims in which refunds are sought for amounts less than $15 outweights the modest benefits of restitution in those situations. *See, e.g., Uban, supra* at 85,225, *See also* 10 CFR 205.286(b).

III. Applications for Refund

We have concluded that the procedures described in the PD&O represent the best means available for distributing the Northeast consent order funds. No comments were received objecting to the refund procedures proposed in the PD&O. Accordingly, for the reasons stated in the PD&O we will implement these proposals. We shall now accept applications for refunds from customers who purchased No. 6 residual fuel oil from Northeast during the audit period. As proposed, the consent order funds will be distributed to the firms that the ERA alleged in its audit were overcharged by Northeast, provided each files an application, as well as to other eligible customers of Northeast who apply for a refund.

In order to receive a refund each claimant will be required to submit with its application, either a schedule of its monthly purchases of residual fuel oil from Northeast or a statement verifing that it purchased residual fuel oil from Northeast and is willing to rely on the data in the audit file. Claimants must indicate, as well, whether they have previously received a refund, from any source, with respect to the alleged overcharges identified in the ERA audit underlying these proceedings.

Purchasers not identified by the ERA audit will be required to provide specific information as to the date, place, and volume of products purchased, the name of the firm from which the purchase was made, and the extent of any injury alleged. A purchaser must indicate, as well, how it used the Northeast product, *i.e.*, whether it was a reseller or ultimate consumer. Each applicant must also state whether there has been a change in ownership of the firm since the audit period, and must provide the names and addresses of any other owners. If there had been a change in ownership, the applicant should either state the reasons why the refund should be paid to the applicant rather than the other owners or provide a signed statement from the other owners indicating that they do not claim a refund.

All applications must be filed in duplicate and must be received within 90 days after publication of this Decision and Order in the **Federal Register**. A copy of each application will be available for public inspection in the Public Docket Room of the Office of Hearings and Appeals. Any applicant who believes that its application contains confidential information must so indicate and submit two additional copies of its application from which the information that the applicant claims is confidential has been deleted. Each application must also include the following statement: "I swear (or affirm) that the information submitted is true and accurate to the best of my knowledge and belief." *See* 10 CFR 205.283(c); 18 U.S.C. 1001. In addition, the applicant should furnish us with the name and telephone number of a person who may be contacted by this Office for additional information concerning the application. All applications should refer to Case Number HEF-0137 (Northeast) and should be sent to: Office of Hearings and Appeals, Department of Energy, 1000 Independence Ave., S.W., Washington, D.C. 20585.

It is therefore ordered that:

(1) Applications for refunds from the funds remitted to the Department of Energy by Northeast Petroleum Industries pursuant to the consent order executed on June 19, 1979, may now be filed.

(2) All applications must be filed no later than 90 days after publication of this Decision and Order in the **Federal Register**.

(3) This is a final order of the Department of Energy.

Dated: August 20, 1985.

George B. Breznay,

Director, Office of Hearings and Appeals.

Appendix

NORTHEAST PETROLEUM INDUSTRIES, INC.

First purchaser	Portion of settlement amount *
Exxon Company, U.S.A.	$30,534
Atlantic Richfield Company	292,214

* Includes interest through Apr. 30, 1982.

[FR Doc. 85-20761 Filed 8-29-85; 8:45 am]

BILLING CODE 6450-01-M

Implementation of Special Refund Procedures; VGS Corp./Southland Oil Co.

AGENCY: Office of Hearings and Appeals, DOE.

ACTION: Notice of Implementation of Special Refund Procedures.

SUMMARY: The Office of Hearings and Appeals of the Department of Energy announces the procedures for filing Applications for Refund from funds obtained from VGS Corporation/ Southland Oil Company, Young Refining Corporation, and Macmillan Ring-Free Oil Co., Inc., in settlement of all issues regarding each firm's application of the federal petroleum price and allocation regulations.

DATE AND ADDRESS: Applications for refund must be postmarked by November 29, 1985, should conspicuously display a reference to case number HEF-0225 (VGS), HEF-0228 (Young), or HEF-0506 (Macmillan), and should be addressed to: Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, SW., Washington, D.C. 20585.

FOR FURTHER INFORMATION CONTACT: Geoffrey D. Stein, Office of Hearings and Appeals, 1000 Independence Avenue, SW., Washington, D.C. 20585 (202) 252-6602.

SUPPLEMENTARY INFORMATION: In accordance with § 205.282(c) of the procedural regulations of the Department of Energy, 10 CFR 205.282(c), notice is hereby given of the issuance of the Decision and Order set forth below. The Decision and Order establishes procedures to distribute funds obtained as a result of consent orders between the DOE, VGS Corporation, Young Refining Corporation, and Macmillan Ring-Free Oil Co., Inc. (the consent order firms). The consent orders settled all disputes between the DOE and the consent order firms concerning possible violations of DOE price and allocation regulations with respect to each firm's sales of refined petroleum products to its customers in certain periods during the federal regulation of petroleum products.

Any members of the public who believe that they are entitled to a refund in this proceeding may file Applications for Refund. All Applications should be postmarked by November 29, 1985, and should be sent to the address set forth at the beginning of this notice. Applications for refunds must be filed in duplicate and these applications will be made available for public inspection between the hours of 1:00 and 5:00 p.m., Monday through Friday, except federal holidays, in the Public Docket Room of the Office of Hearings and Appeals, located in Room 1E-234, 1000 Independence Avenue, SW., Washington, D.C. 20585.

may also submit information to show that they are entitled to larger refunds than those indicated in the Appendix. *See* Standard Oil Co. (Indiana)/Army & Air Force Exchange Service, 12 DOE ¶ 85,015 (1984).

Dated: August 21, 1985.

George B. Breznay,

Director, Office of Hearings and Appeals.

Decision and Order of the Department of Energy

Special Refund Procedures

August 21, 1985.

Names of Cases: VGS Corporation, Young Refining Corporation, Macmillan Ring-Free Oil Co., Inc.

Dates of Filing: October 13, 1983, October 13, 1983, July 25, 1984.

Case Numbers: HEF-0225, HEF-0228, HEF-0506.

The procedural regulations of the Department of Energy (DOE) permit the Economic Regulatory Administration (ERA) to request that the Office of Hearings and Appeals (OHA) formulate and implement procedures for distributing funds received as a result of an enforcement proceeding involving alleged violations of DOE regulations. *See* 10 CFR Part 205, Subpart V. In accordance with these regulatory provisions, the ERA filed Petitions for the Implementation of Special Refund Procedures in connection with consent orders entered into with VGS Corporation (VGS), Young Refining Corporation (Young), and Macmillan Ring-Free Oil Co., Inc. (Macmillan) (hereinafter referred to collectively as the consent order firms).

I. Background

The consent order firms were "refiners" of petroleum products as that term was defined in 10 CFR 212.31. During the consent order period, the consent order firms engaged in the production, refining, and marketing of products covered by the federal petroleum price and allocation regulations set forth in 10 CFR Part 212. The ERA audited the consent order firms to determine their compliance with these regulations. During the course of the audit process, each firm entered into a consent order with the DOE, whereby the firm agreed to remit funds to the DOE to resolve all issues involving its compliance with the regulations during the consent order period.

VGS agreed to refund $1,010,000 to resolve all issues regarding its application of the price regulations during the period December 1, 1973 to January 27, 1981.[1] Notice of this proposed consent order was published for public comment at 46 FR 35963 (1981). Comments were filed by five interested parties.[2] This proposed consent order was adopted without modification as a final order of the DOE on September 1, 1981. 46 FR 43873 (1981).

Young agreed to refund $75,000 to resolve all issues regarding its application of the price regulations during the period August 19, 1973 to April 30, 1974. Notice of this proposed consent order was published for public comment at 46 FR 10976 (1981), and one comment was filed by Hercules Incorporated of Wilmington, Delaware. The consent order was subsequently adopted without modification as a final order of the DOE.

Macmillan agreed to refund $1,550,000 to resolve all issues regarding its application of the price and allocation regulations during the period August 19, 1973 to January 27, 1981. Notice of this proposed consent order was published for public comment at 47 FR 34182 (1982). Comments were received from several interested parties. The proposed consent order was adopted without modification as a final order of the DOE on November 4, 1982. 47 FR 50081 (1982). After the consent order was finalized, the ERA determined that $299,721 should be distributed from the Macmillan consent order fund to six end-user purchasers of "general refinery products".[3] ERA's Petition in the Macmillan proceeding covers the remaining $1,250,279 in the escrow account deposited with the DOE.

On April 17, 1985, the OHA issued a Proposed Decision and Order (PD&O) setting forth a tentative plan for the distribution of the funds that had been deposited with the DOE by the consent order firms. 50 FR 16132 (April 24, 1985). In the PD&O, we described a two-stage process for disbursing refunds. In the first stage, refunds would be made to identifiable purchasers of covered products who may have been injured by a consent order firm's pricing practices, during the applicable consent order period. This decision describes the information that purchasers of a consent order firm's petroleum products should submit in order to demonstrate eligibility for a portion of the consent order funds. After these meritorious claims are paid, a second stage may become necessary if funds remain.

Comments were solicited regarding the proposed refund procedures outlined in the PD&O. Nine states, Southern California Edison Company, the Jackson, Mississippi Municipal Airport Authority, and Tenneco Oil Company filed comments in response to the PD&O.[4] These comments are discussed in the following presentation of the procedures we are adapting. In addition, each of the nine states commented on the distribution of residual funds in a second-stage proceeding. The formulation of procedures for the final disposition of any funds remaining after meritorious claims have been paid will necessarily depend on the size of the fund. *See Office of Enforcement,* 9 DOE ¶ 82,508 (1981). Accordingly, it would be premature for us to address at this time the issues raised by the states' comments concerning disposition of second-stage funds.

II. Refund Procedures

The procedural regulations of the DOE set forth general guidelines to be used by the OHA in formulating and implementing plans to distribute funds received as a result of an enforcement proceeding. 10 CFP Part 205, Subpart V. The Subpart V process may be used in situations where the DOE is unable to identify readily those persons who likely were injured by alleged overcharges or to ascertain readily the amount of such persons' injuries. For a more detailed discussion of Subpart V and the authority of the OHA to fashion procedures to distribute refunds *see Office of Enforcement,* 9 DOE ¶ 82,508 (1981), *and Office of Enforcement,* 8 DOE § 82,597 (1981).

A. Crude Oil Claims

The Macmillan consent order resolves the firm's alleged violations of both the petroleum price and allocation regulations. With regard to the allocation regulations, the consent order specifically settled alleged violations of the DOE Crude Oil Entitlements Program uncovered during the audit of Macmillan. In the PD&O, we proposed dividing the Macmillan consent order fund into two pools. We tentatively decided to set aside a pro rata portion of the consent order fund for claims filed by Entitlements Program participants and their downstream customers. We also stated that those funds would be

[1] VGS marketed all of its petroleum products under the name Southland Oil Company.

[2] The five VGS commenters were: Miller Transporters, Inc. of Jackson, Mississippi; the Jackson, Mississippi Municipal Airport Authority; the Mississippi State Highway Department; Mrs. Jessie C. Vaughan, Jr. of Yazoo City, Mississippi; and Mr. Travis Fitts of Kosciusko, Mississippi.

[3] The six end-user firms were: California-Portland; United States Defense Fuel Supply Center; General Carbon Company; Nevada Power Company; Salt River Project; and Southern California Edison Company. The "general refinery products" sold by Macmillan consisted of lube oils, residual fuel oil, naphtha, and jet fuel.

[4] Arkansas, Delaware, Iowa, Louisiana, North Dakota, Rhode Island, and West Virginia submitted comments as a group. Texas and Florida each filed separate comments.

distributed in accordance with the OHA's findings in the *Department of Energy Stripper Well Litigation* regarding the incidence of injury arising from crude oil overcharges. Since the PD&O was issued, however, the OHA has completed its fact-finding in the *Stripper Well* proceeding, and the Department of Energy has established its policy regarding the future distribution of funds received in settlement of alleged crude oil overcharges. 50 FR 27400 (July 2, 1985). In view of the DOE's recommendation that the overcharges in the *Stripper Well* proceeding would be best distributed on an indirect basis by the Congress of the United States, the OHA intends to place all crude oil funds received pursuant to Subpart V into an escrow account for similar indirect distribution. 50 FR at 27403. In accordance with this policy, a pro rata portion of the Macmillan consent order fund—$449,500 plus accrued interest—will be pooled with other crude oil consent order funds for future distribution.[5]

Tenneco Oil Company (Tenneco) filed comments requesting clarification of the scope of the Macmillan consent order regarding alleged crude oil violations. Specifically, Tenneco wishes to know whether the consent order covers crude oil transactions which may have occurred during the consent order period but before the Entitlements Program began in September 1974. In response to this inquiry we examined the Macmillan consent order and a previous Notice of Probable Violation issued by the ERA to Macmillan concerning alleged Entitlements Program violations. We have determined that Macmillan's alleged violations involved the firm's reporting of crude milk receipts and runs to stills as a refiner, and that the firm apparently did not engage in crude oil sales at any time during the consent order period. Furthermore, Tenneco has not suggested that it purchased crude oil from Macmillan during this period. We therefore do not expect to receive any claims in this proceeding relating to crude oil transactions which occurred prior to the onset of the Entitlement Program.

B. Refined Products Claims

The remaining $800,779 of the Macmillan consent order fund, as well as all of the VGS and Young consent order funds, relate to alleged violations of refined products pricing and allocation regulations. During the first stage in the refund process, consent order funds will be distributed to claimants who satisfactorily demonstrate that they have been adversely affected by alleged overcharges in sales of covered products. As in many prior special refund cases, we will adopt certain presumptions. First, we will adopt a presumption that the alleged overcharges were dispersed equally in all sales of products made by the consent order firms. We will therefore calculate refunds based on a per-gallon, volumetric refund amount. Second, we will adopt a presumption of injury with respect to small claims.

Presumptions in refund cases are specifically authorized by applicable DOE procedural regulations. Section 205.282(e) of those regulations states that:

> [i]n establishing standards and procedures for implementing refund distributions, the Office of Hearings and Appeals shall take into account the desirability of distributing the refunds in an efficient, effective and equitable manner and resolving to the maximum extent practicable all outstanding claims. In order to do so, the standards for evaluation of individual claims may be based upon appropriate presumptions.

10 CFR 205.282(e). The presumptions to be adopted in this case will permit claimants to participate in the refund process without incurring disproportionate expenses, and will enable the OHA to consider refund applications in the most efficient way possible in view of the limited resources available.

A claimant will be eligible to receive a refund equal to the documented number of gallons of covered products it bought from a consent order firm during the applicable consent order period, multiplied by a volumetric percentage. This percentage is computed by dividing the amount of each consent order fund by the total number of gallons of covered products sold by each firm during the consent order period. The calculation of the volumetric percentage for the three consent order funds is presented in the following table:

Firm	Sales of covered products during consent order period (gallons)	Consent order funds for refined products claims	Volumetric refund amount
VGS	704,146,220	$1,010,000	$.001434
Young	11,105,970	75,000	.006753
Macmillan	1,159,432,400	800,779	.000690

In addition, interest which has accrued on the consent order funds will be applied to each paid refund on a pro rata basis.

The pro rata, or volumetric, refund presumption assumes that alleged overcharges by a consent order firm were spread equally over all gallons of product marketed by that firm. In the absence of better information, this assumption is sound because the DOE price regulations generally required a regulated firm to account for increased costs on a firm-wide basis in determining its prices. However, we also recognize that the impact on an individual purchaser may have been greater than the pro rata amount determined by the volumetric presumption. Certain purchasers may believe that they suffered disproportionate injury as a result of a firm's pricing practices during the consent order period. Any such purchaser may file a refund application requesting an amount greater than that calculated using the volumetric presumption, provided that the claimant documents the disproportionate impact on it of the alleged overcharges. *See, e.g., Sid Richardson Carbon and Gasoline Co. and Richardson Products Co./Siouxland Propane Co.*, 12 DOE ¶ 85,054 (1984), and cases cited therein at 88,164.

In the PD&O, we tentatively determined that resellers and retailers seeking refunds totalling $5,000 or less under the volumetric presumption would not be required to demonstrate further any injury resulting from the alleged overcharges. The State of Texas filed comments opposing adoption of this presumption. Texas argues that the OHA would unjustly enrich small claimants by not requiring a showing of injury of all refund applicants, and it contends that first-stage refunds should be paid only to those parties who can prove that they did not pass on the alleged overcharges, regardless of the amount of the claim. We have considered this comment but remain convinced that the small-claims presumption is sound.

The adoption of a presumption of injury for smaller claims is based on a number of important considerations. First, because of the complexity of the pricing issues involved and the time elapsed since the alleged overcharges took place, attempts at restitution to deserving parties necessarily will be inexact. *See Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717, 722–23 (TECA 1982). It is our experience in similar refund proceedings that the presumption of injury enables parties who likely were injured to claim refunds. We note that in past refund

[5] The Macmillan audit files indicate that 29 percent of Macmillan's total alleged overcharges related to alleged entitlements violations. Twenty-nine percent of the total $1,550,000 consent order fund equals $449,500.

proceedings the OHA has analyzed extensively the issue of cost absorption by smaller purchasers of petroleum products. *See, e.g., Economic Regulatory Administration: In the Matter of Standard Oil Company (Indiana),* 10 DOE ¶ 85,048 (1982) (*Amoco*) at 88,205–209. We have found that in cases of alleged overcharges by refiners such as these consent order firms, retailers were probably injured to some degree in that they were unable to pass along all cost increases to their customers. *Amoco* at 88,206. We cannot expect individual purchasers to be capable of producing similar findings, since our analysis was complex and involved data from many different sources. Along with these factors, we must also consider the concerns raised in the PD&O regarding the cost to each firm of gathering all the information necessary to prove injury and the cost to the OHA of analyzing it. In view of the conclusion that smaller claimants bore some impact of the alleged overcharges, and the fact that failure to allow simplified application procedures for small claims would deprive injured parties of the opportunity to receive refunds, we conclude that the small claims presumption should be adopted.

In the PD&O, we tentatively determined that although we would grant smaller refunds without requiring claimants to demonstrate injury, reseller and retailer claims above a certain level would be required to show that the firm was injured by the alleged overcharges. The Jackson, Mississippi Municipal Airport Authority (Authority) filed comments objecting to the requirement that larger claimants demonstrate injury. The Authority argues that it is unfair to require a detailed showing of injury for larger claims, since if a firm with relatively large purchases is presumed to have been injured in purchases up to a threshold amount, that firm must have been injured in its purchases above the threshold as well. The Authority further states that the injury requirement will force a firm to examine its records twice: first to determine the magnitude of its potential refund, and second to establish that it incurred injury if the potential refund is above the threshold level.

The Authority's comments do not convince us that we should pay all refund claims regardless of amount without requiring a showing of injury. As stated *Supra*, the presumption of injury for smaller claims is based on the likelihood that small resellers and retailers, many of whom are unable to prove injury individually, were nevertheless injured by the settled pricing practices. However, we have found that larger claimants are better equipped to prove injury because they generally have greater resources and more complete records. Furthermore, many claimants in past refund proceedings seeking refunds above the threshold have been unable to prove injury despite their attempts to do so. *See, e.g., Standard Oil Co. (Indiana)/ Ashland Oil, Inc.,* 13 DOE ¶ 85,018 (1985). This experience suggests that allowing claimants to receive large refunds based solely on their purchases, without requiring a detailed showing of injury, would potentially enrich these claimants far beyond the impact of the alleged overcharges.[6] We therefore have determined that claims above a threshold level must be accompanied by a detailed showing of injury, as outlined below.

Under the small claims presumption, a claimant who is a reseller or retailer will not be required to submit any additional evidence of injury beyond purchase volumes if its refund claim is based on purchases below a certain level. Several factors determine the value of the threshold below which a claimant is not required to submit any further evidence of injury beyond volumes purchased. One of these factors is the concern that the cost to the applicant and the government of compiling and analyzing information sufficient to show injury not exceed the amount of the refund to be gained. In these cases, where the refund amounts are fairly low and the early months of the consent order periods are many years past, $5,000 is a reasonable value for the threshold. *See Texas Oil & Gas Corp.,* 12 DOE ¶ 85,069 (1984); *Office of Special Counsel: In the Matter of Conoco, Inc.,* 11 DOE ¶ 85,226 (1984), and cases cited therein.

A reseller or retailer which claims a refund in excess of $5,000 will be required to document its injury. While there are a variety of means by which a claimant can make such a showing, a firm is generally required to show that market conditions would not permit it to pass through the increased costs associated with the alleged overcharges. In addition, a reseller or retailer of petroleum products must show that it maintained a "bank" of unrecovered costs, in order to demonstrate that it did not subsequently recover these costs by increasing its prices. *See, e.g., Triton Oil and Gas Corporation/Cities Service Company,* 12 DOE ¶ 85,107 (1984); *Tenneco Oil Co./Mid-Continent Systems, Inc.,* 10 DOE ¶ 85,009 (1982). If actual, contemporaneously calculated cost banks are not available due to specific circumstances, we will accept other types of information which conclusively prove the existence of cost banks during the consent order period. For example, monthly profit margin data may in some cases demonstrate the existence of cost banks. *See, Husky Oil Company,* 13 DOE ¶ 85,045 (1985). We emphasize that the burden of proving the existence of cost banks rests with the claimant, regardless of what information is submitted.[7]

We find that end-users or ultimate consumers whose business is unrelated to the petroleum industry were injured by the alleged overcharges settled in the consent orders. Unlike regulated firms in the petroleum industry, members of this group generally were not subject to price controls during the consent order period, and were not required to keep records which justified selling price increases by reference to cost increases. For these reasons, an analysis of the impact of the increased cost of petroleum products on the final prices of non-petroleum goods and services would be beyond the scope of this special refund proceeding. *See Office of Enforcement, Economic Regulatory Administration: In the Matter of PVM Oil Associates, Inc.,* 10 DOE ¶ 85,072 (1983); *See also Texas Oil & Gas Corp.,* 12 DOE at 88,209 and cases cited therein. We have therefore concluded that downstream, end-user purchasers of a consent order firm's petroleum products need only document their purchase volumes in order to make a sufficient showing that they were injured by the alleged overcharges.

Southern California Edison Company (SCEC) filed comments concerning our statement in the PD&O that six ultimate consumers of Macmillan products, including SCEC, have already received refunds from the Macmillan consent order fund. SCEC states that contrary to the PD&O, it has not received any refunds based on its purchases from Macmillan. As detailed in the PD&O, the ERA excluded $299,721 from its Petition to the OHA for the implementation of Subpart V refund procedures with respect to the Macmillan consent order

[6] In addition, the Authority presents no evidence to support its contention that the proposed threshold will result in an increased cost to potential refund applicants. As discussed below, we consider the need to minimize the expense of applying for a refund as part of our determination on the proper threshold level.

[7] Resellers or retailers who claim a refund in excess of $5,000 but who cannot establish that they did not pass through the price increases will be eligible for a refund up to the $5,000 threshold, without being required to submit further evidence of injury. Firms potentially eligible for greater refunds may choose to limit their claims to $5,000. *See* Office of Enforcement, 8 DOE ¶ 82,597 (1981) at 85,396.

funds. *See VGS Corporation et al.*, Nos. HEF-0225 *et al.*, (April 17, 1985) (Proposed Decision) at 2. In the Petition, the ERA stated that this excluded amount would be refunded to six end-user customers. *See* note 3 *supra*. However, the PD&O incorrectly stated that these payments have already been made. We now understand that the ERA intends to pay refunds to the six end-users when Macmillan has completed its scheduled payments to the DOE escrow account in October 1986. *See* May 6, 1985 memorandum concerning telephone conversation between Wendy Clark, ERA, and Geoff Stein, OHA Staff Analyst. Since the ERA specifically excluded the funds earmarked for the six end-users from the Petition to the OHA, these firms are not eligible to apply for refunds in this proceeding based on their purchases of Macmillan's general refinery products. *See* note 3 *supra*. However, other end-users who purchased Macmillan products from resellers may be eligible to apply for refunds.

Refund applications from firms regulated by a governmental agency or by the terms of a cooperative agreement will not be required to demonstrate that the firm absorbed the alleged overcharges. In the case of regulated firms, *e.g.*, public utilities, any overcharges incurred as a result of alleged violations of the DOE regulations would routinely be passed through to their customers. Similarly, any refunds received by such firms would be reflected in the rates they are allowed to charge their customers. Refunds to agricultural cooperatives will likewise directly influence the prices charged to member customers. Consequently, these firms too need only document their purchase volumes from a consent order firm to make an adequate showing of injury. *See Office of Special Counsel*, 9 DOE ¶ 82,538. However, along with their applications these firms should provide a full, detailed explanation of the manner in which refunds would be passed through to customers and how the appropriate regulatory body or membership group will be advised of the applicant's receipt of a refund.

As in previous cases, we find that there is a class of potential claimants who may be presumed to have suffered no injury from the alleged overcharges. Those parties are firms that made spot purchases of a consent order firm's petroleum products.[8] *See Office of Special Counsel*, 10 DOE ¶ 85,048 (1982); *Office of Enforcement*, 8 DOE ¶ 82,597 (1981) (hereinafter cited as *Vickers*). As we stated in *Vickers*:

> [T]hese customers tend to have considerable discretion in where and when to make purchases and would therefore not have made spot market purchases of Vickers motor gasoline at increased prices unless they were able to pass thorugh the full amount of Vickers' quoted selling price at the time of purchase to their own customers.

8 DOE at 85,396-97. We believe that the same rationale applies in this case. Consequently, we will establish a rebuttable presumption that spot purchasers were not injured by the pricing practices resolved by the consent orders. Thus, a spot purchaser claimant will be required to submit additional evidence sufficient to establish that it was unable to recover the prices it paid to a consent order firm.

As in previous cases, we will set a minimum refund amount to potential claimants. In prior refund cases, we have not granted refunds for less than $15.00 because the cost of issuing such refunds exceeds the restitutionary benefits which may be achieved. *See Amoco* at 88,214. We will utilize the same minimum refund amount in the present case.

III. Applications for Refund

After considering the comments received concerning the first-stage refund procedures tentatively adopted in the April 17, 1985 PD&O, we have concluded that the proposed procedures should be implemented, as outlined above. We shall now accept applications refunds from parties who purchased covered products from the consent order firms during the consent order period.

In order to receive a refund, each claimant must provide a monthly schedule of its volume of purchases from a consent order firm during the applicable consent order period. If no documentation of the number of gallons purchased is available, a claimant must submit a detailed estimate of its purchases. Each claimant must indicate its level in the consent order firms' chain of distribution, *e.g.*, ultimate consumer, reseller, etc. Each applicant must also state whether there has been a change in ownership of the firm during or since the consent order period, and must provide the names and addresses of any other owners. If there has been a change in ownership, the applicant should either state the reasons why the refund should be paid to the applicant rather than the other owners or provide a signed statement from the other owners indicating that they do not claim a refund. If a reseller or retailer claims a refund in excess of $5,000, it must demonstrate that it was injured by the alleged overcharges by submitting the types of information outlined in Section II of this Decision.

All applications must be filed in duplicate and must be received within 90 days of publication of this Decision and Order in the **Federal Register**. A Copy of each application will be available for public inspection in the Public Docket Room of the Office of Hearings and Appeals. Any applicant who believes that its application contains confidential information must so indicate and submit two additional copies of its application from which the confidential information has been deleted. Each application must also include the following statement: "I swear (or affirm) that the information submitted is true and accurate to the best of my knowledge and belief." (*See* 10 CFR 205.283(c); 18 U.S.C. § 1001. In addition, the applicant should provide the name and telephone number of a person who may be contacted by the OHA for additional information concerning the application.

Applications should refer to Case Number HEF-0225 (VGS), HEF-0278 (Young), or HEF-0506 (Macmillan), and should be sent to: Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, SW., Washington, D.C. 20585.

It is therefore ordered that:

(1) Applications for Refund from the funds remitted to the Department of Energy pursuant to the VGS Corporation, Young Refining Corporation, and Macmillan Ring-Free Oil Co., Inc. consent orders may not be filed.

(2) All applications must be filed no later than 90 days after publication of

[8] We will except from this principle cooperative organizations which made spot purchases of products from the consent order firms and resold these products to their members. In the past, we have treated refund applications by cooperatives as applications made on behalf of their members, who, as ultimate consumers, were not in a position to pass along increased costs. Similarly, any refund received by a cooperative would presumably be passed on to its members, in the form of either a price reduction or a distribution of surplus income. Office of Special Counsel, 9 DOE ¶ 82,538 (1982) at 85,203. *See, e.g.*, Anadarko Production Co./Cities Service Co., 12 DOE ¶ 85,060 (1984). Cooperative purchasers therefore will be presumed to have been injured in spot purchases of a consent order firm's products when these products were resold to members. Cooperatives in this category will be eligible to apply for refunds. These firms must explain in their refund applications the manner in which any refunds will be distributed to members.

this Decision and Order in the Federal Register.

George B. Breznay,
Director, Office of Hearings and Appeals.
Dated: August 21, 1985.
[FR Doc. 85-20762 Filed 8-29-85; 8:45 am]
BILLING CODE 6450-01-M

Proposed Refund Procedures; REAPCO

AGENCY: Office of Hearings and Appeals, DOE.

ACTION: Notice of Proposed Implementation of Special Refund Procedures and Solicitation of Comments.

SUMMARY: The Office of Hearings and Appeals of the Department of Energy announces the procedures for disbursement of $125,000.00 (plus accrued interest) obtained as the result of a consent order between the DOE and Resources Extraction and Processing Company (REAPCO). The funds will be distributed to refund applicants who purchased natural gas liquids and natural gas liquid products from REAPCO during the settlement period (October 1, 1978 through January 28, 1981).

DATE AND ADDRESS: Comments must be filed in duplicate by [30 days from date of publication in the Federal Register] and should be addressed to: Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, SW., Washington, D.C. 20585. All comments should display conspicuously a reference to Case No. HEF-0574.

FOR FURTHER INFORMATION CONTACT: Thomas Wieker, Deputy Director or Irene Bleiweiss, Attorney, Office of Hearings and Appeals, 1000 Independence Avenue, SW., Washington, D.C. 20585, (202) 252-2400.

SUPPLEMENTARY INFORMATION: In accordance with § 205.282(b) of the procedural regulations of the Department of Energy (DOE), 10 CFR 205.282(b), notice is hereby given of the issuance of the Proposed Decision and Order set out below. The Proposed Decision and Order sets forth the procedures and standards that the DOE has tentatively formulated to distribute monies obtained from Resources Extraction and Processing Company (REAPCO). REAPCO, the operator and partial owner of the Bayou Vista Gas Plant in St. Mary Parish, Louisiana, entered into a Consent Order to settle possible pricing violations with respect to its sales of petroleum products from October 1, 1978 through January 28, 1981. Under the terms of the Consent Order, REAPCO has remitted $125,000.00 which is being held in an interest-bearing escrow account pending determination of its proper distribution.

The DOE proposed that the REAPCO consent order fund be distributed in a two stage refund proceeding. The first stage will attempt to refund moneys to customers who can document their purchases of REAPCO products. The Proposed Decision and Order provides that the funds will be distributed to successful claimants based on the number of gallons of products which they purchased and the extent to which they can prove that they were injured by the alleged overcharges. After meritorious claims are paid in the first stage, second-stage refund procedures may become necessary to distribute any remaining funds.

Applications for Refund should not be filed at this time. Appropriate public notice will be given when the submission of claims is authorized.

Any member of the public may submit written comments regarding the proposed refund procedures. Commenting parties are requested to submit two copies of their comments. Comments should be submitted within 30 days of publication of this notice in the Federal Register, and should be sent to the address set forth at the beginning of this notice. All comments received will be available for public inspection between the hours of 1:00 p.m. to 5:00 p.m., Monday through Friday, except federal holidays, in the Public Docket Room of the Office of Hearings and Appeals, located in Room 1E-234, 1000 Independence Avenue, SW., Washington, D.C. 20585.

Dated: August 22, 1985
George B. Breznay,
Director, Office of Hearings and Appeals.

Proposed Decision and Order of the Department of Energy

Proposed Special Refund Procedures

August 22, 1985.

Name of Case: Resources Extraction and Processing Company.
Date of Filing: March 19, 1985.
Case Number: HEF-0574.

Under the procedural regulations of the Department of Energy (DOE), the Economic Regulatory Administration (ERA) may request that the Office of Hearings and Appeals (OHA) formulate and implement special refund procedures. *See* 10 CFR Part 205, Subpart V. Such procedures enable the DOE to refund monies to those injured by alleged violations of the DOE pricing regulations.

On March 19, 1985, the ERA requested that the OHA formulate and implement procedures to distribute funds which it received pursuant to a consent order with Resources Extraction and Processing Company (REAPCO). The Proposed Decision contains the procedures which the OHA has tentatively formulated to distribute that consent order fund.

I. Background

During the settlement period (October 1, 1978 through January 28, 1981) REAPCO operated and owned a partial interest in the Bayou Vista Gas Plant in St. Mary Parish, Louisiana. According to the record in this case, REAPCO's sales of products recovered at that plant were its only sales of regulated products. From October 1978 until July 1979, REAPCO sold natural gas liquids (NGL). In July 1979, REAPCO began to fractionate all of its NGL into natural gas liquid products (NGLPs) and, from that time onward, REAPCO sold NGLPs, including propane, butane, and natural gasoline.

On January 21, 1983, the ERA issued a Proposed Remedial Order (PRO) to REAPCO alleging that, from October 1978 through December 1980, REAPCO charged prices for NGL and NGLPs in excess of those permitted under the DOE regulations. In order to settle the claims made in the PRO and any other claims by the DOE which might have arisen from REAPCO's activities between October 1, 1978 and January 28, 1981, REAPCO and the DOE entered into a Consent Order on August 10, 1984. Pursuant to that Consent Order, REAPCO refunded the sum of $125,000.00 to the DOE.

II. Jurisdiction and Authority to Fashion Refund Procedures

The general guidelines which the OHA may use to formulate and implement a plan to distribute funds received as the result of a consent order are set forth in 10 CFR Part 205, Subpart V. The Subpart V process may be used in situations where the DOE is unable readily to identify the persons who may have been injured as a result of alleged or adjudicated violations or to ascertain the amount of each person's injuries. For a more detailed discussion of Subpart V and the authority of the OHA to fashion procedures to distribute refunds obtained as part of settlement agreements, see *Office of Enforcement*, 9 DOE ¶ 82,508 (1981), and *Office of Enforcement*, 8 DOE ¶ 82,597 (1981).

We have considered the ERA's petition to implement a Subpart V proceeding with respect to the REAPCO consent order fund and have determined that such a proceeding is appropriate in

this case. Accordingly, will grant the ERA's petition to implement a Subpart V proceeding and propose to utilize the procedures set forth in this Proposed Decision.

III. Proposed Refund Procedures

We propose to use a two stage process to distribute the consent order monies. The first stage will attempt to refund monies to those who purchased REAPCO products during the settlement period. Such purchasers must file claims and document their purchases in order to be eligible for a portion of the consent order fund. In addition, purchasers will be required to prove that they were injured by the alleged overcharges—i.e. that they did not pass any such overcharges on to their own customers.

After meritorious claims are paid in the first stage, a second stage may become necessary to distribute any remaining funds. *See generally Office of Special Counsel*, 10 DOE ¶ 85,048 (1982). We will not determine second stage refund procedures at this time because such procedures will necessarily depend on the size of the fund remaining after first stage procedures are completed.

1. Refunds to Identifiable Purchasers

During the first stage of the refund process, we prepose to distribute the REAPCO consent order fund to claimants who satisfactorily demonstrate that they were injured by REAPCO's alleged overcharges. According to REAPCO, it sold all of its products to one marketing company: Gas Producers Liquids. Telephone Conversation between Irene Bleiweiss, OHA Staff Attorney and Richard C. Green, Counsel for REAPCO (July 24, 1985). The audit file, which provided the basis for the PRO issued to REAPCO, indicates that Gas Producers Liquids sold a portion of the REAPCO products to Mobil. However, there may be additional indirect purchasers. We will accept applications from all parties who can demonstrate that they purchased products which originated with REAPCO.

In order to be eligible to receive a refund, claimants will have to file an application and, with three exceptions discussed later in this Proposed Decision, show the extent to which they have been injured by the alleged overcharges. To the extent that any individual or firm can establish injury, it will be eligible for a share of the consent order fund. While there are a variety of ways in which a showing of injury may be made, a reseller will generally be required to demonstrate that during the period covered by the Consent Order, it had "banks" or unrecovered product costs which were at least equal to the amount of the refund claimed, and that it did not pass these costs through to its own customers. A reseller might establish that it absorbed the alleged overcharges by showing, for example, that market conditions would not permit it to increase its prices to pass additional costs through to its own customers. Office of Enforcement, 10 DOE ¶ 85,056 (1983); *Office of Enforcement*, 10 DOE ¶ 85,029 (1982). If a reseller of REAPCO products passed the alleged overcharges through to its own customers, then these indirect customers will be entitled to a refund if they themselves can prove injury. Therefore, we will permit customers who indirectly purchased REAPCO products as well as those who purchased directly from REAPCO to file applications for refunds.

We propose to adopt three presumptions of injury which have been used in may previous special refund cases. First we will presume that end-users or ultimate consumers of REAPCO products whose businesses are unrelated to the petroleum industry were injured by the alleged overcharges. Second, we will presume that applicants who are claiming small refunds ($5,000 or less) were injured by the alleged overcharges. Finally, we will not require a showing of injury from agricultural cooperatives which passed the alleged overcharges on to their end-user members, provided that these cooperatives comply with standards set forth later in the Proposed Decision. These presumptions will permit claimants to apply for refunds without incurring disproportionate expenses and will enable the OHA to use its limited resources most effectively.

a. *End-Users.* We propose that end-users or ultimate consumers whose businesses are unrelated to the petroleum industry will not be required to show injury. *See Texas Oil & Gas Corp.*, 12 DOE ¶ 85,069 at 88,209 (1934). Customers in this group might include, for example, businesses and individuals who purchased propane for heating purposes. The fuel costs of such end-users are only one, indistinguishable component of their prices for goods and services. Unlike regulated firms in the petroleum industry, other businesses were not subject to price controls during the consent order period and were not required to keep records. Thus, an analysis of the impact of the increased cost of petroleum products on the final prices of non-petroleum products and services would be beyond the scope of a refund proceeding. *Id.* Therefore, such end-users who document their purchase volumes of REAPCO products during the consent order period will be found to have made a sufficient showing of injury. On the other hand, refund applicants who were subject to the DOE regulatory program will be required to provide a detailed demonstration that they were injured, with the exception of those making small claims.

b. *Applicants Claiming a Refund of $5,000 or Less.* We recognize that making a showing of injury may be too complicated and burdensome for resellers who purchased relatively small amounts of REAPCO products. For example, such firms may have limited accounting and data-retrieval capabilities and may therefore be unable to produce the records necessary to prove the existence of banks of unrecovered costs, or that they did not pass on the alleged overcharges to their own customers. We also are concerned that the cost to the applicant and to the government of compiling and analyzing information sufficient to make a detailed showing of injury not exceed the amount of the refund to be gained. In the past we have adopted a small claims procedure to assure that the costs of filing and processing a refund application do not exceed the benefits. *See, e.g., Aztex Energy Co.*, 12 DOE ¶ 85,115 (1984); *Texas Oil & Gas Corp.*, 12 DOE ¶ 85,014 (1984). We propose to adopt such a procedure in this case. Therefore, we propose that any applicant claiming a refund of $5,000.00 or less need not make a detailed showing of injury in order to be eligible to receive a refund.

c. *Agricultural Cooperatives.* Agricultural cooperatives will not be required to show that they did not pass increased costs through to their customers. By its very nature, an agricultural cooperative would routinely pass through any overcharges to its member customers. Similarly, any refunds received by an agricultural cooperative would influence the prices charged to member customers. Therefore, we have held that agricultural cooperatives are not required to prove injury. *E.g., APCO Oil Corp.*, 12 DOE ¶ 85,144 (1985). Instead, an agricultural cooperative's refund application should explain fully the manner in which refunds will be passed through to its customers and how its members will be advised of the cooperative's receipt of the refund money. Sales by cooperatives to non-members, however, will be treated the same as sales by any other resellers.

d. *Spot Purchasers.* We also propose to adopt a rebuttable presumption that firms which made only spot purchases of REAPCO products have suffered no injury. Spot purchasers tend to have

considerable discretion in where and when to make purchases and would therefore not have made spot purchases of REAPCO's product at increased prices unless they were able to pass through the full amount of the alleged overcharges to their own customers. *See Office of Enforcement*, 8 DOE ¶ 82,597 at 85,396–97 (1981). Accordingly, in order to overcome the rebuttable presumption that they were not injured, spot purchasers should submit additional evidence to establish that they were unable to recover the prices they paid for REAPCO products.

2. Calculation of Refund Amounts

We propose to use a volumetric method to divide the consent order fund among applicants who demonstrate that they are eligible to receive refunds. This method presumes that the alleged overcharges were spread equally over all the gallons of products which REAPCO sold. We have calculated a volumetric refund amount by dividing the consent order amount by the approximate number of gallons which REAPCO sold during the settlement period. Successful claimants will receive refunds based on their eligible purchase volumes multiplied by the volumetric refund amount, plus accrued interest.

We have tentatively set the REAPCO volumetric refund amount at $0.00095 per gallon. We derived this figure by dividing the consent order fund ($125,000.00) by an estimate of the number of gallons of products which REAPCO sold during the consent order period (130,895,607). Since a consent order is necessarily the result of compromise, the volumetric refund amount derived from that consent order settlement is also a compromise. The volumetric refund amount does not purport to calculate the exact amount that a customer may have been overcharged. Rather, it is a method by which we can estimate the portion of the consent order fund that should be allocated to a given purchaser. We recognize that a particular purchaser could have suffered a disproportionate share of the injury. Any purchaser who can make such a showing of disproportionate overcharge may file a refund application based on a claim that the prices he was charged were likely to have included alleged overcharges which were greater than the *pro rata* amount determined by the volumetric presumption.

We also recognize that, although REAPCO sold only NGL and NGLPs, the language of the Consent Order covers all products which the DOE regulated during the settlement period. Therefore, we will accept refund applications from anyone who claims to have purchased other covered products from REAPCO and will consider any such applications on a case-by-case basis. However, if we receive applications based on purchases of products other than NGL or NGLPs, it may become necessary to adjust the per gallon refund amount.

As in previous cases, we will establish a minimum refund amount of $15.00 for first-stage claims. We have found through our experience in prior refund cases that the cost of processing claims in which refunds are sought for amounts less than $15.00 outweighs the benefit of restitution in those situations. *See, e.g., Uban Oil Co.*, 9 DOE ¶ 82,541 at 85,225 (1982).

Before distributing any portion of the consent order fund, we intend to publicize the distribution process, to solicit comments on the proposed refund procedures, and to provide an opportunity for any affected party to file a claim. Comments regarding the tentative distribution process set forth in this Proposed Decision should be filed with the Office of Hearings and Appeals within 30 days of publication of this Proposed Decision and Order in the **Federal Register**. Applications for refunds should not be filed at this time. Detailed procedures for filing applications for refunds will be provided in a final Decision and Order.

It is therefore ordered that: The $125,000.00 refund amount obtained from Resources Extraction and Processing Company pursuant to the Consent Order entered into with the Department of Energy on August 10, 1984 will be distributed in accordance with the foregoing Proposed Decision.

[FR Doc. 85–20764 Filed 8–29–85; 8:45 am]

BILLING CODE 6450–01–M

Implementation of Special Refund Procedures

AGENCY: Office of Hearings and Appeals, DOE.

ACTION: Notice of implementation of special refund procedures.

SUMMARY: The Office of Hearings and Appeals of the Department of Energy announces the procedures for disbursement of $29,673.56 obtained as a result of a consent order which the DOE entered into with Naphsol Refining Company, a reseller-retailer of petroleum products located in Muskegon, Michigan. The money is being held in escrow following the settlement of enforcement proceedings brought by the DOE's Economic Regulatory Administration.

DATE AND ADDRESS: Applications for refund of a portion of the Naphsol consent order funds must be filed in duplicate and must be received within 90 days of publication of this notice in the **Federal Register**. All applications should refer to Case Number HEF–0134 and should be addressed to: Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585. (202) 252–6602.

FOR FURTHER INFORMATION CONTACT: Douglas Friedman, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585.

SUPPLEMENTARY INFORMATION: In accordance with § 205.282(c) of the procedural regulations of the Department of Energy, 10 CFR 205.282(c), notice is hereby given of the issuance of the Decision and Order set out below. The decision relates to a consent order entered into by the DOE and Naphsol Refining Company, which settled all claims and disputes between Naphsol and the DOE regarding the manner in which Naphsol applied the federal price and allocation regulations with respect to its sales of refined petroleum products during the period November 1, 1973, through March 31, 1975. A Proposed Decision and Order tentatively establishing refund procedures and soliciting comments from the public concerning the distribution of the Naphsol consent order funds was issued on June 21, 1985. 50 FR 27,047 (July 1, 1985).

The Decision sets forth procedures and standards that the DOE has formulated to distribute the contents of an escrow account funded by Naphsol pursuant to the consent order. The DOE has decided to accept Applications for Refund from firms and individuals who purchased motor gasoline, No. 1 fuel oil, or No. 2 fuel oil from Naphsol. In order to receive a refund, a claimant must furnish the DOE with evidence which demonstrates that it was injured by Naphsol's pricing practices. Applicants must submit specific documentation regarding the date, place, and volume of product purchased, whether the increased costs were absorbed by the claimant or passed through to other purchasers, and the extent of any injury alleged to have been suffered. An applicant claiming $5,000 or less, however, will be required to document only its purchase volumes.

As the Decision and Order published with this Notice indicates, applications for refunds may now be filed by customers who purchased petroleum

products from Naphsol during the consent order period. Applications will be accepted provided they are received no later than 90 days after publication of this Decision and Order in the Federal Register. The specific information required in an Application for Refund is set forth in the Decision and Order.

Dated: August 23, 1985.

George B. Breznay,

Director, Office of Hearings and Appeals.

Decision and Order of the Department of Energy

Implementation of Special Refund Procedures

Name of Firm: Naphsol Refining Company.

Date of Filing: October 13, 1983.

Case Number: HEF-0134.

August 23, 1985.

Under the procedural regulations of the Department of Energy (DOE), the Economic Regulatory Administration (ERA) may request that the Office of Hearings and Appeals (OHA) formulate and implement special procedures to distribute funds received as a result of an enforcement proceeding in order to remedy the effects of actual or alleged violations of the DOE regulations. *See* 10 CFR Part 205, Subpart V. In accordance with the provisions of Subpart V, on October 13, 1983, ERA filed a Petition for the Implementation of Special Refund Procedures in connection with a consent order entered into with Naphsol Refining Company (Naphsol).

I. Background

Naphsol is a "reseller-retailer" of refined petroleum products as that term was defined in 10 CFR 212.31 and is located in Muskegon, Michigan. A DOE audit of Naphsol's records revealed possible violations of the Mandatory Petroleum Price Regulations, 10 CFR Part 212, Subpart F. The audit alleged that between November 1, 1973, and March 31, 1975 (the audit period), Naphsol committed possible pricing violations amounting to $185,274.48 with respect to its sales of No. 1 fuel oil, No. 2 fuel oil, and motor gasoline.

Under the terms of the consent order, Naphsol was required to deposit $29,673.56 into an interest-bearing escrow account for ultimate distribution by the DOE. Naphsol remitted this sum on September 4, 1981.[1]

On June 21, 1985, we issued a Proposed Decision and Order (PD&O) setting forth a tentative plan for the distribution of refunds to parties who were injured by Naphsol's alleged violations in the sale of petroleum products. 50 FR 27,047 (July 1, 1985). In the PD&O, we described a two-stage process for distributing the Naphsol consent order funds. We proposed to disburse funds in the first stage to claimants who could demonstrate that they were adversely affected by Naphsol's alleged overcharges in the sale of motor gasoline, No. 1 fuel oil, or No. 2 fuel oil during the audit period. We also solicited comments regarding the disbursement of any funds remaining after all meritorious claimants had received appropriate refunds.

The purpose of this decision is the establishment of procedures to be used for filing claims in the first stage of the Naphsol refund process. Since no comments were received concerning first-stage procedures, we will employ the procedures suggested in the PD&O. Since our determination concerning the final disposition of any remaining funds will necessarily depend on the amount of money remaining in the escrow account, it would be premature for us to address the issues raised by commenters concerning a second-stage proceeding.[2] *See Office of Enforcement*, 9 DOE ¶ 82,508 (1981) (Coline).

II. Refund Procedures

The procedural regulations of the DOE set forth general guidelines to be used by OHA in formulating and implementing a plan of distribution for funds received as a result of an enforcement proceeding. 10 CFR Part 205, Subpart V. The Subpart V process may be used in situations where the DOE is unable to identify readily those persons who likely were injured by alleged overcharges or to ascertain readily the amount of such persons' injuries. For a more detailed discussion of Subpart V and the authority of OHA to fashion procedures to distribute refunds, *see Office of Enforcement*, 9 DOE ¶ 82,508 (1981), *and Office of Enforcement*, 8 DOE ¶ 82,597 (1981) (*Vickers*).

The use of presumptions in refund cases is specifically authorized by applicable DOE procedural regulations. Section 205.282(e) of those regulations states that:

> [i]n establishing standards and procedures for implementing refund distributions, the Office of Hearings and Appeals shall take into account the desirability of distributing the refunds in an efficient, effective and equitable manner and resolving to the maximum extent practicable all outstanding claims. In order to do so, the standards for evaluation of individual claims may be based upon appropriate presumptions.

10 CFR 205.282(e). The presumptions we will adopt in this case are used to permit claimants to participate in the refund process without incurring inordinate expenses and to enable OHA to consider the refund applications in the most efficient way possible in view of the limited resources available. First, we will adopt a presumption that the alleged overcharges were dispersed evenly in all sales of products made during the consent order period. In the past, we have referred to a refund process that uses this presumption as a volumetric system. Second, we will adopt a presumption of injury with respect to small claims. Third, we will adopt a presumption that spot purchasers were not injured by the alleged overcharges. As a separate matter, we find that end users of Naphsol products were injured by Naphsol's pricing practices.

The pro rata, or volumetric, refund presumption assumes that alleged overcharges by a consent order firm were spread equally over all gallons of product marketed by that firm. In the absence of better information, this assumption is sound because the DOE price regulations generally required a regulated firm to account for increased costs on a firm-wide basis in determining its prices. This presumption is rebuttable, however. A claimant which believes that it incurred a disproportionate share of the alleged overcharges may submit evidence proving this claim in order to receive a larger refund. *See, e.g., Sid Richardson Carbon and Gasoline Co. and Richardson Products Co. Siouxland Propane Co.*, 12 DOE ¶ 85,054 (1984), and cases cited therein at 88,164.

Under the volumetric system we are adopting, a claimant will be eligible to receive a refund equal to the number of gallons purchased from Naphsol times the volumetric factor. The volumetric factor is the average per gallon refund and in this case equals $.0005036 per gallon.[3] In addition, successful claimants will receive a proportionate share of the accrued interest.

The second presumption we will use is that claimants seeking small refunds were injured by Naphsol's pricing practices. There are a variety of reasons for adopting this presumption. *See, e.g., Uban Oil Co.*, 9 DOE ¶ 82,541 (1982).

[1] As of July 31, 1985, the Naphsol escrow account contained $43,991.12, including accrued interest.

[2] Comments concerning the second stage were filed on behalf of the States of Arkansas, Delaware, Iowa, Louisiana, North Dakota, Rhode Island, and West Virginia.

[3] This figure is derived by dividing the $29,673.56 settlement amount by the 58,927,333 gallons of products sold by Naphsol during the consent order period.

Firms which will be eligible for refunds were in the chain of distribution where the alleged overcharges occurred and therefore bore some impact of the alleged overcharges, at least initially. In order to support a specific claim of injury, a firm would have to compile and submit detailed factual information regarding the impact of alleged overcharges which took place many years ago. This procedure is generally time-consuming and expensive. With small claims, the cost to the firm of gathering the necessary information and the cost to OHA of analyzing it could exceed the expected refund. Failure to allow simplified procedures could therefore deprive injured parties of the opportunity to receive a refund. This presumption eliminates the need for a claimant to submit and OHA to analyze detailed proof of what happened downstream of the initial impact.

Under the small-claims presumption, a claimant who is a reseller or retailer will not be required to submit any additional evidence of injury beyond purchase volumes if its refund claim is based on purchases below a certain level. Several factors determine the value of this threshold. One of these factors is the concern that the cost to the applicant and the government of compiling and analyzing information sufficient to show injury not exceed the amount of the refund to be gained. In this case, where the refund amount is fairly low and the early months of the consent order period are many years past, $5,000 is a reasonable value for the threshold. *See Texas Oil & Gas Corp.; Office of Special Counsel*, 11 DOE ¶ 85,226 (1984) (*Conoco*), and cases cited therein.

A reseller or retailer which claims a refund in excess of $5,000 will be required to document its injury. While there are a variety of methods by which a firm can make such a showing, a firm is generally required to demonstrate that it maintained a "bank" of unrecovered costs, in order to show that it did not pass the alleged overcharges through to its own customers, and to show that market conditions would not permit it to pass through those increased costs.[4]

If a reseller or retailer made only spot purchases, we believe that it should not receive a refund since it is unlikely to have been injured. As we have previously stated with respect to spot purchasers:

> [T]hose customers tend to have considerable discretion in where and when to make purchases and would therefore not have made spot market purchases of [the firm's product] at increased prices unless they were able to pass through the full amount of [the firm's] quoted selling price at the time of purchase to their own customers.

Vickers, 8 DOE at 85,396–97. We believe the same rationale holds true in the present case. Therefore, firms which made only spot purchases from Naphsol will not receive refunds unless they present evidence which rebuts the spot purchaser presumption and establishes the extent to which they were injured as a result of their purchases of No. 1 fuel oil, No. 2 fuel oil, or motor gasoline from Naphsol during the consent order period.

As noted above, we find that end users were injured by the alleged overcharges. Unlike regulated firms in the petroleum industry, members of this group generally were not subject to price controls during the consent order period. They were therefore not required to base their pricing decisions on cost increases or to keep records which would show whether they passed through cost increases. Because of this, an analysis of the impact of the alleged overcharges on the final prices of goods and services which were not covered by the petroleum price regulations would be beyond the scope of a special refund proceeding. *See Office of Enforcement*, 10 DOE ¶ 85,072 (1983)(*PVM*); *see also Texas Oil & Gas Corp.*, 12 DOE at 88, 209, and cases cited therein.[5]

In addition, firms whose prices for goods and services are regulated by a governmental agency or by the terms of a cooperative agreement will not be required to demonstrate that they absorbed the alleged overcharges. In the case of regulated firms, *e.g.*, public utilities, any overcharges incurred as a result of Naphsol's alleged violations of the DOE regulations would routinely be passed through to the firms' customers. Similarly, any refunds received by such firms would be reflected in the rates they were allowed to charge their customers. Refunds to agricultural cooperatives would likewise directly influence the prices charged to their member customers. Consequently, we will add such firms to the class of claimants that are not required to show that they did not pass through to their customers cost increases resulting from alleged overcharges. *See e.g., Office of Special Counsel*, 9 DOE ¶ 82,539 (1982) (*Tenneco*); *and Office of Special Counsel*, 9 DOE ¶ 82,545 at 85,244 (1982) (*Pennzoil*). Instead, those firms should provide with their application a full explanation of the manner in which refunds would be passed through to their customers and how the appropriate regulatory body or membership group will be advised of the applicant's receipt of any refund money. Sales by cooperatives to nonmembers, however, will be treated the same as sales by any other reseller.

As in previous cases, only claims for at least $15 will be processed. This minimum has been adopted in prior refund cases because the cost of processing claims for refunds of less than $15 outweighs the benefits of restitution in those situations. *See, e.g., Uban Oil Co.*, 9 DOE at 85,225. *See also* 10 CFR 205.286(b). The same principle applies here.

III. Applications for Refund

We have determined that by using the procedures described above, we can distribute the Naphsol consent order funds as equitably and efficiently as possible. Accordingly, we will now accept applications for refund from individuals and firms who purchased motor gasoline, No. 1 fuel oil, or No. 2 fuel oil from Naphsol between November 1, 1973, and March 31, 1975.

There is no specific application form which must be used. In order to receive a refund, each claimant must submit the following information:

(1) A schedule of monthly purchases from Naphsol;

(2) Whether the applicant has previously received a refund, from any source, with respect to the alleged overcharges identified in the ERA audit underlying this proceeding;

(3) Whether there has been a change in ownership of the firm since the audit period. If there has been a change in ownership, the applicant must provide the names and addresses of the other owners, and should either state the reasons why the refund should be paid to the applicant rather than to the other owners or provide a signed statement from the other owners indicating that they do not claim a refund;

(4) Whether the applicant is or has been involved as a party in DOE enforcement or private, § 210 actions. If these actions have been concluded the applicant should furnish a copy of any final order issued in the matter. If the action is still in progress, the applicant should briefly describe the action and its current status. The applicant must

[4] Resellers or retailers who claim refund in excess of $5,000 but who cannot establish that they did not pass through the price increases will be eligible for a refund of up to the $5,000 threshold, without being required to submit further evidence of injury. Firms potentially eligible for greater refunds may choose to limit their claims to $5,000. *See* Vickers, 8 DOE at 85,396. *See also* Office of Enforcement, 10 COE P 85,029 at 88,125 (1982)(Ada).

[5] If a firm is both a spot purchaser and an end user, it will be treated as an end user and will not be required to make any showing of injury beyond that required of other end users.

keep OHA informed of any change in status while its Application for Refund is pending. *See* 10 CFR 205.9(d); and

(5) The name and telephone number of a person who may be contacted by this Office for additional information.

Finally, each application must include the following statement: "I swear [or affirm] that the information submitted is true and accurate to the best of my knowledge and belief." *See* 10 CFR 205.283(c); 18 U.S.C. 1001.

All applications must be filed in duplicate and must be received within 90 days from the date of publication of this Decision and Order in the **Federal Register**. A copy of each application will be available for public inspection in the Public Docket Room of the Office of Hearings and Appeals. Any applicant which believes that its application contains confidential information must indicate this and submit two additional copies of its application form which the information has been deleted. All applications should refer to Case No. HEF-0134 and should be sent to: Office of Hearings and Appeals, Department of Energy, 1000 Independence Ave., S.W., Washington, D.C. 20585.

It is therefore ordered that:

(1) Applications for refunds from the funds remitted to Department of Energy by Naphsol Refining Company pursuant to the consent order executed on August 31, 1981, may now be filed.

(2) All applications must be filed no later than 90 days after publication of this Decision and Order in the **Federal Register**.

Dated: August 23, 1985.

George B. Breznay,

Director, Office of Hearings and Appeals.

[FR Doc. 85-20844 Filed 8-29-85; 8:45 am]

BILLING CODE 6450-01-M

ENVIRONMENTAL PROTECTION AGENCY

[OPTS-59729; TSH-FRL 2889-2]

Certain Chemicals Premanufacture Notice

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5 (a)(1) of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture or import a new chemical substance to submit a premanufacture notice (PMN) to EPA at least 90 days before manufacture or import commences. Statutory requirements for section 5(a)(1) premanufacture notices are discussed in EPA statements of the final rule published in the **Federal Register** of May 13, 1983 (48 FR 21722). In the **Federal Register** of November 11, 1964, (49 FR 46066)(40 CFR 723.250), EPA published a rule which granted a limited exemption from certain PMN requirements for certain types of polymers. PMNs for such polymers are reviewed by EPA within 21 days of receipt. This notice announces receipt of seven such PMNs and provides a summary of each.

DATES: Close of Review Period:

Y 85-134, 85-135, 85-136, 85-137, 85-138 and 85-139—September 9, 1985.

Y 85-140—September 10, 1985.

FOR FURTHER INFORMATION CONTACT: Wendy Cleland-Hamnett, Chemical Control Division (TS-794), Office of Toxic Substances, Environmental Protection Agency, Rm. E-611, 401 M St., SW., Washington, DC 20460, (202-382-3725).

SUPPLEMENTARY INFORMATION: The following notice contains information extracted from the non-confidential version of the submission by the manufacturer on the exemptions received by EPA. The complete non-confidential document is available in the Public Reading Room E-107 at the above address between 8:00 a.m. and 4:00 p.m., Monday through Friday, excluding legal holidays.

Y 85-134

Manufacturer. S. C. Johnson & Son, Inc.

Chemical. (G) Water soluble acrylate random copolymer.

Use/Production. (G) Open, non-dispersive use. Prod. range. Confidential.

Toxicity Data. No data submitted.

Exposure. Confidential.

Environmental Release/Disposal. Confidential. Disposal by publicly owned treatment works (POTW).

Y 85-135

Manufacturer. S. C. Johnson & Son, Inc.

Chemical. (G) Water soluble acrylate random copolymer.

Use/Production. (G) Open, non-dispersove use. Prod. range. Confidential.

Toxicity Data. No data submitted.

Exposure. Confidential.

Environmental Release/Disposal. Confidential. Disposal by POTW.

Y 85-136

Manufacturer. S. C. Johnson & Son, Inc.

Chemical. (G) Water soluble acrylate random copolymer.

Use/Production. (G) Confidential. Prod. range. Confidential.

Toxicity Data. No data submitted.

Exposure. Confidential.

Environmental Release/Disposal. Confidential. Disposal by POTW.

Y 85-137

Manufacturer. Confidential.

Chemical. (G) Cross-linked polymeric acrylic micro particles.

Use/Production. (S) Industrial thermosetting decorative and protective coatings. Prod. range. 285, 648-1, 142, 592 kg/yr.

Toxicity Data. No data submitted.

Exposure. Manufacture and processing: a total of 20 workers, only 2 people/da.

Environmental Release/Disposal. No release. Disposal by incineration.

Y 85-138

Manufacturer. Confidential.

Chemical. (G) Modified acrylate terpolymer.

Use/Production. (G) Open, non-dispersive use. Prod. range Confidential.

Toxicity Data. No data submitted.

Exposure. No data submitted.

Environmental Release/Disposal. No data submitted.

Y 85-139

Manufacturer. Confidential.

Chemical. (G) Polyurethane dispersion.

Use/Production. (S) Roofing top coat. Prod. range. Confidential.

Toxicity Data. No data submitted.

Exposure. Manufacture: dermal, a total of 1 worker, 3 to 4 hrs.

Environmental Release/Disposal. 25 kg/da released to washout. Disposal by city sewer system.

Y 85-140

Manufacturer. NL Industries, Inc.

Chemical. (G) Water-based polyurethane elastomer.

Use/Production. (G) Open, non-dispersive manner. Prod. range. Confidential.

Toxicity Data. No data submitted.

Exposure. No data submitted.

Environmental Release/Disposal. No data submitted.

Dated: August 23, 1985.

Linda A. Travers,

Acting Director, Information Management Division.

[FR Doc. 85-20664 Filed 8-29-85; 8:45 am]

BILLING CODE 6560-50-M

[OPTS-51586; TSH-FRL 2889-1]

Certain Chemicals Premanufacture Notices

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5(a)(1) of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture or import a new chemical substance to submit a premanufacture notice (PMN) to EPA at least 90 days before manufacture or import commences. Statutory requirements for section 5(a)(1) premanufacture notices are discussed in EPA statements of the final rule published in the **Federal Register** of May 13, 1983 (48 FR 21722). This notice announces receipt of twenty-eight PMNs and provides a summary of each.

DATES: Close of Review Period:

P 85-1358, P 85-1359 and 85-1360—November 12, 1985.

P 85-1361, 85-1362 and 85-1363, 85-1364, 85-1365, 85-1366 and 85-1367—November 13, 1985.

P 85-1368—November 16, 1985.

P 85-1369, 85-1370, 85-1371, 85-1372, 85-1373, 85-1374, 85-1375, 85-1376, 85-1377, and 85-1378—November 17, 1985.

P 85-1379, 85-1380, 85-1381, 85-1382, and 85-1383—November 18, 1985.

P 85-1384, and 85-1385—November 19, 1985.

Written comments by:

P 85-1358, 85-1359 and 85-1360—October 13, 1985.

P 85-1361, 85-1362, 85-1363, 85-1364, 85-1365, 85-1366 and 85-1367—October 14, 1985.

P 85-1368—October 17, 1985.

P 85-1369, 85-1370, 85-1371, 85-1372, 85-1373, 85-1374, 85-1375, 85-1376, 85-1377 and 85-1378—October 18, 1985.

P 85-1379, 85-1380, 85-1381, 85-1382 and 85-1383—October 19, 1985.

P 85-1384, and 85-1385—October 20, 1985.

ADDRESS: Written comments, identified by the document control number "[OPTS-51586]" and the specific PMN number should be sent to: Document Control Officer (TS-793), Chemical Information Branch, Information Management Division, Office of Toxic Substances, Environmental Protection Agency, Rm. E-201, 401 M St., SW., Washington, DC 20460 (202-382-3532).

FOR FURTHER INFORMATION CONTACT: Wendy Cleland-Hamnett, Premanufacture Notice Management Branch, Chemical Control Division (TS-794), Office of Toxic Substances, Environmental Protection Agency, Rm. E-611, 401 M St., SW., Washington, DC 20460 (202-382-3725).

SUPPLEMENTARY INFORMATION: The following notice contains information extracted from the non-confidential version of the submission provided by the manufacturer on the PMNs received by EPA. The complete non-confidential document is available in the Public Reading Room E-107 at the above address.

P 85-1358

Manufacturer. Confidential.

Chemical. (G) Aromatic acetamide.

Use/Production. (G) Contained use of PMN substance for polymer formulation. Prod. range. Confidential.

Toxicity Data. Acute oral: 4.6 g/kg; Acute dermal: >2.0 g/kg; Irritation: Eye—Slight; Inhalation: Slight irritational.

Exposure. Processing: dermal.

Environmental Release/Disposal. Confidential. Disposal by publicly owned treatment works (POTW).

P 85-1359

Manufacturer. Confidential.

Chemical. (G) Further clarification needed before information can be released to the public files.

Use/Production. (G) Intermediate for electrical insulation coatings. Prod. range. Confidential.

Toxicity Data. No data submitted.

Exposure. Confidential.

Environmental Release/Disposal. Confidential.

P 85-1360

Manufacturer. E. I. du Pont de Nemours & Company, Inc.

Chemical. (G) Esterified polyamic acid.

Use/Production. (G) Open, non-dispersive use. Prod. range. Confidential.

Toxicity Data. No data submitted.

Exposure. Confidential.

Environmental Release/Disposal. Confidential.

P 85-1361

Manufacturer. Kenrich Petrochemicals, Inc.

Chemical. (G) Titanium IV neoalkoxy trisneodecanoato.

Use/Production. (S) Industrial enhanced adhesion/dispersion of particulate in polymeric binder and enhanced adhesion of polymers/polymeric composites to solid surfaces. Prod. range. Confidential.

Toxicity Data. Acute oral: >5 g/kg; Ames test: Non-mutagenic.

Exposure. Manufacture and processing: dermal and inhalation, a total of 25 workers, up to 8 hrs/da, up to 25 da/yr.

Environmental Release/Disposal. 0.5 to 20 kg/batch released to land. Disposal by chemical landfill.

P 85-1362

Manufacturer. Kenrich Petrochemicals, Inc.

Chemical. (G) Titanium IV neoalkoxy, tris dodecylbenzenesulfonato-O.

Use/Production. (S) Industrial enhanced adhesion/dispersion of particulate in polymeric binder and enhanced adhesion of polymers/polymer composites to solid surfaces. Prod. range. Confidential.

Toxicity Data. Acute oral: Male—1.9 g/kg, Female—1.7 g/kg, Total—1.7 g/kg; Ames test: Non-mutagenic.

Exposure. Manufacture and processing: dermal and inhalation, a total of 25 workers, up to 8 hrs/da, up to 25 da/yr.

Environmental Release/Disposal. 0.5 to 20 kg/batch released to land. Disposal by chemical landfill.

P 85-1363

Manufacturer. Kenrich Petrochemicals, Inc.

Chemical. (G) Titanium IV neoalkoxy, tris (3-amino) phenylato.

Use/Production. (S) Industrial enhanced adhesion/dispersion of particulate in polymeric binder and enhanced adhesion of polymers/polymeric composites to solid surfaces. Prod. range. Confidential.

Toxicity Data. Acute oral: 3.0 g/kg; Ames test: Non-mutagenic.

Exposure. Manufacture and processing: dermal and inhalation, a total of 25 workers, up to 8 hrs/da, up to 25 da/yr.

Environmental Release/Disposal. 0.2 to 20 kg/batch released to land. Disposal by chemical landfill.

P 85-1364

Manufacturer. Kenrich Petrochemicals, Inc.

Chemical. (G) Titanium IV neoalkoxy tris ethylenediaminoethanolato.

Use/Production. (S) Industrial enhanced adhesion/dispersion of particulate in polymeric binder and enhanced adhesion of polymers/polymeric composites to solid surfaces. Prod. range. Confidential.

Toxicity Data. Acute oral: 5 g/kg; Ames test: Non-mutagenic.

Exposure. Manufacture and processing: dermal and inhalation, a total of 25 workers, up to 8 hrs/da, up to 25 da/yr.

Environmental Release/Disposal. 0.5 to 20 kg/batch released to land. Disposal by chemical landfill.

P 85–1365

Manufacturer. Kenrich Petrochemicals, Inc.

Chemical. (G) Titanium IV neoalkoxy, tris(diisooctyl) pyrophosphato-0.

Use/Production. Industrial enhanced adhesion/dispersion of particulate in polymeric binder and enhanced adhesion of polymers/polymeric composites to solid surfaces. Prod. range. Confidential.

Toxicity Data. Acute oral: >2.5–<5 g/kg; Ames test: Non-mutagenic.

Exposure. Manufacture and processing: dermal and inhalation, a total of 25 workers, up to 8 hrs/da, up to 25 da/yr.

Environmental Release/Disposal. 0.2 to 20 kg/batch released to land. Disposal by chemical landfill.

P 85–1366

Manufacturer. Kenrich Petrochemicals, Inc.

Chemical. (G) Titanium IV neoalkoxy, tris dioctyl phosphato-0.

Use/Production. (S) Site limited and industrial polymeric composite modification and adhesion of polymers/polymeric composities to solid substrates. Prod. range. Confidential.

Toxicity Data. Acute oral: >5 g/kg; Ames test: Non-mutagenic.

Exposure. Manufacture and processing: dermal and inhalation, a total of 25 workers, up to 8 hrs/da, up to 25 da/yr.

Environmental Release/Disposal. 0.2 to 20 kg/batch released to land. Disposal by chemical landfill.

P 85–1367

Manufacturer. Kenrich Petrochemicals, Inc.

Chemical. (G) Titanium IV neoalkoxy trioctyl.

Use/Production. (S) Site-limited conversion to organotitanium salts. Prod. range. Confidential.

Toxicity Data. No data submitted.

Exposure. Manufacture and use: dermal, a total of 3 workers/batch, up to 10 hrs/da.

Environmental Release/Disposal. 20 kg/batch released to land. Disposal by chemical landfill.

P 85–1368

Importer. Ricoh Corporation.

Chemical. (G) Alkyl benzoic acid metal complex.

Use/Import. (S) For copier toner electrostatically charged and developed for image transfer, then applied onto the surface of paper as image registration after fusing. Import range. Confidential.

Toxicity Data. No data submitted.

Exposure. Use: dermal, a total of 1 worker within 1 minute of time.

Environmental Release/Disposal. Disposal by refuse.

P 85–1369

Manufacturer. Confidential.

Chemical. (G) Ethenyl silane ester.

Use/Production. (S) Modifier for polyolefin resins. Prod. range. Confidential.

Toxicity Data. No data submitted.

Exposure. Confidential.

Environmental Release/Disposal. Confidential.

P 85–1370

Manufacturer. Confidential.

Chemical. (G) Alkyl(heterocyclicyl)phenylazoheteromonocyclicpolyone.

Use/Production. (S) Site-limited intermediate. Prod. Range. 9,100–12,600 kg/yr.

Toxicity Data. Acute oral: >5,000 mg/kg; Irritation: Skin—Non-irritant, Eye—Non-irritant.

Exposure. Manfacturer: dermal and inhalation, a total of 6 workers, up to 2 hrs/da.

Environmental Release/Disposal. 5 to 10 lbs. released to water. Disposal by POTW.

P 85–1371

Importer. Confidential.

Chemical. (G) Alkyl-heterocyclicquinazalone.

Use/Import. (S) Industrial intermediate. Import range. 4,908–7,362 kg/yr.

Toxicity Data. Acute oral: Male and female—>5,000 mg/kg; Irritation: Skin—Non-irritant, Eye—Non-irritant.

Exposure. Import and use: dermal, a total of 2 workers, up to 3 hrs/da.

Environmental Release/Disposal. Release to water. Disposal by POTW.

P 85–1372

Importer. Confidential.

Chemical. (G) Substituted polyhydronaphthalenol.

Use/Import. (G) Ingredients for use in consumer products: highly dispersive use. Import range. 100–1000 kg/yr.

Toxicity Data. Acute oral: 5.0 g/kg; Acute dermal: >2.0 g/kg; Irritation: Skin—Non-irritant, Eye—Non-irritant; Ames test: Non-mutagenic.

Exposure. Importer and use: a total of 6 workers, up to 2 hrs/da, up to 20 da/yr.

Environmental Release/Disposal. Confidential. Disposal by private water treatment plant.

P 85–1373

Manufacturer. Confidential.

Chemical. (S) 2-Hydroxyethyl trialkylacetate with carbon numbers of C_{11}–C_{15}.

Use/Production. (G) Chemical intermediate. Prod. range. Confidential.

Toxicity Data. Acute oral: 5 g/kg; Acute dermal: 3.16 g/kg; Irritation: Skin—Moderate, Eye—Irritant.

Exposure. Manufacture: dermal.

Environmental Release/Disposal. Release to air and water. Disposal by secondary biological treatment.

P 85–1374

Manufacturer. Confidential.

Chemical. Further clarification needed before information can be released to the public files.

Use/Production. (G) Open use industrial paint product. Prod. range. Confidential.

Toxicity Data. No data submitted.

Exposure. Manufacture and processing: dermal, a total of 55 workers, up to 8 hrs/da, up to 250 da/yr.

Environmental Release/Disposal. 5 to 88 kg/batch released to land. Disposal by incineration and landfill.

P 85–1375

Manufacturer. Confidential.

Chemical. (S) Polypropylene toluene sulfonate.

Use/Production. (S) Industrial enhanced oil recovery. Prod. range. Confidential.

Toxicity Data. Acute oral: Male—>5 g/kg, Female—4.4 g/kg; Acute dermal: >5 g/kg; Irritation: Skin—Practically non-irritant, Eye—Severe; Ames test: Non-mutagenic; LC_{50} 96 hr (Rainbow trout): 0.46 mg/L; LC_{50} 96 hr (Sheepshead minnow): 2.66 mg/L; Skin Sensitization: Very weak sensitizer.

Exposure. Confidential.

Environmental Release/Disposal. Confidential.

P 85–1376

Manufacturer. Confidential.

Chemical. (G) Polypropylene toluene.

Use/Production/Import. (S) Chemical intermediate. Prod. range. Confidential.

Toxicity Data. Acute oral: >500 mg/kg; Ames test: Non-mutagenic.

Exposure. Confidential.

Environmental Release/Disposal. No data submitted.

P 85–1377

Manufacturer. Confidential.

Chemical. (G) Alkyl fatty ester.

Use/Production. (G) Finishes, polishes, mold release agent. Prod. range. Confidential.

Toxicity Data. No data submitted.

Exposure. Confidential.

Environmental Release/Disposal. Confidential. Disposal by POTW.

P 85-1378

Importer. Boots Laboratories, Inc.
Chemical. Further clarification needed before information can be released to the public files.
Use/Import. (S) Industrial matrix for glass fabric laminates for PCB's and binder for moulding compounds (injection/compression moulding). Import range. Confidential.
Toxicity Data. Ames test: Non-mutagenic.
Exposure. Processing: dermal, a total of 4 workers, up to 2 hrs/da, up to 40 da/yr.
Environmental Release/Disposal. Less than 10 kg/yr released to air.

P 85-1379

Manufacturer. PMC Specialties Group, Inc.
Chemical. (G) Alkyl benzotriazole.
Use/Production. (S) Commercial metal corrosion inhibitor for copper and alloys. Prod. range. Confidential.
Toxicity Data. No data submitted.
Exposure. Confidential.
Environmental Release/Disposal. Confidential. Disposal by POTW.

P 85-1380

Manufacturer. Confidential.
Chemical. Further clarification needed before information can be released to the public files.
Use/Production. (G) Open, non-dispersive use. Prod. range. 3,500 kg/yr.
Toxicity Data. No data submitted.
Exposure. Processing: a total of 4 workers, up to 1 hr/da, up to 4 da/yr.
Environmental Release/Disposal. 1 to 8 kg/batch released to land. Disposal by dumpsite.

P 85-1381

Manufacturer. Confidential.
Chemical. (G) Unsaturated polyester.
Use/Production. (G) Resin for printing inks. Prod. range. Confidential.
Toxicity Data. No data submitted.
Exposure. Manufacturer: dermal.
Environmental Release/Disposal. No release.

P 85-1382

Manufacturer. The Dow Chemical Company.
Chemical. Further clarification needed before information can be released to public files.
Use/Production. (S) Industrial graphite, glass and kevlar composites for aerospace applications and electrical laminates. Prod. range. Confidential.
Toxicity Data. Acute dermal: 2,000 mg/kg: Irritation: Skin—Non-irritant, Eye—Non-irritant.
Exposure. Manufacture: dermal, a total of 4 workers.
Environmental Release/Disposal. 2 kg/batch released to air with 1 kg/batch to land. Disposal by approved landfill.

P 85-1383

Manufacturer. The Dow Chemical Company.
Chemical. Further clarification needed before information can be released to the public files.
Use/Production. (S) Industrial graphite, glass and kevlar composites for aerospace applications and electrical laminates. Prod. range. Confidential.
Toxicity Data. No data submitted.
Exposure. Manufacture: dermal, a total of 4 workers.
Environmental Release/Disposal. 2 kg/batch released to air with 1 kg/batch to land. Disposal by approved landfill.

P 85-1384

Importer. Confidential.
Chemcial. (G) Butyltin carboxylate derivative.
Use/Import. (G) Stabilizer for PVC. Import range. Confidential.
Toxicity Data. Acute oral: Male—1,889 mg/kg, Female—2,365 mg/kg, Combined—2,119 mg/kg; Acute dermal: >2,000 mg/kg; Irritation: Skin—Corrosive.
Exposure. Processing: dermal, a total of 1 worker, 20 min/da, 200 da/yr.
Environmental Release/Disposal. No release.

P 85-1385

Importer. Confidential.
Chemcial. (G) Butyltinmercaptide.
Use/Import. (G) Stabilizer for PVC. Import range. Confidential.
Toxicity Data. Acute oral: Male—1,889 mg/kg, Female—2,365 mg/kg, Combined—2,119 mg/kg; Acute dermal: 2,000 mg/kg; Irritation: Skin—Corrosive.
Exposure. Processing: dermal, a total of 1 worker, up to 20 min/da, 200 da/yr.
Environmental Release/Disposal. No release.

Dated: August 26, 1985.

V. Paul Fuschini,

Acting Director, Information Management Division.

[FR Doc. 85-20665 Filed 8-29-85; 8:45 am]

BILLING CODE 6560-50-M

[ER-FRL-2868-8]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared August 12, 1985 through August 16, 1985 pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 382-5075/76. An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated October 19, 1984 (49 FR 41106).

Draft EISs

ERP No. D-BPA-L08044-ID, Rating LO, Fall River-Lower Valley Transmission System Reinforcement, Stability, ID. SUMMARY: EPA believes the project impacts should be minimal if the proposed mitigation is implemented.

ERP No. DS-REA-J08013-CO, Rating LO, Hayden to Blue R. 345 kV Transmission Line Project, Blue R. to Gore Pass Portion Construction, Operation and Maintenance, CO. SUMMARY: EPA has no objections to the project as outlined in the DSupp. EIS and supports the adoption of the water quality, soil, and vegetations mitigation measures.

ERP No. D-SFW-C90011-NY, Rating LO, Honeoye Creek Wetland Expansion and Enhancement Project, NY. SUMMARY: EPA believes that the creation of additional wetlands will enhance fish and wildlife resources of the community's area and provide for increased public use and enjoyment of these resources. EPA suggested additional information regarding the upstream sewage treatment plant, construction specifications, and dredge and fill activities be included in the FEIS.

Final EISs

ERP No. F-COE-H36081-MO, Ste. Genevieve Flood Control Plan, Mississippi R., MO. SUMMARY: The FEIS adequately responded to EPA comments made on the DEIS.

ERP No. F-FHW-J40096-MT, Reserve St. Reconstruction, US 93 to S. Third St., Right-of-Way Acquisition and Improvements, MT. SUMMARY: EPA concludes that the project has no unacceptable impacts and could improve Missoula air quality by facilitating movement of vehicles through a presently congested area.

ERP No. F-NOA-E64010-00, Atlantic Swordfish Fishery Mgmt. Plan, ATL. SUMMARY: EPA's review concluded that the FEIS adequately addressed the concerns raised during review of the DEIS.

ERP No. F-SCS-F36150-IL, Lower Des Plaines Tributaries Watershed Multipurpose Plan, Improvements IL. SUMMARY: EPA's review of the FEIS did not identify any significant

environmental impacts requiring changes to the proposed project.

Dated: August 27, 1985.

David G. Davis,

Acting Director, Office of Federal Activities.

[FR Doc. 85-20854 Filed 8-29-85; 8:45 am]

BILLING CODE 6560-50-M

[ER-FRL-2688-7]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 382-5073 or (202) 382-5075.

Availability of Environemental Impact Statements filed August 19, 1985 Through August 23, 1985 Pursuant to 40 CFR 1506.9.

EIS No. 850361, Final, COE, MS, Pearl River Basin Flood Control Plan, Hinds and Rankin Counties, Due: September 30, 1985, Contact: Glen Coffee (205) 690-2729.

EIS No. 850362, Final, AFS, AK, Situk River Wild and Scenic River Study, Designation or Nondesignation, Tongass Nat'l Forest, Due: September 30, 1985, Contact: Kenneth Roberts (907) 747-6671.

EIS No. 850363, Draft, COE, ND, Baldhill Dam and Lake Ashtabula Reservior, Dam Safety Protection Plan, Barnes County, Due: October 15, 1985, Contact: Gary Palesh (612) 725-7746.

EIS No. 850364, Draft, COE, ND, Lake Darling Dam Modifications, Lake Darling Flood Control Project, Souris River, Due: October 15, 1985, Contact: Wayne Knott (612) 725-7745.

EIS No. 850365, Final, FHW, WA, WA-2 and WA-28 Corridor Improvement, between Rocky Reach Dam and East Wenatchee Vicinity, Douglas County, Due: September 30, 1985, Contact: P.C. Gregson (206) 753-2120.

EIS No. 850366, Draft, COE, NJ, NY, Arthur Kill Channel Navigation Improvements, Howland Hook Marine Terminal, Deeping and Maintenance, Union Co., NJ and Richmond Co., NY, Due: October 15, 1985, Contact: Joseph Debler (212) 264-4663.

EIS No. 850367, Draft, FHW, NJ, US 206, (Section 5) improvement, CR-518 to Rts. 202, NJ 28, and US 206 Intersection/ Somerset Circle, Somerset County, Due: October 30, 1985, Contact: Andras Fekete (609) 292-6543.

Amended Notices

EIS No. 850359, Draft, AFS, UT, Manti-LaSal National Forest, Land and Resource Management Plan, Due: November 22, 1985, Published FR 8-23-85—Incorrect due date.

EIS No. 850227, Draft, FWS, NY, Honeoye Creek Wetland Expansion and Enhancement Project, Ontario County, Due: September 15, 1985, Published FR 6-14-85—Review extended.

Dated: August 27, 1985.

David G. Davis,

Acting Director, Office of Federal Activities.

[FR Doc. 85-20853 Filed 8-29-85; 8:45 am]

BILLING CODE 6560-50-M

[OPP-00213; FRL-2891-2]

FIFRA Scientific Advisory Panel; Open Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: There will be a 2-day meeting of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) Scientific Advisory Panel (SAP) to review: a set of scientific issues being considered by the Agency in connection with the Special Review on captan; a set of scientific issues being considered in connection with the Special Review on daminozide; a final regulatory action on the non-wood uses of pentachlorophenol; and an addendum to the Pesticide Assessment Guidelines—Data Reporting.

DATES: The meeting will be held Thursday and Friday, September 26 and 27, 1985, from 8:30 a.m. to 5 p.m. each day.

ADDRESS: The meeting will be held at: Environmental Protection Agency, Rm. 1112, Crystal Mall Building #2, 1921 Jefferson Davis Highway, Arlington, VA.

FOR FURTHER INFORMATION CONTACT:

By mail: Philip H. Gary, Jr., Executive Secretary, FIFRA Scientific Advisory Panel, Office of Pesticide Programs (TS-766C), 401 M St., SW., Washington, D.C. 20460.

Office location and telephone number: Rm. 1117, Crystal Mall Building No. 2, Arlington, VA, (703-557-7096).

SUPPLEMENTARY INFORMATION: The agenda for the meeting is:

1. A set of scientific issues in connection with the Agency's proposed regulatory decision on captan.

2. A set of scientific issues in connection with the Agency's proposed regulatory decision on daminozide.

3. A final reglatory action on the non-wood uses of pentachlorophenol as set forth in the Agency's Position Document 4. Although the SAP reviewed certain scientific issues connected with the non-wood uses of pentachlorophenol at its July 1985 meeting, since that time the Agency has decided to cancel additional registrations for these uses based on new information received in public comments on the Position Document 2/3.

4. An addendum to the Pesticides Assessment Guidelines-Data Reporting. To be considered are eight draft reporting guidances on: teratology, crop field trials, storage stability for residue samples, analytical method, rotational crops, and three avian studies) oral LD50, dietary LC50, and reproduction).

5. Completion of any unfinished business from previous Panel meetings.

6. In addition, the Agency may present status reports on other ongoing programs of the Office of Pesticide Programs.

Copies of documents relating to item 1 may be obtained by contacting:

By mail: Bruce Kapner, Registration Division (TS-767C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, D.C. 20460.

Office location and telephone number: Rm. 711I, Crystal Mall Building No. 2, 1921 Jefferson Davis Highway, Arlington, VA (703-557-7400).

Copies of documents relating to item 2 may be obtained by contacting:

By mail: Joanna Dizikes, Registration Division (TS-767C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, D.C. 20460.

Office location and telephone number: Rm. 711C, Crystal Mall Building No. 2, 1921 Jefferson Davis Highway, Arlington, VA (703-557-7400).

Copies of documents relating to item 3 may be obtained by contacting:

By mail: Spencer Duffy, Registration Division (TS-767C), Office of Pesticide Programs, 401 M St., SW., Washington, D.C. 20460.

Office location and telephone number: Rm. 711B, Crystal Mall Building No. 2, 1921 Jefferson Davis Highway, Arlington, VA (703-557-7400).

Copies of documents relating to item 4 may be obtained by contacting:

By mail: Elizabeth Leovey, Hazard Evaluation Division (TS-769C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, D.C. 20460.

Office location and telephone number: Rm. 805, Crystal Mall Building No. 2, 1921 Jefferson Davis Highway, Arlington, VA (703-557-0576).

Any member of the public wishing to submit written comments should contact Philip H. Gray, Jr. at the address or telephone number given above to be sure that the meeting is still scheduled and to confirm the Panel's agenda.

Interested persons are permitted to file such statements before the meeting, and may, upon advance notice to the Executive Secretary, present oral statements to the extent that time permits. All statements will be made part of the record and will be taken into consideration by the Panel in formulating comments or in deciding to waive comments. Persons wishing to make oral and/or written statements should notify the Executive Secretary and submit 10 copies of a summary no later than September 18, 1985, in order to ensure appropriate consideration by the Panel.

Dated: August 27, 1985.

John A. Moore,

Assistant Administrator for Pesticides and Toxic Substances.

[FR Doc. 85-20921 Filed 8-29-85; 8:45 am]

BILLING CODE 6560-50-M

[OPP-00216; PH-FRL 2891-7]

Administrator's Pesticide Advisory Committee; Subcommittee Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of subcommittee meeting.

SUMMARY: The Administrator's Pesticide Advisory Committee (APAC), Subcommitte on Labeling, will hold a meeting to finalize recommendations regarding how the Agency should utilize the various sources for information dissemination to increase the safe use and handling of pesticide products. This is the final meeting of the APAC Subcommittee and the meeting will be open to the public.

DATE: The meeting will take place on Tuesday, September 17, 1985, at 9:00 a.m. and adjourn by 5:00 p.m.

ADDRESS: The Subcommittee meeting will be held in: Room 1119, Crystal Mall #2, Environmental Protection Agency, 1921 Jefferson Davis Highway, Arlington, VA.

FOR FURTHER INFORMATION CONTACT: Betty Winter, Executive Secretary, Administrator's Pesticide Advisory Committee (TS-788), Office of Pesticides and Toxic Substances, Environmental Protection Agency, Room E636, 401 M Street SW., Washington, D.C. 20460 (202-382-2916).

SUPPLEMENTARY INFORMATION: The Subcommittee will finalize recommendations regarding how the Agency should utilize pesticide dealers, the extension service, certification and training courses, pesticide manufacturers, and the public and private school systems to better communicate information regarding the safe use and handling of pesticides. The Subcommittee will also formulate recommendations for how the Agency can improve pesticide labels. The meeting will be open to the public, and time will be set aside for public comments concerning agenda items. Any member of the public wishing to present an oral or written statement relative to the Subcommittee's topics of discussion for this meeting should contact the APAC Executive Secretary at the address or telephone number listed above. A complete agenda will be available at the meeting.

Dated: August 28, 1985.

John A. Moore,

Assistant Administrator for Pesticides and Toxic Substances.

[FR Doc. 85-21002 Filed 8-29-85; 10:55 am]

BILLING CODE 6560-50-M

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Procurement; Commercial or Industrial Performance; Productivity Review List and Schedule

SUMMARY: In compliance with the Office of Management and Budget (OMB) Circular Number A-76, subject, "Performance of Commercial Activities," and its Supplement, Part I, Chapter 1, paragraph C1b, the Equal Employment Opportunity Commission hereby publishes its productivity review list and schedule (all located at the Headquarters, 2401 E Street, NW., Washington, DC) as follows:

Organization	Function	Review start date
Office of Management	Real property plans, designs, and acquisitions.[1]	October 1985.
Do	Automated data processing operations.[2]	Do.
Do	Library services[1]	Do.
Do	Records and forms analysis and design and office equipment evaluation operations[1].	Do.
Do	Training operations.[1]	Do.

[1] Less than 10 FTEs.
[2] More than 10 FTEs.

This announcement is *not* a solicitation for bids but rather is an advance notification to alert interested persons and businesses of our plans. More specific information relating to this announcement will *not* be furnished until the solicitation for bids is synopsized in the Commercial Business Daily.

FOR FURTHER INFORMATION CONTACT: Robert P. Hill (202) 634-1395, Equal Employment Opportunity Commission, Office of Management, Performance Management Division, Room 225, 2401 E Street, NW., Washington, DC 20507.

John Seal,

Management Director.

[FR Doc. 85-20783 Filed 8-29-85; 8:45 am]

BILLING CODE 5000-01-M

FEDERAL COMMUNICATIONS COMMISSION

[Report No. 1531]

Petitions for Reconsideration and Clarification of Actions in Rulemaking Proceedings

August 12, 1985.

The following listings of petitions for reconsideration and clarification filed in Commission rulemaking procedings is published pursuant to CFR Sec. 1.429(e). Oppositions to such petitions for reconsideration and clarification must be filed within 15 days after publication of this Public Notice in the **Federal Register.** Replies to an opposition must be filed within 10 days after the time for filing oppositions has expired.

Subject: 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 Stardard, 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's 3653, 3695 & 4045)

Filed by: Gary M. Epstein & James F. Rogers, Attorneys for Sovereign Ventures on 8-5-85.

Subject: Amendment of Section 73.606(b), Table of Assisgnments, Television Broadcast Stations, (Sheridan, Wyoming) (MM Docket No. 84-804, RM's 4789 & 4844)

Filed by: James L. Blair, Attorney for Rocky Mountain Communications Network, Inc. (formerly The Chrysostom Corporation) on 8-1-85.

Subject: Amendment of Part 74 of the Commission's Rules and Regulations in Regard to the Instructional Television Fixed Service. (MM Docket No. 83-523)

Filed by:

Shelby D. Green for Instructional Telecommunications Foundation, Inc., on 7-22-85.

Henry Goldberg & Jeffrey H. Olson, Attorneys for Wayne State University on 7–29–85.
Robert E. Kelly, Mary C. Albert & Timothy J. Fitzgibbon, Attorneys for Hispanic Information & Telecommunications Network, Inc., on 7–29–85.
Andrew Jay Schwartzman, Attorney for Media Access Project and Telecommunications Research and Action Center on 7–29–85.
Ernest T. Sanchez, Attorney for Greater Cleveland Hospital Association on 7–29–85.
Richard D. Marks, Todd D. Gray & Corinne M. Antley, Attorneys for Ana G. Mendez Educational Foundation, et al on 7–29–85.
Linda Flores, President for the Puerto Rican Legal Defense and Education Fund on 7–29–85.
Stephen R. Bell & Paul J. Sinderbrand, Attorneys for Microband Corporation of America on 7–29–85.
Steven A. Lerman & Jill Abeshouse Stem, Attorneys for Educational Broadcasting Corporation (WNET–TV) on 7–29–85.
Michael F. Sullivan, Assistant State Superintendent for Maryland State Department of Education on 7–29–85.
Arthur Stambler & Andrew Ritholz, Attorneys for the Network for Instructional T.V., Inc., on 7–29–85.
Irving Gastfreud, Attorney for The George Mason University Foundation, Inc. on 7–30–85.

Federal Communications Commission.

William J. Tricarico,

Secretary.

[FR Doc. 85–20729 Filed 8–29–85; 8:45 am]

BILLING CODE 6712–01–M

FEDERAL EMERGENCY MANAGEMENT AGENCY

Privacy Act of 1974; Proposed New System of Records

AGENCY: Federal Emergency Management Agency.

ACTION: Proposed New System of Records.

SUMMARY: Pursuant to the requirements of the Privacy Act of 1974, 5 U.S.C. 552a, the Federal Emergency Management Agency gives notice of the proposed new system of records entitled "FEMA/NETC–6, Records of Alleged Misconduct of Students Attending Training Courses at the National Emergency Training Center.

A new system has been filed with the Office of Management and Budget, the Speaker of the House of Representatives, and the President of the Senate.

DATE: Comments must be received on or before 30 days from the date of this publication. The notice, including the routine uses, become effective 60 days from the date of this publication, without further notice, unless comments necessitate otherwise.

ADDRESS: Address comments to the Federal Emergency Management Agency, Attn. Docket Clerk, Office of General Counsel, Room 840, 500 C Street, SW., Washington, D.C. 20472. Comments received will be available for public inspection at the above address from 9 a.m. to 4 p.m., Monday through Friday (except for legal holidays).

FOR FURTHER INFORMATION CONTACT: Linda M. Keener, FOIA/Privacy Specialist, at (202) 646–3981.

SUPPLEMENTARY INFORMATION: The proposed system of records is needed to document and evaluate all circumstances which allege misconduct on the part of students attending training courses at the National Emergency Training Center. The information provided by the subject student and other sources will be used during the interview with the subject student prior to a decision being made as to whether such actions warrant dismissal from the National Emergency Training Center. As with any formal training institution, it is necessary to maintain an orderly and professional surrounding for all students. A "Report on New Systems" has been filed, concurrent with this publication, with Congress and the Office of Management and Budget.

Dated: August 9, 1985.

Robert Mahaffey,

Director, Office of Public Affairs, Federal Emergency Management Agency.

FEMA/NETC–6

SYSTEM NAME:

Records of Alleged Misconduct of Students Attending Training Courses at the National Emergency Training Center.

SECURITY CLASSIFICATION:

Unclassifed.

SYSTEM LOCATION:

Federal Emergency Management Agency, National Emergency Training Center, Emmitsburg, Maryland 21727.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Students attending training courses at the National Emerency Training Center who have been charged with alleged misconduct.

CATEGORIES OF RECORDS IN THE SYSTEM:

Files may include statements from the student charged with alleged misconduct and witnesses; Security reports from Security Guards assigned to the National Emergency Training Center; police reports describing the alleged incident; and copy of student application records, FEMA Form 95–2, which contains the name, address, educational level, social security number, emergency management courses taken and where, emergency management organization and program affiliation, emergency managment title, emergency management telephone number and length of emergency management service, employer, business title and business telephone number; student travel authorization and voucher for partial expense and date and location of course; Student Expense files; completed Grant-in-aid forms; State recommendations; and attendance and progress reports.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 44 U.S.C. 3101; 50 U.S.C. App. 2253, 2281; Reorganization Plan No. 3 of 1978, and E.O. 12148 and E.O. 12127.

PURPOSE(S):

For the purpose of evaluating the alleged misconduct to make an administrative decision as to whether the action warrants dismissal from participation in the training course at the National Emergency Training Center. Upon admission to the National Emergency Training Center, students are apprised that if they are sent home as a result of misconduct, they may not attend future training sessions for one (1) fiscal year following the current fiscal year in which the incident occurred.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

A letter notifying the student's employer of the student's dismissal for reasons of misconduct is sent by the National Emergency Training Center. Upon request by the student's employer, information from and/or copies of the statements from the student sent home as a result of misconduct and witnesses, police reports, and security reports from security guards assigned to the National Emergency Training Center may be made available to the student's employer for the purpose of determining if disciplinary action is appropriate by the student's employing organization.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained in file folders.

RETRIEVABILITY:

By name or social security number.

SAFEGUARDS:

Records are maintained in a locked container. All records are maintained in areas that are secured by building guards during non-business hours. Records are retained in areas accessible only to authorized personnel who are properly screened, cleared and trained.

RETENTION AND DISPOSAL:

Records are retained for one fiscal year following the current fiscal year in which the incident occurred. Records are then destroyed by means of shredding or burning.

SYSTEM MANAGER(S) AND ADDRESS:

Associate Director, Training and Fire Programs Directorate, Federal Emergency Management Agency, Washington, D.C. 20472.

NOTIFICATION PROCEDURE:

Individuals wishing to inquire whether this system of records contains information about themselves should contact the system manager identified above. Written request should be clearly marked "Privacy Act Request" on the envelope and letter. Requests should include full name of the individual, some type of appropriate personal identification, and current address. For personal visits, the individuals should be able to provide some acceptable identification, that is, driver's license, employing organization's identification card, or other identification card.

RECORD ACCESS PROCEDURES:

Same as Notification procedure above.

CONTESTING RECORD PROCEDURES:

Individuals desiring to contest or amend information maintained in the system should direct their request to the system manager. Written requests should be clearly marked "Privacy Act Amendment" on the envelope and letter. The letter should state clearly and concisely what information is being contested, the reasons for contesting it, and the proposed amendment to the information sought. FEMA Privacy Act Regulations are promulgated in 44 CFR Part 6.

RECORD SOURCE CATEGORIES:

Directly from the students, witnesses, State and local police departments, and derived from student application and academic records.

[FR Doc. 85-20359 Filed 8-29-85; 8:45 am]

BILLING CODE 6718-01-M

FEDERAL HOME LOAN BANK BOARD

Alliance Federal Savings and Loan Association, Kenner, LA; Replacement of Conservator With Receiver

Notice is hereby given that pursuant to the authority contained in section 5(d)(6)(D) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. 1464(d)(6)(D) (1982), the Federal Home Loan Bank Board on August 23, 1985, replaced John J. Daly as conservator for Alliance Federal Savings and Loan Association, Kenner, Louisiana ("Association"), with the Federal Savings and Loan Insurance Corporation as sole receiver for the Association.

Dated: August 27, 1985.

Jeff Sconyers,

Secretary.

[FR Doc. 85-20792 Filed 8-29-85; 8:45 am]

BILLING CODE 6720-01-M

FEDERAL MARITIME COMMISSION

Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, D.C. Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, D.C. 20573, within 15 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 207-010811.

Title: "Peru Lines Service" a Joint Service Agreement by and between Naviera Neptuno, S.A. ("Neptuno") and Empresa Naviera Santa, S.A. ("Santa").

Parties: Naviera Neptuno, S.A. Empresa Naviera Santa, S.A.

Synopsis: The proposed agreement would establish a joint service arrangement between the parties in the trade between U.S. Atlantic and Gulf ports and inland points via such ports and ports and points in Peru, Chile, Bolivia, Mexico and other wayports. It would allow the parties the use of the trade name "Peru Lines Service"; to designate joint agents, coordinate management and issue joint bills of lading; and to share in revenues and expenses. It would also allow the parties to join or resign from any lawful conference in the trade, and publish their own tariff where the parties are not conference members.

By Order of the Federal Maritime Commission.

Dated: August 27, 1985.

Bruce A. Dombrowski,

Acting Secretary.

[FR Doc. 85-20863 Filed 8-29-85; 8:45 am]

BILLING CODE 6730-01-M

FEDERAL RESERVE SYSTEM

Citizens State Bancorp, 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 (12 CFR 225.14) 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 September 20, 1985.

A. **Federal Reserve Bank of Cleveland** (Lee S. Adams, Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101:

1. *Citizens State Bancorp,* Cincinnati, Ohio; to become a bank holding company by acquiring 100 percent of the voting shares of Citizens State Bank, Cincinnati, Ohio. Comments on this

application must be received not later than September 23, 1985.

B. **Federal Reserve Bank of Atlanta** (Robert E. Heck, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303:

1. *CB&T Bancshares, Inc.*, Hartselle, Alabama; to become a bank holding company by acquiring 80 percent of the voting shares of Community Bank & Trust, Hartselle, Alabama.

2. *Hibernia Corporation*, New Orleans, Louisiana; to merge with Fidelity National Financial Corporation, Baton Rouge, Louisiana, thereby indirectly acquiring Fidelity National Bank of Baton Rouge, Baton Rouge, Louisiana.

Hibernia Corporation has also applied to acquire 24. 9 percent of the voting shares of Fidelity National Financial Corporation, Baton Rouge, Louisiana, thereby indirectly acquiring Fidelity National Bank of Baton Rouge, Baton Rouge, Louisiana.

C. **Federal Reserve Bank of Chicago** (Franklin D. Dreyer, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *Farmers State Bancorp.*, College Corner, Ohio; to acquire 100 percent of the voting shares of State Bank of Carthage, Carthage, Indiana and the First National Bank of Mays, Mays, Indiana.

D. **Federal Reserve Bank of Minneapolis** (Bruce J. Hedblom, Vice President) 250 Marquette Avenue, Minneapolis, Minnesota 55480:

1. *Grant County Bancorporation, Inc.*, Carson, North Dakota; to become a bank holding company by acquiring 99 percent of the voting shares of First Southwest Bank-Carson, Carson, North Dakota.

E. **Federal Reserve Bank of Kansas City** (Thomas M. Hoenig, Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *LJT, Inc.*, Holdrege, Nebraska; to become a bank holding company by acquiring 34.79 percent of the voting shares of First Holdrege Banc Shares, Inc., Holdrege, Nebraska.

F. **Federal Reserve Bank of Dallas** (Anthony J. Montelaro, Vice President) 400 South Akard Street, Dallas, Texas 75222:

1. *First Huntsville Corporation*, Huntsville, Texas; to acquire 100 percent of the voting shares of First National Bank of Madisonville, Madisonville, Texas, a *de novo* bank.

2. *Gulfbanks, Inc.*, Corpus Christi, Texas; to become a bank holding company by acquiring 100 percent of the voting shares of the following banks: CTRL National Gulfbank of Corpus Chrisiti, Corpus Christi, Texas; 1st National Bank of Corpus Christi, Corpus Christi, Texas; Southern National Bank of Corpus Christi, Corpus Christi, Texas; and Western National Bank of Corpus Christi, Corpus Christi, Texas.

Comments on this application must be received not later than September 23, 1985.

Board of Governors of the Federal Reserve System, August 26, 1985.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 85-20735 Filed 8-29-85; 8:45 am]

BILLING CODE 6210-01-M

Fidelcor, Inc., 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 (12 CFR 225.23(a)(1)) 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 (12 CFR 225.21(a)) 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 product 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 September 18, 1985.

A. **Federal Reserve Bank of Philadelphia** (Thomas K. Desch, Vice President) 100 North 6th Street, Philadelphia, Pennsylvania 19105:

1. *Fidelcor, Inc.*, Philadelphia, Pennsylvania; to expand through its subsidiary, Latimer & Buck, Inc., Philadelphia, Pennsylvania, the geographic area in which the Applicant can undertake the following permissible non-banking activities: originating or acquiring or servicing, for the account of others, short-term or long-term extensions of credit or mortgages; holding for its own account, extensions of credit commonly associated with the financing of real estate; servicing real estate sale leaseback transactions; performing appraisals of real estate; and arranging equity financing. These activities would be expanded to include the entire United States of America.

2. *Fidelcor, Inc.*, Philadelphia, Pennsylvania; to engage *de novo* through its subsidiary, Latimer & Buck, Inc., Philadelphia, Pennsylvania, an advisory company for a mortgage or real estate investment trust as permitted under Regulation Y, § 225.25(b)(4)(i).

B. **Federal Reserve Bank of Chicago** (Franklin D. Dreyer, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *Associated Banc-Corp.*, Green Bay, Wisconsin; to acquire Associated Insurance Corporation, Phoenix, Arizona; and thereby engage in underwriting, reinsuring, offering credit life insurance and credit accident and health insurance on extensions of credit by Associated, Banc-Corp. and its subsidiaries, pursuant to section 4(c)(8)(A) of the Act.

Board of Governors of the Federal Reserve System, August 26, 1985.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 85-20736 Filed 8-29-85; 8:45 am]

BILLING CODE 6210-01-M

First Exchange Corp.; Application To Engage de Novo in Permissible Nonbanking Activities

The company listed in this notice has filed an application under § 225.23(a)(1) of the Board's Regulation Y (12 CFR 225.23(a)(1)) 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 (12 CFR 225.21(a)) 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.

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.

Unless otherwise noted, comments regarding the application must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than September 19, 1985.

A. Federal Reserve Bank of St. Louis (Delmer P. Weisz, Vice President) 411 Locust Street, St. Louis, Missouri 63166:

1. *First Exchange Corp.*, Cape Girardeau, Missouri; to engage *de novo* through its wholly owned subsidary, Exchange Financial Services, Inc., Cape Girardeau, Missouri, in originating and selling real estate loans.

Board of Governors of the Federal Reserve System, August 26, 1985.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 85-20737 Filed 8-29-85; 8:45 am]

BILLING CODE 6210-01

National Mercantile Bancorp; 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 (12 CFR 225.23(a)(2) or (f) 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 (12 CFR § 225.21(a)) 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 September 20, 1985.

A. Board of Governors of the Federal Reserve System (William W. Wiles, Secretary) Washington, D.C. 20551:

1. *National Mercantile Bancorp*, Los Angeles, California; to engage through its subsidiary, Media Funding Corporation, Beverly Hills, California, in joint venture activities (commercial finance lending to television, motion pictures, music and video producers with security for the repayment of such loans provided by a payment right under a distribution agreement). This application may also be inspected at the Federal Reserve Bank of San Francisco.

Board of Governors of the Federal Reserve System, August 26, 1985.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 85-20738 Filed 8-29-85; 8:45 am]

BILLING CODE 6210-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Agency Forms Submitted to the Office of Management and Budget for Clearance

Each Friday the Department of Health and Human Services (HHS) publishes a list of information collection packages it has submitted to the Office of Management and Budget (OMB) for clearance in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). The following are those packages submitted to OMB since the last list was published on August 16, 1985.

Health Care Financing Administration

Subject: Information Collection Requirements in the Home and Community Based Services Waiver Request—HCFA-8003—New.

Respondents: State/local governments.

Subject: Chronic Renal Disease Medical Evidence Report—HCFA-2728—Revision (0938-0046).

Respondents: Individuals or households, businesses or other for-profit institutions.

OMB Desk Officer: Fay S. Iudicello.

Office of the Secretary

Subject: The Preferred Provider Organization Study—New.

Respondents: Individuals.

OMB Desk Officer: Judy A. McIntosh.

Social Security Administration

Subject: Information Collection Requirements Contained in the Revised Regulation on Listing of Impairments-Mental Disclosures-20 CFR 404 Subpart P and 416 Subpart I—SSA-2506 BK—New.

Respondents: State Disability Determination Staffs.

OMB Desk Officer: Judy A. McIntosh.

Public Health Service

National Institutes of Health

Subject: Established Populations for Epidemiologic Studies of the Elderly, (Telephone Follow-up; Years 4 and 5)—New.

Respondents: Individuals or households.

Subject: Vitamin Supplements and Neural Tube Defects—New.

Respondents: Individuals or households.

Health Resources and Services Administration

Subject: Uncompensated Service Assurance Report—Revision (0915–0077).

Respondents: Health care facilities.

Centers for Disease Control

Subject: Regulation—42 CFR 51b—Veneral Disease Program Grants—Extension (0920–0112).

Respondents: State/local governments, non-profit institutions.

OMB Desk Officer: Fay S. Iudicello.

Food and Drug Administration

Subject: Standards Survey—New.

Respondents: Voluntary standards organizations and professional societies that develop medical device standards.

OMB Desk Officer: Bruce Artim.

Copies of the above information collection clearance packages can be obtained by calling the HHS Reports Clearance Officer on 202–245–6511.

Written comments and recommendations for the proposed information collections should be sent directly to the appropriate OMB Desk Officer designated above at the following address: OMB Reports Management Branch, New Executive Office Building, Room 3208, Washington, D.C. 20503; Attn: (name of OMB Desk Officer).

Dated: August 26, 1985.

K. Jacqueline Holz,

Deputy Assistant Secretary for Management Analysis and Systems.

[FR Doc. 85–20788 Filed 8–29–85; 8:45 am]

BILLING CODE 4150–04–M

Food and Drug Administration

[Docket No. 85P–0399]

Canned Spinach Deviating From Identity Standard; Temporary Permit for Market Testing

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a temporary permit has been issued to Rogers Walla Walla, Inc., and Continental Can Co., Inc., to market test experimental packs of canned spinach containing added zinc chloride. The purpose of the temporary permit is to allow the applicant to measure consumer acceptance of the food.

DATES: The permit is effective for 15 months, beginning on the date the food is introduced or caused to be introduced into interstate commerce, but no later than November 29, 1985.

FOR FURTHER INFORMATION CONTACT: F. Leo Kauffman, Center for Food Safety and Applied Nutrition (HFF–214), Food and Drug Administration, 200 C Street SW., Washington, DC 20204, 202–485–0107.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 130.17 concerning temporry permits to facilitate market testing of foods deviating from the requirements of a standard of identity promulgated under section 401 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 341), FDA is giving notice that a temporary permit has been issued to Rogers Walla Walla, Inc., P.O. Box 998, Walla Walla, WA 99362, and Continental Can Co., Inc., 51 Harbor Plaza, Box Number 10004, Stamford, CT 06904–2004.

The permit covers limited interstate marketing tests of experimental packs of canned spinach. The test product deviates from the standard of identity for canned spinach (21 CFR 155.200) in that it will contain added zinc chloride in an amount reasonably necessary to retain the green color of the product (up to 75 parts per million of zinc in the finished food). The test product meets all requirements of § 155.200 with the exception of this deviation.

The permit provides for the temporary marketing of a total of 400,000 cases of 4 container sizes, i.e., 300,000 cases of 8Z Tall cans, No. 303 cans, and No. 2½ cans, and 100,000 cases of No. 10 cans of the test product. The experimental packs of the test product will be distributed in the continental United States. The test product is to be manufactured at the Rogers Walla Walla, Inc., plant located in Walla Walla, WA.

The principal display panel of the label states the product name as "Sliced Spinach." Each of the ingredients used is stated on the label as required by the applicable sections of 21 CFR Part 101. The permit is effective for 15 months, beginning on the date the food is introduced or caused to be introduced into interatate commerce, but no later than November 29, 1985.

Dated: August 22, 1985.

John M. Taylor,

Acting Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 85–20731 Filed 8–29–85; 8:45 am]

BILLING CODE 4160–01–M

[Docket No. 85P–0372]

Grated Cheese Deviating From Identity Standard; Temporary Permit for Market Testing

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a temporary permit has been issued to Great Lakes Cheese Co., Inc., to market test grated cheese containing powdered cellulose as an anticaking agent. The purpose of the temporary permit is to allow the applicant to measure consumer acceptance of the food.

DATES: This permit is effective for 15 months, beginning on the date the food is introduced or caused to be introduced into interstate commerce, but no later than November 29, 1985.

FOR FURTHER INFORMATION CONTACT: Johnnie G. Nichols, Center for Food Safety and Applied Nutrition (HFF–215), Food and Drug Administration, 200 C Street SW., Washington, DC 20204, 202–485–0101.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 130.17 concerning temporary permits to facilitate market testing of foods deviating from the requirements of the standards of identity promulgated under section 401 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 341), FDA is giving notice that a temporary permit has been issued to Great Lakes Cheese Co., Inc., Newburg, OH 44065.

The permit covers limited interstate marketing tests of grated cheese that deviates from the standard of identity for grated cheeses (21 CFR 133.146). Powdered cellulose, an ingredient not currently permitted for use in grated cheese, will be used as an anticaking agent, either alone or in combination with other anticaking agents listed in § 133.146(b)(2) in an amount not to exceed 2 percent by weight of the finished food. The test product meets all requirements of § 133.146, with the exception of this deviation. The permit provides for the temporary marketing of 9 million pounds of grated cheese. The test product will be distributed in all 50 States.

The test product is to be manufactured at the Great Lakes Cheese Co., Inc., plant located in Newburg, OH.

The principal display panel of the label states the product's name. Each of the ingredients used in the food, including the powdered cellulose, is stated on the label as required by the applicable sections of 21 CFR Part 101. This permit is effective for 15 months beginning on the date the food is introduced or caused to be introduced into interstate commerce, but no later than November 29, 1985.

Dated: August 22, 1985.

John M. Taylor,

Acting Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 85-20730 Filed 8-29-85; 8:45 am]

BILLING CODE 4160-01-M

[Docket No. 85E-0296]

Determination of Regulatory Review Period for Purposes of Patent Extension; New Jersey Meniscal Bearing Knee Replacement

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: Food and Drug Administration (FDA) has determined the regulatory review period for the New Jersey Meniscal Bearing Knee Replacement and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Commissioner of Patents and Trademarks, Department of Commerce, for the extension of a patent which claims that medical device.

ADDRESS: Written comments and petitions should be directed to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: James C. Shehan, Office of Health Affairs (HFY-20), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-1382.

SUPPLEMENTARY INFORMATION: The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98-417) generally provides that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under that act, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: a testing phase and an approval phase. For medical devices, the testing phase begins with a clinical investigation of the device and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the device and continues until permission to market the device is granted. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Commissioner of Patents and Trademarks may award (half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a medical device will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(3)(B).

FDA recently approved for marketing the New Jersey Meniscal Bearing Knee Replacement. This patented product, which consists of the Rotating Platform of the New Jersey Total Knee System (PM30055) and the Sliding Meniscal Bearing of the New Jersey Total Knee System (PM30055/S2), is indicated for cemented use in cases of osteoarthritis and rheumatoid arthritis. Based on this recent approval, DePuy, Inc., has applied for patent term restoration.

FDA has determined that the applicable regulatory review period for the New Jersey Meniscal Bearing Knee Replacement is 1,701 days. Of this time, 1,095 days occurred during the testing phase of the regulatory review period, while 606 days occurred during the approval phase. These periods of time were derived from the following dates:

1. The date a clinical investigation was begun: August 16, 1980.

The applicant claimed July 14, 1980, as the date which commenced the testing phase. FDA received the application for an investigational device exemption on July 17, 1980. Thirty days after this application was received, it was automatically approved under 21 CFR 812.30(a)(1) on August 16, 1980.

2. The date an application was initially submitted under section 515 of the Federal Food, Drug, and Cosmetic Act: August 16, 1983.

The applicant claimed that the premarket approval applications for the product (PM30055 and PM30055/S2) were submitted on August 12, 1983. However, FDA received the application on August 16, 1983.

3. The date the application was approved: April 12, 1985.

The applicant claimed that its product was approved on April 25, 1985. FDA has determined, however, that premarket approval application (PM30055) and its supplement (PM30055/S2), which cover both parts of the New Jersey Meniscal Bearing Knee Replacement, were approved on April 12, 1985.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 90 days of patent extension.

Anyone with knowledge that any of the dates as published is incorrect may, on or before October 29, 1985, submit to the Dockets Management Branch (address above) written comments and ask for a redetermination. Furthermore, any interrested person may petition FDA, on or before February 26, 1986, for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (See H. Rept. 98-857, Part 1, 98th Cong., 2d Sess., pp. 41-42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Comments and petitions should be submitted to the Dockets Management Branch (address above) in three copies (except that individuals may submit single copies) and identified with the document number found in brackets in the heading of this document. Comments and petitions may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: August 28,1985.

Stuart L. Nightingale,

Associate Commissioner for Health Affairs.

[FR Doc. 85-20936 Filed 8-29-85; 8:45 am]

BILLING CODE 4160-01-M

Health Resources and Services Administration

Redesignation of Illinois Health Service Areas 7 and 8

AGENCY: Health Resources and Services Administration, Public Health Service, HHS.

ACTION: On July 25, 1985 a Notice was published in the **Federal Register** (50 FR 30301) annoucing the Secretary's decision to redesignate Illinois health service areas 7 and 8. The effective date was to have been September 13, 1985. Subsequent to that announcement an action was filed in the U.S. District Court, District of Columbia, seeking to have the Secretary's area redesignation decision set aside. In order to allow that litigation to proceed in an orderly manner, the Department has agreed to postpone the effective date until October 15, 1985.

FOR FURTHER INFORMATION CONTACT: John F. Belin, Director, Division of Agency Operations and Management, OHP, BHMORD, 5600 Fishers Lane, Room 9A-19, Rockville, Maryland 20857, 301-443-6680.

Dated: August 27, 1985.

John H. Kelso,

Acting Administrator, HRSA.

[FR Doc. 85-20750 Filed 8-29-85; 8:45 am]

BILLING CODE 4160-16-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute, Board of Scientific Counselors, Division of Cancer Prevention and Control; Meeting

Pursuant to Pub. L. 92-463, notice is hereby given of the meeting of the Board of Scientific Counselors, Division of Cancer Prevention and Control, National Cancer Institute, National Institutes of Health, September 19-20, 1985, Conference Rooms 7 and 8, Sixth Floor C-Wing, Building 31, 9000 Rockville Pike, Bethesda, Maryland 20205. This meeting will be open to the public on September 19 from 8:30 a.m. to 3:00 p.m. and on September 20 from 8:30 a.m. to adjournment to review programs and policies of the Division of Cancer Prevention and Control. Attendance by the public will be limited to space available.

In accordance with provisions set forth in section 552b(c)(6), Title 5, U.S. Code and section 10(d) of Pub. L. 92-463, a portion of the meeting will be closed to the public on September 19 from approximately 3:00 p.m. to recess for review, discussion and recommendations regarding the disposition of a cooperative agreement project. The discussion regarding the process of the review and subsequent recommendations could reveal personal information concerning individuals associated with the project, disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Also reviewed during this closed session will be the results of the intramural research site visit of the Cancer Prevention Studies Branch. The site visit chairman will present the site visit report to the Board of Scientific Counselors.

Mrs. Winifred Lumsden, the Committee Management Officer, National Cancer Institute, Building 31, Room 10A06, National Institutes of Health, Bethesda, Maryland 20205 (301-496-5708) will provide summaries of the meeting and rosters of committee members upon request.

Mr. J. Henry Montes, Executive Secretary, Board of Scientific Counselors, Division of Cancer Prevention and Control, National Cancer Institute, Blair Building, Room 1A07, National Institutes of Health, Bethesda, Maryland 20205 (Telephone: 301-427-8630) will furnish substantive program information.

Dated: August 9, 1985.

Betty J. Beveridge,

Committee Management Officer, NIH.

[FR Doc. 85-20797 Filed 8-29-85; 8:45 am]

BILLING CODE 4140-01-M

Developmental Therapeutics Contracts Review Committee; Meeting Cancellation

Notice of the meeting of the Developmental Therapeutics Contracts Review Committee, National Cancer Institutes, National Institute of Health, September 13, 1985, Building 31, Conference Room 7, Bethesda, Maryland 20205, published in the **Federal Register**, (50 FR 28479) is hereby cancelled. For further information, please contact Dr. Kendall G. Powers, Executive Secretary, National Cancer Institute, Westwood Building, Room 805, National Institutes of Health, Bethesda, Maryland 20205 (301/496-7575).

Dated: August 19, 1985.

Thomas E. Malone, Ph.D.,

Deputy Director, NIH.

[FR Doc. 85-20798 Filed 8-29-85; 8:45 am]

BILLING CODE 4140-01-M

National Cancer Institute, Board of Scientific Counselors; Division of Cancer Biology and Diagnosis; Meeting

Pursuant to Pub. L. 92-463, notice is hereby given of the meeting of the Board of Scientific Counselors, DCBD, National Cancer Institute, October 29, 1985, at the National Institutes of

Health, Building 31, Conference Room 7, Bethesda, Maryland. This meeting will be open to the public on October 29, from 8:30 a.m. to 3:00 p.m. for review of the DCBD Extramural Research Program. Attendance by the public will be limited to space available.

In accordance with the provisions set forth in section 552b(c)(6), Title 5, U.S. Code and section 10(d) of Pub. L. 92–463, the meeting will be closed to the public on October 29, from 3:00 p.m. to adjournment, for the review, discussion, and evaluation of individual programs and projects conducted by DCBD, National Cancer Institute, including consideration of personnel qualifications and performance, the competence of individual investigators, medical files of individual research subjects, and similar items, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Mrs. Winifred Lumsden, Committee Management Officer, National Cancer Institute, Building 31, Room 10A06, National Institutes of Health, Bethesda, Maryland 20205 (301/496–5708) will provide summaries of the meeting and rosters of committee members, upon request.

Dr. Ihor J. Masnyk, Deputy Director, Division of Cancer Biology and Diagnosis, National Cancer Institute, Building 31, Room 3A–04, National Institutes of Health, Bethesda, Maryland 20205 (301/496–4345) will furnish substantive program information.

Dated: August 9, 1985.

Betty J. Beveridge,

Committee Management Officer, NIH.

[FR Doc. 85–20799 Filed 8–29–85; 8:45 am]

BILLING CODE 4140–01–M

National Institute on Aging, Board of Scientific Counselors; Meeting

Pursuant to Pub. L. 92–463, notice is hereby given of the meeting of the Board of Scientific Counselors, National Institute on Aging, October 21–23, 1985, to be held at the Gerontology Research Center, Baltimore, Maryland. The meeting will be open to the public from 8:30 a.m. on Monday, October 21 until approximately 4:00 p.m. and will again be open to the public from 8:30 a.m. on Tuesday, October 22 until 4:00 p.m. Attendance by the public will be limited to space available.

In accordance with the provisions set forth in section 552b(c)(6), Title 5, U.S. Code and section 10(d) of Pub. L. 92–463, the meeting will be closed to the public on October 21 from 4:00 p.m. until recess, and again on October 22 from 4:00 p.m. until adjournment on October 23 for the review, discussion, and evaluation of individual programs and projects conducted by the National Institutes of Health, NIA, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Ms. June C. McCann, Committee Management Officer, NIA Building 31, Room 2C05, National Institutes of Health, Bethesda, Maryland 20205, (telephone: 301/496–5898) will provide a summary of the meeting and a roster of committee members. Dr. Richard C. Greulich, Scientific Director, NIA, Gerontology Research Center, Baltimore City Hospitals, Baltimore, Maryland 21224, will furnish substantive program information.

(Catalog of Federal Domestic Assistance Program No 13.866, Aging Research, National Institutes of Health)

Dated: August 9, 1985.

Betty J. Beveridge,

NIH Committee Management Officer.

[FR Doc. 85–20800 Filed 8–29–85; 8:45 am]

BILLING CODE 4140–01–M

National Institute of Allergy and Infectious Diseases; National Advisory Allergy and Infectious Diseases Council; Allergy and Immunology Subcommittee and Microbiology and Infectious Diseases Subcommittee; Meeting

Pursuant to Pub. L. 92–463, notice is hereby given of the meeting of the National Advisory Allergy and Infectious Diseases Council, National Institute of Allergy and Infectious Diseases, and its subcommittees on September 19–20, 1985, at the National Institutes of Health, Building 31C, Conference Room 10, Bethesda, Maryland 20205.

The meeting will be open to the public on September 19 from approximately 9:00 a.m. to 9:30 a.m. for opening remarks of the Institute Director and again from 1:30 p.m. to approximately 5:00 p.m. for discussion of procedural matters, Council business, and a report from the Institute Director which will include a discussion of budgetary matters. The primary program discussions will be on Asthma and Allergic Diseases: State of the Art Reviews. On September 20 of the meeting will be open to the public from approximately 8:30 a.m. to 9:30 a.m. for the reports of the Director of the Microbiology and Infectious Diseases Program and the Director of the Immunology, Allergic and Immunologic Diseases Program.

In accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5, U.S. Code, and section 10(d) of Pub. L. 92–463, the meeting of the NAAIDC Allergy and Immunology Subcommittee and of the NAAIDC Microbiology and Infectious Diseases Subcommittee will be closed to the public for approximately three hours for the review, evaluation, and discussion of individual grant applications. It is anticipated that this will occur from 9:30 a.m. until approximately 12:30 p.m. on September 19. The meeting of the full Council will be closed from approximately 9:30 a.m. until adjournment on September 20 for the review, evaluation, and discussion of individual grant applications. These applications and the discussions could reveal confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the applications, disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Ms. Gwendolyn Trible, Office of Research Reporting and Public Response, National Institute of Allergy and Infectious Diseases, Building 31, Room 7A32, National Institutes of Health, Bethesda, Maryland 20205, telephone (301) 496–5717, will provide summaries of the meetings and rosters of the Council members as requested.

Dr. John W. Diggs, Director, Extramural Activities Program, NIAID, NIH, Westwood Building, Room 703, telephone (301) 496–7291, will provide substantive program information.

(Catalog of Federal Domestic Assistance Program Nos. 13.855, Pharmacological Sciences; 13.856, Microbiology and Infectious Diseases Research, National Institutes of Health)

Dated: August 9, 1985.

Betty J. Beveridge,

NIH Committee Management Officer.

[FR Doc. 85–20801 Filed 8–29–85; 8:45 am]

BILLING CODE 4140–01–M

National Institute of Neurological and Communicative Disorders and Stroke; Meetings

Pursuant to Pub. Law 92–463, notice is hereby given of the meetings of the committees of the National Institute of Neurological and Communicative Disorders and Stroke.

These meetings will be open to the public to discuss administrative details or other issues relating to committee business as indicated in the notice.

Attendance by the public will be limited to space available.

These meetings will be closed to the public as indicated below in accordance with the provisions set forth in section 552(b)(4) and 552(c)(6), Title 5, U.S. Code and section 10(d) of Pub. L. 92–463, for the review, discussion and evaluation of individual grant applications. These applications and the discussions could reveal confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Summaries of meetings, rosters of committee members, and other information pertaining to the meetings can be obtained from the Executive Secretary indicated.

Name of Committee: National Advisory Neurological and Communicative Disorders and Stroke Council and Its Planning Subcommittee.

Dates: October 9–11, 1985.

Place: National Institute of Health: Building 31C, Conference Room 10; 9000 Rockville Pike; Bethesda, Maryland 20205.

Open: October 9, 1:00 p.m.—3:00 p.m. (Planning Subcommittee); October 10, 9:00 a.m.—2:00 p.m. (Council).

Agenda: To discuss program planning, program accomplishments, and special reports.

Closed: October 9, 3:00 p.m.—5:00 p.m. (Planning Subcommittee); October 10, 2:00 p.m.—4:00 p.m. (Council); October 11, 8:30 a.m.—adjournment (Council).

Closure Reason: For review of grant applications.

Executive Secretary: John C. Dalton, Ph.D., Director, NINCDS–EAP, Federal Building, Room 1016, National Institutes of Health, Bethesda, Maryland 20205, Telephone: 301/496–9248.

Name of Committee: Neurological Disorders Program Project Review B Committee.

Dates: October 18, 19, and 20, 1985.

Place: Grenelefe Hotel, 1011 S. Akard, Dallas, Texas 75215.

Open: October 18, 8:30 a.m.—9:00 a.m.

Closed: October 18, 9:00 a.m.—recess; October 19, 8:30 a.m.—recess; October 20, 8:00 a.m.—adjournment.

Closure Reason: To review grant applications.

Acting Executive Secretary: Dr. A. Beau White, Federal Building, Room 9C–14, National Institutes of Health, Betheda, Maryland 20205, Telephone: 301/496–9223.

Name of Committee: Communicative Disorders Review Committee.

Dates: October 31—November 1, 1985.

Place: Ramada Inn, Bethesda, 8400 Wisconsin Avenue, Bethesda, Maryland 20814.

Open: October 31, 8:00 a.m.—8:30 a.m.

Closed: October 31, 8:30 a.m.—recess; November 1, 8:00 a.m.—adjournment.

Closure Reason: To review grant applications.

Executive Secretary: Dr. Marilyn Semmes, Federal Building, Room 9C–14, National Institutes of Health, Bethesda, Maryland 20205, Telephone: 301/496–9223.

Name of Committee: Neurological Disorders Program Project Review A Committee

Dates: October 31, November 1 and 2, 1985.

Place: Ramada Inn, Bethesda, 8400 Wisconsin Avenue, Bethesda, MD 20814.

Open: October 31, 8:00 p.m.—8:30 p.m.

Closed: October 31, 8:30 p.m.—recess; November 1, 8:30 a.m.—recess; November 2, 8:30 a.m.—adjournment.

Closure Reason: To review grant applications.

Executive Secretary: Dr. Leon Jack Greenbaum, Jr., Federal Building, Room 9C–14, National Institutes of Health, Bethesda, Maryland 20205, Telephone: 301/496–9223.

(Catalog of Federal Domestic Assistance Program No. 13.853, Clinical Basis Research; No. 13.854, Biological Basis Research)

Dated: August 9, 1985.

Betty J. Beveridge,

Committee Management Officer, NIH.

[FR Doc. 85–20802 Filed 8–29–85; 8:45 am]

BILLING CODE 4140–01–M

Division of Research Grants; Meetings

Pursuant to Pub. L. 92–463, notice is hereby given of the meetings of the following study sections for September through November 1985, and the individuals from whom summaries of meetings and rosters of committee members may be obtained.

These meetings will be open to the public to discuss administrative details relating to study section business for approximately one hour at the beginning of the first session of the first day of the meeting. Attendance by the public will be limited to space available. These meetings will be closed thereafter in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5, U.S. Code and section 10(d) of Pub. L. 92–463, for the review, discussion and evaluation of individual grant applications. These applications and the discussions could reveal confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

The Grants Inquiries Office, Division of Research Grants, Westwood Building, National Institutes of Health, Bethesda, Maryland 20205, telephone 301–496–7441 will furnish summaries of the meetings and rosters of committee members. Substantive program information may be obtained from each executive secretary whose name, room number, and telephone number are listed below each study section. Since it is necessary to schedule study section meetings months in advance, it is suggested that anyone planning to attend a meeting contact the executive secretary to confirm the exact date, time and location. All times are A.M. unless otherwise specified.

Study section	September–November, 1985 Meetings	Time	Location
Allergy and Immunology, Dr. Eugene Zimmerman, Rm. 320, Tel. 301–496–7380	Oct. 17–19	8:30	Holiday Inn, Gaithersburg, MD.
Bacteriology and Mycology-1, Dr. Milton Gordon, Rm. 304, Tel. 301–496–7340	Oct. 9–11	8:30	Holiday Inn, Georgetown, DC.
Bacteriology and Mycology-2, Dr. William Branche, Jr., Rm. 306, Tel. 301–496–7681	Oct. 16–18	8:30	Holiday Inn, Georgetown, DC.
Behavioral Medicine, Dr. Joan Rittenhouse, Rm. 232, Tel. 301–496–7109	Oct. 9–11	9:00	Georgetown Hotel, Washington, DC.
Biochemical Endocrinology, Dr. Norman Gold, Rm. 226, Tel. 301–496–7430	Oct. 16–19	8:30	Holiday Inn, Bethesda, MD.
Biochemistry-1, Dr. Adolphus P. Toliver, Rm. 3188, Tel. 301–496–7516	Oct. 23–25	8:30	Westpark Hotel, Rosslyn, VA.
Biochemistry-2, Dr. Alex Liacouras, Rm. 316A, Tel. 301–496–7517	Oct. 17–19	8:30	Linden Hill Hotel, Bethesda, MD.
Bio-Organic and Natural Products Chemistry, Dr. Michael Rogers, Rm. 5, Tel. 301–496–7107.	Oct. 17–19	9:00	Holiday Inn, Georgetown, DC.
Biophysical Chemistry, Dr. John S. Wolff, Rm. 236B, Tel. 301–496–7070	Oct. 17–19	8:30	Room 7, Bldg. 31C, Bethesda, MD.
Bio-Psychology, Dr. A. Keith Murray, Rm. 220, Tel. 301–496–7058	Sept 30–Oct. 3	9:00	Ramada Inn, Bethesda, MD.
Cardiovascular and Pulmonary, Dr. Anthony C. Chung, Rm. 2A–04, Tel. 301–496–7316	Oct. 9–11	8:30	Linden Hill Hotel, Bethesda, MD.
Cardiovascular and Renal, Dr. Rosemary Morris, Rm. 321, Tel. 301–496–7901	Oct. 21–23	8:30	Holiday Inn, Bethesda, MD.
Cellular Biology and Physiology-1, Dr. Gerald Greenhouse, Rm. 336, Tel. 301–496–7396	Oct. 9–11	8:30	Room 7, Bldg. 31C, Bethesda, MD.

Study section	September–November, 1985 Meetings	Time	Location
Cellular Biology and Physiology-2, Dr. Evelyn Horenstein, Rm. 306, Tel. 301-496-7681	Oct. 21-23	8:30	Linden Hill Hotel, Bethesda, MD.
Chemical Pathology, Dr. Edmund Copeland, Rm. 353, Tel. 301-496-7078	Oct. 17-19	8:00	Ramada Inn, Bethesda, MD.
Diagnostic Radiology, Dr. Catharine Wingate, Rm. 219B, Tel. 301-496-7650	Oct. 23-25	8:30	Room A, Landow Bldg., Bethesda, MD.
Endocrinology, Dr. Harry Brodie, Rm. 333, Tel. 301-496-7346	Oct. 22-24	9:00	Ramada Inn, Bethesda, MD.
Epidemiology and Disease Control-1, Dr. Phyllis B. Eveleth, Rm. 203C, Tel. 301-496-7246	Oct. 15-17	8:30	Holiday Inn, Chevy Chase, MD.
Epidemiology and Disease Control-2, Dr. Ann Schluederberg, Rm. 203B, Tel. 301-496-7246	Oct. 15-17	8:30	Holiday Inn, Chevy Chase, MD.
Experimental Cardiovascular Sciences, Dr. Richard Peabody, Rm. 234, Tel. 301-496-7940	Oct. 15-17	8:00	Gramercy Inn, Washington, DC.
Experimental Immunology, Dr. David Lavrin, Rm. 222B, Tel. 301-496-7238	Oct. 16-18	9:00	Old Colony Inn, Alexandria, VA.
Experimental Therapeutics, Dr. Morris Kelsey, Rm. 221, Tel. 301-496-7597	Oct. 16-18	8:30	Holiday Inn, Bethesda, MD.
Experimental Virology, Dr. Garrett V. Keefer, Rm. 206, Tel. 301-496-7474	Oct. 21-23	8:30	Room 8, Bldg. 31C, Bethesda, MD.
General Medicine A-1, Dr. Harold Davidson, Rm. 354A, Tel. 301-496-7797	Oct. 23-25	8:30	Room 10, Bldg. 31C, Bethesda, MD.
General Medicine A-2, Dr. Donna J. Dean, Rm. 354B, Tel. 301-496-7140	Oct. 23-25	8:30	Room 6, Bldg. 31C, Bethesda, MD.
General Medicinde B, Dr. Antonia Novello, Rm. 322 Tel. 301-496-7730	Oct. 23-25	8:30	Holiday Inn, Georgetown, DC.
Genetics, Dr. David Remondini, Rm. 349, Tel. 301-496-7271	Oct. 17-19	9:00	Room 8, Bldg. 31C, Bethesda, MD.
Hearing Research, Dr. Joseph Kimm, Rm. 225, Tel. 301-496-7494	Oct. 16-18	8:30	Georgetown Hotel, Washington, DC.
Hematology-1, Dr. Clark Lum, Rm. 355A, Tel. 301-496-7506	Oct. 17-19	8:00	Georgetown Inn, Washington, DC.
Hematology-2, Dr. Bruce Maurer, Rm. 355B, Tel. 301-496-7506	Oct. 9-11	8:00	Holiday Inn, Georgetown, DC.
Human Development and Aging-1, Dr. Teresa Levitin, Rm. 303, Tel. 301-496-7025	Oct. 23-25	9:00	State Plaza Hotel, Washington, DC.
Human Development and Aging-2, Dr. Samuel Rawlings, Rm. 305, Tel. 301-496-7640	Oct. 9-11	9:00	Wellington Hotel, Washington, DC.
Human Development and Aging-3, Dr. Susan C. Streufert, Rm. 203, Tel. 301-496-9403	Oct. 21-22	8:30	Highland Hotel, Washington, DC.
Human Embryology and Development, Dr. Arthur Hoversland, Rm. 319A, Tel. 301-496-7839.	Oct. 22-25	8:00	Linden Hill Hotel, Bethesda, MD.
Immunobiology, Dr. William Stylos, Rm. 222A, Tel. 301-496-7780	Oct. 9-11	8:30	Holiday Inn, Bethesda, MD.
Immunological Sciences, Dr. Hugh Stamper, Rm. 233A, Tel. 301-496-7179	Oct. 16-18	8:30	Wellington Hotel, Washington, DC.
Mammalian Genetics, Dr. Jerry Roberts, Rm. 349, Tel. 301-496-7271	Oct. 24-26	8:30	Twin Bridges Marriott, Arlington, VA.
Medicinal Chemistry, Dr. Ronald Dubois, Rm. 5, Tel. 301-496-7107	Oct. 23-25	9:00	Holiday Inn, Georgetown, DC.
Metabolism, Dr. Robert Leonard, Rm. 339A, Tel. 301-496-7091	Oct. 24-26	8:30	Room 8, Bldg. 31C, Bethesda, MD.
Metallobiochemistry, Dr. John A. Beisler, Rm. 310, Tel. 301-496-7733	Oct. 24-26	8:30	Holiday Inn, Bethesda, MD.
Microbial Physiology and Genetics-1, Dr. Martin Slater, Rm. 236, Tel. 301-496-7183	Oct. 23-25	8:30	Sherton-Potomac, Rockville, MD.
Microbial Physiology and Genetics-2, Dr. Gerald Liddel, Rm. 357, Tel. 301-496-7130	Oct. 23-25	8:30	Ramada Inn, Bethesda, MD.
Molecular and Cellular Biophysics, Dr. Patricia Straat, Rm. 236A, Tel. 301-496-7060	Oct. 24-26	8:30	Sheraton-Potomac, Rockville, MD.
Molecular Biology, Dr. Donald Disque, Rm. 328, Tel. 301-496-7830	Oct. 17-19	8:30	Holiday Inn, Georgetown, DC.
Molecular Cytology, Dr. Ramesh Nayak, Rm. 233B, Tel. 301-496-7149	Oct. 10-12	8:30	Wellington Hotel, Washington, DC.
Neurological Sciences-1, Dr. Allen C. Stoolmiller, Rm. 437B, Tel. 301-496-7280	Oct. 10-12	8:00	Holiday Inn, Bethesda, MD.
Neurological Sciences-2, Dr. Stephan Gobel, Rm. 154, Tel. 301-496-8808	Oct. 8-11	8:30	Holiday Inn, Bethesda, MD.
Neurology A, Dr. Catherine Woodbury, Rm. 326, Tel. 301-496-7095	Oct. 9-12	12:00 p.m.	Holiday Inn, Bethesda, MD.
Neurology B-1, Dr. Jo Ann McConnell, Rm. 152, Tel. 301-496-7846	Oct. 15-18	8:30	Governor's House, Washington, DC.
Neurology B-2, Dr. Herman Teitelbaum, Rm. 152, Tel. 301-496-7422	Oct. 1-4	8:30	Room 9, Bldg. 31C, Bethesda, MD.
Neurology C, Dr. Kenneth Newrock, Rm. 154, Tel. 301-496-8808	Oct. 18-19	8:30	Linden Hill Hotel, Bethesda, MD.
Nutrition, Dr. John Schubert, Rm. 204, Tel. 301-496-7178	Oct. 23-25	8:30	Room 4, Bldg. 31A, Bethesda, MD.
Oral Biology and Medicine-1, Dr. J. Terrell Hoffeld, Rm. 325, Tel. 301-496-7818	Oct. 16-18	8:30	Sherton-Potomac, Rockville, MD.
Oral Biology and Medicine-2, Dr. J. Terrell Hoffeld, Rm. 325, Tel. 301-496-7818	Oct. 23-25	8:30	Linden Hill Hotel, Bethesda, MD.
Orthopedics and Musculoskeletal, Ms. Ileen Stewart, Rm. 350, Tel. 301-496-7581	Oct. 26-28	8:30	Room 10, Bldg. 31C, Bethesda, MD.
Pathobiochemistry, Dr. Sharon Johnson, Rm. A-26, Tel. 301-496-7820	Oct. 23-25	8:30	Room 7, Bldg. 31C, Bethesda, MD.
Pathology A, Dr. John L. Meyer, Rm. 337, Tel. 301-496-7305	Oct. 16-18	8:00	Ramada Inn, Bethesda, MD.
Pathology B, Dr. Martin Padarathsingh, Rm. 352, Tel. 301-496-7244	Oct. 23-25	8:30	Holiday Inn, Georgetown, DC.
Pharamacology, Dr. Joseph Kaiser, Rm. 206, Tel. 301-496-7408	Oct. 15-17	8:30	Ramada Inn, Rockville, MD.
Physical Biochemistry, Dr. Gopa Rakhit, Rm. 218B, Tel. 301-496-7120	Oct. 23-25	8:30	Marbury House, Georgetown, DC.
Physiological Chemistry, Dr. Stanley Burrous, Rm. 339B, Tel. 301-496-7837	Oct. 23-25	8:00	Holiday Inn, Chevy Chase, MD.
Physiology, Dr. Raymond Bahor, Rm. 209, Tel. 301-496-7878	Oct. 9-12	9:00	Wellington Hotel, Washington, DC.
Radiation, Dr. John Zimbrick, Rm. 219A, Tel. 301-496-7073	Oct. 28-30	9:00	Holiday Inn, Bethesda, MD.
Reproductive Biology, Dr. Dharam Dhindsa, Rm. 307, Tel. 301-496-7318	Oct. 22-25	8:30	Holiday Inn, Bethesda, MD.
Respiratory and Applied Physiology, Dr. Herbert Yellin, Rm. 218A, Tel. 301-496-7320	Oct. 9-11	8:30	Linden Hill Hotel, Bethesda, MD.
Safety and Occupational Health, Dr. Richard Rhoden, Rm. 3A10, Tel. 301-496-6723	Oct. 30-Nov. 1	8:30	Colonial Manor, Rockville, MD.

Study section	September-November, 1985 Meetings	Time	Location
Sensory Disorders and Language, Dr. Michael Halasz, Rm. 3A-07, Tel. 301-496-7550	Oct. 30-Nov. 1	8:30	Capitol Holiday Inn, Washington, DC.
Social Sciences and Population, Ms. Carol Campbell, Rm. 210, Tel. 301-496-7906	Oct. 10-12	9:00	Holiday Inn, Chevy Chase, MD.
Surgery and Bioengineering, Dr. Paul F. Parakkal, Rm. 303A, Tel. 301-496-7506	Oct. 21-23	8:00	Wellington Hotel, Washington, DC.
Surgery, Anesthesiology and Trauma, Dr. Keith Kramer, Rm. 319B, Tel. 301-496-7771	Oct. 10-11	8:30	Ramada Inn, Bethesda, MD.
Toxicology, Ms. Faye J. Calhoun, Rm. 205, Tel. 301-496-7570	Oct. 16-18	8:00	Holiday Inn, Georgetown, DC.
Tropical Medicine and Parasitology, Dr. Jean Hickman, Rm. 334, Tel. 301-496-1190	Oct. 14-16	8:00	Holiday Inn, Bethesda, MD.
Virology, Dr. Claire Winestock, Rm. 309, Tel. 301-496-7605	Oct. 10-12	8:30	Room 9, Bldg. 31C, Bethesda, MD.
Visual Sciences A-1, Dr. Luigi Giacometti, Rm. 207, Tel. 301-496-7000	Oct. 23-25	9:00	Linden Hill Hotel, Bethesda, MD.
Visual Sciences A-2, Dr. Jane Hu, Rm. 439A, Tel. 301-496-7310	Oct. 16-19	8:30	Holiday Inn, Georgetown, DC.
Visual Sciences B, Dr. Earl Fisher, Jr., Rm. 325, Tel. 301-496-7251	Oct. 9-12	8:30	Wellington Hotel, Washington, DC.

(Catalog of Federal Domestic Assistance Program Nos. 13.306, 13.333, 13.337, 13.393–13.396, 13.837–13.844, 13.846–13.878, 13.892, 13.893, National Institutes of Health, HHS)

Dated: August 9, 1985.

Betty J. Beveridge,

Committee Management Officer, NIH.

[FR Doc. 85-20803 Filed 8-29-85; 8:45 am]

BILLING CODE 4140-01-M

Public Health Service

Statement of Organization, Functions, and Delegations of Authority; National Institutes of Health

Notice is hereby given that program-level organizational changes occurring in the National Institutes of Health (NIH) will no longer be published in the Federal Register.

On July 23, 1984, authority to approve organizational changes at the program level (fourth echelon) was delegated from the Director, Office of Management, PHS, to the Director, NIH. This delegated authority also included the right of the Director, NIH, to determine whether or not to continue the publication of Program organizational changes at NIH. It has been determined that the cost savings for non-publication outweigh the benefits of publishing these changes.

Further information may be obtained from Mr. John J. Migliore, Chief, Management Analysis Branch, Division of Management Policy, Office of Administration, National Institutes of Health, Building 31, Room 3B19, 9000 Rockville Pike, Bethesda, MD 20892 (301-496-2461).

Dated: August 19, 1985.

James B. Wyngaarden, M.D.,

Director, NIH.

[FR Doc. 85-20804 Filed 8-29-85; 8:45 am]

BILLING CODE 4140-01-M

National Institutes of Health

National Arthritis Advisory Board; Meeting

Pursuant to Pub. L. 92-463, notice is hereby given of the meeting of the National Arthritis Advisory Board on September 6, 1985, 8:30 a.m. to 12:30 p.m. at the San Francisco Marriott, Fishermen's Wharf, San Francisco, CA. The meeting, which will be open to the public, is being held to discuss the Board's activities and to continue the evaluation of the implementation of the long-range plan to combat arthritis. Attendance by the public will be limited to space available. Notice of the meeting room will be posted in the Hotel lobby.

Further information, times and meeting locations of the subcommittees may be obtained by contacting Mr. Raymond Kuehne, Executive Director, National Arthritis Advisory Board, P.O. Box 30174, Bethesda, Maryland 20205, (301) 496-6045. The agenda and rosters of the members can also be obtained from his office. Summaries of the meeting may be obtained by contacting Carole A. Frank, Committee Management Office, NIADDK, National Institutes of Health, Room 9A47, Building 31A, Bethesda, Maryland, 20205, (301) 496-6917.

Dated: August 27, 1985.

J.E. Rall,

Acting Director, NIH.

[FR Doc. 85-20919 Filed 8-29-85; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Privacy Act of 1974—Revision and Deletion of Notices of Systems of Records

This notice updates and revises the information which the Department of the Interior has published describing systems of records maintained which are subject to the requirements of section 3 of the Privacy Act of 1974, as amended, 5 U.S.C. 552a. Except as noted below, all changes being published are editorial in nature, and reflect organization changes and other minor administrative revisions which have occurred since the previous publication of the material in the Federal Register.

The system of records notice describing the Department's financial interest statements and Ethics Counselor decision records (OS-3), previously published on July 2, 1984 (49 FR 27215), is revised to add a reference to "Associate Ethics Counselors" in the system location description. The existing routine disclosure statement for litigation purposes is revised to incorporate the clarification on such disclosures prescribed by the Office of Management and Budget (OMB) in its supplementary guidelines dated May 24, 1985, for implementing the Privacy Act. Also, the retention and disposal statements are amended to reference the National Archives and Records Administration (NARA) General Records Schedule as prescribed in the Assistant Archivist for Records Administration's memorandum to Agency Records Officers dated June 11, 1985.

The system of records notice describing records on Secretarial controlled correspondence (OS-20), previously published on April 11, 1977 (42 FR 19019), is revised to: (1) Clarify the existing routine disclosure for litigation purposes pursuant to the OMB guidelines referenced above; (2) clarify the existing routine disclosure statement regarding congressional inquiries; and (3) revise the retention and disposal statement pursuant to the NARA memorandum referenced above.

The notice titled "Emergency Loan Fund Committee Loan Records—Interior, Office of the Secretary-80", previously published on May 27, 1981

(46 FR 28522), is deleted from the Department's inventory of systems of records notices. The loan fund was discontinued on October 4, 1983, and the associated records are no longer maintained.

The two notices being revised (OS-3 and OS-20) are published in their entirety below. Since these changes do not involve any new or intended use of the information in the systems of records, the notices shall be effective August 30, 1985. Additional information regarding these revisions may be obtained from the Department Privacy Act Officer, Office of the Secretary (PIR), Room 7357, Main Interior Building, U.S. Department of the Interior, Washington, D.C. 20240.

Dated: August 22, 1985.

James P. Jadlos,

Acting Director, Office of Information Resources Management.

INTERIOR/OS-3

SYSTEM NAME:

Financial Interest Statements and Ethics Counselor Decisions—Interior, Office of the Secretary—

SYSTEM LOCATIONS:

(1) Office of the Assistant Secretary—Policy, Budget and Administration, Interior, 18th and C Street, N.W., Washington, D.C. 20240; (2) Bureau and Office of Ethics Counselors, Deputy Ethics Counselors, Associate Ethics Counselors, and Assistant Ethics Counselors. (A list may be obtained from the Deputy Agency Ethics Official, Office of the Assistant Secretary—Policy, Budget and Administration.)

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Present or past Department employees required to file financial interests or disclosure statements as required by in 5 CFR Part 734, 43 CFR Part 20, or 30 CFR Part 706; and, present or past Department employees subjected to remedial or disciplinary action for conflicts of interest or other ethics violations.

CATEGORIES OF RECORDS IN THE SYSTEM:

Contains confidential statements of employment and financial interests (forms DI-212, DI-212A, DI-213, or DI-278) for present or past Interior Department employees required to file such statements. Contains Public Financial Disclosure Reports required by the Ethics in Government Act of 1978, as amended, (form SF-278) for present or past incumbents in position required to file such statements. Also contains records of conflict of interest decisions and appeals, analysis of financial holdings, employee statements, bureau or office comments, and supervisor comments on present or past employees, as requested by the bureau or office counselors or as needed by the Designated Agency Ethics Official.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

(1) 5 U.S.C. 7301; (2) 16 U.S.C. 1912; (3) 30 U.S.C. 1211; (4) 42 U.S.C. 6392; (5) 43 U.S.C. 1743; (6) 43 U.S.C. 1864; (7) Executive Order No. 11222, 18 U.S.C. 201 note; (8) 5 CFR Parts 734 and 736; and (9) 43 CFR Part 20.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

The primary uses of the records are: (a) To review employee financial interests and determine employee compliance or non-compliance with applicable conflict of interest statutes and regulations, and to effect remedial and disciplinary action where non-compliance is ascertained; (b) to record in fact that the employee has been made aware of specifically directed legislation or regulations covering his organization and that he or she is in compliance with such specific legislation or regulations; (c) to provide the public with access to, and to adequately control access to, financial disclosure reports which must by statute be made available to the public; and (d) to provide an adequate system of records for Departmental auditors performing compliance audits within the Department.

Disclosure outside of the Department may be made: (1) to the U.S. Department of Justice or in a proceeding before a court or adjudicative body when (a) the United States, the Department of the Interior, a component of the Department, or, when represented by the government, an employee of the Department is a party to litigation or anticipated litigation or has an interest in such litigation, and (b) the disclosure is deemed by the Department of the Interior to be relevant or necessary to the litigation, and (c) the Department of the Interior determines that disclosure is compatible with the purpose for which the records were compiled; (2) to a Member of Congress from the record of an individual in response to an inquiry made at the request of that individual; (3) to federal, state, tribal, territorial or local agencies where necessary to obtain information relevant to the hiring or retention of an employee, or the issuance of a security clearance, contract, license, grant or other benefit; (4) to a federal agency which has requested information relevant or necessary to its hiring or retention of an employee, or issuance of a security clearance, license, contract, grant, or other benefit; (5) to the Office of Personnel Management to perform oversight reviews; (6) to the public for only those records covered by specific statutes requiring their public disclosure; (7) to appropriate federal, state, tribal, territorial, local or foreign agencies responsible for investigating or prosecuting the violation of, or for enforcing, implementing, or administering a statute, rule, regulation, program, facility, order, lease, license, contract, grant, or other agreement; (8) to a federal, state, tribal, territorial, local or foreign agency, or an organization, or an individual when reasonably necessary to obtain information or assistance relating to an audit, investigation, trial, hearing, preparation for trial or hearing, or any other authorized activity or the Department; (9) to an appropriate federal, state, tribal, territorial, local, or foreign court or grand jury in accordance with established constitutional, substantive, or procedural law or practice; (10) to an actual or potential party or his or her attorney for the purpose of negotiation or discussion on such matters as settlement of the case or matter, plea bargaining, or informal discovery proceedings; and (11) to a foreign government pursuant to an international treaty, convention, or executive agreement entered into by the United States.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

(1) For confidential statements of employment and financial interests, DI-212, DI-212A, and DI-213:

STORAGE:

Maintained in file folders, word processing equipment storage media, and computer disks and output.

RETRIEVABILITY:

For each bureau and office, information is filed alphabetically by position or employee name.

SAFEGUARDS:

Maintained in locked file cabinets in locked rooms; manual files, standard passworded filed on word processor, and software are accessible to authorized persons only. Access to computer files is restricted by the use of file passwords and file encryption.

RETENTION AND DISPOSAL:

Retention and disposal is in accordance with General Records Schedule No. 1, Item No. 25.

(2) For Public Disclosure Statements of Known Financial Interest, SF-278; and Confidential Supplement Form DI-278:

STORAGE:

Maintained in file folders.

RETRIEVABILITY:

Filed by bureau, alphabetically by employee name in the Office of the Assistant Secretary—Policy, Budget and Administration.

SAFEGUARDS:

Maintained in locked file cabinets or in locked rooms; manual files, standard passworded files and software are accessible to authorized persons only.

RETENTION AND DISPOSAL:

Retention and disposal is in accordance with General Records Schedule No. 1, Item No. 25.

SYSTEM MANAGER(S) AND ADDRESS:

Designated Agency Ethics Official, Office of the Assistant Secretary—Policy, Budget and Administration, U.S. Department of the Interior, 18th and C Streets, NW., Washington, D.C. 20240.

NOTIFICATION PROCEDURES:

Inquiries may be addressed to the System Manager identified above, or to the appropriate Bureau or Office Ethics Counselor. (A list of Ethics Counselors can be obtained from the System Manager.) (See 43 CFR 2.60 for procedures on making inquiries.)

RECORD ACCESS PROCEDURES:

A request for access may be addressed to the System Manager, identified above, or to the appropriate Bureau or Office Ethics Counselor. (A list of Ethics Counselors can be obtained from the System Manager.) The request must be in writing and signed by the requester. The request must meet the content requirements of 43 CFR 2.63.

CONTESTING RECORD PROCEDURES:

A petition for amendment shall be addressed to the System Manager or to the appropriate Bureau or Office Ethics Counselor. (A list may be obtained from the System Manager) and must meet the requirements of 43 CFR 2.71.

RECORD SOURCE CATEGORIES:

Present Department employees who are, or past Department employees who were, required to file financial interest statements, and Department bureaus and offices.

INTERIOR/OS-20

SYSTEM NAME:

Secretarial Controlled Correspondence File—Interior, Office of the Secretary—20.

SYSTEM LOCATION:

Executive Secretariat, Office of the Under Secretary, U.S. Department of the Interior, 18th and C Streets, N.W., Washington, D.C. 20240.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Persons who have written to the Secretary of the Interior on official business.

CATEGORIES OF RECORDS IN THE SYSTEM:

Identification of writer, subject, date and disposition of correspondence.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 43 U.S.C. 1457; 44 U.S.C. 3101; Reorganization Plan 3 of 1950.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

The primary use of the records is to ascertain the status of correspondence to the Secretary of the Interior. Disclosures outside the Department of the Interior may be made: (1) To a Federal agency so that the agency may respond to an inquiry from the named individual, (2) to the U.S. Department of Justice or in a proceeding before a court or adjudicative body when (a) the United States, the Department of the Interior, a component of the Department, or, when represented by the government, an employee of the Department is a part to litigation or anticipated litigation or has an interest in such litigation, and (b) the disclosure is deemed by the Department of the Interior to be relevant or necessary to the litigation, and (c) the Department of the Interior determines that disclosure is compatible with the purpose for which the records were compiled, (3) of information indicating a violation or potential violation of a statute, regulation, rule, order or license to appropriate Federal, State, local or foreign agencies responsible for investigating or prosecuting the violation or for enforcing or implementing the statute, rule, regulation, order or license, and (4) to a congressional office from the record of an individual in response to an inquiry the individual has made to the congressional office.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Binders (index file).

RETRIEVABILITY:

Indexed by name, number and subject.

SAFEGUARDS:

Records maintained in locked file in secure room Retention and disposal: In accordance with General Records Schedule No. 23, Item No. 3.

SYSTEM MANAGER(S) AND ADDRESS:

Executive Secretary, Interior Building, Room 6221, 18th and C Streets, NW., Washington, D.C. 20240.

NOTIFICATION PROCEDURE:

Inquiries regarding the existence of records should be addressed to the System Manager. A written, signed request stating that the requester seeks information concerning his/her records is required. See 43 CFR 2.60.

RECORD ACCESS PROCEDURE:

A request for access may be addressed to the System Manager. The request must be in writing and be signed by the requester. The request must meet the content requirements of 43 CFR 2.63.

CONTESTING RECORD PROCEDURE:

A petition for amendment should be addressed to the System Manager and must meet the content requirements of 43 CFR 2.71.

RECORD SOURCE CATEGORIES:

Individuals on whom the record is maintained.

[FR Doc. 85-20860 Filed 6-29-85; 8:45 am]
BILLING CODE 4310-10-M

Bureau of Indian Affairs

Transfer of Federally-Owned Lands; Pueblo of San Felipe, NM

This notice is pulished in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 DM 8.1. In the absence of the Assistant Secretary—Indian Affairs, 209 DM 8.3A authorizes the Deputy Assistant Secretary—Indian Affairs final approval authority.

On March 20, 1985, pursuant to authority contained in the Federal Property and Administrative Services Act of 1949, as amended by Public Law 93-599 dated January 2, 1975 (88 Stat. 1954), the below-described property and

improvements were transferred by the Director, Disposal Division, Fort Worth Regional Office, General Services Administration, to the Secretary of the Interior, without reimbursement, to be held in trust for the benefit and use of the Pueblo of San Felipe, New Mexico.

San Felipe Day School Site

The following described parcel of land in Sandoval County, New Mexico:

In the South ½ Section 19, Township 14 North, Range 5 East, New Mexico Principal Meridian, described as follows: From the northwest corner of the San Felipe Church, South 28° 23' West, 600 feet; thence South 61° 37' East, 600 feet to the west bank of the Rio Grande; and from said point 600 feet distant from said church as before described, thence South 28° 23' West, 400 feet; thence South 61° 37' East, 730 feet to the west bank of the Rio Grande, thence up said west bank to intersect the line run South 61° 37' East, from the point 600 feet distant from said church as before described, containing 6.10 acres, more or less.

This land, totaling 6.10 acres, is to be treated as and receive the same benefits and protection as other trust lands held for the benefit and use of the Pueblo of San Felipe. Appropriate notation will be made in the land records of the Bureau of Indian Affairs.

Dated: August 20, 1985.

John W. Fritz,

Deputy Assistant Secretary, Indian Affairs.

[FR Doc. 85-20813 Filed 8-29-85; 8:45 am]

BILLING CODE 4310-02-M

Bureau of Land Management

Richfield District Advisory Council Meeting and Tour

AGENCY: Bureau of Land Management.

ACTION: Richfield District Advisory Council Meeting and Tour.

SUMMARY: Notice is hereby given, in accordance with Pub. L. 94-479 and 43 CFR Part 1780 that a Council Meeting will be held at the resource area office located in Hanksville, Utah, September 25, 1985 at 10:00 a.m. There will be a field trip in the Henry Mountains the following day.

Agenda items include:

1. Project work in Capitol Reef National Park.
2. Wild horse removal and adoption program.
3. Wildlife counts.
4. Summary of grasshopper and noxious weed spraying.
5. Recreation fee collection program.
6. Current update on Rangeland Policy.
7. Mt. Ellen road trespass decision.
8. Fremont River blasting trespass.
9. Proposed boundary adjustment on Piute Tribe land acquisition.
10. Status of Met Johnson Exchange.
11. Arrange next meeting.

The field trip in the Henry Mountains is open to the public. Those wishing to go on the field trip will need to provide their own transportation (four wheel drive vehicle required).

The business meeting is also open to the public. Interested persons may make oral statements to the Council from 1:00 p.m. to 2:00 p.m. September 25, 1985, or file written statements for the Council's consideration. Depending on the number of persons wishing to make oral statements, a per person time limit may be established by the District Manager.

Summary of the Council Meeting will be maintained in the District Office and will be available for public inspection and reproduction 30 days following the meeting.

Donald L. Pendleton,

District Manager.

August 21, 1985.

[FR Doc. 85-20771 Filed 8-29-85; 8:45 am]

BILLING CODE 4310-DQ-M

[M 66461(ND)]

Coal Exploration License Application; North Dakota; Invitation

Members of the public are hereby invited to participate with The Falkirk Mining Company in a program for the exploration of coal deposits owned by the United States of America in the following described lands located in McLean County, North Dakota:

T. 146 N., R. 87 W., 5th P.M.,
Sec. 24: SE¼.
160.00 acres.

Any party electing to participate in this exploration program shall notify, *in writing*, both the State Director, Bureau of Land Management, P.O. Box 36800, Billings, Montana 59107; and The Falkirk Mining Company, 2000 Schafer Street, P.O. Box 2200, Bismarck, North Dakota 58502-2200. Such written notice must refer to serial number M 66461(ND) and be received no later than 30 calendar days after publication of this Notice in the **Federal Register** or 10 calendar days after the last publication of the Notice in the Washburn Leader, whichever is later. This Notice will be published for two consecutive weeks in the Washburn Leader.

This proposed exploration program is fully described and will be conducted pursuant to an exploration plan to be approved by the Bureau of Land Management, Montana State Office, Granite Tower Building, 222 North 32nd Street, Billings, Montana. The exploration plan is available for public inspection at this address.

Dated: August 22, 1985.

Marvin LeNoue,

Associate State Director, Montana State Office.

[FR Doc. 85-20779 Filed 8-29-85; 8:45 am]

BILLING CODE 4310-DN-M

Filing of Plat of Survey; New Mexico

August 19, 1985.

The plat of survey described below were officially filed in the New Mexico State Office, Bureau of Land Management, Santa Fe, New Mexico, effective at 10:00 a.m. on August 19, 1985.

The surveys in Townships 23 North, Ranges 14, 15 and 16 West, and the dependent resurvey and subdivision of sections in Township 12 South, Range 26 East, New Mexico Principal Meridian, New Mexico.

These surveys were requested by the Bureau of Indian Affairs, Navajo Area Office, Windowrock, Arizona and the District Manager, Roswell District Office, Bureau of Land Management.

The plats will be in the open files of the New Mexico State Office, Bureau of Land Management, P.O. Box 1449, Santa Fe, New Mexico 87501. Copies of the plat may be obtained from that office upon payment of $2.50 per sheet.

Gary S. Speight,

Chief, Branch of Cadastral Survey.

[FR Doc. 85-20780 Filed 8-29-85; 8:45 am]

BILLING CODE 4310-FB-M

Fish and Wildlife Service

Acceptance of Bids for Duck Stamp Sheets

AGENCY: U.S. Fish and Wildlife Service

ACTION: Notice.

SUMMARY: Notice is given that the U.S. Fish and Wildlife Service will accept sealed bids for fifteen (15) sheets of 1984-85 Duck Stamps consisting of 120 stamps per sheet.

DATE: Bids will be accepted starting Sunday, September 1, 1985, and must be received no later than 4:00 p.m., Friday, November 1, 1985.

ADDRESS: U.S. Fish and Wildlife Service, Duck Stamp Sheets, P.O. Box 57020, Washington, D.C. 20037-0020.

FOR FURTHER INFORMATION CONTACT: Conley L. Moffett, Chief, Office of Public Use Management, U.S. Fish and Wildlife Service, 18th and C Streets, NW., Washington, D.C. 20240, (202) 653-2220, or Peter A. Anastasi, Office of Public

Use Management, 18th and C Streets, NW., Washington, D.C. 20240. (202) 343–5508.

SUPPLEMENTARY INFORMATION: The U.S. Fish and Wildlife Service gives notice of its intention to accept sealed bids for fifteen (15) sheets of the 1984–85 50th Anniversary Migratory Bird Hunting and Conservation Stamp ("Duck Stamp"). Each sheet is numbered from 1 to 15 and contains four panels. Each panel is numbered and consists of thirty (30) stamps for a total of one hundred twenty (120) stamps per sheet. In addition, the words "1934–84 50th Anniversity" are printed in gold on the selvage of each panel.

Commencing Sunday, September 1, 1985, and until 4:00 p.m., Friday, November 1, 1985, the U.S. Fish and Wildlife Service will accept sealed bids for the Duck Stamp sheets under the following conditions:

1. Minimum bid per sheet $2,000.00.
2. Bidders limited to one (1) sheet.
3. Bids must be accompanied by a certified or cashier's check or money order in the full amount of the bid payable to "Migratory Bird Conservation Fund," and the bidders full name, address, and telephone number.
4. Bids must be accompanied by a stamped, self-addressed business envelope by which bidders will be notified of the results of the bidding and by which unsuccessful bidders' checks or money orders will be returned.
5. Bids must be mailed to the above Post Office Box and be received by 4:00 p.m., Friday, November 1, 1985.
6. Successful bidders must make their own arrangements with the U.S. Fish and Wildlife Service for delivery of sheets.

Bids will remain sealed until Monday, November 4, 1985, at 9:00 a.m., at which time, they will be opened in the Office of the Director, U.S. Fish and Wildlife Service. The highest bidder will be awarded sheet number 1, the second highest bidder will be awarded sheet number 2, and so forth until the fifteenth (15th) highest bidder is awarded sheet number 15. If there are identifical bids *that exceed* the number of sheets available, rebidding will be requested of those bidders for the remaining sheets. If there are identical bids that *do not exceed* the number of sheets available, sheet numbers will be awarded by drawing of random numbers.

These stamps were valid during the period July 1, 1984, through June 30, 1985, and each sheet had a face value of $900.00. Currently, they have no face value. Their value rests only in the fact that they are collector's items that and there are only fifteen (15) of these commemorative, uncut sheets in existence.

Results of the bidding will be announced at the 1985 Duck Stamp Contest on Wednesday, November 6, 1985, at 1:00 p.m., in the Department of the Interior Auditorium at 18th and C Streets, NW., Washington, D.C.

Dated: August 23, 1985.

Robert A. Jantzen,
Director—U.S. Fish and Wildlife Service.

[FR Doc. 85–20790 Filed 8–29–85; 8:45 am]
BILLING CODE 4310–55–M

INTERSTATE COMMERCE COMMISSION

Motor Carriers; Intent To Engage In Compensated Intercorporate Hauling Operations

This is to provide notice as required by 49 U.S.C. 10524(b)(1) that the named corporations intend to provide or use compensated intercorporate hauling operations as authorized in 49 U.S.C. 10524(b).

1. Parent Corporation and address of principal office: American Stores Company (Del.), P.O. Box 27447, 709 E. South Temple, Salt Lake City, UT 84127–0447.

2. Wholly owned subsidiaries which will participate in the operations, and States of incorporation:

(i) Alpha Beta Company (Del.), 777 South Harbour Blvd., LaHabra, CA 90631
(ii) American Stores Buying Company (Del.), Post Office Box 30658, Salt Lake City, UT 84130
(iii) Acme Markets, Inc. (PA), 124 North 15th Street, Philadelphia, PA 19101
(iv) Jewel Companies, Inc. (N.Y.), 5725 N. East River Road, Chicago, IL 60631

Subsidiaries/Divisions of Jewel Companies, Inc.

(a) Buttrey Food Stores (Div.), 601 Sixth Street, SW., Great Falls, MT 59404
(b) Jewel Food Stores (Div.), 1955 West North Avenue, Melrose Park, IL 60160
(c) Osco Drug, Inc. (Ill), 1818 Swift Drive, Oak Brook, IL 60521
(d) Osco Drug of Michigan, Inc. (Mich.), 5725 N. East River Road, Chicago, IL 60631
(e) Osco Drug Northwest, Inc. (Del.), 601 South Sixth Street, SW., Great Falls, MT 59404
(f) Sav-On-Drugs, Inc. (Calif.), 1500 S. Anaheim Blvd., Anaheim, CA 92805
(g) Specialities, Inc. (Wisc.), 121 Industrial Drive, Beaver Dam, WI 53916
(h) Star Market Company (Div.), 625 Mt. Auburn Street, Cambridge, MA 02138
(i) White Hen Egg Farms, Inc. (Del.), 5725 N. East River Road, Chicago, IL 60631

(v) Skaggs Alpha Beta Company (Del.), 5201 Amelia Earhart Drive, Salt Lake City, UT 84116
(vi) Skaggs Companies, Inc. (Del.), Post Office Box 30658, Salt Lake City, UT 84130)
(vii) Skyline Distributors, Inc. (Del.), 1905 Horseshoe Road, Lancaster, PA 17601
(viii) Sunrich Mercantile Corp. (Calif.), 444 East Lambert Road, Fullerton, CA 92635

1. Parent corporation and address of principal office: Norfolk Southern Corporation, One Commercial Place, Norfolk, VA 23510,

2. Wholly-owned subsidiaries which will participate in the operations, and state(s) of incorporation:

(1) Norfolk and Western Railway Co., Virginia
(2) Chesapeake Western Railway, Virginia
(3) Lake Erie Dock Company, Delaware
(4) Lamberts Point Docks, Inc., Virginia
(5) The Nickel Plate Improvement Co., Inc., Indiana
(6) Pocahontas Development Corporation, Kentucky
(7) Pocahontas Land Corporation, Virginia
(8) The Scioto Valley and New England Railroad Co., Ohio
(9) Shenandoah-Virginia Corporation, Virginia
(10) The Toledo Belt Railway Co., Ohio
(11) Virginia Holding Corporation, Virginia
(12) Southern Railway Co., Virginia
(13) Airforce Pipeline, Inc., North Carolina
(14) The Alabama Great Southern Railroad Co., Alabama
(15) Arrowood-Southern Co., North Carolina
(16) Arrowood Southern Executive Park, Inc., North Carolina
(17) The Atlanta and Charlotte Air Line Railway Co., Georgia, North Carolina, South Carolina
(18) Atlanta Terminal Co., Georgia
(19) Atlantic and East Carolina Railway Co., North Carolina
(20) Birmingham Terminal Co., Alabama
(21) Blue Ridge Railway Co., South Carolina
(22) Camp Lejeune Railroad Co., North Carolina
(23) Carolina and Northwestern Railway Co., North Carolina, Virginia

(24) Central of Georgia Railroad Co., Georgia
(25) Charlotte-Southern Corporation, North Carolina
(26) Chattanooga Station Co., Tennessee
(27) Chattanooga Terminal Railway Co., Tennessee
(28) The Cincinnati, New Orleans and Texas Pacific Railway Co., Ohio
(29) Citico Realty Co., Virginia
(30) Danville and Western Railway Co., Virginia
(31) Durham and South Carolina Railroad Co., Georgia
(32) Elberton Southern Railway Co., Georgia
(33) The Georgia Midland Railway Co., Georgia
(34) The Georgia Northern Railway Co., Georgia
(35) Georgia Southern and Florida Railway Co., Georgia
(36) Interstate Railroad Co., Virginia
(37) Lenoir Car Works, Tennessee
(38) Live Oak, Perry and South Georgia Railway Co., Georgia
(39) Louisiana Southern Railway Co., Louisiana
(40) Memphis and Charleston Railway Co., Mississippi
(41) The National Investment Co., Connecticut
(42) New Orleans Terminal Co., Louisiana
(43) Norfolk Southern Industrial Development Corp., Virginia
(44) St. Johns River Terminal Co., Florida
(45) Southern Rail Terminals, Inc., Georgia
(46) Southern Rail Terminals of Alabama, Inc., Alabama
(47) Southern Rail Terminals of North Carolina, Inc., North Carolina
(48) Southern Railway-Carolina Division, South Carolina
(49) Southern Region Coal Transport, Inc., Alabama
(50) Southern Region Industrial Realty, Inc., Georgia
(51) Southern Region Materials Supply, Inc., Georgia
(52) Southern Region Motor Transport, Inc., Georgia
(53) Tennessee, Alabama & Georgia Railway Co., Delaware
(54) Tennessee Railway Co., Tennessee
(55) Terminal Properties, Inc., Alabama
(56) Transylvania Railroad Co., North Carolina
(57) Virginia and Southwestern Railway Co., Virginia
(58) North American Van Lines, Inc., Delaware
(59) A Three Rivers Forwarding, Inc., Indiana
(60) Agency Media Services, Inc., Indiana
(61) Almac Moving & Storage, Inc., Massachusetts
(62) Almac Moving & Storage of New Hampshire, New Hampshire
(63) Astro Express, Inc., Massachusetts
(64) City Storage & Transfer, Inc., Colorado
(65) EHT, Inc., Delaware
(66) Fleet Insurance Management, Inc., Indiana
(67) Great Falls North American, Inc., Montana
(68) NACAL, Inc., California
(69) NAVTRANS International Freight Forwarding, Inc., Indiana
(70) NorAm Forwarding, Inc., Indiana
(71) North American Distribution Systems, Inc., Indiana
(72) North American Forwarding, Inc., Indiana
(73) North American Moving & Storage, Inc., Indiana
(74) North American Properties, Inc., Indiana
(75) North American Van Lines of Texas, Inc., Texas
(76) Pioneer Freight, Inc., Oklahoma
(77) Relocation Management Systems, Inc., Delaware
(78) Rustalong Corporation, Arizona
(79) Transportation Collections, Inc., Indiana
(80) Triangle Fleet Service, Inc., Indiana
(81) Lamberts Point Bargo Co., Inc., Virginia
(82) Norfolk Southern Marine Services, Inc., Virginia
(83) NS Fiber Optics, Inc., Virginia
(84) NS Transportation Brokerage Corporation, Virginia
(85) NW Equipment Corporation, Delaware

1. *Parent Corporation and Address of Principal Office:* Sunrizon Homes, Inc., 1707. North Dallas Parkway, Suite 103, Dallas, Texas 75248.

2. *Wholly-Owned Subsidiaries Which Will Participate in the Operations and States of Incorporation:* (i) Sunrizon Transportation, Inc.—A Texas Corporation, 211 East Freeman, Suite 102, Duncanville, Texas 75116.

1—Parent corporation and address of principal office: Turner Furniture Companies, Inc., 220 East First Avenue, PO Box 907, Lexington, North Carolina 27293-0907.

2—Wholly-owned subsidiaries which will participate in the operations, and State of incorporation:

Jamestown Sterling Inc. (in DE), P.O. Box 610—Allen Street Extension, Jamestown, NY 17402-0610
DeVille Furniture Inc. (in DE), P.O. Box 2246, 915 Hwy 321, North, Hickory, NC 28601
Williams Furniture Inc. (in DE), P.O. Box 1489, 602 Fulton Street, Sumter, SC 29501
Union Furniture Inc. (in DE), 122 West George Street, Batesville, IN 47006
United Globe, Inc. (in DE), P.O. Box 907, Lexington, NC 27293-0907
Turner Furniture Transports, Inc. (in DE), 220 East First Avenue, Lexington, NC 27293-0907
Dunmore Furniture Inc. (in DE), P.O. Box 3740, 1859 Main Avenue SE., Hickory, NC 28603
State of Newburgh Inc. (in DE), 1-17 Wisner Avenue, Newburgh, NY 12550

James H. Bayne,

Secretary.

[FR Doc. 85-20830 Filed 8-29-85; 8:45 am]
BILLING CODE 7035-01-M

[I.C.C. Order No. P-87]

Rail Carriers; Union Pacific Railroad Co.; Passenger Train Operation

TO: Union Pacific Railroad Company

It appearing, that the National Railroad Passenger Corporation (Amtrak) has established through passenger train service between Chicago, Illinois and San Francisco, California. The operation of these trains requires the use of tracks and other facilities of Southern Pacific Transportation Company (SP). A portion of the SP tracks at Humboldt, Nevada, are temporarily out of service because of a derailment. An alternate route is available via the Union Pacific Railroad Company between Winnemucca, Nevada and Sacramento, California.

It is the opinion of the Commission that the use of such alternate route is necessary in the interest of the public and the commerce of the people; that notice and public procedure herein are impracticable and contrary to the public interest; and that good cause exists for making this order effective upon less than thirty days' notice.

It is ordered,

(a) Pursuant to the authority vested in me by order of the Commission decided July 24, 1985, and of the authority vested in the Commission by section 402(c) of the Rail Passenger Service Act of 1970 (45 U.S.C. 562(c)), the Union Pacific Railroad Company (UP), is directed to operate trains of the National Railroad Passenger Corporation (Amtrak) between Winnemucca, Nevada and a connection with Southern Pacific Transportation Company at Sacramento, California.

(b) In executing the provisions of this order, the common carriers involved shall proceed even though no agreements or arrangements now exist between them with reference to the compensation terms and conditions applicable to said transportation. The compensation terms and conditions

shall be, during the time this order remains in force, and conditions shall be, during the time this order remains in force, those which are voluntarily agreed upon by and between said carriers; or upon failure of the carriers to so agree, the compensation terms and conditions shall be as hereafter fixed by the Commission upon petition of any or all of the said carriers in accordance with pertinent authority conferred upon it by the Interstate Commerce Act and by the Rail Passenger Service Act of 1970, as amended.

(c) *Application.* The provisions of this order shall apply to intrastate, interstate and foreign commerce.

(d) *Effective date.* This order shall become effective at 6:25 a.m., EDT, August 9, 1985.

(e) *Expiration date.* The provisions of this order shall expire at 11:59 p.m., EDT, August 9, 1985, unless otherwise modified, amended, or vacated by order of this Commission.

This order shall be served upon Union Pacific Railroad Company and upon The National Railroad Passenger Corporation (Amtrak), and a copy of this order shall be filed with the Director, Office of the Federal Register.

Issued at Washington, D.C., August 9, 1985.

Interstate Commerce Commission.

John H. O'Brien,

Agent.

[FR Doc. 85-20831 Filed 8-29-85; 8:45 am]

BILLING CODE 7035-01-M

Rail Carriers; Release of Waybill Data for Use by Michigan State University

The Commission has received a request from Michigan State University on behalf of one of its graduate students for permission to use the Commission's 1984 Waybill Sample for a dissertation on assigning railroad track costs to individual line segments. The specific data sought are rail carload terminations for shipments with origins or destinations in the State of Michigan, point locations, commodity designations, and nodes taversed. Information on rates charged is not necessary.

The Commission requires rail carriers to file waybill sample information if in any of the past three years they terminated on their lines at least: (1) 4,500 revenue carloads or (2) 5 percent of revenue carloads in any one State (49 CFR Part 1244). From this waybill information, the Commission has developed a Public Use Waybill File that has satisfied the majority of all our waybill data requests while protecting the confidentiality of proprietary data submitted by the railroads. However, if confidential waybill data are requested, as in this case, we will consider releasing the data only after certain protective conditions are met and public notice is given. More specifically, under the Commission's current policy for handling waybill requests, we will not release any confidential waybill data until after: (1) Certain requirements designed to protect the data's confidentiality are agreed to by the requesting party and (2) public notice is provided so affected parties have an opportunity to object. (48 FR 40328, September 6, 1983).

Accordingly, if any parties object to this request, they should file their objections (an original and 2 copies) within 14 calendar days of the date of this notice. They should also include all grounds for objection to the full or partial disclosure of the requested data. The Commission's Director of the Office of Transporation Analysis will consider these objections in determining whether to release the requested waybill data. Any parties who filed objections will be timely notified of the Director's decision.

Contact: Elaine K. Kaiser, (202) 275-0907.

James H. Bayne,

Secretary.

[FR Doc. 85-20829 Filed 8-29-85; 8:45 am]

BILLING CODE 7035-01-M

DEPARTMENT OF JUSTICE

Antitrust Division

Proposed Termination of Final Judgment; United States of America v. The Mortgage Conference of New York, et al.

Notice is hereby given that The Mutual Life Insurance Company of New York ("MONY) and Guardian Life Insurance Company of America ("Guardian") have filed with the United States District Court for the Southern District of New York and joint motion to terminate the final judgment in *United States of America* v. *The Mortgage Conference of New York, et al.*, Civil No. 37-247; and the Department of Justice ("Department"), in a stipulation also filed with the court, has consented to termination of the judgment as to defendants MONY and Guardian, but has reserved the right to withdraw its consent for at least seventy (70) days after the publication of this notice. The complaint in this case (filed on August 6, 1946) alleged a combination and conspiracy in restraint of trade and commerce in setting mortgage interest rates, mortgage payment schedules, and appraisal procedures in violation of section 1 of the Sherman Act, 15 U.S.C. 1. Specifically, the complaint described how by creating a trade association, The Mortgage Conference of New York ("The Mortgage Conference"), the defendants jointly set rental policies for mortgaged properties, exchanged weekly reports of new mortgage commitments, withheld financing for new construction that might lessen income from other mortgaged properties, and engaged in red-lining—jointly refusing on racial or ethnic grounds to grant mortgages in certain neighborhoods, regardless of the qualifications of the applicant or the property in question. The case was settled by entry of a consent decree. The judgment (entered on June 16, 1948) required the dissolution of the Mortgage Conference and enjoined the other defendants from jointly setting rates or terms of mortgages, exchanging information about pending applications, joint red-lining or otherwise refraining from competing in greater New York City, including the counties of New York, Bronx, Kings, Queens, Richmond, Westchester, and Nassau.

The Department has filed with the court a memorandum setting forth the reasons why the Department believes that termination of the judgment would serve the public interest. Copies of the complaint and final judgment, the joint motion papers of MONY and Guardian, the stipulation containing the government's consent, the Department's memorandum and all further papers filed with the court in connection with this motion will be available for inspection in the Legal Procedure Unit of the Antitrust Division, Room 7233, Department of Justice, 10th Street and Pennsylvania Avenue, NW., Washington, D.C. 20530 (telephone 202/633-2481), and at the Office of the Clerk of the United States District Court for the Southern District of New York, Foley Square, New York, New York 10007. Copies of any of the materials may be obtained from the Legal Procedure Unit upon request and payment of the copying fee set by Department of Justice regulations.

Interested persons may submit comments regarding the proposed termination of the decree to the Department. Such comments must be received within sixty (60) days, and will be filed with the court. Comments should be addressed to B. Barry Grossman, Chief, Special Regulated Industries Section, Antitrust Division,

Department of Justice, Washington, D.C. 20530 (telephone 202/724-6693).

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 85-20570 Filed 8-29-85; 8:45 am]

BILLING CODE 4410-01-M

Drug Enforcement Administration

[Docket No. 85-25]

Antonio C. Camacho, M.D., Chicago, IL; Hearing

Notice is hereby given that on April 15, 1985, the Drug Enforcement Administration, Department of Justice, issued to Antonio C. Camacho, M.D., an Order To Show Cause as to why the Drug Enforcement Administration should not revoke his DEA Certificate of Registration, AC5596424, and deny any pending applications for registration as a practitioner under 21 U.S.C. 823(f).

Thirty days having elapsed since the said Order To Show Cause was received by Respondent, and written request for a hearing having been filed with the Drug Enforcement Administration, notice is hereby given that a hearing in this matter will be held, commencing at 9:30 a.m. on Thursday, September 12, 1985, in Courtroom 1690, U.S. Bankruptcy Court, Dirksen Federal Building, 219 South Dearborn Street, Chicago, Illinois.

Dated: August 26, 1985.

John C. Lawn,

Administrator, Drug Enforcement Administration.

[FR Doc. 85-20808 Filed 8-29-85; 8:45 am]

BILLING CODE 4410-09-M

[Docket No. 85-32]

John Howard Hottinger, D.D.S., Capitola, CA; Hearing

Notice is hereby given that on June 4, 1985, the Drug Enforcement Administration, Department of Justice, issued to John Howard Hottinger, D.D.S., an Order To Show Cause as to why the Drug Enforcement Administration should not revoke his DEA Certificate of Registration, AH1660821, for registration as a practitioner under 21 U.S.C. 823(f).

Thirty days having elapsed since the said Order To Show Cause was received by Respondent, and written request for a hearing having been filed with the Drug Enforcement Administration, notice is hereby given that a hearing in this matter will be held, commencing at 9:00 a.m. on Tuesday, September 10, 1985, in Courtroom 18059, U.S. District Court, Federal Building, 450 Golden Gate Avenue, San Francisco, California.

Dated: August 26, 1985.

John C. Lawn,

Administrator, Drug Enforcement Administration.

[FR Doc. 85-20809 Filed 8-29-85; 8:45 am]

BILLING CODE 4410-09-M

Registration as Manufacturer of Controlled Substances; Marion Laboratories Inc.

By Notice dated May 14, 1985, and published in the **Federal Register** on May 17, 1985; (50 FR 20632), Marion Laboratories Inc., Analytical System Inc. Division, 23162 LaCadena Drive, Laguna Hills, California 92653, made application to the Drug Enforcement Administration to be registered as a bulk manufacturer of the basic classes of controlled substances listed below, exclusively for manufacturing reference standards.

Drug:	Schedule
Phencyclidine (7471)	II
1-piperidinocyclohexane-carbonitrile (PCC) (8603)	II
Benzoylecgonine (9187)	II

No comments or objectives have been received. Therefore, pursuant to section 303 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 and Title 21, Code of Federal Regulations, § 1301.54(e), the Deputy Assistant Administrator hereby orders that the application submitted by the above firm for registration as a bulk manufacturer of the basic classes of controlled substances listed above is granted.

Dated: August 23, 1985.

Gene R. Haislip,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 85-20810 Filed 8-29-85; 8:45 am]

BILLING CODE 4410-09-M

Registration as Manufacturer of Controlled Substances; Norac Co., Inc.

By Notice dated March 4, 1985, and published in the **Federal Register** on March 8, 1985; (50 FR 9527), Norac Company Inc., 405 South Motor Avenue, Azusa, California 91702, made application to the Drug Enforcement Administration to be registered as a bulk manufacturer of Tetrahydrocannabinols (7370), a basic class of controlled substance listed in Schedule I.

No comments or objections have been received. Therefore, pursuant to Section 303 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 and Title 21, Code of Federal Regulations, § 1301.54(e), the Deputy Assistant Administrator hereby orders that the application submitted by the above firm for registration as a bulk manufacturer of the basic class of controlled substance listed above is granted.

Dated: August 22, 1985.

Gene R. Haislip,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 85-20811 Filed 8-29-85; 8:45 am]

BILLING CODE 4410-09-M

Registration as Manufacturer of Controlled Substances; Sterling Drug, Inc.

By Notice dated May 20, 1985, and published in the **Federal Register** on June 4, 1985 (50 FR 23537), Sterling Drug, Inc., 33 Riverside Avenue, Rensselaer, New York 12144, made application to the Drug Enforcement Administration to be registered as a bulk manufacturer of Pethidine (meperidine) (9230), a basic class controlled substance listed in Schedule II.

No comments or objections have been received. Therefore, pursuant to section 303 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 and Title 21, Code of Federal Regulations, § 1301.54(e), the Deputy Assistant Administrator hereby orders that the application submitted by the above firm for registration as a bulk manufacturer of the basic class of controlled substance listed above is granted.

Dated: August 23, 1985.

Gene R. Haislip,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 85-20812 Filed 8-29-85; 8:45 am]

BILLING CODE 4410-09-M

Office of Juvenile Justice and Delinquency Prevention

Missing Children's Advisory Board; Meeting

The Missing Children's Advisory Board will meet in Toledo, Ohio on October 4-6, 1985. The meeting will take place at the Hotel Sofitel, 2 Seagate, Toledo, Ohio 43666. The public is welcome to attend.

The Board will discuss its annual comprehensive plan and other issues related to missing and exploited children.

For further information, please contact Michelle Easton, Director, Missing Children's Program, Office of Juvenile Justice and Delinquency Prevention, 633 Indiana Avenue NW., Washington, DC 20531, (202) 724-7655.

Dated: August 28, 1985.

Approved:

Alfred S. Regnery,

Administrator, Office of Juvenile Justice and Delinquency Prevention.

[FR Doc. 85-20778 Filed 8-29-85; 8:45 am]

BILLING CODE 4410-01-M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA-W-16,125]

AMAX Chemical Corp., Carlsbad, NM; Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, an investigation was intiated on June 28, 1985 in response to a worker petition received on June 20, 1985, which was filed by the United Steelworkers of America, Local No. 181 on behalf of workers at Amax Chemical Corporation, Carlsbad, New Mexico.

An active certification covering the petitioning group of workers remains in effect (TA-W-14,770). Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, D.C., this 22nd day of August 1985.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

[FR Doc. 85-20819 Filed 8-29-85; 8:45 am]

BILLING CODE 4510-30-M

[TA-W-16,182]

Joy-See Fashions Inc., Hialeah, FL; Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, an investigation was initiated on July 29, 1985 in response to a worker petition received on July 18, 1985 which was filed by workers on behalf of workers at Joy-See Fashions Incorporated, Hialeah, Florida.

All workers were separated from the subject firm more than one year prior to the date of the petition. Section 223(b) of the Act specifies that no certification may apply to any worker whose last separation occurred more than one year before the date of the petition. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, D.C., this 22nd day of August 1985.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

[FR Doc. 85-20818 Filed 8-29-85; 8:45 am]

BILLING CODE 4510-30-M

[TA-W-14,557]

Oak Communications Systems, Elkhorn, WI; Amended Revised Determination

On August 6, 1985, the Department issued a Notice of Revised Determination for former employees of Oak Communications Systems, Elkhorn, Wisconsin. The Revised Determination will be published shortly in the **Federal Register**. The initial Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance was published in the **Federal Register** on December 13, 1983 (48 FR 55526).

The Revised Determination issued on August 6, 1985 should have included the impact date of March 26, 1982 since layoffs that were found to be adversely affected by increased imports occurred several months prior to September 1, 1982 impact date. Imports of cable TV decoders increased substantially in the second and third quarters of 1982 compared to the same quarters of 1981.

Production, of cable TV decoders at Elkhorn, Wisconsin decreased sharply, in quantity, in the second and third quarters of 1982 compared to the immediately preceding quarters.

The intent of the certification for workers producing cable TV decoders at the Elkhorn, Wisconsin plant is to cover all workers who were affected by the decline in production of cable TV decoders which was related to the increase in imports of "like or directly competitive" articles. The notice of revised determination for former workers who produced cable TV decoders at the Elkhorn, Wisconsin plant of Oak Communications Systems, TA-W-14,557, therefore, is amended to include a new impact date of March 26, 1982.

Conclusion

After careful review of the facts obtained in the investigation, I conclude that increases of imports of articles like or directly competitive with decoders for cable TV produced at Oak Communications Systems, Elkhorn, Wisconsin contributed importantly to the decline in sales or production and to the total or partial separation of workers of that firm. In accordance with the provisions of the Act, I make the following certification:

All workers of Oak Communications Systems, Elkhorn, Wisconsin engaged in employment related to the production of decoders for cable TV at Oak Communications Systems, Elkhorn, Wisconsin who became totally or partially separated from employment on or after March 26, 1982 and before December 31, 1983 are eligible to apply for adjustment assistance benefits under Section 223 of the Trade Act of 1984.

I further determine that all workers of Oak Communications Systems, Elkhorn, Wisconsin engaged in employment related to the production of head end equipment and decoders for satellite TV are denied eligibility to apply for adjustment assistance under Section 223 of the Trade Act of 1974.

Signed at Washington, D.C., this 22nd day of August 1985.

Robert O. Deslongchamps,

Director, Office of Legislation and Actuarial Services, UIS.

[FR Doc. 85-20817 Filed 8-29-85; 8:45 am]

BILLING CODE 4510-30-M

NATIONAL SCIENCE FOUNDATION

Committee Establishments

Pursuant to the Federal Advisory Committee Act (Pub. L. 92-463), the establishment of the Advisory Committees' listed below are necessary, appropriate, and are in the public interest in connection with the performance of duties imposed upon the Director, National Science Foundation (NSF), and other applicable law. This determination follows consultation with the Committee Management Secretariat, General Services Administration.

Names of Committees

- Advisory Committee for Engineering Science in Chemical, Biochemical and Thermal Engineering.
- Advisory Committee for Engineering Science in Mechanics, Structures and Materials Engineering.
- Advisory Committee for Engineering Science in Electrical, Communications and Systems Engineering.
- Advisory Committee for the Emerging Engineering Systems Section.
- Advisory Committee for the Critical Engineering Systems Section.

Purpose: The Committees will provide advice, recommendations, and oversight concerning the directions for and impact of Foundation-supported research and related activities in the Engineering field.

Effective Date and Duration: These establishments are effective upon filing the charters with the standing committees of Congress having legislative jurisdiction of the Foundation. These Committees will operate on a continuing basis subject to renewal every 2 years.

Balanced Membership: Membership of these Committees shall be fairly balanced in terms of the points of view represented and the Committees' functions. Members will be individuals eminent in their respective fields of endeavor or specification as related to the areas of interest in each Division. Due consideration will be given to achieving membership that reasonably represents public, private, and academic communities, women and minorities, the handicapped, and different geographical regions of the country.

Dated: August 27, 1985.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 85-20814 File 8-29-85; 8:45 am]

BILLING CODE 7555-01-M

NUCLEAR REGULATORY COMMISSION

Abnormal Occurrence Report; Section 208 Report Submitted to the Congress

Notice is hereby given that pursuant to the requirements of section 208 of the Energy Reorganization Act of 1974, as amended, the Nuclear Regulatory Commission (NRC) has published and issued the periodic report to Congress on abnormal occurrences (NUREG-0090, Vol. 8, No. 1).

Under the Energy Reorganization Act of 1974, which created the NRC, an abnormal occurrence is defined as "an unscheduled incident or event which the Commission (NRC) determines is significant from the standpoint of public health or safety." The NRC has made a determination, based on criteria published in the **Federal Register** (42 FR 10950) on February 24, 1977, that events involving an actual loss or significant reduction in the degree of protection against radioactive properties of source, special nuclear, and byproduct materials are abnormal occurrences.

This report to Congress is for the first calendar quarter of 1985. The report identifies the occurrences or events that the Commission determined to be significant and reportable; the remedial actions that were undertaken are also described. During the report period, there was one abnormal occurrence at the nuclear power plants licensed to operate; the event involved a premature criticality during reactor startup. There were three abnormal occurrences at the other NRC licensees. Two events involved diagnostic medical misadministrations and the other event involved unlawful possession of radioactive material. There were four abnormal occurrences reported by an Agreement State (Texas). Three events involved radiation overexposures; the other event involved a well logging source which was apparently stolen, but later was recovered.

The report also contains information updating some previously reported abnormal occurrences.

Interested persons may review the report at the NRC's Public Document Room, 1717 H Street, NW, Washington, DC or at any of the nuclear power plant Local Public Document Rooms throughout the country.

Copies or microfiche of NUREG-0090, Vol. 8, No. 1 (or any of the previous reports in this series), may be purchased by calling (202) 275-2060 or (202) 275-2171, or by writing to the Superintendent of Documents, U.S. Government Printing Office, Post Office Box 37082, Washington, DC 20013-7982. A year's subscription to the NUREG-0090 series publication, which consists of four issues, is also available. Documents may be purchased by check, money order, Visa, MasterCard, or charged to a GPO Deposit Account.

Copies of the report may also be purchased from the National Technical Information Service, Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161.

Dated at Washington, DC, August 26, 1985.

For the Nuclear Regulatory Commission.

Andrew L. Bates,

Acting Secretary of the Commission.

[FR Doc. 85-20843 Filed 8-29-85; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-219]

GPU Nuclear Corp.; Withdrawal of Application for Amendment to Provisional Operating License

The U.S. Nuclear Regulatory Commission (the Commission) has granted the request of GPU Nuclear Corporation (the licensee) to withdraw its September 25, 1984 application for amendment to Provisional Operating License No. DPR-16, issued to the licensee for operation of the Oyster Creek Nuclear Generating Station (OCNGS) located in Ocean County, New Jersey. Notice of consideration of issuance of this amendment was published in the **Federal Register** on October 24, 1984 (49 FR 42823).

The request proposed a change to § 4.5, Containment, Surveillance Requirements of the Appendix A Technical Specifications (TS). The change was to revise TS 4.5.F.1.b. to accommodate the inclusion of additional isolation valves under the type C testing requirement of Appendix J to 10 CFR Part 50 and to revise the acceptance criteria for all containment penetrations and isolation valves subject to Type B and Type C testing. Since receipt of the licensee's submittal, the staff has had discussions with the licensee on the proposed TS 4.5.F.1.b and the licensee has decided to submit a new proposed technical specification to the staff in this area.

In the staff's June/July Progress Review meeting with the licensee on July 31 and August 1, 1985, the licensee requested, pursuant to 10 CFR 2.107, permission to withdraw its September 25, 1984, application. The Commission has considered the licensee's request and has determined that permission to withdraw the September 25, 1984 application for amendment should be granted.

For further details with respect to this action, see: (1) The application for amendment dated September 25, 1984, (2) the licensee's request for withdrawal documented in the NRC staff's June/July Progress Review meeting summary dated August 22, 1985, and (3) our letter dated August 26, 1985. All of the above documents are available for public inspection at the Commission's Public Document Room, 1717 H Street, NW, Washington, DC, and at the Ocean County Library, 101 Washington Street, Toms River, New Jersey.

Dated at Bethesda, Maryland, August 26, 1985.

For the Nuclear Regulatory Commission.

John A. Zwolinski,

Chief, Operating Reactors Branch No. 5, Division of Licensing.

[FR Doc. 85-20842 File 8-29-85; 8:45 am]

BILLING CODE 7590-01-M

SECURITIES AND EXCHANGE COMMISSION

[File No. 22-14067]

Application and Opportunity for Hearing; Storage Equities, Inc.

August 23, 1985.

Notice is hereby given that Storage Equities, Inc., a California corporation ("Applicant") has filed an application

under clause (ii) of section 310(b)(1) of the Trust Indenture Act of 1939 (the "Act") for a finding that the trusteeship of Trust Services of America, Inc., a California corporation ("TSA") (as successor trustee to First Interstate Bank of California, a California banking corporation), under an eighth supplement of an existing indenture qualified under the Act is not so likely to involved a material conflict of interest as to make it necessary in the public interest or for the protection of investors to disqualify TSA from acting as trustee under such eighth supplement.

Section 310(b) of the Act provides in part that, if a trustee under an indenture qualified under the Act has or shall acquire any conflicting interest, it shall within ninety (90) days after ascertaining that it has such conflicting interest, either eliminate such conflicting interest or resign. Subsection (1) of such section provides, in effect, with certain exceptions, that a trustee under a qualified indenture shall be deemed to have a conflicting interest if such trustee is trustee under another indenture under which any other securities of the same issuer are outstanding.

However, under clause (ii) of subsection (1), there may be excluded from the operation of this provision another indenture under which other securities of the issuer are outstanding, if the issuer shall have sustained the burden of proving, on application to the Commission and after opportunity for hearing thereon, that trusteeship under such qualified indenture and such other indenture is not so likely to involve a material conflict of interest as to make it necessary in the public interest or for the protection of investors to disqualify such trustee from acting as trustee under either of such indentures.

The Applicant alleges that:

1. TSA, as successor trustee, currently is acting as trustee under an indenture (the "Indenture") and several prior supplements thereto under which the Applicant is an obligor. The Indenture, dated as of August 9, 1983, is between Applicant and TSA and provides for the periodic issuance of secured notes in partial consideration for the purchase of property by Applicant. This indenture was filed as Exhibit 4.3 to Applicant's registration statement No. 2-80850 filed under the Securities Act of 1933, and has been qualified under the Trust Indenture Act in connection with a Form T-1 filing, File No. 22-12633.

Applicant has also entered into, and filed by way of post-effective amendments to the registration statement stated above, prior supplements under which TSA is a trustee. Applicant has issued several series of its secured notes under the prior supplements.

2. Applicant wishes TSA continue as Trustee under the eighth supplemental indenture executed July 10, 1985.

3. The Applicant is not in default in any respect under the Indenture or prior supplements thereto.

4. Each series of secured notes issued under the prior supplements are secured by separate and distinct assets of Applicant so that should TSA have occasion to proceed against the security under any series of notes, such action would not affect the security, or the use of any security, under any other series. Thus, the existence of the other trusteeships should not inhibit or discourage TSA's actions under any one series.

The Applicant has waived notice of hearing, hearing on the issues raised by its Application and all rights to specify procedures under Rule 8(b) of the Rules of Practice of the Securities and Exchange Commission in connection with this matter. For a more detailed statement of the matters of fact and law asserted, all persons are referred to said Application, File No. 22-14067, which is a public document on file in the office of the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, D.C. 20549.

Notice is further given that any interested person may, not later than September 20, 1985, request in writing that a hearing be held on such matter, stating the nature of his interest, the reasons for such request, and the issues of fact or law raised by said Application which he desires to controvert, or he may request that he be notified if the Commission should order a hearing theron.

Any such request should be addressed: Secretary, Securities and Exchange Commission, Washington, D.C. 20549. At any time after said date, the Commission may issue an order granting the Application upon such terms and conditions as the Commission may deem necessary or appropriate in the public interest and the interest of investors, unless a hearing is ordered by the Commission.

For the Commission, by the Division of Corporation Finance, pursuant to delegated authority.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 85-20715 Filed 8-29-85; 8:45 am]

BILLING CODE 8010-01-M

[File No. 22-14137]

Application and Opportunity for Hearing; Storage Equities, Inc.

August 23, 1985.

Notice is hereby given that Storage Equities, Inc., a California corporation ("Applicant") has filed an application under clause (ii) of section 310(b)(1) of the Trust Indenture Act of 1939 (the "Act") for a finding that the trusteeship of Trust Services of America, Inc., a California corporation ("TSA") (as successor trustee to First Interstate Bank of California, a California banking corporation), under a ninth supplement of an existing indenture qualified under the Act is not so likely to involve a material conflict of interest as to make it necessary in the public interest or for the protection of investors to disqualify TSA from acting as trustee under such ninth supplement.

Section 3120(b) of the Act provides in part that, if a trustee under an indenture qualified under the Act has or shall acquire any conflicting interest, it shall within ninety (90) days after ascertaining that it has such conflicting interest, either eliminate such conflicting interest or resign. Subsection (1) of such section provides, in effect, with certain exceptions, that a trustee under a qualified indenture shall be deemed to have a conflicting interest if such trustee is trustee under another indenture under which any other securities of the same issuer are outstanding.

However, under clause (ii) of subsection (1), there may be excluded from the operation of this provision another indenture under which other securities of the issuer are outstanding, if the issuer shall have sustained the burden of proving, on application to the Commission and after opportunity for hearing thereon, that trusteeship under such qualified indenture and such other indenture is not so likely to involve a material conflict of interest as to make it necessary in the public interest or for the protection of investors to disqualify such trustee from acting as trustee under either of such indentures.

The Applicant alleges that:

1. TSA, as successor trustee, currently is acting as trustee under an indenture (the "Indenture") and several prior supplements thereto under which the Applicant is an obligor. the Indenture, dated as of August 9, 1983, is between Applicant and TSA and provides for the periodic issuance of secured notes in partial consideration for the purchase of property by Applicant. This indenture was filed as Exhibit 4.3 to Applicant's registration statement no. 2-80850 filed

under the Securities Act of 1933, and has been qualified under the Trust Indenture Act in connection with a Form T-1 filing, File No. 22-12633.

Applicant has also entered into, and filed by way of post-effective amendments to the registration statement stated above, prior supplements under which TSA is a trustee. Applicant has issued several series of its secured notes under the prior supplements.

2. Applicant wishes TSA to continue as Trustee under the ninth supplemental indenture executed July 10, 1985.

3. The Applicant is not in default in any respect under the Indenture or prior supplements thereto.

4. Each series of secured notes issued under the prior supplements are secured by separate and distinct assets of Applicant so that should TSA have occasion to proceed against the security under any series of notes, such action would not affect the security, or the use of any security, under any other series. Thus, the existence of other trusteeships should not inhibit or discourage TSA's actions under any one series.

The Applicant has waived notice of hearing, hearing on the issues raised by its Application and all rights to specify procedures under Rule 8(b) of the Rules of Practice of the Securities and Exchange Commission in connection with this matter. For a more detailed statement of the matters of fact and law asserted, all persons are referred to said Application, File No. 22-14067, whichis a public document on file in the office of the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, D.C., 20549.

Notice is further given that any interested person may, not later than September 20, 1985, request in writing that a hearing be held on such matter, stating the nature of his interest, the reasons for such request, and the issues of fact or law raised by said Application which he desires to controvert, or he may request that he be notified if the Commission should order a hearing thereon.

Any such request should be addressed: Secretary, Securities and Exchange Commission, Washington, D.C. 20549. At any time after said date, the Commission may issue an order granting the Application upon such terms and conditions as the Commission may deem necessary or appropriate in the public interest and the interest of investors, unless a hearing is ordered by the Commission.

For the Commission, by the Division of Corporation Finance, pursuant to delegated authority.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 85-20714 Filed 8-29-85; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-22351; SR-MSRB-84-13]

Self-Regulatory Organizations; Filing and Immediate Effectiveness of Proposed Rule Change by the Municipal Securities Rulemaking Board

The Municipal Securities Rulemaking Board ("MSRB") has submitted a proposed rule change pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") and Rule 19b-4 thereunder, to change a reference in MSRB rule G-4 from Commission Rule 19d-3 to Commission Rule 19h-1(d). MSRB Rule G-4 establishes grounds for disqualification of municipal brokers or dealers, and procedures for requalification for purposes of MSRB rule G-2.

This proposed rule change has become effective, pursuant to section 19(b)(3)(A) of the Act. At any time within sixty days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

Interested persons are invited to submit written comments concerning the submission within 21 days from the date of publication in the **Federal Register**. Persons submitting written comments should file six copies thereof with the Secretary of the Securities and Exchange Commission, 450 5th Street, NW., Washington, D.C. 20549. References should be made to File No. SR-MSRB-84-13.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority. 17 CFR 200.30-3(12).

Dated: August 23, 1985.

Shirley E. Hollis,

Assistant Secretary

[FR Doc. 85-20765 Filed 8-29-85; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-22354; File No. SR-OCC-85-13]

Self-Regulatory Organizations; the Options Clearing Corp.; Notice of Proposed Rule Change

Pursuant to section 19(b)(i) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(i), notice is hereby given that on August 9, 1985, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Introduction

The Philadelphia Stock Exchange, Inc. ("PHLX") has proposed to form a link with the London floor of The Stock Exchange of the United Kingdom and the Republic of Ireland (the "London Exchange") whereby foreign currency options that are presently traded on PHLX will also be traded on the London Exchange. Options of a given series would be fungible, regardless of the market in which the option was purchased or sold; and option positions acquired in one market could be liquidated in the other. These options ("International Foreign Currency" or "IFX" options) will be traded and cleared pursuant to an "International Market Agreement" among OCC, PHLX and the London Exchange (the "IMA"). Because OCC believes that similar agreements may in the future be reached among domestic options exchanges (the "Exchanges") and other foreign markets in both Europe and Asia, the proposed rule change is intended to establish a general system for the clearance of "international options" traded pursuant to such agreements.

International options will be traded through a separate system which will be in most respects the same as OCC's present system for clearing non-equity options. Becaause trading will be taking place (when Asian markets are added) virtually 24-hours per day, daily processing of trading activity in international options, calculation of margin requirements and assignment of exercise notices will have to be completed within a five-hour processing "window" between 3:00 p.m. and 8:00 p.m., Chicago time. This will permit Position Reports and other daily reports to be distributed to Clearing Members in Hong Kong, for example, prior to the beginning of the trading day there.

Issuance, clearance and settlement of "International options" would be in accordance with OCC's existing By-laws and Rules, as supplemented and modified by provisions applicable only to international options. The

relationship among OCC, PHLX and London Exchange would be governed by the IMA, the proposed form of which has been filed as a part of this proposed rule change. The proposed IMA contains many provisions analogous to the provisions of the Restated Participant Exchange Agreement (the "PEA"), which governs the relationship among OCC and the five Exchanges. The terms of the PEA would continue to be applicable to foreign currency options traded on PHLX, except to the extent inconsistent with the IMA.

In connection with the proposed clearance by OCC of options transactions effected on the London Exchange, OCC intends to form a relationship with the International Commodity Clearing House Limited ("ICCH") whereby ICCH will become an "associate clearinghouse" of OCC for the purpose of carrying the accounts of London-based securities firms that do not choose to become Clearing Members of OCC. ICCH would be treated under OCC's By-Laws and Rules as a Clearing Member for most purposes except that it would be required to meet financial and reporting requirements designed specifically for it.

The Proposed By-Law and Rule Changes

A. Definitions

OCCis proposing to amend section 1 of Article I of its By-Laws to add definitions of "international market", "international market agreement", "international transaction", and "international option". An "international market" is a securities exchange not within or subject to the jurisdiction of the United States. The term "international market agreement" is defined as an agreement between OCC and an international market pursuant to which OCC acts as the clearing agent with respect to options transactions effected on an international market. One or more Exchanges may, but need not be, parties to an international market agreement. An "international transaction" means an Exchange transaction effected either on an international market or on an Exchange pursuant to the provisions of an international market agreement. "International option" means an option issued by the Corporation as the result of an international transaction pursuant to an international market agreement. The definitions of the terms "Exchange rules," "Exchange member," and "Exchange transaction" are amended to include, respectively, the rules and members of, and transactions on, an international market.

The definitions of "class of options" contained in Article I of the By-Laws and in Article XV (which applies only to foreign currency options) are being amended to provide that all options issued as the result of international transactions pursuant to a particular international market agreement are deemed to be separate classes of options from options issued pursuant to any other international market agreement or any other options. The effect of this provision is to assure the non-fungibility of such options with other options.

Rule 101 is being amended to add a definition of "international office" as an office of OCC outside the United States through which Clearing Members may clear certain international transactions and conduct such other business with OCC as OCC may from time to time specify. The basic purpose of this amendment is to permit OCC to establish offices in cities outside the United States where international markets are located. Only international transactions may be cleared through such offices because various deadlines and the processing schedule applicable to other options will not accommodate trading in widely disparate time zones.

The new term "associate clearinghouse" is defined as a clearinghouse not located in the United States which is designated in an international market agreement as an associate clearinghouse.

The definition of "Market-Maker; Specialist" is amended to provide that, in respect of an international market, such terms shall mean such classes of persons as may be deemed to be Market-Makers or specialists pursuant to an international market agreement. The purpose of this provision is to allow persons performing functions analogous to those of Market-Makers on an international market to be treated as Market-Makers for purposes of maintaining Market-Maker accounts with their respective Clearing Members.

The "settlement time" is the time at which Clearing Members are required to make payment to OCC of any option premiums or margin payments due to OCC on each business day. The definition of "settlement time" is being amended to permit OCC to specify settlement times in respect of international transactions that are different from the settlement time applicable to other option transactions.

The term "business day" is being amended to provide for those occasions when holidays in the United States and in countries where an international office of the Clearing Corporation may be located do not coincide. The revised definition would permit OCC to treat such Days as business days for some purposes and not for others.

B. Article VI of the By-Laws: Clearance of Exchange Transactions

Certain sections of Article VI relating to the issuance of option contracts, reporting of matched trades, payment of premiums and exercise restrictions are being amended to apply to Exchange transactions occurring on an international market in precisely the same way that they apply to exchange transactions on one of the domestic options exchanges. Section 10 of Article VI relating to the terms of option contracts is being amended to provide that new series of international option contracts shall be opened for trading in accordance with the procedures set forth in an international market agreement. The procedures applicable to the opening of new series of international foreign currency options are described below.

OCC proposes to add a new section 20 to Article VI entitled "Clearance of International Transactions." The new section provides that international transactions shall be cleared in accordance with the By-Laws and Rules provided, however, that the time specified in the By-Laws and Rules for the delivery of reports and the payment of amounts due to or from Clearing Members in respect of international options cleared through an international office may be as determined by the Corporation from time to time upon prior notice to affected Clearing Members. It further provides that international transactions, positions in international option contracts, margin requirements arising therefrom, and exercises and assignments of exercise notices in respect of international option contracts shall be reported separately from transactions in respect of other options and that premium, margin and exercise settlements in respect of international options may be conducted separately from other settlements.

C. Miscellaneous Other Rules

Rule 204, "Designation of Clearing Offices" is being amended to permit a Clearing Member to designate one or more international offices through which it may clear its international transactions. Rule 204 also provides that a Clearing Member that designates an international office shall clear all of its international transactions effected pursuant to a particular international market agreement through the same international office.

Rule 310 is being added to indicate that the financial requirements applicable to an associate clearinghouse are different from those applicable to other Clearing Members and shall be established pursuant to the international market agreement designating an entity as an associate clearinghouse. Rules 401 and 402 relating to the reporting of matched trades are being amended to apply to reporting of matched trades by an international market in exactly the same way as they apply to reporting of matched trades by the five domestic options exchanges.

Rule 601(e) is being amended to provide that a Clearing Member's long value credit in respect of international options will not reduce the required margin in respect of other options, and a Clearing Member's long value credit in respect of other options will not reduce its required margin in respect of international options. This same restriction on "crossover margin credit" exist now between stock and non-equity options, and the reason in both cases is that the options are processed through separate clearing systems and crossover marging is therefore not possible as a technical matter.

Rule 801, "exercise of options," is being amended to require that exercise notices in respect of international options must be tendered to OCC prior to 3:00 p.m. Central Time instead of 7:00 p.m. as is the case with other options. This earlier deadline is necessary because of the decreased amount of time available for processing exercise notices in respect of international options.

An interpretation is being added following Rule 604 to specify that common stocks may not be deposited in satisfaction of margin requirements in respect of positions arising from international transactions at the present time. For practical reasons, OCC has chosen to initiate the new clearing system for international options in a somewhat simplified form. Additional features such as the program necessary to accept deposits of common stocks may be added as OCC gains experience with the international system.

The International Market Agreement

The text of the proposed IMA among OCC, PHLX, and the London Exchange has been filed as a part of the proposed rule change. Following certain introductory material, definitions are set forth in section 1. Section 2 of the IMA provides that it is applicable to the issuance, clearance and settlement of international foreign currency options ("IFX options"). It provides that such options shall be issued and cleared by OCC in accordance with OCC's By-Laws and Rules applicable to international transactions and international options, and that the London Exchange shall have the rights and obligations of an international market under the By-Laws and Rules. Section 2 further provides that, as between OCC and PHLX the IMA supplements the PEA. Section 3 of the IMA gives PHLX the same right to open new series of IFX options it has under the PEA in respect of other options that are traded on PHLX. The London Exchange, however, may open only series of options that have been or are concurrently being opened on PHLX. Section 4 imposes on the London Exchange essentially the same obligations in respect of daily trade comparisons and reporting that are imposed on Exchanges in the PEA.

Sections 5, 6 and 7, which are essentially the same as the corresponding provisions of the PEA, set forth the basic obligations of OCC in clearing transactions reported by the London Exchange.

Section 8 requires the London Exchange to provide OCC with any information that OCC might be required to disclose to IFX options investors under applicable securities laws of the United States or other jurisdictions.

Section 9 expresses the agreement of OCC to establish and enforce margin requirements for its Clearing Members. The section is similar to provisions in the PEA, except that it contemplates that OCC may at some time in the future accept margin in the form of securities of foreign governments. The present proposed rule change does not amend OCC's By-Laws and Rules to permit OCC to accept margin in that form, and an additional filing on Form 19b–4 would be required when OCC determines to do so.

A London Clearing Member is defined in Section 1 as a Clearing Member that has designated OCC's London office as the office through which it will clear its transactions in IFX options. Section 10 specifies that OCC may establish separate qualifications and requirements applicable to some or all London Clearing Members. This provision recognizes that different London Clearing Members may be differently situated. Some may be broker-dealers, registered as such in the United States, that have chosen to clear IFX options in London. Others may be London firms not registered as broker-dealers in the United States. In general, London Clearing Members in the latter category will be required to meet the standards applicable to Foreign Clearing Members as set forth in Article V of the By-Laws.

Section 11 describes the qualifications and functions of ICCH, the "associate clearinghouse" authorized by OCC to clear transactions in IFX options of persons that are not Clearing Members. The associate clearinghouse acts in many respects as a Clearing Member of OCC except that it will be permitted, subject to applicable law, to carry all its positions in IFX options in one account, thereby permitting it to receive margin credit for long positions to the extent permitted by Rule 601 in respect of a firm lien or Market-Maker account. The associate clearinghouse, however, will be subject to financial requirements developed uniquely for it and may extend its own guarantee in respect of IFX options cleared through it. It will make clearing fund contributions in amounts calculated in the same way as for other Clearing Members.

Section 12 specifies that "jobbers" on the London Exchange shall be deemed to be Market-Makers under OCC's By-Laws and Rules. There is a strict separation of function on the London Exchange between jobbers, who trade only for their own accounts, have market-making responsibilities, and are prohibited from dealing with customers, and brokers, who act as agents on behalf of customers and are prohibited from trading for their own accounts. The effect of deeming jobbers to be Market-Makers is to permit the Clearing Members carrying the positions of jobbers to establish separate accounts for those positions under Section 3 of Article VI of the By-Laws, and thereby to reduce their net margin obligations under Rule 601.

Section 13 provides that premiums in respect of IFX options shall be quoted in United States dollars and that all settlements (other than the delivery of foreign currency) shall be in United States dollars. Section 14 provides that OCC will permit London Clearing Members to designate an OCC-approved London bank through which settlement with OCC will be conducted. Section 15 provides for notification and coordination of certain rule changes by PHLX and the London Exchange.

Section 16 requires PHLX and the London Exchange to provide volume forecasts in order to facilitate planning by OCC.

Sections 17, 18 and 19 relate to the authority and the obligation of OCC with respect to setting standards applicable to London Exchange Members in dealing with their customers. These sections are

essentially the same as the corresponding provisions of the PEA.

Section 20 permits the London Exchange to examine trade data and other records relating to positions and transactions in IFX options or relating to any Clearing Member that is a member of the London Exchange. The London Exchange may use such information in connection with its surveillance activities.

Section 21 requires the London Exchange to share certain information regarding the financial condition of Clearing Members with OCC. OCC requires such information in connection with its responsibility for monitoring the financial condition of its Clearing Members. The provisions of section 21 are essentially the same as the corresponding provisions of the PEA.

Section 22 provides for indemnification of OCC by PHLX and the London Exchange, and of PHLX and the London Exchange by OCC. The structure of the indemnification provisions is similar to the structure of the corresponding provisions in the PEA except that there is no cross-indemnification between the two markets and the indemnification of OCC by the markets includes any alleged violations by OCC of the securities laws of the United Kingdom so long as OCC is acting in accordance with its By-Laws and Rules. The remaining sections of the IMA relate to conditions to initiation of trading on the London Exchange, termination of the agreement, delivery of notices among the parties and miscellaneous matters such as choice of law provisions.

II.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to provide for the clearance of International Foreign Currency Options that are traded on PHLX and the London Exchange. The rule change provides a system for the trading of international options that will be applicable to options that may in the future be traded in other options markets outside the United States. OCC believes that this system is a significant step in the internationalization of the options markets and will be of benefit to investors both in the United States and elsewhere. Because international options will be cleared pursuant to the same basic rules and procedures applicable to existing options, the proposed rule change is consistent with the requirements of section 17A of the Securities Exchange Act of 1934, as amended.

(B) Self-Regulatory Organization's Statement on Burden on Competition

Under the proposed rule change, IFX options traded on PHLX and the London Exchange pursuant to the IMA would not be fungible with options traded on other Exchanges, even if such options had terms identical to the terms of IFX options. Notwithstanding the foregoing, other Exchanges may trade options with terms identical to, and directly competitive with, IFX options; and such Exchanges may enter into international market agreements with one or more international markets for the trading of such options. It should also be noted that United States persons will be prohibited by provisions of the Commodity Exchange Act from trading in IFX options on the London Exchange. Investors having access to the London Exchange may therefore be able to respond to market movements by acquiring or liquidating positions in IFX options at times when PHLX is closed. Although it is possible that either of the foregoing factors may have a competitive effect in certain situations, OCC believes that the proposed rule changes would not place a burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Written comments were not and are not intended to be solicited by OCC with respect to the proposed rule change, and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the self-regulatory organization consents, the Commission will:

(a) By order approve such proposed rule change, or

(b) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicition of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by September 20, 1985.

For the Commission by the Division of Market Regulation, prusuant to delegated authority.

Dated: August 23, 1985.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 85-20766 Filed 8-29-85; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-22352; File No. SR-PSE-85-20]

Self-Regulatory Organizations; Proposed Rule Change by The Pacific Stock Exchange, Inc. Relating to the Implementation and Procedures of the Establishment and Creation of Eleven New Specialist Ports Upon the Equity Trading Floors

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(l)(1), notice is hereby given that on July 23, 1985, the Pacific Stock Exchange, Inc., filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule filing from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed plan to establish and create eleven new specialist posts on the Pacific Stock Exchange Equity Trading Floors is based on a plan for the creation of nine new posts which was approved by the Commission on December 18, 1984 in Release No.

21578.[1] The plan will provide for existing specialists to freeze a certain number of stocks based upon their specialist evaluations, with the new posts selecting fifteen stocks from a list of those submitted by the specialists on the Floor where the new specialist will be located.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in section (A), (B) and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The proposed expansion plan corresponds to a plan utilized for the creation of nine new posts in the first quarter of 1985. This plan was contained in Release No. 21578 and was approved by the Commission on December 18, 1984. That plan was designated as Phase I of a plan to initiate twenty new specialist posts. This filing will initiate Phase II of that plan and will provide for the remaining eleven new expansion posts.

The procedures utilized in the development of Phase II will be the same as those utilizied in Phase I, as that system worked in an appropriate and fair manner.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No comments were received following the April 29, 1985, announcement to members regarding the Phase II plan.

[1] See Securities Exchange Act Release No. 21578, 49 FR 50349 (December 27, 1984).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approved such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, at 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street NW., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by September 20, 1985.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Dated: August 23, 1985.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 85-20767 Filed 8-29-85; 8:45 am]

BILLING CODE 8010-01-M

[Release No. IC-14693 (File No. 812-6131)]

Application and Opportunity for Hearing; Capital Realty Investors-V Limited Partnership

August 23, 1985.

Notice is hereby given that Capital Realty Investors-V Limited Partnership (the "Partnership"), a Maryland limited partnership, and its general partners, C.R.I., Inc. ("CRI"), William B. Dockser, Martin C. Schwartzberg, and H. William Willoughby (collectively, "General Partners", and together with the Partnership, "Applicants"), One Central Plaza, 11300 Rockville Pike, Rockville, Maryland 20852, filed an application on June 13, 1985, for an order pursuant to section 6(c) of the Investment Company Act of 1940 ("Act") exempting the Partnership from all provisions of the Act. 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 to the Act for the text of all applicable provisions thereof.

According to the application, the Partnership intends to publicly offer 20,000 units of limited partnership interest at $1,000 per unit ("Units"). Applicants state that the Partnership will operate as a "two-tier" partnership, that is, the Partnership, as a limited partner, will invest in other limited partnerships ("Local Partnerships") which will own or lease and will operate apartment complexes most of which will receive or (at the time of the Partnership's investment, will be receiving) one or more forms of substantial federal, state or local government assistance, including government mortgage insurance. ("Government Enhanced Apartment Complexes.") Applicants state that such Government-Enhanced Apartment Complexes may or may not be classified as "low income housing" under the Internal Revenue Code of 1954, as amended. Applicants further state that the Partnership may also invest up to 20% of amounts invested in all Local Partnerships in Local Partnerships that own or lease and will operate conventional (non-government-enhanced) apartment complexes. Applicants represent that the Partnership may invest in certain limited partnerships that are general partners in a general partnership which owns or leases Government-Enhanced [or conventional apartment complexes.] Applicants state that an affiliate of CRI will be a Partner in each Local Partnership.

Applicants state that one category of Local Partnerships in which the Partnership intends to invest will own apartment complexes which have subsidies which are typically indirect in nature and are not directly funded by governmental entities but rather are funded through a partnership with the private sector. For example, Applicants state, section 244 of the National Housing Act provides for a coinsurance

program established to guarantee the continued availability of HUD mortgage insurance. Applicants state that mortgage insurance under this section is issued in connection with the refinancing of existing multifamily apartment complexes and provides for federal insurance of mortgages pursuant to a coinsurance contract with a private lender whereby the lender assumes a percentage of the risk of loss on the mortgage loans should the Local Partnership default on its loan. Applicants represent that this coinsurance is available for, among others, section 221(d)(4) insured and section 223(f) properties. Applicants further represent that the latter properties are not specifically designated as for the benefit of low and moderate income families, but are authorized under national housing laws for the preservation of existing housing and neighborhoods through moderate rehabilitation of property and improved maintenance.

Applicants state that other types of subsidy and assistance within this category would include financial benefits provided by a local community encouraging residential multifamily development, such as real estate tax abatement, or a substantially reduced charge for public services in lieu of real estate taxes, for the property. Applicants state that the Partnership also may invest in properties which have subsidies derived from the Housing and Urban Renewal Recovery Act of 1983. This subsidy program provides a "front end" grant from the federal government to a city, from which grant the city may make a grant or loan or provide interest reductions to entities which own residential multifamily properties ("HoDAG Program"). The HoDAG Program includes restrictions; which include targeting the funds to areas with "severe shortage of decent rental housing opportunities for families and individuals without otherwise reasonable and affordable housing alternatives in the private market".

Applicants represent that the Partnership is organized as a limited partnership because a limited partnership is the only form of organization which provides investors with both (1) the ability to claim on their individual tax returns the deductions, losses, credits, and other tax items arising from the Partnership's interests in Local Partnerships that own and operate the government-assisted and conventional apartment complexes and (2) liability limited to their capital investment.

Applicants state that any subscriptions for units of limited partnership interests must be approved by the Applicant, which approval shall be conditioned upon representations as to suitability of the investment for each subscriber, including representations that without regard to investment in the Partnership, each subscriber has either (1) a net worth (exclusive of home, home furnishings, and automobiles) of at least $50,000 and expects (i) (with respect to a married taxpayer filing a joint return) to have taxable income for the current year which will be at least $45,800 or (ii) (with respect to all other taxpayers excluding corporations) federal taxable income for the current year will be at least $34,100, and with respect to (i) and (ii) above, the subscriber must represent that for the two succeeding years, the subscriber's marginal federal income tax rate will be at least 38%, or (2) irrespective of annual federal taxable income, the subscriber has a net worth (exclusive of home, home furnishings, and automobiles) of at least $150,000 or is purchasing in a fiduciary capacity for a person or entity having such net worth and annual taxable income as set forth in clause (1) or such net worth as set forth in clause (2). Any prospective transferee of a Unit will be required to make similar representation in writing to the Partnership.

Applicants state that the General Partners will receive 1.51 percent of all items of the Partnerships profits and losses. Applicants further state that in addition to the 1.51 percent participation in the Partnerships profits and losses, the General Partners and their affiliates will receive certain fees for managing the conduct of the affairs of the Partnership and the Local Partnerships and the continuing operation of projects owned by the Local Partnerships. Applicants represent that all compensation to be paid the General Partners and their affiliates will be fair and on terms no less favorable to the Partnership than would be the case if such arrangements had been made with independent third parties. Applicants further represent that the Partnership believes such compensation meets all applicable guidelines necessary to permit the Units to be offered and sold in the various states that prescribe such guidelines, including, without limitation, the Statement of Policy adopted by the North American Securities Administrators Association, Inc. with respect to real estate programs. Applicants state that all compensation to be paid to the General Partners and their Affiliates will be specified in the Prospectus.

Applicants assert that the requested exemption is both necessary and appropriate in the public interest and would be consistent with the protection of investors and the purposes and policies underlying the Act. The application states that any of the net proceeds of the offering which the Partnership has not invested or committed to investment in Local Partnerships within 24 months from the date of the prospectus, except for amounts utilized to pay operating expenses and amounts set aside for reserves, will be returned by the Partnership to the Limited Partners without a reduction for any fees. The application also states that the Partnership will invest any net proceeds not immediately utilized to acquire Local Partnership interests or for other Partnership purposes (such as the establishment of a reserve equal to 5% of the Gross Proceeds), in United States government securities, including treasury bills, other United States government guaranteed obligations, certificates of deposit or bank time deposits, or tax-exempt notes or bonds with maturities not exceeding one year. It is asserted that the Partnership does not intend to trade in temporary investments and will not speculate in any of the temporary securities.

Notice is further given that any interested person wishing to request a hearing on the application may, not later than September 16, 1985, at 5:30 p.m., do so by submitting a written request setting forth the nature of his interest, the reasons for his request, and the specific issues, if any, 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 Applicants 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.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 85-20711 Filed 8-29-85; 8:45 am]

BILLING CODE 8010-01-M

[Release No. IC-14392; 811-3485, 811-3679, 811-3680, 811-3681, and 811-3582]

Application and Opportunity for Hearing; Federal Life Money Market Fund, Inc., et al.

August 23, 1985.

Notice is hereby given that Federal Life Money Market Fund, Inc., Portfolio of Money Market Fund Shares, Inc., Portfolio of Income and Growth Fund Shares, Inc., Portfolio of Bond Fund Shares, Inc., and Portfolio of Mutual Fund Shares, Inc. ("Applicant"), 3750 West Deerfield Road, Riverwoods, Illinois 60015, underlying investment funds for Federal Life Variable Annuity Account C ("Account") and registered under the Investment Company Act of 1940 ("Act") as open-end, diversified management investment companies, filed applications on June 25, 1985, pursuant to section 8(f) of the Act, for an order of the Commission declaring that Applicants have ceased to be investment companies. All interested persons are referred to the applications 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 the applicable provisions.

On June 10, 1982, Federal Life Money Market Fund, Inc. filed a notification of registration on Form N-8A and a registration statement on Form N-1. This registration statement became effective on September 2, 1982. Portfolio of Money Market Fund Shares, Inc., Portfolio of Income and Growth Fund Shares, Inc., Portfolio of Bond Fund Shares, Inc., and Portfolio of Mutual Fund Shares Inc. each filed a notification of registration on Form N-8A on March 8, 1983, and a registration statement on Form N-1. These registration statements became effective on June 8, 1983. Each Applicant was incorporated under the laws of the State of Maryland.

Applicants state they have never made, and do not intend to make, either directly or indirectly, a public offering of any of their securities, which would have been shares of beneficial interest funding variable annuity life insurance contracts ("contracts"). According to the applications, the Account is the sole shareholder of each of the Applicants, and on June 25, 1985, redeemed all but a minor number of shares in anticipation of the winding up of the affairs of the Applicants. Each Applicant currently has less than $10,000 invested in money market instruments, and has no debts or other liabilities outstanding other than normal organizational expenses, which will be paid by Federal Life Insurance Company. The Applicants are not party to any litigation or administrative proceedings. Applicants maintain that they are not engaged, nor do they propose to engage, in any business activities other than those necessary for the winding up of their affairs. On May 31, 1985, the board of directors of the Applicants authorized the filing of the applications.

Notice is further given that any interested person wishing to request a hearing on the applications may, not later than September 16, 1985, at 5:30 p.m., do so by submitting a written request setting forth the nature of his interest, the reasons for his request, and the specific issues, if any, 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 Applicants 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 applications 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.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 85-20712 Filed 8-29-85; 8:45 am]

BILLING CODE 8010-01-M

[File No. 22-14000]

Application and Opportunity for Hearing; Phillips Petroleum Co.

August 23, 1985.

Notice is hereby given that Phillips Petroleum Company (the "Applicant" or the "Company") has filed an application pursuant to clause (ii) of section 310(b)(1) of the Trust Indenture Act of 1939, as amended (herein sometimes referred to as the "Act"), for a finding by the Securities and Exchange Commission (the "Commission") that the trusteeships of J. Henry Schroder Bank & Trust Company ("Schroder"), a corporation duly organized and existing under the laws of the State of New York, under certain indentures of Phillips Petroleum Company, which were heretofore qualified under the Act, are not so likely to involve a material conflict of interest as to make it necessary in the public interest or for the protection of investors to disqualify Schroder from acting as trustee under any of such indentures.

The Company has issued and outstanding, as of June 24, 1985, the following debt securities secured by the following indentures, in each case, between the Company and Schroder, as trustee, all of which are the subject of this application:

(i) $112,230,000 principal amount of 7⅝% Sinking Fund Debentures Due 2001, under an Indenture dated March 15, 1971 (the "1971 Indenture");

(ii) $191,270,000 principal amount of 8⅞% Sinking Fund Debentures Due 2000, under an Indenture dated November 15, 1975 (the "1975 Indenture");

(iii) $200,000,000 principal amount of 12⅞% Notes Due September 1, 1992, under an Indenture dated August 1, 1982 (the "1982 Indenture");

(iv) $300,000,000 principal amount of 12¼% Sinking Fund Debentures Due 2012, under the 1982 Indenture;

(v) $250,000,000 principal amount of 11¼% Sinking Fund Debentures Due May 1, 2013, under the 1982 Indenture;

(vi) $2,104,820,000 principal amount of Floating Rate Senior Notes Due 1995, under an Indenture dated March 15, 1985 (the "March 1985 Indenture"); and

(vii) $1,306,440,000 principal amount of 13⅞% Senior Notes Due 1997, under the March 1985 Indenture.[1]

Bankers Trust Company (the "Resigning Trustee") as the original trustee, or assignee of the original trustee, under each of the 1971, 1975 and 1982 Indentures is resigning and the Company is duly appointing Schroder as successor trustee, which appointment Schroder is accepting, all pursuant to an Instrument of Resignation, Appointment and Acceptance dated June 24, 1985, among the Company, the Resigning Trustee and Schroder.

Section 310(b) of the Act (which is included in section 6.08 of the 1971, 1975, 1982 and March 1985 Indentures, collectively referred to herein as the "Indentures") provides in part that if a trustee under an indenture qualified under the Act has or shall acquire any conflicting interest (as defined in the section), it shall, within ninety days after ascertaining that it has such conflicting interest, either eliminate such conflicting interest or resign. Subsection (b)(1) of this section provides, with certain exceptions stated therein, that a trustee under a qualified indenture of a company shall be deemed to have a conflicting interest if such trustee is trustee under another indenture under

[1] The Company and Schroder executed an Indenture dated February 15, 1985 and supplemented February 18, 1985, but no securities have been issued thereunder nor has such indenture been qualified under the Act.

which any other securities, or certificates of interest or participation in any other securities of such company are outstanding.

The present application, filed pursuant to clause (ii) of section 310(b)(1) of the Act (as set forth in section 6.08 of each of the Indentures), seeks to exclude the Indentures from the operation of Section 310(b)(1) of the Act.

The effect of the proviso contained in clause (ii) of section 310(b)(1) of the Act on the matter of the present application is such that the Indentures may be excluded from the operation of section 310(b)(1) of the Act if the Company shall have sustained the burden of proving, by this application to the Commission and after opportunity for hearing thereon, that the trusteeships of Schroder under the Indentures are not so likely to involve a material conflict of interest as to make it necessary in the public interest or for the protection of investors to disqualify Schroder from acting as trustee under any Indenture.

The Applicant alleges that:

(1) The Indentures are wholly unsecured and the debt securities secured by the Indentures rank *pari passu inter se*. The only material differences between the Indentures and the rights of the holders of the debt securities secured by the Indentures relate to aggregate principal amounts, dates of issue, certain financial covenants of the Company, Events of Default as defined in the Indentures, maturity and interest payment dates, interest rates, redemption prices and procedures, sinking fund provisons, and other provisions of a similar nature.

(2) No default has at any time existed under any Indenture.

(3) Such differences as exist among the Indentures are not so likely to involve a material conflict of interest as to make it necessary in the public interest or for the protection of investors to disqualify Schroder from acting as trustee under any one or more of the Indentures.

The Applicant has waived notice of hearing, any right to a hearing on the issues raised by the application, and all rights to specify procedures under the Rules of Practice of the Commission with respect to its application.

For a detailed statement of the matters of fact and law asserted, all persons are referred to said application, File No. 22-14000, at the Securities and Exchange Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549.

Notice Is Further Given that an order granting the application may be issued by the Commission any time on or after September 17, 1985, unless prior thereto a hearing upon the application is ordered by the Commission, as provided in clause (ii) of section 310(b)(1) of the Trust Indenture Act of 1939, as amended. Any interested person may, no later than September 17, 1985, at 5:30 P.M., Eastern Daylight Savings Time, in writing, submit to the Commission, his or her views or any additional facts bearing upon this application or the desirability of a hearing thereon or request notification if the Commission should order a hearing. Any such comments or requests should be addressed to: Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549, and should state briefly the nature of the interest of the person submitting such information or requesting a hearing, the reasons for such request, and the issues of fact and law raised by the application that he desires to controvert. At any time after such date, the Commission may issue an order granting the application, upon such terms and conditions as it may deem necessary or appropriate in the public interest or for the protection of investors unless a hearing is ordered by the Commission.

For the Commission, by the Division of Corporation Finance, pursuant to delegated authority.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 85-20713 Filed 8-29-85; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-22356; File No. S7-820]

Joint Industry Plan; Receipt of an Amendment to the Options Price Reporting Authority Plan

On August 12, 1985, the participants in the Options Price Reporting Authority ("OPRA") submitted to the Commission, pursuant to Rule 11Aa3-2 under the Securities Exchange Act of 1934 ("Act"), an amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information" ("OPRA Plan").[1]

I. Description of the Amendment

The amendment to the OPRA Plan enlarges the category of persons eligible to become parties, heretofore limited to national securities exchanges, to include national securities associations. Conforming changes are made throughout he OPRA Plan to reflect this enlargement of eligibility for participation. In addition, "housekeeping" revisions are made to the list of parties set forth in Section I of the OPRA Plan.

The OPRA Plan participants indicate that these changes are necessary to accommodate the request of the National Association of Securities Dealers, Inc. ("NASD") to become a party to the OPRA Plan. The OPRA Plan participants also indicate that the NASD will be included as a party upon its completion of a separate application for participation.

II. Request for Comment

Pursuant to Rule 11Aa3-2(c)(3)(ii) under the Act, the amendment became effective upon filing with the Commission. The Commission, however, may summarily abrogate the amendment within 60 days of its filing and require refiling and approval of the amendment by Commission order pursuant to Rule 11Aa3-2(c)(2), if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors and maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act.

In order to assist the Commission in determining whether to abrogate the amendment, interested persons are invited to submit their views to John Wheeler, Secretary, Securities and Exchange Commission, 450 5th Street, NW., Washington, D.C. 20549, within 21 days from the date of publication of this notice in the **Federal Register**. The amendment to the OPRA notice in the **Federal Register**. The amendment to the OPRA Plan will be available for public inspection in the Commission's Public Reference Room. All communications should refer to File No. S7-820.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority. 17 CFR § 200.30-(a)(27).

Dated: August 26, 1985.

John Wheeler,

Secretary.

[FR Doc. 85-20341 Filed 8-29-85; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 35-23802; 70-6925]

Central and South West Corp., West Texas Utilities Co.; Proposal to Issue Preferred Stock

August 23, 1985.

Central and South West Corporation, P.O. Box 220164, Dallas, TX 75222, a registered holding company, and its wholly owned subsidiary, West Texas

[1] *See* Securities Exchange Act Release No. 17638 (March 18, 1981).

Utilities Company ("WTU"), 301 Cypress, Abilene, TX 79601, have filed an amendment to their application-declaration subject to sections 6(a), 7, 9(a), 10 and 12(e) of the Public Utility Holding Company Act of 1935 ("Act") and Rules 45, 50, 62 and 65 thereunder.

In the application-declaration WTU requested authority to issue and sell during the two year period prior to December 31, 1985 up to 300,000 shares, in one or more series, Preferred Stock, $100 par value ("Additional Preferred"), at not less than $100 per share nor more than $102.75 per share, with dividends to accrue thereon only from the date of issue. WTU still anticipates the need for such financing; however, due to its financing requirements, in light of the recent sale of $35 million in principal amount of its First Mortgage Bonds, Series L, and market conditions, it appears that WTU may not issue the Additional Preferred until the last quarter of 1985 or the first half of 1986. Therefore, WTU hereby requests authority to issue 300,000 shares of the Additional Preferred until June 30, 1986.

Depending upon market conditions, WTU requests the flexibility to either issue perpetual preferred or sinking fund preferred stock. If a sinking fund preferred stock is issued, WTU further requests that it be authorized to determine the size and timing of the sinking fund to be based on market conditions at the time of the issue. It is anticipated that the Additional Preferred will be redeemable at any time in whole or part provided that such redemption will not be allowed for a period of five years from issue if it is part of a refunding at an effective interest cost lower than that of the particular series of Additional Preferred. It is anticipated that dividend rates and commissions will be established pursuant to competitive billing. Unless the application-declaration is amended to provide for a negotiated public offering or private placement, WTU proposes, pursuant to Rule 50 under the Act to issue and sell the Additional Preferred.

The application-declaration and any amendments thereto is 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 September 16, 1985, 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 an attorney at law, by certificate) should be filed with the request. Any request for a hearing shall identify specifically the issue 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 Division of Investment Management, pursuant to delegated authority.

Shirley E. Hollis,

Assistant Secretary

[FR Doc. 85-20635 Filed 8-29-85; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 35-23803; 70-7140]

Columbia Gas System, Inc.; Proposal to Amend Supplemental Indenture

August 23, 1985.

The Columbia Gas System, Inc. ("Columbia"), 20 Montchanin Road, Wilmington, Delaware 19807, a registered holding company, has filed a declaration with this Commission pursuant to section 6(a), 7(e), and 12(e) of the Public Utility Holding Company Act of 1935 ("Act"), and Rules 62 and 65 thereunder.

Columbia proposes to amend its Twenty-Ninth Supplemental Indenture ("Supplemental Indenture"), dated as of June 1, 1982, supplementing its indenture dated as of June 1, 1961 ("Indenture"). Debentures in the principal amount of $100 million at 15⅝%, Series due June 1997 ("Debentures"), were issued pursuant to the Supplemental Indenture and approved by this Commission, HCAR No. 22498.

Columbia proposes to request the Trustee to execute a Thirtieth Supplemental Indenture to eliminate the current restriction on capital stock distributions in the Supplemental Indenture and replace it with the dividend restriction included in the Twenty-Eighth Supplemental Indenture, dated as of August 1, 1980 ("Twenty-Eight Supplemental Indenture"). This dividend restriction states that Columbia will not authorize or make any distribution on Capital stock if, after giving effect to such distribution, the cumulative aggregate amount of all distributions on capital stock subsequent to December 31, 1979, will exceed the amount of Columbia's net income available for dividends after December 31, 1979, plus $110,000,000, plus such additional amount as shall be authorized or approved by the Commission.

As a result of this modification, approximately $163 million of additional retained earnings would be made available for common and preferred stock dividends. Approximately $552 million of retained earnings will continue to be restricted.

As compensation to the holders of the Debentures, it is expected that the non-refundable period and/or the accelerated sinking fund option of Columbia's Indenture will be modified, which will lengthen the holding period of the Investor. It is also possible that Columbia may eliminate the Cash Call Redemption option until expiration of the applicable non-refunding period. Commission approval of an extension of the non-refundable provision for up to two years beyond the current five years is requested. The exact terms of the modifications will be the subject of a Rule 24 letter.

The Thirtieth Supplemental Indenture effecting the proposed change cannot be executed until Columbia delivers to the Trustee written consents of the holders of 66⅔% in aggregate principal amount of the debentures at the time outstanding under the Supplemental Indenture. Solicitation of such consents, it is proposed, will be undertaken through Salomon Brothers, acting as agent for Columbia.

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 September 16, 1985, 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 or 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 Division of Investment Management, pursuant to delegated authority.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 85-20636 Filed 8-29-85; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 35-23800; 70-7133]

Consolidated Natural Gas Co.; Proposed Revolving Credit Long-Term Bank Financing by Holding Company; Intrasystem Financing

August 23, 1985.

Consolidated Natural Gas Company ("Consolidated"), 100 Broadway, New York, New York 10005, a registered holding company, has filed an application-declaration pursuant to sections 6(a) and 7 of the Public Utility Holding Company Act of 1935 ("Act"), and Rule 50(a)(2) thereunder.

By an order dated January 8, 1982 (HCAR No. 22362), the Commission authorized Consolidated to borrow up to $100,000,000 for periods not exceeding eight years pursuant to a revolving credit agreement with the Chase Manhattan Bank N.A. ("Chase"), acting for itself and as agent for other banks. Consolidated now proposes to enter into a new revolving credit agreement (the "Agreement") with Chase, acting for itself and as agent for other banks, in addition to that authorized in HCAR No. 22362. Under the terms of the new Agreement, the bank loans will be in the form of revolving credits, and may be converted in three-year term loans on December 31, 1990. During the revolving credit period, each bank will make loans to Consolidated from time to time through December 30, 1990, up to the maximum of its commitment under the Agreement. During that period, Consolidated may borrow, pay or prepay and reborrow up to each bank's commitment. In accord with the terms of the Agreement, Consolidated will have the rights at any time, upon notice to Chase, as Agent, to terminate or reduce the individual commitments of the banks.

Each loan during the revolving credit period will be evidenced by a Promissory Note. At the option of Consolidated, the interest rate will be (1) the prime commercials lending rate announced by Chase as in effect from time to time at its principal office in New York City, (2) the London Interbank Offered Rate ("LIBOR") as quoted by the London Office of Chase, or as specified, plus an increment of three-eights of one percent (0.375%) or, (3) the average of the bid rates quoted in the secondary market for Certifcates of Deposit of Chase as quoted from time to time by two recognized dealers ("CD Rate") plus an increment of one-half of one percent (0.500%) or (4) at a Composite Rate determined by negotiations between the individual participating banks and Consolidated.

The LIBOR and CD Rate will be adjusted, if applicable, by dividing the rate then effective by such factor as will satisfy reserve requirements of Chase and the banks as set forth by regulation of the board of Governors of the Federal Reserve System or other costs stipulated by the Board of Governors. Additionally, the CD Rate will be adjusted to reflect the cost of required deposit insurance.

Except for the Composite Rate, the rate of interest as quoted by Chase will include all cost plus any of the applicable above-mentioned increments. The Composite Rate will be as outlined above. Interest will be payable quarterly in arrears on March 31, June 30, and September 30 and December 31, or as specified, or at prepayment date, as the case may be. The floating Chase prime from time to time and any such change will be effective as to the revolving credit loans on the date of the change.

A commitment for of one-quarter of one percent(.250%) fee per annum will be charged on the unused portion of the revolving credit commitment commencing on the effective date of the Credit Agreement.

Under the terms of the Agreement, each bank agrees to make a three-year term loan to Consolidated on December 31, 1990 (the "Conversion Date"), in an amount not exceeding its commitment on the date of that loan. Each term loan will be evidenced by Consolidated's note, maturing in six equal semi-annual installments commencing June 30, 1991. In no event will the final maturity be later than December 31, 1993. Interest on each Term Note will be computered, at the option of Consolidated as follows: (1) prime commercial lending rate in effect from time to time at the principal office of Chase in New York City plus an increment of one-eighth of one percent (0.125%), (2) LIBOR adusted rate as quoted by the London Office of Chase plus an increment of one-half of one percent (0.500%), or (3) the average of the bid rates quoted in the secondary market for Certificates of Deposit of Chase as quoted from time to time by two recognized dealers ("CD Rate"), plus and increment of six-tenths of one percent (0.600%).

During the revolving credit period under consolidated's new Agreement with the Banks, as hereinabove described, Consolidated will make long-term nonnegotiable loans to subsidiary companies for capital expeditures. These loans will be evidence by long-term, nonnegotiated notes of the subsidiary companies maturing over a period of time to be determined by the officers of Consolidated, until such time as Consolidated sells debentures. These long-term, nonnegotiable notes will bear interest at a rate predicted on a substantially equal to the effective cost of money to Consolidated under Agreement until Consolidated sells its debentures. Thereafter, the notes will bear interest at a rate substantially equal to the effective cost of money through the sale of the debentures, and Consolidated will make additional long-term loans to its subsidiaries on the same basis as those previously made or in the form of revolving credit advances, upon letter agreement of note, payable to Consolidated on or before June 30, 1991. Following the conversion by Consolidated of its revolving credit loan into a term loan under the Credit Agreement, revolving credit advances to subsidiary companies will be converted into Term Notes of those subsidiary companies with maturities substantially the same as Consolidated's related term loan under the Credit Agreement.

The fees expenses incurred, or to be incurred in connection with the proposed transaction are estimated at $23,000. No state or federal commission other than this Commission, has jurisdiction over the proposed transaction.

The application-declaration is available for public inspection through the Commission's Office of Public Reference. Interested persons wishing to comment or request a hearing on it should submit their views in writing by September 16, 1985, to the Secretary, Securities and Exchange Commission, Washington, D.C. 20549, and serve a copy on applicant-declarant at the address specified above. Proof of service (by affidavit or, in the case of an attorney at law, by certificate) should be filed with the request. Any request for a hearing should 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 of 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 Division of Investment Management, pursuant to delegated authority.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 85-20837 Filed 8-29-85; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 35-23801; 70-7139]

The Southern Company, et al.; Proposal to Issue Authorized But Unissued Common Stock

August 23, 1985.

The Southern Company ("Southern"), 64 Perimeter Center East, Atlanta, Georgia, 30346, a registered holding company, its subsidiaries, Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Southern Company Service, Inc., Southern Electric Generating Company, and Southern Electrical International, Inc., have filed an application-declaration with this Commission pursuant to sections 6(a), 7, 9(a) and 10 of the Public Utility Holding Company Act of 1935 ("Act") and Rule 50(a)(5) thereunder.

Southern proposes to issue up to a maximum of $5,000,000 in value of its authorized but unissued shares of common stock, par value $5 per share ("Additional Common Stock"), in order to provide common stock to fund The Employee Stock Ownership Plan of The Southern Company System ("Plan") for the Plan year 1984, including any reinvestment of cash dividends on such stock, by direct purchases of common stock from Southern. The exact number of shares to be issued by Southern will be determined, in each case by the aggregate amount of contributions to be invested by the trust established pursuant to the Plan ("Trust") in respect of the Plan year and the purchase price per share of Southern's common stock. Southern proposes to apply the proceeds it receives from the sale of the Additional Common Stock for further equity investments and for other corporate purposes. Southern anticipates that the contributions by the Employing Companies to the Trust will be made in cash. However, if a contribution consists of Additional Common Stock, the purchase price per share shall be the average of the closing prices of a share of Southern's common stock based on consolidated trading and reported by the New York Stock Exchange for the 20 consecutive trading days immediately preceding the date on which such shares are contributed to the Plan. The purchase price per share of Additional Common Stock acquired from Southern by the Trust with cash contributions shall be the fair market value as of the date of acquisition. Cash contributions to the Trust also may be invested in Southern's common stock through open market purchases or private purchases from parties other than Southern. The purchase price per share of common stock acquired in this manner shall not be greater than the last sale price or highest current independent bid price, whichever is higher, for a share determined on the basis of consolidated trading reported by the New York Stock Exchange plus an amount equal to the commission payable in a stock exchange transaction.

Under the Plan, the Trust is required to reinvest cash dividends on common stock allocated to a participant's account in additional shares of common stock, unless the participant elects to receive such cash dividends.

All costs of administration of the Plan and the Trust, in excess of those costs withheld from contributions or to be paid by the Trust, are paid by the Employing Companies.

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 September 16, 1985 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 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 application-declaration, as filed or as it may be amended, may be granted and permitted to become effective.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 85-20838 Filed 8-29-85; 8:45 am]

BILLING CODE 8010-01-M

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Boston Stock Exchange, Inc.

August 26, 1985.

The above named national securities exchange has filed applications with the Securities and Exchange Commission pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder, for unlisted trading privileges in the following securities:

Student Loan Marketing Association
Common Stock, $.50 Par Value (File No. 7-8570)

Placer Development, Ltd.
Common Stock, No Par Value (File No. 7-8571)

Club Med, Inc.
Common Stock, $1.00 Par Value (File No. 7-8572)

Republic New York, Corporation
Common Stock, $5.00 Par Value (File No. 7-8573)

Health Care Property Investors, Inc.
Common Stock, $1.00 Par Value (File No. 7-8574)

Vendo Company
Common Stock, $1.25 Par Value (File No. 7-8575)

Sysco Corporation
Common Stock, $1.00 Par Value (File No. 7-8576)

Perry Drug Stores, Inc.
Common Stock, $.05 Par Value (File No. 7-8577)

Mortgage Investment Plus, Inc.
Common Stock, $.01 Par Value (File No. 7-8578)

Inflight Services, Inc.
Common Stock, $.50 Par Value (File No. 7-8579)

Bolar Pharmaceutical Company, Inc.
Common Stock, $.01 Par Value (File No. 7-8580)

Central Louisiana Electric Corp.
Common Stock, $4.00 Par Value (File No. 7-8581)

These securities are listed and registered on one or more other national securities exchanges and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before September 16, 1985, written data, views and arguments concerning the above-referenced applications. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, Washington, D.C. 20549. Following this opportunity for hearing, the Commission will approve the applications if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

John Wheeler,

Secretary.

[FR Doc. 85-20840 Filed 8-29-85; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-22350; File No. SR-CBOE-84-31]

Self-Regulatory Organizations; Proposed Rule Change by Chicago Board Options Exchange, Inc. Relating to Foreign Currency Options

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on July 16, 1985 the Chicago Board Options Exchange, Incorporated filed with the Securities and Exchange Commission Amendment No. 2 to its proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the amended proposed rule change from interested persons.

I. Text of the Proposed Rule Change

This Amendment Number Two only shows changes to Amendment Number One, which was a restatement of the original filing. Additions are italicized and deletions are bracketed.

Days and Hours of Business

Rule 22.5. On the days that the Exchange is open for business, currency options normally shall be traded from 7:[3]00 a.m. to 1:30 p.m. Central Standard or Daylight Time as appropriate.

Fractional Changes for Bids and Offers

Rule 22.7. Bids and offers shall be expressed as follows, unless the Floor Procedure sets a different fraction of a cent for a currency option contract of a particular series: British pound, ¢.05 or ¢.025; Canadian dollar, ¢.10; French franc, ¢.005; Japanese yen ¢.0001; Swiss franc, ¢.01 and West German mark, ¢.01.

Obligations of Market Makers

Rule 22.8. In supplementation of Rule 8.7, a Market Maker is expected to perform the following activities in the course of maintaining a fair and orderly market, *except that there is no one-point-rule requirement in foreign currency options, that is, 8.7(b)(ii) does not apply.*

no change to the five paragraphs on bid/ask differentials

The Floor Procedure Committee may establish differences other than the above for one or more series or classes of currency options. The bid-ask differentials stated above apply to [all but the longest term currency option series open for trading in each class] *series of less than nine months.* For [these] *all other* series, the bid-ask differential shall be twice the stated amount.

Post Coordinators [for Currency Options] and Trading Rotations

Rule 22.9. *(a) Post Coordinators.* Notwithstanding any provision in the Rules to te contrary, there shall be neither Board Brokers nor Order Book Officials for currency options, and there shall be no limit order book for currency options. *There shall be Post Coordinators who shall handle trading rotations.*

(b) Opening Rotations. The opening rotation in each series of each class of foreign currency options shall be overseen by the Post Coordinator and shall begin promptly at 7:00 a.m. Chicago time. Generally, the Post Coordinator or his representative shall open first those series of a class with respect to which the greatest buying and selling interest has been expressed (deferring opening relatively inactive series); provided, however, that more than one series and more than one class may be opened simultaneously. These procedures may be altered or supplemented by the Board (or the Committee designated by the Board).

(c) Closing Rotations. A closing rotation shall be employed for each series and class of currency options on the last business day prior to their expiration, starting at 1:30 p.m. Chicago time.

Margin Requirements

Rule 22.11. (a) and (b) no change

(c) Foreign currency option margin requirements may be satisfied by a deposit of cash, marginable securities or by presentation to the member organization carrying such customer's account of a letter of credit in a form satisfactory to, and issued by a bank or trust company approved by, the Exchange. Such a letter of credit: (i) shall contain the unqualified commitment of the issuer to pay to the member or participant organization a specified sum of money equal to or greater than the amount of margin due with respect to such option position, immediately upon demand at any time prior to the expiration of such letter of credit; (ii) shall be irrevocable; (iii) shall expire no earlier than the expiration of such option; and (iv) shall expire no later than eighteen (18) months from the date of its issuance. Such a letter of credit may serve as margin for more than one foreign currency option position written by the customer for whose account the letter of credit is issued, provided that the margin due with respect to each such option position does not, in the aggregate, exceed the sum specified in such letter of credit and provided that such letter expires no sooner than the most distant expiration date of any of the options with respect to which it is designed to serve as margin.

. . . Interpretations and Policies:

.01 For purposes of this Rule, all valuations shall be based on current market prices unless the specific provisions of the Rule otherwise provide.

.02 The Exchange may in its discretion approve a bank or trust company as an issuer of letters of credit if:

(a) U.S. Institutions:

(1) it is organized under the laws of the United States or a State thereof and is regulated and examined by federal or state authorities having regulatory authority over banks or trust companies; and

(2) it has, at the time of approval and continuously thereafter, shareholders' equity of $200,000,000 or more.

(b) Non-U.S. Institutions:

(1) it is organized under the laws of a country other than the United States and has a Federal or State Branch or Agency (as defined in the International Banking Act of 1978) located in the United States;

(2) it has, at the time of approval and continuously thereafter, shareholders' equity in excess of $200,000,000 (U.S.);

(3) its principal executive office is located in a country that (a) is rated "AAA" by Moody's Investor Service and/or Standard & Poor's; and

(4) (a) it has a "P-1" rating from Moody's Investor Service and/or an "A-1" rating from Standard & Poor's on its commercial paper or other short-term obligations, or

(b) in the event it has no rating on its commercial paper or other short-term obligations,

(i) any such commercial paper or short-term obligations issued by its parent or an affiliated entity has such a rating; or

(ii) any such commercial paper or short-term obligations issued by non-affiliated entities and supported or guaranteed by the institution has such a rating; or

(iii) the institution, its parent or any affiliated entity has a "Aaa" rating from Moody's Investor Service and/or an "AAA" rating from Standard & Poor's on its long-term obligations.

.04 Any letter of credit issued by a non-U.S. institution must be issued and payable at a Federal or State Branch or Agency thereof.

.05 The total amount of letters of credit issued by a U.S. or non-U.S. financial institution for the account of any one customer and outstanding at any one time shall not exceed 15% of the unimpaired capital and surplus of such institution and the total amount of letters of credit issued by a U.S. or non-U.S. financial institution naming any one member organization as beneficiary and outstanding at any one time shall not exceed 20% of the unimpaired capital and surplus of such institution.

.06 If the customer for whose account a letter is issued pursuant is itself a bank or trust company, such letter or credit shall be issued by another bank or trust company.

.07 The Exchange reserves the right in its sole discretion to refuse or revoke approval of any financial institution as an issuer of letters of credit at any time.

Foreign Currency Option Permits

Rule 22.13. The Exchange may issue up to 75 nontransferable, nonleasable currency option permits. Permits shall entitle holders to effect transactions in only currency options as market makers or floor brokers on the Exchange's trading floor. A permit holder cannot also be a clerk, a special member, a regular member with a floor function, or a bond permit holder. The Membership Committee (1) may give preference to traders and to firms that have experience in foreign-currency trading, (2) may limit the number of permits purchased by a single firm and (3) shall review all changes of nominees to insure that nominees are firm employees.

Permit holders shall be subject to all of the obligations of regular members under the rules and policies of the Exchange, including dues, fees (including application fees), other charges, and the member death benefit. They shall have no interest in the property and assets of the Exchange and shall have no right to vote, to petition, or to serve on any committee except as a nonmember of the Exchange.

Applications only shall be accepted until the close of business on the day before trading in currency options begins on the Exchange. Permits shall be effective for one year and can be renewed for a maximum duration of three years from the date of issuance at the following nonrefundable permit fees: first year—$10,000, second—$15,000 and third—$20,000. If a permit holder purchases a regular membership in the open market after 18 months (but before 3 years) as a permit holder, the Exchange will refund to him 50 percent of his paid-in permit fees; if such a regular membership is sold within six months of the date of purchase, the Exchange will deduct the full amount of the refund from the proceeds of the sale.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and the basis for the amended proposed rule change and discussed any comments it received on the amended rule change. The text of these statements may be examined at the places specified in Item IV below and is set forth in sections (A), (B), and (C) below.

(A) Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

The purposes of this proposed Amendment Number Two are as follows. The opening of trading is changed from 7:30 a.m. Chicago time to 7:00 a.m. The fractional change for the British pound can be either ¢.05 or ¢.025, and the Exchange will announce well before the start of trading which will be used. If a change is to be made after trading begins, the Exchange will announce the change well in advance of its effective date. In addition, it is made clear that the one-point rule does not apply, and the bid-ask differentials apply to series of less than nine months and are doubled for all other series.

This Amendment also adds language concerning opening and closing trading rotations. The Exchange intends to open foreign currency options similarly to the way Treasury bond options are opened as approved by the Commission in Release Number 34–22144 concerning SR–CBOE–85–11. First, the Post Coordinator ordinarily will open within an options class those series with the nearest expirations that are at-the-money, first in-the-money and first out-of-the-money. The Post Coordinator will then open any other near term options within the class for which a broker requests a market. Next the Post Coordinator will open any longer-term series within the class for which a broker requests a market.

Series for which there was no buying or selling interest during opening rotation will be opened during the trading day in response to buying or selling interest, or forty minutes prior to the close, whichever is sooner. (Of course, in periods of unusual market activity, or when other extraordinary circumstances are present, the Post Coordinator is vested with discretion to open the inactive currency option series more immediately prior to the close of trading than forty minutes.) No quotations will be posted for series of currency options until they are opened for trading. Once a series is opened, however, current market quotations for such series will be maintained and disseminated.

Allowing letters of credit to satisfy the initial and maintenance margin requirements of foreign currency options alleviates many of the computational problems that have inhibited the entities that the product was designed for from participating in foreign currency option trading on a securities exchange.

The acceptance of letters of credit to meet foreign currency margin requirements is subject to a one year pilot program during which each member organization named as the beneficiary of a letter of credit issued must provide the Exchange with: (i) The name of the financial institution issuing the letter of credit; (ii) the name of the customer on whose behalf the letter of credit as issued; (iii) the sum of money specified in the letter; (iv) the expiration date of the letter; (v) the class and series of each option position to which such letter is to serve as margin; (vi) the transaction date of each such option position; and (vii) the margin due with respect to each such option position. Each member organization must also provide the Exchange with prompt notification of the withdrawal of any such letter of credit or the liquidation of any option position with respect to which such letter is intended to suffice as margin and of the assignment of an exercise notice to any such option position.

A member organization's ability to accept a letter of credit in satisfaction of the margin due with respect to a customer's foreign currency option position(s) shall continue for a period of one year from the effective date of Exchange Rule 22.11, unless sooner terminated pursuant to the second sentence hereof. During the one-year period subsequent to the effective date of Rule 22.11, the Exchange may, at any time, on its own initiative or at the direction of the Securities and Exchange Commission or the Board of Governors of the Federal Reserve System, suspend, terminate or otherwise modify a member organization's ability to accept a letter of credit in satisfaction of a customer's original margin obligations.

Finally, the Amendment adds an access plan, which plan was approved by a membership vote at a special meeting held beginning June 4, 1985. It should be noted that the months

available for trading will be the nearby two months and three further out months from the March cycle. For example, on September 24 when trading is scheduled to begin, the following months will be available: October, November, December, March and June. It also should be noted that sales personnel who conduct a public-customer business in foreign currency options must pass the Series 15 examination. Since the Series 15 examination presently does not cover European options or the size of the Exchange's currency option contracts, the Exchange will undertake to cover these subjects as part of its currency option education efforts.

The amended proposed rule change is consistent with the Securities Exchange Act of 1934 and in particular Section 6(b)(5) thereof in that it serves to protect investors and the public interest.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that this proposed rule change will impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Amended Proposed Rule Change Received from Members, Participants or Others

Comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submission should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, D.C. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by September 20, 1985.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Dated: August 23, 1985.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 85-20839 Filed 8-29-85; 8:45 am]

BILLING CODE 8010-01-M

SMALL BUSINESS ADMINISTRATION

FCA Investment Co.; Issuance of a License to Operate as a Small Business Investment Company

[License No. 06/06-0289]

On March 25, 1985, a notice was published in the Federal Register (50 FR 11779), stating that FCA Investment Company (FCA) located at 3000 Post Oak Boulevard, Houston, Texas 77056, had filed an application with the Small Business Administration pursuant to 13 CFR 107.102(1985), for a license to operate as a small business investment company under the provisions of section 301(c) of the Small Business Investment Act of 1958, as amended.

The period for comment expired on April 24, 1985, and no significant comments were received.

Notice is hereby given that considering the application and other information, SBA has issued License No. 06/06-0289 to FCA.

Dated: August 23, 1985.

Robert G. Lineberry,

Deputy Associate Administrator for Investment.

[FR Doc. 85-20749 Filed 8-29-85; 8:45 am]

BILLING CODE 8025-01-M

Presidential Advisory Committee on Small and Minority Business Ownership; Public Meeting

The Presidential Advisory Committee on Small and Minority Business Ownership, located in Washington, DC, will hold a public meeting at 9:00 a.m. until 5:00 p.m., Monday, September 9, 1985, at the Small Business Administration, 1441 L Street, NW., 2nd Floor Conference Room, Washington, DC 20416, to conduct a meeting of the Committee members to draft the first writing of the Committee's report to the President of the United States and the U.S. Congress on their activities during Fiscal Year 1985. The meeting will be open to the interested public, however, space is limited.

Persons wishing to obtain further information should contact Mrs. Maurine Fisher, Office of Private Industry Programs, Small Business Administration, Room 602, 1441 L Street, NW., Washington, DC 20416, telephone (202) 653-6851.

Dated: August 23, 1985.

Jean M. Nowak,

Director, Office of Advisory Councils.

[FR Doc. 85-20747 Filed 8-29-85; 8:45 am]

BILLING CODE 8025-01-M

Small Business Investment Companies; Maximum Annual Cost of Money to Small Business Concerns

13 CFR 107.302 (a) and (b) limit the maximum annual Cost of Money (as defined in 13 CFR 107.3) that may be imposed upon a Small Concern in connection with Financing by means of Loans or through the purchase of Debt Securitites. The cited regulation incorporates the term "FFB Rate", which is defined elsewhere in 13 CFR 107.3 in terms that require SBA to publish, from time to time, the rate charged by the Federal Financing Bank on ten-year debentures sold by Licensees to the Bank. Notice of this rate is generally published each month.

Accordingly, Licensees are hereby notified that effective *September 1, 1985*, and until further notice, the FFB Rate to be used for computation of maximum cost of money pursuant to 13 CFR 107.302 (a) and (b) is *10.345%* per annum.

13 CFR 107.302 does not supersede or preempt any applicable law imposing an interest ceiling lower than the ceiling imposed by its own terms. Attention is directed to section 308(i) of the Small Business Investment Act, as amended by Section 524 of Pub. L. 96-221, March 31, 1980 (94 Stat. 161), to that law's Federal override of State usury ceilings, and to its forfeiture and penalty provisions.

Dated: August 23, 1985.

Robert G. Lineberry,

Deputy Associate Administrator for Investment.

[FR Doc. 85-20748 Filed 8-29-85; 8:45 am]

BILLING CODE 8025-01-M

DEPARTMENT OF STATE

[Public Notice CM-8/879]

Advisory Committee to the United States National Section of the International Commission for the Conservation of Atlantic Tunas; Partially Closed Meeting

Notice is hereby given, pursuant to the provisions of Pub. L. 92-463, that a meeting of the Advisory Committee to the United States National Section of the International Commission for the Conservation of Atlantic Tunas will be held on October 9, 1985, from 9:30 a.m. to 5:00 p.m., and on October 10, 1985, from 9:30 a.m. to 12:00 p.m. and from 1:30 p.m. to 5:00 p.m. at the Woodward Room of the National Wildlife Federation, 1412 16th Street, NW., Washington, D.C.

The October 9 meeting and the morning session of the October 10 meeting will be open to the public, and the public may participate in the discussions subject to instructions of the Committee Chairman. Subjects to be discussed include: overview of U.S. preparations for the meeting of the Standing Committee on Research and Statistics (SCRS); review of research concerning tropical tunas and albacore; review of research concerning billfish; review of research concerning bluefin tuna; report of bluefin tuna fishery conducted in the U.S. EEZ and in the Canadian Zone; and estimates of Japanese harvest of tuna and billfish in the Atlantic U.S. EEZ.

The Advisory Committee will meet in closed session on the afternoon of October 10, 1985. At this session documents classified in accordance with Executive Order 12356 of April 2, 1982 will be circulated and discussed and matters will be considered which the public interest requires be withheld from disclosure. Accordingly, a determination has been made to close this session pursuant to section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. App. I, s.10(d) and 5 U.S.C. 552b (c)(1) and (c)(9).

Requests for further information should be directed to Barbara Rothschild, Office of International Fisheries Affairs, National Marine Fisheries Service, Department of Commerce. She may be reached by telephone on (202) 634-7257.

Dated: August 26, 1985.

Edward E. Wolfe,

Deputy Assistant Secretary for Oceans and Fisheries Affairs.

[FR Doc. 85-20816 Filed 8-29-85; 8:45 am]

BILLING CODE 4710-09-M

[Pubic Notice CM-8/878]

Advisory Committee to the United States National Section of the Inter-American Tropical Tuna Commission; Meeting

Notice is hereby given, pursuant to the provisions of Pub. L. 92-463, that a meeting of the Advisory Committee to the United States National Section of the Inter-American Tropical Tuna Commission will be held on September 19, 1985 from 9:30 A.M. to 11:30 A.M. in the auditorium of the Southwest Fisheries Center of the National Marine Fisheries Service at 8604 La Jolla Shores Drive, La Jolla, California.

The meeting will be open to the public and the public may participate in the discussions subject to the instructions of the Committee Chairman. Subjects to be discussed include an evaluation of the 1985 fishery experience, a preliminary outlook for the 1986 fishery, and U.S. views on the IATTC management program.

Requests for further information on the meeting should be directed to Brian Hallman, OES/OFA, Room 5806, Department of State. He may be reached by telephone on (202) 632-1073.

Dated: August 26, 1985.

Edward E. Wolfe,

Deputy Assistant Secretary for Oceans and Fisheries Affairs.

[FR Doc. 85-20815 Filed 8-29-85; 8:45 am]

BILLING CODE 4710-09-M

DEPARTMENT OF TRANSPORTATION

Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits; Week Ended August 23, 1985

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 DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings. (See 14 CFR 302.1701 et seq.)

Date filed	Docket No.	Description
Aug. 21, 1985	43362	Soundair Corporation, c/o L. Harvey Poe, Jr., 1701 Pennsylvania Avenue, NW., Washington, DC 20006. Application of Soundair Corporation pursuant to Section 402 of the Act and Subpart Q of the Regulations, requests a foreign air carrier permit to operate a class 9-2 International Regular Specific Point commercial air service to transport goods between Montreal, Quebec and Dayton, Ohio, using fixed wing aircraft in Group E, carrying goods on a year around basis. Answers may be filed by September 18, 1985.
Aug. 23, 1985	43366	Pan American World Airways, Inc., c/o Daid M. O'Connor, Suite 901, 1660 L Street, NW., Washington, DC 20036. Application of Pan American World Airways, Inc. pursuant to Section 401 of the Act and Subpart Q of the Regulations requests an amend its certificate of public convenience and necessity for Route 136 as follows: Segment 8 "Between the coterminal points Detroit, Mich., Washington, D.C., Baltimore, Md., Tampa and Miami—Ft. Lauderdale, Fla., New Orleans, La., New York, N.Y.—Newark, N.J. and San Juan, P.R., the intermediate points *Turks and Caicos Islands*; St. Maarten; St. Kitts; Grenada; St. Lucia; and Aruba; and the terminal point Curacao." (Proposed revisions underlined) Segment 10 "Between a point or points in the United States and a point or points in Antigua and Barbuda, Grenada, *the Turks and Caicos Islands*, the Netherlands Antilles, St. Christopher and Nevis and St. Lucia." (Proposed revisions underlined) Conforming Applications, Motions to Modify Scope and Answers may be filed by September 20, 1985.

Phyllis T. Kaylor,

Chief, Documentary Services Division.

[FR Doc. 85-20776 Filed 8-29-85; 8:45 am]

BILLING CODE 4910-62-M

Proposed Revocation of The Domestic All-Cargo Certificate Issued to Michigan Peninsula Airways

AGENCY: Department of Transportation.

ACTION: Notice of Order to Show Cause, (Order 85-8-74) Docket 43368.

SUMMARY: The Department of Transportation is directing all interested persons to show cause why it should not issue an order revoking the domestic all-cargo air service certificate issued to Michigan Peninsula Airways.

DATES: Persons wishing to file objection should do so no later than September 13, 1985.

ADDRESSES: Responses should be filed in Docket 43368 and addressed to the Office of Documentary Services, Department of Transportation, 400 Seventh Street, SW., room 4107, Washington, DC 20590 and should be served the parties listed in Attachment A to the order.

FOR FURTHER INFORMATION CONTACT: Joseph Brooks, Office of Aviation Enforcement and Proceedings, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 426–7631.

SUPPLEMENTARY INFORMATION: The complete text of Order 85–8–74 is available for inspection at our Documentary Services Division at the above address.

Dated: August 26, 1985.

Jeffrey N. Shane,

Acting Assistant Secretary for Policy and International Affairs

[FR Doc. 85–20777 Filed 8–29–85; 8:45 am]

BILLING CODE 4910–62–M

UNITED STATES INFORMATION AGENCY

Culturally Significant Objects Imported for Exhibition; Colossal Statue of Ramses II; Determination

Notice is hereby given of the following determination: Pursuant to the authority vested in me by the act of October 19, 1965 (79 Stat. 985, 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978 (43 FR 13359, March 29, 1978), and Delegation of Authority of June 27, 1985 (50 FR 27393, July 2, 1985), I hereby determine that the "Colossal Statue of Ramses II," imported from abroad for temporary exhibition without profit within the United States, is of cultural significance. This object is imported pursuant to a loan agreement between the Egyptian Antiquities Organization and the City of Memphis. I also determine that the temporary exhibition or display of the listed exhibit objects in the City of Memphis during all or part of 1987 is in the national interest.

Public notice of this determination is ordered to be published in the **Federal Register.**

Dated: August 26, 1985.

C. Normand Poirier,

Acting General Counsel and Congressional Liaison.

[FR Doc. 85–20847 Filed 8–29–85; 8:45 am]

BILLING CODE 8230–01–M

Culturally Significant Objects Imported for Exhibition; Determination

Notice is hereby given of the following determination: Pursuant to the authority vested in me by the act of October 19, 1965 (79 Stat. 935, 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978 (43 FR 13359, March 29, 1978), and Delegation of Authority of June 27, 1985 (50 FR 27393, July 2, 1985), I hereby determine that the objects to be included in the exhibit, "Art Nouveau Jewelry by Rene Lalique" (included in the list [1] filed as a part of this determination) imported from aboard for the temporary exhibition without profit within the United States are of cultural significance. These objects are imported pursuant to a loan agreement between the Calouste Gulbenkian Foundation and the International Exhibitions Foundation. I also determine that the temporary exhibition or display of the listed exhibit objects at the Walters Art Gallery, Baltimore, Maryland, beginning on or about November 19, 1985, to on or about January 5, 1986; the Virginia Museum, Richmond, Virginia, beginning on or about January 16, 1986, to on or about March 16, 1986; the Kimbell Art Museum, Fort Worth, Texas, beginning on or about March 29, 1986, to on or about June 8, 1986; and the Los Angeles County Museum of Art, Los Angeles, California, beginning on or about June 26, 1986, to on or about August 18, 1986, is in the national interest.

Public notice of this determination is ordered to be published in the **Federal Register.**

Dated: August 26, 1985.

C. Normand Poirier,

Acting General Counsel and Congressional Liaison.

[FR Doc. 85–20848 Filed 8–29–85; 8:45am]

BILLING CODE 8230–01–M

[1] An itemized list of objects included in the exhibit is filed as part of the original document

Sunshine Act Meetings

Federal Register
Vol. 50, No. 169
Friday, August 30, 1985

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

	Item
Consumer Product Safety Commission	1
Federal Election Commission	2
Federal Reserve System	3
Legal Services Corporation	4, 5

1

CONSUMER PRODUCT SAFETY COMMISSION

TIME AND DATE: 9:30 a.m., Thursday, September 5, 1985.

LOCATION: Third Floor Hearing Room, 1111-18th Street, NW. Washington, D.C.

STATUS: Closed to the Public.

MATTERS TO BE CONSIDERED:
Commission Procedures.

The Commission and staff will consider internal procedures relating to Commission decisionmaking.

FOR A RECORDED MESSAGE CONTAINING THE LATEST AGENDA INFORMATION, CALL: 301-492-5709.

CONTACT PERSON FOR ADDITIONAL INFORMATION: Sheldon D. Butts, Office of the Secretary, 5401 Westbard Ave., Bethesda, Md. 20207 301-492-6800.

Dated: August 27, 1985.

Sheldon D. Butts,

Deputy Secretary.

[FR Doc. 85-20924 Filed 8-28-85; 1:08 pm]

BILLING CODE 6355-01-M

2

FEDERAL ELECTION COMMISSION

[Federal Register No. 85-18947]

PREVIOUSLY ANNOUNCED DATE AND TIME: Thursday, August 15, 1985, 10:00 a.m.

CHANGE IN MEETING: The open meeting scheduled for this date was canceled.

* * * * *

DATE AND TIME: Wednesday, September 4, 1985, 10:00 a.m.

PLACE: 1325 K Street, NW., Washington, DC.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED: Compliance. Litigation. Audits. Personnel.

* * * * *

DATE AND TIME: Thursday, September 5, 1985, 10:00 a.m.

PLACE: 1325 K Street, NW., Washington, DC.

STATUS: This meeting will be open to the public.

MATTERS TO BE CONSIDERED:

Setting of Dates of Future Meetings
Correction and Approval of Minutes
Draft AO 1985-21
  Lois Moore, on behalf of Consolidated Freightways, Inc.
Draft AO 1985-23
  Judah C. Sommer, Goldman, Sachs & Co. and GSMMI Holdings, Inc.
Reclassification—Printing Officer
Reclassification—Special Assistant to the Staff Director 1987 Budget Request
Routine Administrative Matters

PERSON TO CONTACT FOR INFORMATION: Mr. Fred Eiland, Information Officer, 202-523-4065.

Mary W. Dove,

Administrative Assistant.

[FR Doc. 85-20896 Filed 8-28-85; 10:18 am]

BILLING CODE 6715-01-M

3

FEDERAL RESERVE SYSTEM

TIME AND DATE: 10:00 a.m., Wednesday, September 4, 1985.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 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. You may call (202) 452-3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: August 27, 1985.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 85-20827 Filed 8-27-85; 4:14 pm.]

BILLING CODE 6210-01-M

4

LEGAL SERVICES CORPORATION

Committee on the Provisions for the Delivery of Legal Services Meeting
Amendment of Agenda

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: Published August 27, 1985, 85 FR 20502.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: 9:00 a.m., Thursday, September 5, 1985.

EXPLANATION OF CHANGE: Item number three of the previously announced agenda, Case Service Reporting (CSR) System, will be amended to include a discussion of the goals and objectives of implementing performance measures as a potential component of a revised Case Service Reporting System.

CONTACT PERSON FOR MORE INFORMATION: Daniel M. Rathbun, Office of Field Services, (202) 272-4080.

Date issued: August 28, 1985.

D. Clifford Crook, III,

Assistant to the President, Chief-of-Staff.

[FR Doc. 85-20880 Filed 8-28-85; 9:39 am]

BILLING CODE 6820-35-M

5

LEGAL SERVICES CORPORATION

Board of Directors Meeting; Amendment of Agenda.

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: Published August 27, 1985, 50 FR 34793.

PREVIOUS ANNOUNCED TIME AND DATE OF MEETING: An executive session will be held at 7:30 p.m., Wednesday, September 4, 1985. The public portion of the meeting will commence at 11:00 a.m., Friday September 6, 1985, and continue until all official business is completed.

EXPLANATION OF CHANGE: Item number six of the previously announced agenda, Report of the Operations and Regulations Committee, will be amended to read as follows:

6. Discussion and Action on the Recommendations of the Committee on Operations and Regulations—45 CFR Part 1620.

CONTACT PERSON FOR MORE INFORMATION: Thomas A. Bovard, Office of the General Counsel, (202) 272-4010.

Date issued: August 29, 1985.

D. Clifford Crook, III,

Assistant to the President, Chief-of-Staff.

[FR Doc. 85-20996 Filed 8-29-85; 9:52 am]

BILLING CODE 6820-35-M

Federal Register

Friday
August 30, 1985

Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 20

Migratory Bird Hunting; Early Seasons, Bag Limits and Possession of Certain Migratory Game Birds in the Contiguous United States, Alaska, Hawaii, Puerto Rico, and the Virgin Islands; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 20

Migratory Bird Hunting; Early Seasons, Bag Limits and Possession of Certain Migratory Game Birds in the Contiguous United States, Alaska, Hawaii, Puerto Rico, and the Virgin Islands

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: This rule prescribes the hunting seasons, hours, areas, and daily bag and possession limits of mourning doves, white-winged and white-tipped doves, band-tailed pigeons, rails, woodcock, common snipe, common moorhens and purple gallinules; teal in September, in the contiguous United States; sea ducks in certain defined areas of the Atlantic Flyway; ducks in September in Florida, Iowa, Kentucky and Tennessee; sandhill cranes in the Central Flyway and Arizona; sandhill cranes and Canada geese in southwestern Wyoming; migratory game birds in Alaska, Hawaii, Puerto Rico and the Virgin Islands; and special extended falconry seasons during 1985–86. The taking of these migratory birds is prohibited unless hunting seasons are specifically provided. The rules will permit the hunting of these species within specified periods of time beginning as early as September 1, as has been the case in past years.

DATE: Effective on August 30, 1985.

FOR FURTHER INFORMATION CONTACT: Rollin D. Sparrowe, Chief, Office of Migratory Bird Management, U.S. Fish and Widlife Service, Department of the Interior, Room 536, Matomic Building, 1717 H Street, NW., Washington, D.C., telephone 202–254–3207.

SUPPLEMENTARY INFORMATION: The Migratory Bird Treaty Act of July 3, 1918 (40 Stat. 755; 16 U.S.C. 703 et seq.), as amended, authorizes and directs the Secretary of the Interior, having due regard for the zones of temperature and for the distribution, abundance, economic value, breeding habits, and times and lines of flight of migratory game birds to determine when, to what extent, and by what means such birds or any part, nest, or egg thereof may be taken, hunted, captured, killed, possessed, sold, purchased, shipped, carried, exported or transported.

On March 14, 1985, the U.S. Fish and Wildlife Service (hereinafter the Service) published for public comment in the **Federal Register** (50 FR 10276) a proposal to amend 50 CFR Part 20, with comment periods ending June 20, July 15, and August 19, (later extended to August 22) 1985, respectively, for the 1985–86 hunting season frameworks proposed for Alaska, Hawaii, Puerto Rico and the Virgin Islands; other early seasons; and late seasons. That document dealt with the establishment of hunting seasons, hours, areas and limits for migratory game birds under §§ 20.101 through 20.107 and 20.109 of Subpart K. On June 4, 1985, the Service published in the **Federal Register** (50 FR 23459) a second document consisting of a supplemental proposed rulemaking dealing with both the early and late-season frameworks. On July 5, 1985, the Service published for public comment in the **Federal Register** (50 FR 27638) a third document consisting of a proposed rulemaking dealing specifically with frameworks for early-season migratory bird hunting regulations. On July 26, 1985, the Service published in the **Federal Register** (50 FR 29706) a fourth document consisting of final frameworks for Alaska, Puerto Rico and the Virgin Islands. On August 13, 1985, the Service published a fifth document in the **Federal Register** (50 FR 32587) consisting of a proposed rulemaking dealing specifically with frameworks for late-season migratory bird hunting regulations. On August 21, 1985, the Service published a sixth document (50 FR 33737) consisting of a final rulemaking for the early-season frameworks for migratory game bird hunting regulations from which State wildlife conservation agency officials selected early-season hunting dates, hours, areas and limits for the 1985–86 season. The final rule described here is the seventh in a series of proposed, supplemental and final rulemaking documents for migratory game bird hunting regulations and deals specifically with amending Subpart K of 50 CFR Part 20 to set hunting seasons, hours, areas and limits for mourning doves, white-winged and white-tipped doves, band-tailed pigeons, rails, woodcock, snipe, and common moorhens and purple gallinules; September teal seasons; sea ducks in certain defined areas of the Atlantic Flyway; ducks in September in Florida, Iowa, Kentucky and Tennessee; sandhill cranes in the Central Flyway and Arizona; sandhill cranes and Canada geese in southwestern Wyoming; migratory game birds in Alaska, Hawaii, Puerto Rico and the Virgin Islands; and special extended falconry seasons.

These regulations contain no information collections subject to Office of Management and Budget review under the Paperwork Reduction Act of 1980.

Nontoxic Shot Regulations

On February 12, 1985, the Service published in the **Federal Register** (50 FR 5759) final rules describing nontoxic shot zones for waterfowl hunting. When eaten by waterfowl, spent lead pellets can have a toxic effect. Nontoxic shot zones reduce availability of lead pellets in selected waterfowl feeding areas. An amendment to the February 12, 1985, final rule, adding areas where nontoxic shot is required because lead shot used by waterfowl hunters in those areas poses a threat to bald eagles, was published in the **Federal Register** dated May 7, 1985 (50 FR 19178).

Waterfowl hunters are advised to become familiar with State and local regulations regarding the use of nontoxic shot for waterfowl hunting.

NEPA Consideration

The "Final Environmental Statement for the Issuance of Annual Regulations Permitting the Sport Hunting of Migratory Birds (FES–75–74)" was filed with the Council on Environmental Quality on June 6, 1975, and notice of availability was published in the **Federal Register** on June 13, 1975 (40 FR 24241). In addition, several environmental assessments have been prepared on specific matters which serve to supplement the material in the Final Environmental Statement. Copies of the environmental assessments are available from the Service.

Endangered Species Act Consideration

Section 7 of the Endangered Species Act provides that, "The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act" [and] . . . by taken such action necessary to insure that any action authorized, funded or carried out . . . is not likely to jeopardize the continued existence of such endangered or threatened species or result in the destruction or modification of habitat of such species . . . which is determined to be critical."

Subsequently, the Service initiated section 7 consultation under the Endangered Species Act for the proposed hunting season frameworks.

On June 18, 1985, the Acting Chief, Office of Endangered Species, gave a biological opinion that the proposed action is not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of their critical habitats.

As in the past, hunting regulations this year are designed, among other things, to remove or alleviate chances of conflict between seasons for migratory game birds and the protection and conservation of endangered and threatened species.

The Service's biological opinion resulting from its consultation under section 7 is considered a public document and is available for inspection in the Office of Endangered Species and the Office of Migratory Bird Management, U.S. Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240.

Regulatory Flexibility Act and Executive Order 12291

In the **Federal Register** dated March 14, 1985, (at 50 FR 10282), the Service reported measures it had undertaken to comply with requirements of the Regulatory Flexibility Act and the Executive Order. These included preparing a Determination of Effects and an updated Final Regulatory Impact Analsis, and publication of a summary of the latter. These regulations have been determined to be major under Executive Order 12291 and they have a significant economic impact on substantial numbers of small entities under the Regulatory Flexibility Act. This determination is detailed in the aforementioned documents which are available upon request from the Office of Migratory Bird Management, U.S. Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240.

Authorship

The primary author of this rule is Morton M. Smith, Office of Migratory Bird Management, working under the direction of Rollin D. Sparrowe, Chief.

Memorandum of Law

The Service published its Memorandum of Law, required by section 4 of Executive Order 12291, in the **Federal Register** dated July 26, 1985, (at 50 FR 30425).

Regulations Promulgation

After analysis of migratory game bird survey data obtained through investigations conducted by the Service, State conservation agencies, and other sources, and consideration of all comments received on the early proposals (50 FR 10276, March 14, 1985; 50 FR 23459, June 4, 1985; and 50 FR 27638, July 5, 1985), the Service published in the **Federal Register** on July 26, 1985, (50 FR 30424) final early season frameworks for Alaska, Puerto Rico, the Virgin Islands; and on August 21, 1985, (50 FR 33737) those for the contiguous United States and Hawaii. Copies of the final frameworks were also sent to the officials of the State conservation agencies and to conservation agency officials in Puerto Rico and the Virgin Islands who were invited to submit recommendations for hunting seasons which complied with the season times and lengths, hours, areas and limits specified in the frameworks.

The taking of the designated species of migratory birds is prohibited unless open hunting seasons are specifically provided. The following amendments will permit taking of the designated species within specified time periods beginning as early as September 1, as has been the case in past years, and benefit the public by relieving existing restrictions.

The rulemaking process for migratory game bird hunting must, by its nature, operate under severe time constraints. However, the Service intends that the public be given the greatest possible opportunity to comment on the regulations. Thus, when proposed rulemakings were published on March 14, June 4, and July 5, 1985, the Service established what it believed were the longest periods possible for public comment. In doing this, the Service recognized that when the comment period closed time would be of the essence. That is, if there were a delay in the effective date of these regulations after this final rulemaking, the States would have insufficient time to select their season dates, shooting hours, hunting areas and limits; to communicate those selections to the Service; and to establish and publicize the necessary regulations and procedures to implement their decisions. The Service therefore finds that "good cause" exists, within the terms of 5 U.S.C. 553(d)(3) (Administrative Procedure Act), and these regulations will, therefore, take effect immediately upon publication.

Accordingly, each State conservation agency having had an opportunity to participate in selecting the hunting seasons desired for its State on those species of migratory birds for which open seasons are now to be prescribed, and consideration have been given to all other relevant matters presented, certain section of Title 50, Chapter I, Subchapter B, Part 10, Subpart K, are amended as set forth below.

The rules that eventually will be promulgated for the 1985–86 hunting season are authorized under the Migratory Bird Treaty Act of July 3, 1918 (40 Stat. 755; 16 U.S.C. 704 et seq.) as amended.

List of Subjects in 50 CFR Part 20

Exports, Hunting, Imports, Transportation, Wildlife.

PART 20—[AMENDED]

1. The authority citation for Part 20 continues to read:

Authority: Migratory Bird Treaty Act, sec. 3, Pub. L. 65–186, 40 Stat. 755 (16 U.S.C. 704); sec. 3(h), Pub. L. 95–616, 92 Stat. 3112 (16 U.S.C. 712) unless otherwise noted.

2. Section 20.101 is revised to read as follows:

§ 20.101 Seasons, limits and shooting hours for Puerto Rico and the Virgin Islands.

Subject to the applicable provisions of the preceding sections of this part, the open seasons (dates inclusive), the shooting and hawking hours, and the daily bag and possession limits, and areas for hunting the species designated in this section are prescribed as follows:

(a) *Puerto Rico.*

	Doves	Pigeons
Daily bag limit	10 singly or in the aggregate of all permitted species.	5
Possession limit	10 singly or in the aggregate of all permitted species.	5

Season dates: Sept. 7 to Nov. 5, 1985.
Shooting hours: One-half hour before sunrise to sunset daily.

Restrictions: Only the following species of doves and pigeons may be hunted during the open season: Zenaida dove (*Tortola cardosantera*); white-winged dove (*Tortola aliblance o cubanita*); mourning dove (*Tortola rabilarga o rabiche*); and scaly-naped pigeon (*Paloma turca o torcaz*).

Closed Areas

No season is prescribed for doves and pigeons on Mona Island in order to protect the reduced population of white-crowned pigeon (*Columba leucocephala*), known locally as "Paloma cabeciblanca."

No season is prescribed for doves and pigeons in the Municipality of Culebra and on Desecheo Island.

No season is prescribed in the El Verde Closure Area consisting of those areas of the municipalities of Rio Grande and Loiza delineated as follows: (1) All lands between Routes 956 on the west and 186 on the east, from Route 3 on the north to the juncture of Routes 956 and 186 (Km 13.2) in the south; (2) all lands between Routes 186 and 966 from the juncture of 186 and 966 on the north, to the Caribbean National Forest Boundary on the south; (3) all lands lying west of Route 186 for one (1)

kilometer from the juncture of Routes 186 and 956 south to Km 6 on Route 186; (4) all lands within Km 14 and Km 6 on the west and the Caribbean National Forest Boundary on the east; and (5) all lands within the Caribbean National Forest Boundary whether private or public.

No season is prescribed for doves and pigeons of any species in all of Cidra Municipality and in portions of Aguas Buenas, Caguas, Cayey, and Comerio Municipalities as encompassed within the following boundary: beginning on Highway 172 as it leaves the Municipality of Cidra on the west edge, north to Highway 156, east on Highway 156 to Highway 1, south on Highway 1 to Highway 765, south on Highway 765 to Highway 763, south on Highway 763 to the Rio Guavata, west along the Rio Guavata, west along the Rio Guavata to Highway 1, southwest on Highway 1, to Highway 14, west on Highway 14 to Highway 729, north on Highway 729 to Cidra Municipality, and westerly, northerly, and easterly along the Cidra Municipality boundary to the point of beginning.

Check Commonwealth Regulations for Additional Restrictions

(b) *Puerto Rico.*

	Ducks	Coots	Common moorhens (gallinules)	Common snipe
Daily bag limits	4	Closed	6	6
Possession limits	8	Closed	12	12

Season dates: Nov. 9 to Dec. 10, 1985 and Feb. 1 to Feb. 23, 1986.

Shooting hours: One-half hour before sunrise until sunset daily.

Restrictions: No season is prescribed for waterfowl in the Municipality of Culebra and on Desecheo Island. The season is closed on the ruddy duck (*Oxyura jamaicensis*); White-cheeked pintail (*Anas bahamensis*); West Indian whistling (tree) duck (*Dendrocygna arborea*); fulvous whistling (tree) duck (*Dendrocygna bicolor*); masked duck (*Oxyura dominica*); and purple gallinule (*Porphyrula martinica*).

Check Commonwealth Regulations for Additional Restrictions

Note.—Local names for game birds: Ruddy duck (*Oxyura jamaicensis*)—Pato rojo (protected); purple gallinule (*Porphyrula martinica*)—Gallareta azul (protected); and Puerto Rican plain pigeon (*Columbia inornata wetmorei*)—Paloma sabanera (protected).

(c) *Virgin Islands.*

	Zenaida dove	Scaly-naped pigeon	Ducks
Daily bag limits	10	5	4
Possession limits	10	5	8

Season dates:

Zenaida dove and scaly-naped pigeon: Sept. 1 through Oct. 30, 1985.

Ducks only: Dec. 14, 1985, through Jan. 31, 1986.

Shooting hours: One half-hour before sunrise until sunset daily.

Restrictions: No open season is prescribed for ground or quail dove, or other pigeons in the Virgin Islands. The season is closed on the ruddy duck (*Oxyura jamaicensis*); White-cheeked pintail (*Anas bahamensis*); West Indian whistling (tree) duck (*Dendrocygna arborea*); fulvous whistling (tree) duck (*Dendrocygna bicolor*); masked duck (*Oxyura dominica*), and purple gallinule (*Porphyrula martinica*).

Check Commonwealth Regulations for Additional Restrictions! EXT. 005 ...TWO READINGS... (PART 0, RULES AND REGS) A46AD0 EARL DOUGLAS MARTIN SR. 61556 J.054–999 F.12 A46AD0.005 %118.0

Note.—Local names for game birds: Zenaida dove (*Zenaida aurita*)—mountain dove; bridled quail dove (*Geotrygon mystacea*)—Barbary dove, partridge (protected); ground dove (*Columbina passerina*)—stone dove, tobacco dove, rola, tortolita (protected); and scaly-naped pigeon (*Columba squamosa*)—red-necked pigeon, scaled pigeon.

3. Section 20.102 is revised to read as follows:

§ 20.102 Seasons, limits, and shooting hours for Alaska.

Subject to the applicable provisions of the preceding sections of this part, the areas open to hunting, the respective open seasons (dates inclusive), the shooting and hawking hours, and the daily bag and possession limits on the species designated in this section are prescribed as follows:

Shooting and hawking hours: One-half before sunrise to sunset daily.

Check State Regulations for Additional Restrictions, Including Area Descriptions

Open Seasons—Ducks, Geese, Cranes and Common Snipe

Area	
Northern: State Game Mgmt. Units 11–13 and 17–26.	Sept. 1 to Dec. 16.
Gulf Coast: State Game Mgmt. Units 5–7, 9, 14–16, and Unimak Island.	Do.
Southeast: State Game Mgmt. Units 1–4.	Do.
Pribilof and Aleutian Islands: State Game Mgmt. Unit 10 except Unimak Island.	Oct. 8 to Jan. 22.
Kodiak: State Game Mgmt. Unit 8.	Do.

DAILY BAG AND POSSESSION LIMITS

Area	Ducks [1]	Geese [2]	Emperor geese	Brant	Common snipe	Sandhill cranes
Northern	10–30	6–12	2–4	2–4	8–16	(*)
Gulf Coast	8–24	6–12	2–4	2–4	8–16	2–4
Southeast	7–21	6–12	2–4	2–4	8–18	2–4
Pribilof and Aleutian Islands	7–21	6–12	2–4	2–4	8–16	2–4
Kodiak	7–21	6–12	2–4	2–4	8–16	2–4

[1] In addition to the basic daily bag and possession limits, a daily bag limit of 15 and a possession limit of 30 is permitted singly or in the aggregate of the following species: scoter, eider, oldsquaw, harlequin, and American and red-breasted mergansers.

[2] No more than 4 daily, or 8 in possession may be any combination of Canada and/or white-fronted geese, provided that: in Units 1–9, 14–16 and 18, no more than 2 daily, or 4 in possession, may be white-fronted geese. In Units 5 and 6, the taking of Canada geese is prohibited from September 1 through September 14. In Unit 9(E), 10 (except Unimak Island) and 18, the taking of Canada geese is prohibited. In Unit 1(C), the taking of snow geese is prohibited.

[*] 2–4 in Unit 17; 3–6 in Units 11–13 and 18–26.

4. Section 20.103 is revised to read as follows:

§ 20.103 Seasons, limits, and shooting hours for mourning and white-winged doves and wild pigeons.

Subject to the applicable provisions of the preceding sections of this part, the areas open to hunting, the respective open seasons (dates inclusive), the shooting and hawking hours and the daily bag and possession limits on the species designated in this section are prescribed as follows:

(a) *Mourning Doves—Eastern Management Unit.*

In all States except Alabama, Illinois, Tennessee, and Michigan:	
Daily bag limit	12
Possession limit	24
In Illinois and Tennessee:	
Daily bag limit	15
Possession limit	30
In Alabama:	
Daily bag limit	15
Possession limit	15
In Michigan:	
Daily bag limit	6
Possession limit	12

Shooting and hawking hours: One-half hour before sunrise until sunset daily except as noted otherwise.

Check State Regulations for Additional Restrictions, Including Area Descriptions

Seasons in:	
Alabama:	
North Zone: [1]	
12 noon to sunset.	Sept. 14.
One-half hour before sunrise to sunset.	Sept. 15 to Oct. 26 and Dec. 14 to Dec. 30.
South Zone: [1] 12 noon to sunset.	Oct. 5 to Dec. 3.
Connecticut	Closed.
Delaware (12 noon to sunset).	Sept. 7 to Sept. 28 and Oct. 14 to Oct. 26 and Dec. 9 to Jan. 11.
Florida: [2]	
12 noon to sunset	Oct. 5 to Oct 27.
One-half hour before sunrise to sunset.	Nov. 9 to Nov. 24 and Dec. 14 to Jan. 13.
Georgia:	
North Zone: [3]	
12 noon to sunset.	Sept. 7.
One-half hour before sunrise to sunset.	Sept. 8 to Oct. 6 and Nov. 28 to Dec. 1 and Dec. 7 to Jan. 11.
South Zone: [3]	
12 noon to sunset.	Sept. 28.
One-half hour before sunrise to sunset.	Sept. 29 to Oct. 27 to Nov. 28 and Dec. 1 and Dec. 7 to Jan. 11.
Illinois (12 noon to sunset.	Sept. 1 to Oct. 30.
Indiana (12 noon to sunset).	Sept. 1 to Oct. 30 and Nov. 28 to Dec. 7.
Kentucky:	
11 a.m. to sunset	Sept. 1 to Oct. 31.
Sunrise to sunset	Nov. 30 to Dec. 8.
Louisiana:	
North Zone: [4] 12 noon to sunset.	Sept. 1 to Sept. 8 and Oct. 19 to Dec. 1 and Dec. 14 to Dec. 31.
South Zone: [4] 12 noon to sunset.	Oct. 19 to Dec. 1 and Dec. 14 to Jan. 8.
Maine	Closed.
Maryland:	
12 noon to sunset	Sept. 2 to Oct. 26.
One-half hour before sunrise to sunset.	Nov. 15 to Nov. 23 and Dec. 23 to Dec. 28.
Massachusetts	Closed.
Michigan (one-half hour before sunrise to sunset):	
South of U.S. Highway 10.	Sept. 15 to Oct. 6.
Remainder of State	Closed.
Mississippi (One-half hour before sunrise to sunset).	Sept. 7 to Sept. 29 and Oct. 19 to Nov. 17 and Dec. 21 to Jan. 6.
New Hampshire	Closed.
New Jersey	Do.
New York	Do.
North Carolina (one-half hour before sunrise to sunset).	Sept. 2 to Oct. 9 and Nov. 25 to Nov. 30 and Dec. 21 to Jan. 15.
Ohio	Closed.
Pennsylvania:	
12 noon to sunset	Sept. 2 to Oct. 19.
One-half hour before sunrise to sunset.	Nov. 2 to Nov. 23.
Rhode Island:	
12 noon to sunset	Sept. 9 to Sept. 29.
Sunrise to sunset	Oct. 19. to Nov. 6 and Dec. 16 to Jan. 14.
South Carolina (one-half hour before sunrise to sunset).	Sept. 7 to Oct. 12 and Nov. 23 to Nov. 30 and Dec. 21 to Jan. 15.
Tennessee:	
12 noon to sunset	Sept. 1.
One-half hour before sunrise to sunset.	Sept. 2 to Sept. 29 and Oct. 12 to Oct. 19 and Dec. 14 to Jan. 5.
Vermont	Closed.
Virginia:	
12 noon to sunset	Sept. 2 to Oct. 28.
One-half hour before sunrise to sunset.	Dec. 23 to Jan. 4.
West Virginia:	
12 noon to sunset	Sept. 2 to Nov. 2.
One-half hour before sunrise to sunset.	Dec. 24 to Dec. 31.
Wisconsin	Closed.

[1] In Alabama the South Zone is defined as: Mobile, Baldwin, Escambia, Covington, Coffee, Geneva, Dale, Houston and Henry Counties. North Zone: remainder of the State.

[2] In Florida, the daily bag limit is 12 mourning and white-winged doves in the aggregate, of which not more than 4 may be white-winged doves. The possession limit is 24 mourning and white-winged doves in the aggregate, of which not more than 8 may be white-winged doves.

[3] In Georgia, the North Zone is defined as that area lying north of a division line as follows: U.S. Highway 280 from Columbus to Wilcox County, thence southward along the western border of Wilcox County, thence east along the southern border of Wilcox County to the Ocmulgee River, thence north along the Ocmulgee River to Highway 280, thence east along Highway 280 to the Little Ocmulgee River; thence southward along the Little Ocmulgee River to the Ocmulgee River; thence southwesterly along the Ocmulgee River to the western border of Jeff Davis County, south along the western border of Jeff Davis County, east along the southern border to Jeff Davis and Appling Counties, north along the eastern border of Appling County to the Altamaha River, east to the eastern border of Tattnall County, north along the eastern boundary of Tattnall County, north along the western border of Evans County to Candler County, east along the northern border of Evans County to Bulloch County, north along the western border of Bulloch County to Highway 301, then northeast along Highway 301 to the South Carolina line.

[4] In Louisiana, the North Zone is defined as that area lying north of Interstate Highway 10 from the Texas State line to Baton Rouge, Interstate Highway 12 from Baton Rouge to Slidell, and Interstate Highway 10 from Slidell to the Mississippi State line. The South Zone consists of the remainder of Louisiana.

(b) *Mourning Doves—Central Management Unit.*

In Missouri:	
Daily bag limit	10
Possession limit	20
In Texas:	
Daily bag limit	12
Possession limit	24
In Arkansas, Colorado, Kansas, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Wyoming, and Montana:	
Daily bag limit	15
Possession limit	30

Shooting and hawking hours: One-half hour before sunrise until sunset daily except as noted otherwise.

Check State Regulations for Additional Restrictions, Including Area Descriptions

Seasons in:	
Arkansas	Sept. 1 to Sept. 30 and Dec. 14 to Jan. 12.
Colorado	Sept. 1 to Oct. 15.
Iowa	Closed.
Kansas	Sept. 1 to Oct. 30.
Minnesota	Closed.
Missouri	Sept. 1 to Nov. 9.
Montana	Sept. 7 to Nov. 5.
Nebraska	Sept. 1 to Oct. 30.
New Mexico [1]	Sept. 1 to Sept. 30 and Dec. 1 to Dec. 30.
North Dakota	Sept. 1 to Oct. 30.
Oklahoma	Do.
South Dakota	Sept. 1 to Sept. 30.
Texas: [2] [3]	
North Zone	Sept. 1 to Nov. 9.
Central Zone	Sept. 1 to Oct. 30 and Jan. 4 to Jan. 13.
South Zone	Sept. 20 to Nov. 12 and Jan. 4 to Jan. 19.
Wyoming	Sept. 1 to Oct. 15.

[1] In New Mexico, the daily bag limit is 15 and the possession limit is 30 white winged and mourning doves, singly or in the aggregate of these species.

[2] In Texas the three zones are North, South and Central as follows:

North Zone—That portion of the State north of a line beginning at the International Bridge south of Fort Hancock; north along FM 1088 to State Highway 20; west along State Highway 20 to State Highway 148; north along State Highway 148 to Interstate Highway 10 at Fort Hancock; east along

Interstate Highway 10 to Interstate Highway 20; northeast along Interstate Highway 20 to Interstate Highway 30 at Fort Worth; northeast along Interstate Highway 30 to the Texas-Arkansas State line.

South Zone—That portion of the State south and west of a line beginning at the International Bridge south of Fort Hancock; north along FM 1088 to State Highway 20; west along State Highway 20 to State Highway 148; north along State Highway 148 to Interstate Highway 10 at Fort Hancock; east along Interstate Highway 10 at Van Horn, south and east on U.S. 90 to San Antonio; then east on Interstate 10 to Orange, Texas.

Central Zone—That portion of the State lying between the North and South Zones.

[3] In Texas, the daily bag limit is 12 mourning, white-winged and white-tipped doves in the aggregate, of which no more than 2 can be white-winged doves and 2 can be white-tipped doves; and possession limit is 24, of which no more than 4 may be whitewings and 4 may be whitetips.

(c) *Mourning Doves—Western Management Unit.*

In Washington:	
Daily bag limit	10
Possession limit	20
In Arizona:	
Daily bag limit	12
Possesion limit	24
In California, Idaho, Nevada, Oregon, and Utah:	
Daily bag limit	15
Possession limit	30

Shooting and hawking hours: One-half hour before sunrise until sunset.

Check State Regulations for Additional Restrictions, Including Area Descriptions

Seasons in:	
Arizona [1]	Sept. 1 to Sept. 22 and Nov. 23 to Jan. 9.
California [2]	Sept. 1 to Oct. 15 and Nov. 18 to Nov. 30.
Idaho	Sept. 1 to Oct. 30.
Nevada [2]	Do.
Oregon	Sept. 1 to Sept. 30.
Utah	Sept. 2 to Sept. 30.
Washington	Sept. 1 to Sept. 15.

[1] In Arizona during September 1 through 22 the daily bag limit is 12 mourning and white-winged doves in the aggregate of which no more than 6 may be white-winged doves. The possession limit after opening day is 24 mourning and white-winged doves in the aggregate of which no more than 12 may be white-winged doves. During November 23 through January 9, the bag and possession limits are 12 and 24 mourning doves, respectively.

[2] In those counties of California (Imperial, Riverside, and San Bernardino) and Nevada (Clark and Nye) having a season on white-winged doves, the daily bag limit is 15 and the possession limit is 30 mourning and white-winged doves, singly or in the aggregate of these species; however, the bag and possession limits of white-winged doves may not exceed 10 and 20, respectively.

Notice.—Hawaii—Subject to the applicable provisions of the preceding sections of this part, mourning doves may be taken in accordance with the State regulations.

(d) *White-winged Doves.*

Shooting and hawking hours: One-half hour before sunrise until sunset except as noted otherwise.

Check State Regulations for Additional Restrictions, Including Area Descriptions

Seasons in—	Season dates	Limits	
		Bag	Poss.
Arizona (Statewide)	Sept. 1 to Sept. 22	[4]6	[4]12
California:			
Counties of Imperial, Riverside, and San Bernardino.	Sept. 1 to Oct. 15 and Nov. 16 to Nov. 30.	[5]10	[5]20
Remainder of State	Closed		
Nevada:			
Counties of Clark and Nye.	Sept. 1 to Oct. 30	[5]10	[5]20
Remainder of State	Closed		
New Mexico	Sept. 1 to Sept. 30 and Dec. 1 to Dec. 30.	[5]15	[5]30
Texas:			
Special white-winged dove season.	Closed		

See mourning dove regulations.

[4] In Arizona during September 1 through 22 the daily bag limit is 12 mourning and white-winged doves in the aggregate of which no more than 6 may be white-winged doves. The possession limit after opening day is 24 mourning and white-winged doves in the aggregate of which no more than 12 may be white-winged doves.

[5] In designated counties of California and Nevada, the daily bag limit is 15 and the possession limit is 30 white-winged and mourning doves, singly or in the aggregate of both species; however, the bag and possession limits of white-winged doves may not exceed 10 and 20, respectively.

[6] In New Mexico the daily bag limit is 15 and the possession limit is 30 white-winged and mourning doves, singly or in the aggregate of both species.

(e) *Band-tailed Pigeons.*

Shooting and hawking hours: One-half hour before sunrise until sunset.

Check State Regulations for Additional Restrictions, Including Area Descriptions

Seasons in—	Season dates	Limits	
		Bag	Poss.
Arizona [1]	Oct. 11 to Nov. 9	5	10
California:			
Counties of Alpine, Butte, Del Norte, Glan, Humboldt, Lassen, Mendocino, Modoc, Plumas, Shasta, Sierra, Siskiyou, Tehama, and Trinity.	Sept. 28 to Oct. 27	5	5
Remainder of State	Dec. 14 to Jan. 12	5	5
Colorado: In all lands west of U.S. Interstate 25 and Small Game Management Units 80, 81, 82 and 83.	Sept. 1 to Sept. 30	5	10
Nevada: [1] Carson City, churchill, Douglas, Humboldt, Lyon, Mineral, Pershing, Washoe, and Storey Counties only.	do	5	5
New Mexico:			
North Zone [2]	Sept. 1 to Sept. 20	5	10
South Zone [2]	Oct. 1 to Oct. 20	5	10
Oregon	Sept. 1 to Sept. 30	5	5
Utah	Sept. 2 to Sept. 30	5	10
Washington	Sept. 1 to Sept. 30	5	5

[1] Each hunter must have for Arizona a special bird permit stamp issued by the State and for Nevada a special permit issued by the State.

[2] In New Mexico the *North Zone* is defined as that area lying north and east of a line following U.S. Highway 60 from the Arizona State line east to Interstate Highway 25 at Socorro and then south along Interstate Highway 25 to the Texas State line. The *South Zone* is defined as that area lying south and west of the North Zone.

5. Section 20.104 is revised to read as follows:

§ 20.104 Seasons, limits, and shooting hours for rails, woodcock, and common snipe.

Subject to the applicable provisions of the preceding sections of this part, the areas open to hunting respective open seasons (dates inclusive), the shooting and hawking hours, and the daily bag and possession limits on the species designated in this section are as follows:

	Rails (Sora and Virginia)	Rails (Clapper and King)	Woodcock	Common snipe
Daily bag limit	[1]25	See footnote [2]	[3]5	8
Possession limit	[1]25	do	[3]10	16

Shooting and hawking hours: One-half hour before sunrise until sunset daily on all species, except as noted otherwise.
Check State regulations restrictions, including area descriptions.

Seasons in the Atlantic Flyway

Connecticut	Sept. 2 to Nov. 9	Sept. 2 to Nov. 9	Oct. 19 to Dec. 2	Oct. 19 to Dec. 2.
Delaware	do	do	Nov. 18 to Jan. 1	Nov. 18 to Jan. 31.
Florida	Sept. 1 to Nov. 9	Sept. 1 to Nov. 9	Dec. 14 to Jan. 27	Nov. 2 to Feb. 16.
Georgia	Sept. 14 to Nov. 22	Sept. 14 to Nov. 22	Nov. 30 to Jan. 13	Nov. 29 to Feb. 28.
Maine	Sept. 1 to Nov. 9	Closed	Oct. 1 to Nov. 14	Sept. 1 to Dec. 16.
Maryland	Sept. 2 to Nov. 9	Sept. 2 to Nov. 9	Oct. 21 to Dec. 4	Oct. 1 to Jan. 15.
Massachusetts	do	Closed	Deferred	Sept. 2 to Dec. 16.
New Hampshire	Closed	do	Oct. 1 to Nov. 14	Oct. 1 to Dec. 4.
New Jersey: [4]				
North Zone	Sept. 2 to Nov. 9	Sept. 2 to Nov. 9	Deferred	Deferred.
South Zone	do	do	do	Do.

	Rails (Sora and Virginia)	Rails (Clapper and King)	Woodcock	Common snipe
New York: [1]				
Long Island	Closed	Closed	Oct. 1 to Nov. 14	Closed.
Remainder of State	Sept. 1 to Nov. 9	do	do	Sept. 1 to Dec. 16.
North Carolina	Sept. 23 to Nov. 30	Sept. 23 to Nov. 30	Nov. 23 to Jan. 6	Nov. 14 to Feb. 28.
Pennsylvania	Sept. 2 to Nov. 9	Closed	Oct. 19 to Nov. 9	Oct. 19 to Dec. 14.
Rhode Island	Sept. 15 to Nov. 23	Sept 15 to Nov. 23	Oct. 19 to Dec. 2	Sept. 15 to Dec. 7 and Dec. 16 to Jan. 7.
South Carolina	Sept. 13 to Oct. 18 and Nov. 11 to Dec. 14.	Sept. 13 to Oct. 18 and Nov. 11 to Dec. 14.	Nov. 28 to Jan. 11	Nov. 14 to Feb. 28.
Vermont	Sept. 28 to Dec. 6	Closed	Oct. 1 to Nov. 14	Sept. 28 to Dec. 6.
Virginia	Sept. 9 to Nov. 16	Sept. 9 to Nov. 16	Oct. 28 to Nov. 19 and Dec. 25 to Jan. 15.	Oct. 17 to Jan. 31.
West Virginia	Sept. 2 to Nov. 9	Closed	Oct. 12 to Nov. 23	Sept. 2 to Dec. 17.
Seasons in the Mississippi Flyway				
Alabama (*)	Nov. 12 to Jan. 20	Nov. 12 to Jan. 20	Nov. 28 to Jan. 31	Nov. 14 to Feb. 28.
Arkansas	Sept. 1 to Nov. 9	Closed	Nov. 9 to Dec. 13 and Jan. 11 to Feb. 9.	Sept. 14 to Sept. 22 and Nov. 23 to Feb. 28.
Illinois	do	do	Oct. 1 to Dec. 4	Sept. 7 to Dec. 22.
Indiana	do	do	Sept. 21 to Sept. 27 and Oct. 5 to Dec. 1.	Sept. 1 to Dec. 16.
Iowa [2]	Sept. 7 to Nov. 15	do	Sept. 14 to Nov. 17	Sept. 7 to Dec. 22.
Kentucky	Deferred	do	Oct. 1 to Dec. 4	Oct. 1 to Dec. 4.
Louisiana	Sept. 21 to Sept. 29 and Nov. 9 to Jan. 8.	Sept. 21 to Sept. 29 and Nov. 9 to Jan. 8.	Dec. 7 to Feb. 9	Nov. 9 to Feb. 23.
Michigan [3]	Sept. 15 to Nov. 14	closed	Sept. 15 to Nov. 14	Sept. 15 to Nov. 14.
Minnesota	Sept. 1 to Nov. 4	do	Sept. 1 to Nov. 4	Sept. 1 to Nov. 4.
Mississippi	Oct. 19 to Dec. 27	Oct. 19 to Dec. 27	Dec. 21 to Feb. 23	Nov. 9 to Feb. 23.
Missouri	Sept. 1 to Nov. 9	Closed	Oct. 15 to Dec. 16	Sept. 1 to Dec. 16.
Ohio	Sept. 2 to Nov. 9	do	Sept. 27 to Nov. 30	Sept. 2 to Nov. 30 and Dec. 9 to Dec. 25.
Tennessee	Deferred	do	Oct. 12 to Nov. 17 and Feb. 1 to Feb. 28.	Nov. 19 to Feb. 28.
Wisconsin	do	do	Sept. 14 to Nov. 17	Deferred.
Seasons in the Central Flyway				
Colorado [4]	Sept. 1 to Nov. 9	Closed	Closed	Sept. 1 to Dec. 1.
Kansas	Sept. 14 to Nov. 22	do	Oct. 1 to Dec. 4	Sept. 14 to Dec. 29.
Montana [4]	Closed	do	Closed	Deferred.
Nebraska [4]	Sept. 1 to Nov. 9	do	Sept. 15 to Nov. 18	Sept. 1 to Dec. 15.
New Mexico [4]	Sept. 7 to Nov. 15	do	Closed	Sept. 7 to Dec. 8.
North Dakota	Closed	do	do	Sept. 28 to Nov. 24.
Oklahoma	Sept. 1 to Nov. 9	do	Nov. 28 to Jan. 30	Oct. 20 to Feb. 3.
South Dakota [5]	Closed	do	Closed	Sept. 1 to Oct. 31.
Texas	Sept. 1 to Nov. 9	Sept. 1 to Nov. 9	Deferred	Deferred.
Wyoming (*)	Sept. 21 to Nov. 29	Closed	Closed	Sept. 21 to Jan. 5.
Seasons in the Pacific Flyway				
Colorado (*)	Sept. 1 to Nov. 9	Closed	Closed	Sept. 1 to Dec. 1.
Montana (*)	Closed	do	do	Deferred.
New Mexico (*)	Sept. 7 to Nov. 15	do	do	Sept. 7 to Dec. 8.
Wyoming (*)	Sept. 21 to Nov. 29	do	do	Sept. 21 to Dec. 22.

[1] The bag and possession limits for sora and Virginia rails apply singly or in the aggregate of these two species.

[2] In addition to the limits on sora and Virginia rails, in Connecticut, Delaware, Maryland, New Jersey, and Rhode Island, there is a daily bag limit of 10 and possession limit of 20 clapper and king rails, singly or in the aggregate of these two species, except that the season is closed on king rails in New Jersey by State regulation. In Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia, there is a daily bag limit of 15 and possession limit of 30 clapper and king rails, singly or in the aggregate of these two species.

[3] In States of the Atlantic Flyway, the woodcock bag limit is 3 daily and 6 in possession.

[4] For description of zones or management units within a State, see State regulations.

[5] In Alabama, the rail limits are 15 daily and 15 in possession.

[6] In Iowa, the rail limits are 15 daily and 25 in possession. Shooting hours are sunrise to sunset.

[7] See State regulations for listing of certain Great Lakes waters where the season is open concurrently with the duck season.

[8] The Central Flyway portion consists of: *Colorado* and *Wyoming*—the area lying east of the Continental Divide; *Montana*—the area lying east of Hill, Chouteau, Cascade, Meagher, and Park Counties; *New Mexico*—the area lying east of the Continental Divide but outside the Jicarilla Apache Indian Reservation. The remaining portions of these States are in the Pacific Flyway.

[9] In Nebraska, the rail limits are 10 daily and 20 in possession.

[10] In South Dakota, the snipe limits are 5 daily and 15 in possession.

NOTE.—Some States may select rail, woodcock, and snipe seasons at the time they select their duck seasons in August. Consult waterfowl regulations to be published later for information concerning these seasons.

NOTE.—No seasons are prescribed for woodcock. Snipe seasons have been deferred by all other States in the Pacific Flyway. Consult waterfowl regulations to be published later for information concerning the snipe season in Montana.

6. Section 20.105 is amended by revising paragraphs (a)–(c) and by amending paragraph (d) to read as follows:

§ 20.105 Seasons, limits, and shooting hours for waterfowl, coots, and common moorhens and purple gallinules.

Subject to the applicable provisions of the preceding sections of this part, the areas open to hunting, the respective open seasons (dates inclusive), the shooting and hawking hours, and the daily bag and possession limits on the species designated in this section are prescribed as follows:

(a) *Sea Ducks.* (1) An open season for taking scoter, eider, and oldsquaw ducks is prescribed according to the following table during the period between September 15, 1985, and January 20, 1986, in all coastal waters and all waters of rivers and streams seaward from the first upstream bridge in Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut; in those coastal waters of New York lying in Long Island and Block Island Sounds and associated bays eastward from a line running between Miamogue Point in the Town of Riverhead to Red Cedar Point in the Town of Southampton, including any ocean waters of New York lying south of Long Island; in any waters of the Atlantic Ocean and, in addition, in any tidal waters of any bay which are separated by at least one mile of open water from any shore, island, and emergent vegetation in New Jersey, South Carolina and Georgia; and in any

waters of the Atlantic Ocean and/or in any tidal waters of any bay which are separated by at least 800 yards of open water from any shore, island, and emergent vegetation in Delaware, Maryland, North Carolina, and Virginia; and provided that any such areas have been described, delineated, and designated as special duck hunting areas under the hunting regulations adopted by the respective States. In all other areas of these States and in all other States in the Atlantic Flyway, sea ducks may be taken only during the regular open season for ducks.

(2) The daily bag limit is 7 and the possession limit is 14, singly or in the aggregate of these species. During the regular duck season in the Atlantic Flyway, States may set, in addition to the regular limits, a daily bag limit of 7 and a possession limit of 14 scoter, eider, and oldsquaw ducks, singly or in the aggregate of these species.

(3) Shooting and hawking hours are one-half hour before sunrise until sunset daily.

Check State Regulations for Additional Restrictions

Seasons in:	
Connecticut	Sept. 20 to Jan. 4.
Delaware	Sept. 21 to Jan. 4.
Georgia	Deferred.
Maine	Oct. 1 to Jan. 15.
Maryland	Deferred.
Massachusetts	Do.
New Hampshire	Sept. 15 to Dec. 30.
New Jersey	Deferred.
New York (Long Island only).	Sept. 23 to Jan. 7.
North Carolina	Deferred.
Rhode Island	Do.
South Carolina	Do.
Virginia	Do.

(4) Notwithstanding the provisions of this Part 20, the shooting of *crippled* waterfowl from a motorboat under power will be permitted in Maine, Massachusetts, New Hampshire, Rhode Island, Connecticut, New York, Delaware, Virginia, and Maryland in those areas described, delineated, and designated in their respective hunting regulations as being open to sea duck hunting.

Note.—States with deferred seasons may select sea duck seasons at the time they select their waterfowl seasons in August. Consult waterfowl regulations to be published later for information concerning these later seasons.

(b) *Teal.* September season: An open season for teal ducks (blue-winged, green-winged, and cinnamon) is prescribed according to the following table in those areas which are described, delineated, and designated in the hunting regulations of the following States:

Daily bag limit	4
Possession limit	8

Shooting and hawking hours: Sunrise until sunset daily.

Check State Regulations for Additional Restrictions

Seasons in the Mississippi Flyway:	
Alabama [1]	Sept. 14 to Sept. 22.
Arkansas	Sept. 14 to Sept. 22.
Illinois [2]	Sept. 7 to Sept. 15.
Indiana [3]	Do.
Louisiana	Sept. 21 to Sept. 29.
Mississippi	Sept. 14 to Sept 22.
Missouri	Do.
Ohio	Sept. 6 to Sept. 14
Seasons in the Central Flyway:	
Colorado [4 5]	Sept. 7 to Sept. 15.
Kansas	Sept. 14 to Sept. 22.
New Mexico [5]	Sept. 7 to Sept. 15.
Oklahoma	Do.
Texas	Sept. 14 to Sept. 22.

[1] In Alabama, shooting hours in Mobile Delta north of the causeway and south of the L&N Railroad are sunrise to 12 noon.

[2] In Illinois the shooting hours are from 7 a.m.–4 p.m. local time by State regulation.

[3] In Indiana, the Kankakee and LaSalle Fish and Wildlife Areas, and portions of Atterbury, Hovey Lake, Jasper-Pulaski and Pigeon River Fish and Wildlife Areas are closed to teal hunting by State regulations.

[4] Only in Lake and Chaffee Counties, and that portion of Colorado east of U.S. Highway-Colorado State Highway 85 from the Wyoming State line to its intersection with U.S. Interstate Highway 25 to the New Mexico State line.

[5] Central Flyway portion only.

(c) *Common Moorhens and Purple Gallinules.*

Daily bag limit.	15 singly or in the aggregate of the two species.
Possession limit.	30 singly or in the aggregate of the two species.

Shooting and hawking hours: One-half hour before sunrise to sunset.

Check State Regulations for Additional Restrictions

Seasons in the Atlantic Flyway:	
Connecticut	Sept. 2 to Nov. 9.
Delaware	Do.
Florida [1]	Sept. 1 to Nov. 9.
Georgia	Oct. 4 to Oct. 6 and Nov. 28 to Nov. 30 and Dec. 7 to Jan. 19.
Maine	Sept. 1 to Nov. 9.
Maryland	Sept. 2 to Nov. 9.
Massachusetts	Deferred.
New Hampshire	Closed.
New Jersey	Sept. 2 to Nov. 9.
New York:	
Long Island	Closed.
Remainder of State	Sept. 1 to Nov. 9.
North Carolina	Sept. 23 to Nov. 30.
Pennsylvania	Sept. 2 to Nov. 9.
Rhode Island	Sept. 15 to Nov. 23.
South Carolina	Sept. 13 to Oct. 18 and Nov. 11 to Dec. 14.
Vermont	Sept. 28 to Dec. 6.
Virginia	Deferred.
West Virginia	Do.
Seasons in the Mississippi Flyway:	
Alabama [2]	Nov. 12 to Jan. 20.
Arkansa	Sept. 1 to Nov. 9.
Illinois	Closed.
Indiana	Sept. 1 to Nov. 9.
Iowa	Closed.
Kentucky	Deferred.
Louisiana	Sept. 21 to Sept. 29 and Nov. 9 to Jan. 6.
Michigan	Deferred.
Minnesota	Do.
Mississippi	Oct. 19 to Dec. 27.
Missouri	Closed.
Ohio	Sept. 2 to Nov. 9.
Tennessee	Deferred.
Wisconsin	Do.
Seasons in the Central Flyway:	
Colorado [3]	Closed.
Kansas	Do.
Montana [3]	Deferred.
Nebraska	Closed.
New Mexico [3]	Oct. 15 to Dec. 23.
North Dakota	Closed.
Oklahoma	Sept. 1 to Nov. 9.
South Dakota	Closed.
Texas	Sept. 1 to Nov. 9.
Wyoming [3]	Closed.
Seasons in the Pacific Flyway:	
All States and portions thereof.	Deferred.

[1] The season in Florida applies to the common moorhen only. There is no open season on the purple gallinule in Florida.

[2] In Alabama, the gallinule limits are 15 daily and 15 in possession.

[3] Seasons apply to Central Flyway portion of State only.

Note.—States with deferred seasons may select common moorhen and purple gallinule seasons at the time they select their waterfowl seasons in August. Consult waterfowl regulations to be published later for information concerning these later seasons.

(d) *Waterfowl and coots in Atlantic, Mississippi, Central and Pacific Flyways.*

Atlantic Flyway

Flywaywide Restrictions

Shooting (including hawking) hours: One-half hour before sunrise to sunset daily except as otherwise restricted.

* * * * *

	Season dates	Limits: Bag	Limits: Possession
* * * * *			
Florida:			
Ducks, no more than 1 of which may be a species other than teal or wood duck, and the possession limit will be double the daily bag limit.	Sept. 21 to Sept. 25	4	8
* * * * *			

Mississippi Flyway

Shooting (including hawking) hours: One-half hour before sunrise to sunset daily except as otherwise restricted.

* * * * *

	Season dates	Limits: Bag	Limits: Possession
* * * * *			
Iowa:			
Ducks	Sept. 21 to Sept. 23	(1)	(1)
* * * * *			
Kentucky:			
Ducks, no more than 1 of which may be a species other than teal or wood duck, and the possession limit will be double the daily bag limit.	Sept. 11 to Sept. 15	4	8
* * * * *			
Tennessee:			
Ducks, no more than 1 of which may be a species other than teal or wood duck, and the possession limit will be double the daily bag limit.	Sept. 14 to Sept. 18	4	8
* * * * *			

[1] Limits to conform to those set for the regular season.

* * * * *

7. Section 20.106 is amended by revising the Central and Pacific Flyways provisions to read as follows:

§ 20.106 Seasons, limits, and shooting hours for sandhill cranes.

Central Flyway: Subject to the applicable provisions of the preceding sections of this part, open seasons are prescribed for taking sandhill cranes with a daily bag limit of 3 and a possession limit of 6 cranes, and with shooting hours from one-half hour before sunrise until sunset in the following areas for the dates indicated:

(a) In Colorado (the Central Flyway portion except the San Luis Valley) the season has been deferred.

(b) In the New Mexico counties of Chaves, Curry, De Baca, Eddy, Lea, Quay, and Roosevelt, the inclusive dates for the regular season are October 26, 1985, through January 26, 1986.

(c) In Oklahoma (that portion west of I–35) the season has been deferred.

(d) In Texas that portion west of a line from Brownsville along U.S. 77 to Victoria; U.S. 87 to Placedo; Farm Road 616 to Blessing; State 35 to Alvin; State 6 to U.S. 290; U.S 290 to Sonora; U.S. 277 to Abilene; Texas 351 to Albany; U.S. 283 to Vernon; and U.S. 183 to the Texas-Oklahoma boundary the season has been deferred.

(e) In North Dakota, in Zone 1 (the area east of a line starting on the east shore of Lake Oahe at the South Dakota border, then north on this shore to Bismarck, then north on U.S. Highway 83 to Canada; and west of a line starting where ND No. 14 enters Canada, then south on ND No. 14 to U.S. Highway 83, then south on U.S. Highway 83 to South Dakota) the inclusive dates are Sept. 7–Nov. 3, 1985; in Zone 2 (that area east of Zone 1 and west of U.S. Highway 281) the inclusive dates are Sept. 7–Sept. 27, 1985.

(f) In Montana (the Central Flyway portion except that area south of I–95 and west of the Bighorn River), the season has been deferred.

(g) In South Dakota, the inclusive season dates are September 28 through November 3, 1985.

(h) In Wyoming, in Compbell, Converse, Crook, Goshen, Laramie, Niobrara, Platte, and Weston Counties, the inclusive season dates are September 21 through November 17, 1985.

Each hunter particpating in the regular sandhill crane hunting season must obtain and carry in his possession while hunting, a valid Federal sandhill crane hunting permit available without cost from conservation agencies in the States where crane hunting seasons are allowed. The permit must be displayed to an authorized law enforcement official upon request.

Pacific Flyway: In Arizona (within Game Management Units 30A, 30B, 31, and 32), the season has been deferred.

In Wyoming's sandhill crane-Canada goose hunt areas (Bear River drainage and Star Valley of Lincoln County), hunting is by State permit only with limits of 2 sandhill cranes and 3 Canada geese per season. The inclusive season dates are September 1–2; September 7–8; and September 14–15.

* * * * *

8. Section 20.109 is revised as follows:

§ 20.109 Extended seasons, limits, and hours for taking migratory game birds by falconry.

Subject to the applicable provisions of this part, the areas open to hunting, the respective open seasons (dates inclusive), the hawking hours, and the daily bag and possession limits on the species designated in this section are prescribed as follows:

Daily bag limit.	3 singly or in the aggregate.
Possession limit.	6 singly or in the aggregate.

These limits apply during both regular hunting seasons and extended falconry seasons. Hawking hours: One-half hour before sunrise until sunset daily.

Check State Regulations for Additional Restrictions

Atlantic Flyway

Florida:	
Mourning doves and white-winged doves.	Sept. 28 to Dec. 6.
Woodcock	Oct. 26 to Dec. 9.
Snipe	Nov. 2 to Feb. 16.
Ducks, mergansers, and coots.	Oct. 8 to Nov. 22.
Common moorhens and rails.	Sept. 28 to Dec. 6.
Maryland:	
Mourning doves	Sept. 2 to Oct. 26 and Nov. 25 to Jan. 5.
Rails	Sept. 2 to Dec. 17.
Woodcock	Oct. 21 to Jan. 31.
Snipe	Oct. 1 to Jan. 15.
Common moorhens and purple gallinules.	Sept. 2 to Dec. 17.
Ducks, coots, geese	Deferred.
Pennsylvania:	
Mourning doves	Sept. 2 to Dec. 14.
Ducks, mergansers, coots and geese.	Oct. 8 to Jan. 13.
Virginia:	
Woodcock and snipe	Oct. 17 to Jan. 31.

Mourning doves and rails.	Sept. 2 to Nov. 30 and Dec. 19 to Jan. 4.
Mississippi Flyway	
Illinois:	
Mourning doves, woodcock and rails.	Sept. 1 to Dec. 16.
Snipe	Sept. 7 to Dec. 22.
Teal	Sept. 7 to Sept. 15.
Ducks, mergansers, and coots.	Oct. 8 to Jan. 13.
Indiana:	
Woodcock	Sept. 1 to Sept. 20.
Mourning doves	Oct. 31 to Nov. 27.
Iowa:	
Rails	Sept. 7 to Nov. 15.
Snipe	Sept. 7 to Dec. 22.
Woodcock	Sept. 14 to Nov. 17.
Geese	Sept. 28 to Jan. 6.
Ducks and coots	Deferred.
Michigan:	
Woodcock, snipe, and rails.	Sept. 1 to Dec. 16.
Common moorhens, purple gallinules and geese.	Sept. 28 to Jan. 12.
Ducks	Deferred.
Minnesota:	
Woodcock, snipe, and rails.	Sept. 1 to Dec. 16.
Ducks, mergansers, coots, moorhens, purple gallinules and geese.	Deferred.
Mississippi:	
Ducks, mergansers and coots.	Nov. 2 to Dec. 13.
Mourning doves	Sept. 30 to Oct. 13 and Nov. 22 to Dec. 13.
Missouri: Mourning doves.	Sept. 1 to Dec. 16.
Wisconsin:	
Rails, woodcock, snipe, common moorhens and purple gallinules.	Do.
Ducks, mergansers, and coots.	Oct. 8 to Jan. 13.
Central Flyway	
New Mexico:[1]	
Mourning doves and white-winged doves.	Sept. 1 to Nov. 6 and Nov. 22 to Dec. 30.
Band-tailed pigeons	Sept. 1 to Nov. 30.
Sandhill cranes only in Chaves, Curry, De Baca, Eddy, Lea, Quay, and Roosevelt Counties.	Oct. 13 to Jan. 27.
Ducks, mergansers and coots.	Oct. 15 to Jan. 13.
Common moorhens and purple gallinules.	Oct. 15 to Jan. 19.
Canada and white-fronted geese.	Do.
Snow, blue, and Ross' geese.	Nov. 15 to Feb. 28.
Texas:	
Mourning doves (statewide).	Sept. 1 to Nov. 30 and Jan. 4 to Jan. 19.
Rails, common moorhens and purple gallinules.	Sept. 1 to Dec. 16.
White-winged doves	Sept. 1 to Nov. 30 and Jan. 4 to Jan. 19.
Wyoming:	
Mourning doves	Sept. 1 to Oct. 15.
Snipe and rails	Sept. 21 to Nov. 29.
Pacific Flyway	
Idaho: Ducks and geese	Deferred.
New Mexico:[1]	
Mourning doves and white-winged doves.	Sept. 1 to Nov. 6 and Nov. 22 to Dec. 30.
Band-tailed pigeons	Sept. 1 to Nov. 30.
Ducks, mergansers and coots.	Oct. 8 to Jan. 13.
Geese	Oct. 5 to Jan. 19.
Common moorhens and purple gallinules.	Do.
Oregon: Mourning doves.	Sept. 1 to Dec. 16.
Utah: Mourning doves	Sept. 2 to Sept. 30.
Wyoming:	
Mourning doves	Sept. 1 to Oct. 15.
Snipe and rails	Sept. 21 to Nov. 29.

[1] In New Mexico, the aggregate bag and possession limits of all species are 3 and 6, respectively.

Note.—See waterfowl season footnotes for descriptions of zones. For some States, the extended falconry season dates also include general season dates.

Dated: August 21, 1985.

P. Daniel Smith,

Acting Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 85-20391 Filed 8-29-85; 8:45 am]

BILLING CODE 4310-55-M

federal register

Friday
August 30, 1985

Part III

Department of Labor

Employment Standards Administration, Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions, Notice

DEPARTMENT OF LABOR

Employment Standards Administration, Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor specify, in accordance with applicable law and on the basis of information available to the Department of Labor from its study of local wage conditions and from other sources, the basic hourly wage rates and fringe benefit payments which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of the character and in the localities specified therein.

The determinations in these decisions of such prevailing rates and fringe benefits have been made by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR 5.1 (including the statutes listed at 36 FR 306 (1970) following Secretary of Labor's Order No. 24–70) containing provisions for the payment of wages which are dependent upon determination by the Secretary of Labor under the Davis-Bacon Act; and pursuant to the provisions of part 1 of subtitle A of title 29 of Code of Federal Regulations Procedure for Predetermination of Wage Rates, 48 FR 19533 (1983) and of Secretary of Labor's Orders 9–83, 48 FR 35736 (1983), and 6–84, 49 FR 32473 (1984). The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue construction industry wage determination frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions are effective from their date of publication in the Federal Register without limitation as to time and are to be used in accordance with the provisions of 29 CFR Parts 1 and 5. Accordingly, the applicable decision together with any modifications issued subsequent to its publication date shall be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR, Part 5. The wage rates contained therein shall be the minimum paid under such contract by contractors and subcontractors on the work.

Modifications and Supersedeas Decisions to General Wage Determination Decisions

Modifications and supersedeas decisions to general wage determination decisions are based upon information obtained concerning changes in prevailing hourly wage rates and fringe benefit payments since the decisions were issued.

The determinations of prevailing rates and fringe benefits made in the modifications and supersedeas decisions have been made by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR 5.1 (including the statutes listed at 36 FR 306 (1970) following Secretary of Labor's Order No. 24–70) containing provisions for the payment of wages which are dependent upon determination by the Secretary of Labor under the Davis-Bacon Act; and pursuant to the provisions of Part 1 of Subtitle A of Title 29 of Code of Federal Regulations Procedure for Predetermination of Wage Rates, 48 FR 19533 (1983) and of Secretary of Labor's Order 6–84, 49 FR 32473 (1984). The prevailing rates and fringe benefits determined in foregoing general wage determination decisions, as hereby modified, and/or superseded shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged in contract work of the character and in the localities described therein.

Modifications and supersedeas decisions are effective from their date of publication in the Federal Register without limitation as to time and are to be used in accordance with the provisions of 29 CFR Parts 1 and 5.

Any person, organization, or governmental agency having an interest in the wages determined as prevailing is encouraged to submit wage rate information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Office of Program Operations, Division of Wage Determinations, Washington, D.C. 20210. The cause for not utilizing the rulemaking procedures prescribed in 5 U.S.C. 553 has been set forth in the original General Determination Decision.

New General Wage Determination Decisions

Arkansas:
AR85–4030
AR85–4036

Modifications to General Wage Determination Decisions

The numbers of the decisions being modified and their dates of publication in the Federal Register are listed with each State.

California: CA84–5022	Oct. 5, 1984.
Maryland: MD85–3041	July 25, 1985.
New Jersey: NJ85–3031	Aug. 2, 1985.
North Dakota: ND84–5032	Oct. 19, 1984.
Oregon: OR85–5030	June 28, 1985.
Pennsylvania:	
PA84–3035	Sept. 21, 1984.
PA84–3037	Oct. 5, 1984.
PA84–3049	Dec. 21, 1984.
PA85–3017	Apr. 5, 1985.
PA85–3037	Aug. 9, 1985.
Virginia:	
VA85–3020	Apr. 6, 1985.
VA84–3006	July 6, 1984.
VA85–3025	May 3, 1985.
Wisconsin:	
WI83–2079	Oct. 7, 1983.
WI84–5038	Oct. 19, 1984.

Supersedeas Decisions to General Wage Determination Decisions

Louisiana: LA84–4008 (LA85–4029)	Feb. 17, 1984.

Signed at Washington, D.C. this 23rd day of August 1985.

James L. Valin,

Assistant Administrator.

BILLING CODE 4510-22-M

NEW DECISION

STATE: ARKANSAS COUNTY: WASHINGTON

DECISION NO. AR85-4036 DATE: Date of Publication

DESCRIPTION OF WORK: Building projects (excluding single family homes and apartments up to and including four (4) stories).

	Basic Hourly Rates	Fringe Benefits
BRICKLAYERS	$ 9.00	
CARPENTERS	7.92	
CEMENT MASONS	7.67	
ELECTRICIANS	9.51	
GLAZIERS	7.60	
IRONWORKERS	6.87	
LABORERS (General)	5.23	
Mason Tenders	5.67	
Plasterers Tender	7.45	
PAINTERS	8.00	
PLASTERERS	11.22	
PLUMBER & PIPEFITTERS	11.46	1.14
ROOFERS	7.50	
SHEET METAL WORKERS	7.51	
TILE SETTERS	10.00	
TRUCK DRIVERS	6.05	12%
POWER EQUIPMENT OPERATORS:		
Asphalt Finishing	6.15	12%
Asphalt Pavers	6.05	12%
Asphalt Rakers	6.39	
Asphalt Dist. Operators	5.82	11%
Bulldozer Operator	5.95	16%
Backhoe Operator	6.65	
Crane Operator	6.87	
Roller Operator	6.52	
Motor Patrol Operator	6.88	
Foundation Drill Op.	7.29	
Scarpers	5.75	15%

WELDERS: Receive rate prescribed for craft performing operation to which welding is incidental.

Unlisted classifications needed for work not included within the scope of the classifications listed may be added after award only as provided in the labor standards contract clauses (29 CFR, 5.5(a)(1)(ii).

(2)

NEW DECISION

STATE: ARKANSAS COUNTY: SEBASTIAN

DECISION NO. AR85-4030 DATE: Date of Publication

DESCRIPTION OF WORK: Building projects (excluding single family homes and apartments up to and including four (4) stories).

	Basic Hourly Rates	Fringe Benefits
BOILERMAKERS	$16.125	$2.95
BRICKLAYERS	13.50	.85
CARPENTERS	10.14	
Millwrights	12.29	1.59
CEMENT MASONS	12.75	.63
ELECTRICIANS	14.79	1.00+ 8.75%
Cable splicers	15.04	1.00+ 8.75%
GLAZIERS	8.63	
IRONWORKERS	10.48	1.51
LABORERS:		
Construction Laborers	6.51	.98
Mason Tenders	6.66	1.45
METAL BUILDING ASSEMBLER	7.67	.70
PAINTERS:		
Brush	7.92	
Spray	10.00	
PLASTERERS	14.20	
Plumbers & Pipefitters:		
Commercial buildings, schools, colleges, universities, motels, hotels, banks, all two (2) stories and under, shopping centers super-markets, malls, fast foods, theater, and churches, warehouses, one (1) story, industrial maintenance industrial plant modifications, hospitals and hospital addicions, one (1) and two (2) stories.	11.00	1.65
All other work	13.56	1.69
ROOFERS	$11.91	$ .35
SHEET METAL WORKERS	12.58	2.02+ 3%
SPRINKLER FITTERS	14.57	3.38
TILE SETTERS	11.00	
TILE FINISHERS	7.20	
POWER EQUIPMENT OPERATORS:		
Backhoe	13.18	1.40
Bulldozer	12.56	1.40
Crane	13.00	
Scraper	12.56	1.40

Welders: Receive rate prescribed for craft performing operation to which welding is incidental.

Unlisted classifications needed for work not included within the scope of the classifications listed may be added after award only as provided in the labor standards contract clauses (29 CFR, 5.5(a)(1)(ii)).

(3)

MODIFICATIONS P. 1

	Basic Hourly Rates	Fringe Benefits
DECISION NO. CA84-5022 - Mod. #12 (49 FR 39416 - October 5, 1984) Alameda, Alpine, Amador, etc., Counties, California		
Change:		
Carpenters:		
Area 1:		
Carpenters	$21.21	$6.455
Hardwood Floorlayers: Power Saw Operators; Saw Filers; Shinglers; Steel Scaffold Erectors and Steel Shoring	21.36	6.455
Millwrights	22.11	7.855
Piledrivers: Bridge, Wharf and Dock Builders	19.38	9.715
Area 2:		
Carpenters	18.58	6.455
Hardwood Floorlayers; Power Saw Operatog; Saw Filers; Shingler; Steel Scaffold Erectors and Steel Shoring	18.73	6.455
Millwrights	19.48	7.855
Piledriver; Bridge, Wharf and Dock Builders	19.38	9.715
Electricians:		
Area 10:		
Electrician	15.00	6.71+3%
Cable Splicer	16.88	6.71+3%
Residential Electrician	7.50	4.64+4%

	Basic Hourly Rates	Fringe Benefits
DECISION NO. MD85-3041 MOD. #2 (50 FR 30587-July 25, 1985) ANNE ARUNDEL (EXCLUDING THE D.C. TRAINING SCHOOL), BALTIMORE AND BALTIMORE CITY, MARYLAND (Building and Heavy Construction) HARFORD & HOWARD COUNTIES, MARYLAND (Heavy Construction Only)		
CHANGE: CARPENTERS, SOFT FLOOR LAYERS, MILLWRIGHTS, PILEDRIVERS, DIVERS AND DIVER'S TENDERS		
Zone 1		
Divers	23.21	2.08
Diver's Tenders	16.85	2.08
Zone 2		
Carpenters, soft floor layers, resilient floor layers	14.00	2.92
Piledrivers	13.85	3.07
Diver's Tenders	13.85	3.07
Divers	28.75	3.07
Millwrights	14.28	3.27

	Basic Hourly Rates	Fringe Benefits
DECISION NO. OR85-5030 - Mod #2 (50 FR 26893 - June 28, 1985) Statewide Oregon		
CHANGE: LABORERS: (See Footnote "C" Groups 1 to 4 only)		

MODIFICATIONS P. 2

	Basic Hourly Rates	Fringe Benefits
DECISION NO. PA84-3035 MOD. NO. 6 (49 FR 27243 - Sept. 21, 1984) Lackawanna, Susquehanna, Wayne & Wyoming Counties, Pennsylvania		
CHANGE: Ironworkers: Lackawanna, Wayne and Wyoming Counties:		
Structural & Ornamental	$17.75	4.80
Reinforcing	17.50	4.80
DECISION NO. PA84-3037 MOD. NO. 3 (49 FR 39436 - October 5, 1984) Lebanon, Lycoming, Northumberland, Schuylkill & Sullivan Counties, Pennsylvania		
CHANGE: Ironworkers: Zone 3		
Structural	17.75	4.80
Reinforcing	17.50	4.80
DECISION NO. PA84-3049 MOD. NO. 3 (49 FR 49825 - DEcember 21, 1984) Luzerne County, Pennsylvania		
CHANGE: Ironworkers:		
Structural & Ornamental	17.75	4.80
Reinforcing	17.50	4.80

	Basic Hourly Rates	Fringe Benefits
DECISION NO. PA85-3017 MOD. NO. 2 (50 FR 13702 - April 5, 1985) Carbon, Monroe County including Tobyhanna Army Depot and Pike County, Pennsylvania		
CHANGE: Ironworkers:		
Structural & Ornamental	17.75	4.80
Reinforcing	17.50	4.80
DECISION NO. PA85-3037 MOD. NO. 1 (50 FR 32369 - August 9, 1985) Adams, Berks, Bradford, Carbon, Columbia, Cumberland, Dauphin, Juniata, Lackawanna, Lancaster, Lebanon, Lehigh, Luzerne, Lycoming, Monroe, Montour, Northampton, Northumberland, Perry, Pike, Schuylkill, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming & York Counties, Pennsylvania		
CHANGE: Ironworkers: Columbia, Lackawanna, Luzerne, Sullivan, Wayne, Wyoming, Pike Cos., (Monroe County Tobyhanna Depot only)		
Structural & Ornamental	17.75	4.80
Reinforcing	17.50	4.80

DECISION NO. NJ85-3031
MOD. NO. 3
(50 FR 31459 - August 2, 1985)
Bergen, Essex, Hudson, (excluding Ellis Island and Statue of Liberty Island), Hunterdon, Middlesex, Morris, Passaic, Somerset, Sussex, Union and Warren Counties, New Jersey

	Basic Hourly Rates	Fringe Benefits
CHANGE:		
Electricians & Cable Splicers:		
Zone 3	$21.75	3.04+ 10%
Zone 8	21.45	3.04+ 10%
Zone 10	21.73	3.04+ 10%
Line Construction:		
Zone 5		
Linemen & Cable Splicer	21.45	3.00+ 10%
Groundman	18.59	3.00+ 10%

DECISION NO. ND84-5032 - Mod.#3
(49 FR 41136 - October 19, 1984)
Statewide, North Dakota

	Basic Hourly Rates	Fringe Benefits
Omit:		
All Heavy Construction Wage Rates and Classifications		
Change:		
Description of work to read:		
Highway Construction Projects		
Ironworkers, Structural Steel:		
Mercer County	$14.63	$3.19

DECISION NO. VA84-3006
MOD. #2
(49 FR 27878-July 6, 1984)
City of Newport News & (PORT EUSTIS)

	Basic Hourly Rates	Fringe Benefits
CHANGE:		
ELECTRICIANS	13.83	1.15+9%

DECISION NO. VA85-3025
MOD. #1
(50 FR 18966-May 3, 1985)
RADFORD ARMY AMMUNITION PLANT, VIRGINIA

	Basic Hourly Rates	Fringe Benefits
CHANGE:		
SHEET METAL WORKERS	13.50	2.09

DECISION NO. VA85-3020-
MOD. #4
(50 FR 13706-April 6, 1985)
HENRICO AND THE Independent City of RICHMOND.

	Basic Hourly Rates	Fringe Benefits
CHANGE:		
ASBESTOS WORKERS	14.03	3.30
ELECTRICIANS	14.70	13%
ELEVATOR CONSTRUCTORS	12.99	3.29+ a&b
ELEVATOR CONSTRUCTORS HELPERS	9.09	3.29+ a&b
ELEVATOR CONSTRUCTORS HELPERS, PROBATIONARY	6.495	
LABORERS:		
Laborers	6.75	.71
Tenders (excluding brick masons tenders) Motorized Georgia Buggy Operators, Nozzlemen (Gunite or Sandblasting), Concrete Saw Operator, Air Tool and Vibrator Operators	8.25	.71
Motor Mixers, Hod Carriers, Pipelayers, Caulkers, Marble and Tile and Terrazzo Setters Helpers	8.40	.71
Burners (wrecking)	8.50	.71
Floor, Base & Terrazzo Grinders	8.55	.71
Wagon Drill Air Tract	8.65	.71
Powdermen	8.90	.71
ROOFERS, Composition	8.50	

DECISION NO. WI84-5038
MOD. #3
(49 FR 41148-October 19, 1984)
Milwaukee, Ozaukee, Waukesha and Washington Counties Wisconsin

	Basic Hourly Rates	Fringe Benefits
OMIT:		
Communication Systems:		
Installer	$11.88	$3.59
Insulators	12.50	3.91
ADD:		
Communication Systems:		
Installer	11.88	3.59
Insulators	12.50	3.91

DECISION NO. WI83-2078
MOD #8
(48 FR 45919-October 7, 1983)
Columbia, Dane Iowa and Sauk Counties, Wisconsin

	Basic Hourly Rates	Fringe Benefits
CHANGE:		
Roofers	$15.44	.40

SUPERSEDEAS DECISION

STATE: Louisiana PARISH: Calcasieu
DECISION NO.: LA85-4029 DATE: Date of Publication
Supersedes Decision No. LA84-4008, dated 2/17/84, in 49 FR 6205
DESCRIPTION OF WORK: Residential Projects consisting of single family homes & apartments up to & including 4 stories.

	Basic Hourly Rates	Fringe Benefits
ASBESTOS WORKERS	$19.145	2.335
BRICKLAYERS & STONEMASONS	11.01	2.32
CARPENTERS:		
Carpenters, piledrivermen & soft floor layers	10.72	1.60
Millwrights	15.46	.07
CEMENT MASONS	13.42	
ELECTRICIANS:		
New & old single or multiple family residence & apt. complex not to exceed 12 units, 2-story walk-ups	10.90	2.00+ 3-5/10%
Other work:		
Electricians	17.70	2.00+ 3-5/10%
Cable splicers	18.20	2.00+ 3-5/10%
ELEVATOR CONSTRUCTORS:		
Mechanics	14.87	3.29+a
Helpers	70%JR	3.29+a
Helpers (Prob.)	50%JR	
GLAZIERS	15.25	.02+b
IRONWORKERS	11.02	2.42
LABORERS	8.00	1.04
LATHERS	10.72	1.60
MARBLE & TERRAZZO WORKERS	11.01	2.32
PAINTERS:		
New Construction	12.45	.60
Maintenance	11.65	.60
PLASTERERS	14.20	

	Basic Hourly Rates	Fringe Benefits
PLUMBERS & PIPEFITTERS	$12.46	3.00
POWER EQUIPMENT OPERATORS:		
GROUP 1	13.36	2.50
GROUP 2	9.25	2.50
GROUP 3	13.61	2.50
GROUP 4	13.86	2.50
GROUP 5	14.11	2.50
GROUP 6	14.36	2.50
GROUP 7	14.86	2.50
GROUP 8	8.59	2.50
ROOFERS:		
Roofers	12.90	.20
Roofer helpers remove old roofing, hustle material & cleanup under supervision of journeymen	8.10	.20
SHEET METAL WORKERS	17.28	3.12+3%
SPRINKLER FITTERS	15.07	3.23
TILE SETTERS	15.07	1.70
TRUCK DRIVERS	9.10	1.10
WELDERS - receive rate prescribed for craft performing operation to which welding is incidental		

Unlisted classifications needed for work not included within the scope of the classifications listed may be added after award only as provided in the labor standards contract clauses (29 CFR, 5.5(a)(1)(ii)).

(8)

DECISION NO. LA85-4029 PAGE 2

PAID HOLIDAYS FOR ELEVATOR CONSTRUCTORS & GLAZIERS
A-New Years' Day; B-Memorial Day; C-Independence Day; D-Labor Day; E-Thanksgiving Day; F-the Friday after Thanksgiving Day; G-Christmas Day

FOOTNOTES FOR ELEVATOR CONSTRUCTORS & GLAZIERS
a - 1st 6 mos. - none; 6 mos. to 5 yrs. - 6%; over 5 yrs. - 8% of basic hourly rate; Seven Paid Holidays A thru G
b - 5 days paid vacation; Paid Holidays A, C, D, E, G & Good Friday

POWER EQUIPMENT OPERATORS CLASSIFICATIONS DEFINITIONS
GROUP 1 - Crane, all types; derricks; deck winches (2); Hi-Ho & similar type equipment; three drum (or more) stabilizers; pulls, all types; concrete mixer 1 yd. & over; all pavers; ditching or trenching machines (track type); mechanics & equipment welders; well point systems; hoist, 2 drums or more; hoist, 1 drum, 40 vertical ft. or more; scrapers; bulldozers, rubber-tired or track, other than farm-type; scoopmobile; motor patrol; gradeall; roller on hot mix; asphalt paving machines; front end loaders, other than farm-type, one cubic yard or over; shovels & backhoes, all types & equivalent equipment; piledriver operator; side boom cats; boom truck; bush hog; cableways; cherry pickers (all types); dredges; foundation drill locomotives (all types); motorized street sweepers (self-propelled); push cat; test pump (internal combustion engine powered)
GROUP 2 - 2 drum & single drum stabilizers; front end loaders under 1 cubic yard; A-frame truck when handling steel or pipe; finishing machines (concrete); power subgraders; 2 tractors (crawler type); 1 drum hoist under 40 vertical ft.; fireman; concrete spreader; pugmill op.; bituminous distributor on surface treatment & equivalent equipment; bull floats & equivalent equipment; job greaseman; work boats, not requiring licensed ops.; inboard & outboard motored crew boats; concrete mixer under 1 yd.; spray curing machines; rollers on subgrade; 1 air compressor over 125 cu. ft.; form graders; asphalt finisher screedman; pump over 4 inches; scale ops; crusher ops.; concrete jointing machines; concrete saw; tack machines & equivalent equipment; pumpcrete; electric elevator (inside); oiler drivers; farm-type, rubber-tired tractor, with attachments, except backhoes; Kolum buff & similar equipment; fork lifts, 10 ton capacity & under; mechanic helper, batch plant op.; oiler on crane using air to drive piles, fireman operating steam valve, unit ops.; fireman; mixers (1 sack under); oiler; oiler-compressor op.; oiler-driver on motor crane; oiler-frleman; pump (under 3" suction); scale op.; water blast pump; welding machine
GROUP 3 - Op. on crane 60 to 99 tons; crane w/boom 100 ft. to 149 ft.
GROUP 4 - Op. on crane 100 to 125 tons; crane w/boom 150 ft. to 224 ft.
GROUP 5 - Op. on crane 126 to 200 tons
GROUP 6 - Op. on crane 201 to 300 tons; crane w/boom 225 ft. to 299 ft.
GROUP 7 - Op. on crane over 300 tons; crane w/boom 300 ft. & over
GROUP 8 - Oiler

(9)

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Friday
August 30, 1985

Part IV

Environmental Protection Agency

40 CFR Part 86

Control of Air Pollution From New Motor Vehicles and New Motor Vehicle Engines: Nonconformance Penalties for Heavy-Duty Engines and Heavy-Duty Vehicles, Including Light-Duty Trucks; Final and Proposed Rules

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 86

[FRL-2869-1]

Control of Air Pollution From New Motor Vehicles and New Motor Vehicle Engines; Nonconformance Penalties for Heavy-Duty Engines and Heavy-Duty Vehicles, Including Light-Duty Trucks

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is promulgating the generic aspects of a nonconformance penalty (NCP) rule. The NCP will allow a manufacturer of heavy-duty engines (HDEs) or heavy-duty vehicles (HDVs) whose engines or vehicles fail to conform with certain applicable emission standards, but which do not exceed a designated upper limit, to be issued a certificate of conformity upon payment of a monetary penalty. An "upper limit" is an emission level, established by regulation and appropriate to a specific pollutant, above which an HDE or HDV cannot be certified.

This rule specifies the criteria for the availability of NCPs, the method of establishing upper limits, a testing program called Production Compliance Auditing (PCA), a penalty formula to determine the dollar amount of the NCP and other general aspects of an NCP rule. Specific upper limits and penalty rates to be used in the penalty formula are proposed in a separate rulemaking published elsewhere in this issue.

This rule is the result of an innovative rulemaking process called Regulatory Negotiation, the concept of which is to allow the parties interested in or affected by the outcome of the rule an opportunity to participate in its development through face-to-face negotiations. This rule, which was proposed in 50 FR 9204 (March 6, 1985), is based upon the consensus that was reached during the Regulatory Negotiation process. This is EPA's first completed rulemaking under this new regulatory process.

Regulations affected by this rulemaking are codified in Subparts A, K and L of 40 CFR Part 86.

EFFECTIVE DATE: September 30, 1985.

ADDRESS: Public Docket: Copies of materials relevant to this rulemaking proceeding are contained in Public Docket EN-85-02 at the Central Docket Section of the U.S. Environmental Protection Agency, West Tower Lobby/Gallery 1, 401 M Street, S.W., Washington, D.C. 20460, and are available for review between the hours of 8:00 a.m. and 4:00 p.m., Monday through Friday. As provided in 40 CFR Part 2, a reasonable fee may be charged for copying services.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Montgomery or Mr. Claude Magnuson, Manufacturers Operations Division [EN-340F], Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460. Telephone: (202) 382-2487 or (202) 382-2547.

SUPPLEMENTARY INFORMATION

A. Statutory Authority

Section 206(g) of the Clean Air Act (the Act), 42 U.S.C. 7525(g), requires EPA to issue a certificate of conformity for any class or category of heavy-duty vehicles or engines which exceeds a section 202(a) emissions standard, but does not exceed an upper limit associated with that standard, if the manufacturer pays a nonconformance penalty (NCP) established by rulemaking. In placing section 206(g) in the Clean Air Act amendments of 1977, Congress intended NCPs as a response to perceived problems with technology-forcing heavy-duty emissions standards.[1] Following *International Harvester* v. *Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973), Congress realized the dilemma that technology-forcing standards were likely to cause. If strict standards were maintained, then some manufacturers (technological laggards) might be unable to comply initially and would be forced out of the marketplace. NCPs were intended to remedy this potential problem: the laggards would have a temporary alternative to permit them to sell their engines or vehicles through payment of a penalty, yet leaders would not suffer an economic disadvantage compared to nonconforming manufacturers, because the NCP would be based, in part, on the amount of money the laggard and his customer saved from the nonconforming engine or vehicle.

Under section 206(g)(1), NCPs may be offered for heavy-duty vehicles (HDVs) and heavy-duty engines (HDEs), which are engines to be installed in heavy-duty vehicles. HDVs are defined by section 202(b)(3)(C) as vehicles in excess of 6000 pounds gross vehicle weight (GVW). They include the part of the light-duty truck (LDT) class between 6001 and 8500 pounds GVW—the heavy light-duty trucks. The penalty may vary by pollutant and by class or category of vehicle or engine.

Section 206(g)(3) requires NCPs to be designed so as to:

- Increase with the degree of emission nonconformity;
- Increase periodically to provide incentive for nonconforming manufacturers to achieve the emission standards; and
- Remove any competitive disadvantage to conforming manufacturers.

Section 206(g) authorizes EPA to require testing of production vehicles or engines in order to determine the emission level on which the penalty is based. This emission level, the "compliance level," becomes the benchmark for warranty and recall liability; the manufacturer who elects to pay an NCP may be responsible for warranty or recall liability if its vehicle or engine exceeds the compliance level in-use. It would not have in-use warranty or recall liability for emissions levels above the standard but below the compliance level.

However, if the emission level of a vehicle or engine exceeds the upper limit of nonconformity, the vehicle or engine would not qualify for an NCP under section 206(g) and no certificate of conformity could be issued to the manufacturer.

B. Previous EPA Rulemakings Regarding Heavy-Duty Engine and Light-Duty Truck NCPs

NCPs were previously proposed by EPA in two separate rulemakings. An NCP system was first proposed when EPA proposed HC and CO standards for 1983 and later model year HDEs (44 FR 9464, February 13, 1979). A generic NCP formula was proposed, based on the marginal cost of bringing a "typical" HDE into compliance when its emissions are in the allowable range of nonconformity (not in excess of the upper limit). Also proposed was a system of Production Compliance Auditing (PCA) to measure the compliance levels of vehicles and engines which may qualify for NCPs. The notice stated that the proposed hydrocarbon (HC) and carbon monoxide (CO) emission standards for HDEs could probably be achieved by all manufacturers, so that upper limits would be set equal to the proposed standards, and NCPs would not be offered for those standards. A similar NCP/PCA system was outlined when EPA proposed HC and CO standards for 1983 and later model year LDTs (44 FR 40784, July 12, 1979), but again, specific NCPs were not proposed.

[1] The existence of NCPs, however, will not change the criteria under which the standards have been and will be set under section 202.

In adopting the final HC and CO standards for both HDEs and LDTs, EPA stated that NCPs would be offered as part of a separate rulemaking to provide for isolated instances where compliance was not achieved. However, in April, 1981, the Administration announced a number of regulatory relief initiatives aimed at reducing the impact of government regulations on the automotive industry. One element of this program included the proposed revision of HC and CO emission standards so that catalysts would not be required for heavy-duty gasoline engines. Thus, NCPs were not offered for the final standards, as revised in 1983 (48 FR 1413, 1424, January 12, 1983), since the Agency believed manufacturers could generally comply with the revised standards. However, recognizing that NCPs may be necessary for some future emissions standards, such as the oxides of nitrogen (NO_x) and particulate standards recently promulgated for 1988 and later model years (50 FR 10606, March 15, 1985), or for previously promulgated standards if future standards for other pollutants makes compliance with existing standards more difficult, EPA published the Notice of Proposed Rulemaking (NPRM) for this rule earlier this year (50 FR 9204, March 6, 1985).

C. Generic Rule

This rule is the culmination of the generic phase (Phase I) of the current NCP rulemaking. During this generic phase, EPA is promulgating regulations concerning when NCPs will be made available for emissions standards, how upper limits will be chosen, the general formula for calculating the penalties, and procedures for testing the degree of emissions nonconformity. This final rule adopts, in most respects, the proposed generic rule. In Phase II, EPA will apply the Phase I concepts to determine particular emissions standards for which NCPs will be available, specific upper limits, and numerical values for the variables in the penalty formula for particular subclasses of engines. Subsequent phases will repeat this process as necessary for other future standards.

Under the schedule set by a federal district court order in *Natural Resources Defense Council* v. *Ruckelshaus*, No. 84–758 (D.D.C. Sept. 14, 1984), EPA will publish this generic final rule and the Phase II NPRM by August 31, 1985, and the Phase II final rule by December 31, 1985.

D. Public Participation

This rule is a result of an innovative rulemaking process called regulatory negotiation, which allows the parties interested in or affected by the outcome of the proposed rule an opportunity to participate in the rule's development through face-to-face negotiations. This rule is based largely upon the consensus that was reached during the regulatory negotiation process prior to the proposal. This is EPA's first completed rulemaking under this new regulatory process.

Participants in the negotiations included heavy-duty vehicle and engine manufacturers, representatives of state air pollution control programs, an environmental organization, industry trade associations and EPA.

During the time that was available for public comment on the NPRM, a total of thirteen organizations presented written and/or oral comments. Seven were heavy-duty vehicle or engine manufacturers, three were industry trade associations, two were state air pollution control programs and one was an environmental organization.

Several of the participants in the negotiations commented that EPA should use the regulatory negotiation process for the Phase II NCP rulemaking. Due to the court-ordered deadline of August 31, 1985 for publication of the Phase II proposal, however, there is insufficient time to use the regulatory negotiation process.

E. Discussion of Final Rule and Comments

This final rule adopts most of the proposed provisions for the reasons stated in the NPRM. EPA will not discuss in this notice all of the provisions of the rule. Instead, EPA will discuss only the most significant provisions, or those that have been significantly revised or that were criticized in comments.

1. Availability Criteria

This generic rule imposes three conditions, as proposed, that must be met before NCPs will be made available: an emission standard must become more dificult to meet, either because the standard itself has become more stringent or because compliance with it has been made more difficult because of another standard which has become more stringent; EPA must find that substantial work is necessary to meet the standard; and EPA must determine that there is likely to be a technological laggard.

The possibility of a technological laggard is a key concept in the NCP availability scheme. Congress intended that EPA limit the availability of NCPs to situations where there are likely to be technological laggards. One purpose of section 206(g) was to avoid, at least temporarily, the problem of technological laggards being driven out of the market because of their inability to meet technology-forcing emissions standards. Thus, the existence of NCPs presupposes the existence of a potential laggard. If laggards are not anticipated, then an upper limit may be set equal to the standard and NCPs need not be offered.

The Engine Manufacturers Association (EMA) and Onan Corporation commented that EPA should accept a manufacturer's claim that it cannot comply as *prima facie* evidence that there is likely to be a technological laggard. Of course, when considering whether to make an NCP available, EPA intends to seek comments on the likelihood that there will be a laggard and will accord respect to a manufacturer's claim. However, as the Agency made clear during the negotiations, EPA does not have the burden of disproving the manufacturer's claim. The regulatory negotiation consensus document stated that an NCP will be made available only when "*EPA finds . . .* that there is likely to be a technological laggard" (emphasis added). Because the manufacturer has superior access to data for developmental emissions control technology, the Agency believes that it must be the manufacturer's responsibility to support any claim that there will be a technological laggard and not EPA's responsibility to disprove the manufacturer's claim. Accordingly, EPA chooses to adopt the provision as proposed, and reject the comments.

In the proposal, EPA requested comments on whether it could offer NCPs for evaporative emission standards for heavy-duty vehicles in excess of 8,500 pounds GVWR, without departing from the consensus agreement. All commenters stated that the EPA proposal was correct in making NCPs potentially available for these heavy-duty vehicles. Accordingly, this rule confirms that NCPs may be made available in the future for evaporative emissons from such vehicles.

Another issue raised in the NPRM was whether vehicles or engines which qualify as HDVs on the basis of vehicle frontal area greater than 45 square feet could qualify for NCPs, even though they are under 6,000 pounds GVWR. Onan Corporation stated that vehicles with greater than 45 square feet frontal area or engines to be installed in such vehicles should qualify for NCPs so that nonconforming engines could be installed in a greater range of vehicle chassis. However, EPA agrees with the

comment of the Manufacturers of Emission Controls Association (MECA), which stated that sections 202(b)(3)(C) and 206(g) of the Act require that a vehicle/engine combination must exceed 6,000 pounds GVWR to be considered heavy-duty and, thus, eligible for an NCP. Thus, NCPs will not be available for vehicles which exceed 45 square feet frontal area, but not 6,000 pounds GVWR.

Once EPA makes NCPs for a given pollutant available for any subclass or other group, they may be used by any manufacturer for its vehicles or engines in that category, with the exception of nonconforming vehicles or engines imported under 40 CFR Part 85, Subpart P. When a manufacturer decides to pay an NCP, no judgments will be made about whether the manufacturer is motivated by economic rather than technological reasons. The penalty formula, as discussed below, has been designed to remove the economic advantage for nonconformance and, by doing so, obviates the need for making difficult determinations of subjective intent.

If NCPs are appropriate, they will generally be made available concurrent with a promulgation or revision of emission standards. But as EPA stated in the NPRM, "when this is not feasible or appropriate, the NCPs will be published subsequent to the promulgation of the new standards." 50 FR 9204, 9206 (March 6, 1985).

Concerning availability of NCPs as a remedy for in-use nonconformities, EMA and General Motors Corporation (GM) protested the Agency's statement in the proposal that "NCPs are not available to a manufacturer in lieu of recalling engines or vehicles due to in-use nonconformities." Both argued that this issue is specific, not generic, and thus should be addressed in Phase II of the NCP rulemaking. Furthermore, they claimed that this statement in the Phase I NPRM was offered without adequate explanation. However, EPA repeatedly emphasized during the regulatory negotiation process that Congress clearly intended NCPs solely as a remedy for problems with obtaining or retaining certificates of conformity. In describing NCPs, section 206(g)(1) states that "a certificate of conformity . . . shall not be suspended or revoked" if a manufacturer pays NCPs on the nonconforming vehicles or engines. Similarly, the legislative history of section 206(g) only discusses NCPs as a means of avoiding denial, suspension, or revocation of a certificate of conformity. *See* H.R. Rep. No. 95–294 95th Cong., 1st Sess. 275–76 (1977); Conference Report, H.R. Rep. No. 95–564 95th Cong., 1st Sess. 163 (1977). A certificate of conformity only permits a manufacturer to put a vehicle or engine into the stream of commerce. See section 203(a)(1). Since an in-use problem would normally not affect the certificate of conformity, NCPs were not intended to be available to remedy in-use problems. Accordingly, EPA concludes that there is no authority under section 206(g) to offer NCPs for in-use vehicles and that this is clearly a generic issue appropriate for resolution in Phase I. For similar reasons, EPA will not permit NCPs for vehicles or engines produced prior to an SEA failure (*see infra*).

2. Upper Limits

An upper limit is an emission level, established by regulation and appropriate to a specific HDE or HDV pollutant, above which NCPs are not available and an HDE or HDV configuration cannot be certified or introduced into commerce. In effect, this limits the magnitude of the overall effect on air quality this might result from use of NCPs and, in all cases, prevents the introduction into commerce of grossly polluting engines or vehicles. Section 206(g)(2) of the Clean Air Act refers to the upper limit as a percentage above the emission standard, set by regulation, that corresponds to an emission level EPA determines to be "practicable."

EPA intends to set each upper limit at an emission level that should be achievable by all manufacturers, including technological laggards. EPA proposed that when an emission standard is changed and becomes more stringent than the prior emission standard, the upper limit for the new emission standard be the prior emission standard, when one existed. EPA requested comments on whether this should always be the case. The NPRM also proposed that in cases where there is no prior standard, the upper limit would be set by EPA through the rulemaking process.

Mack Trucks supported the concept that the prior emission standard, where there is one, should always be the upper limit. MECA commented that it is opposed to setting the upper limit above the old standard simply to facilitate the emissions averaging program.

Several manufacturers, however, commented that the upper limit for an emission standard should be the prior emission standard, except that it should not be more stringent than the corresponding upper limit (i.e., the family emission limit), if there is one, for emissions averaging purposes (e.g., for particulate emissions, 50 FR 10607). GM commented that it would be too confusing for a manufacturer to be potentially subject to different upper limits for the same pollutant in the NCP program and the emission averaging program.

The California Air Resources Board (CARB) commented that the upper limit for an unchanged emission standard that becomes more difficult to meet due to a change in another standard should not be the prior emission standard. CARB suggested that the upper limit in this situation should be determined by EPA based on the degree by which the unchanged emission standard has become more stringent.

EPA has considered all comments received on this issue and has decided that the upper limit for standards tightened either by regulation or by operation of another standard will be the prior emission standard, when one existed. When an emission standard is promulgated for a pollutant that had no prior emission standard, the upper limit will be determined by EPA through rulemaking. In the limited circumstances where a manufacturer participates in the emissions averaging program and carries over certification of an engine family from the prior model year, the upper limit for that engine family will be the family emission limit of the prior model year, provided that the family emission limit was above the prior emission standard.

EPA reached these decisions because it believes that if NCPs are available, a manufacturer should not be forced to immediately remove an HDE or HDV from the market when an emission standard becomes more stringent. Therefore, the upper limit for a standard should be set at a level that is reasonably achievable by all manufacturers with vehicles in the relevant class. For standards tightened by regulation, the prior emission standard or family emission limit, when it exists, represents such a level, since manufacturers certified their vehicles to that standard or limit in the past. For standards tightened by operation of another standard, the previous standard will not necessarily represent such a level, as manufacturers did not in the past have to meet the prior standard *and* the standard whose operation has tightened the current standard. However, EPA believes that in practice the prior standard should be achieveable in almost all cases and thus adopts the consensus approach to setting the upper limit for standards tightened by operation of another standard. As for identifying an upper limit more stringent than the prior standard, as suggested by CARB, EPA

believes that it would often be very difficult to identify such a limit that all manufacturers could meet, considering the number and variety of vehicle models potentially involved. Because of the administrative burden and risk of noncompliance associated with setting an upper limit somewhere below the previous standard, EPA rejects such an approach.

With the exception noted above for averaged engine families carried over into the current model year, EPA is uncertain how the NCP program and the emissions averaging program will relate. However, EPA at this time agrees in general with MECA's comment that the NCP upper limit should not be set above the prior emission standard simply to facilitate the combining of NCPs and emissions averaging. Moreover, EPA does not agree with GM's comment that being potentially subject to different upper limits for the same pollutant under these two programs would be too confusing for manufacturers. Therefore, the Agency has decided not to set the NCP upper limit at a level above the prior emission limit, except in the case of averaged engine families carried over into the current model year.

3. Implementation Scheme

a. Production Compliance Auditing

As proposed, before a manufacturer can pay an NCP for the introduction into commerce of nonconforming engines or vehicles, it would have to perform a Production Compliance Audit (PCA) to determine the emission levels that are being emitted by those production engines or vehicles. A manufacturer can elect to conduct a PCA following the failure of engines or vehicles to conform with emission requirements during certification testing or Selective Enforcement Audit (SEA) testing or following a production running change, provided that certain conditions, discussed below, are met.

The purpose of a PCA is to establish "compliance levels" for the pollutants for which the NCPs have been elected. The compliance level is somewhat analogous to the Acceptable Quality Level in EPA's existing production line SEA testing program (40 CFR Part 86, Subpart K). The compliance level is a value derived from the PCA test results and set so that 40 percent of the HDEs or HDVs tested have emission levels greater than that value; that is, the compliance level marks the 60th percentile of the emissions distribution of these HDEs or HDVs.[3]

As discussed previously, the PCA compliance level is used to determine the size of an NCP penalty and, if the vehicles are introduced into commerce and the penalty is paid, the compliance level becomes the level at which the manufacturer may incur warranty and recall liability for engines and vehicles which are subsequently found to exceed that level during their useful lives.[3] The compliance level is rounded to the same number of significant figures contained in the applicable standard in accordance with ASTM E29–69.

The PCA is also used to determine whether the emission levels for the pollutants for which the PCA was initiated are in excess of the associated upper limit. If a compliance level is determined to be in excess of the upper limit for the applicable emission standard, NCPs would not be available.

As proposed, EPA is promulgating three alternative sampling plans that would establish the compliance level(s) during PCA testing: the primary sampling plan and two optional reduced sampling plans.

The primary sampling plan is a non-parametric test (i.e., not dependent on emission distribution) which requires the testing of at least 24 engines or vehicles. The emission test results from the PCA are ranked in order from the lowest to the highest values, and the test result of the sequence number determined from Table 1 of Appendix XII of this rule becomes the compliance level. This test result approximates the 60th percentile points. This is a variation of the testing plan EPA proposed in 44 FR 9490 (February 13, 1979) and 44 FR 40826 (July 12, 1979).

EPA is also promulgating two optional sampling plans: the fixed reduced sampling plan and the sequential reduced sampling plan. These reduced sampling plans, which require fewer tests, are being promulgated to accommodate small volume manufacturers or manufacturers with high testing costs, although any manufacturer may use either of them. Each reduced sampling plan is a parametric test (i.e., assuming a normal emission distribution) with a sample size of less than 24 engines or vehicles. In both cases, the compliance level is equal to the value of $\bar{X}+Ks$, where $\bar{X}$ is the mean of a sample of emission test results, s is the sample standard deviation, and K is a factor that provides for the additional protection against underestimation required by EPA for a test sample size less than 24. The value of K depends upon the sample size and decreases, approaching a constant, as the sample size increases. Due to the smaller test sample and the assumption of a normal emission distribution, the reduced sampling plans are likely to result in a somewhat higher compliance level than the primary sampling plan. Thus, the reduced sampling plans give the manufacturer the option of a reduced testing burden at the expense of a penalty per engine that is likely to be higher than that determined using the primary sampling plan.

A manufacturer that elects to use the fixed reduced sampling plan has the option to choose a sample size between 3 and 23 engines or vehicles. However, that specific sample size must be selected prior to the start of testing. For values of K that correspond to a specific sample size using this sampling plan, see Table 2 of Appendix XII of the regulations.

A manufacturer that elects to use the sequential reduced sampling plan has the option to choose a sample size between 4 and 20 engines or vehicles, provided that the sample size is a multiple of 4 (i.e., 4, 8, 12, 16 or 20). After the manufacturer tests the engines or vehicles of the selected sample size and determines the compliance level, it has the option to continue testing, in multiples of 4 engines or vehicles up to the maximum sample size of 20, to revise the initially determined compliance level. For values of K that correspond to the five possible sample sizes using this sampling plan, see Table 3 of Appendix XII of the regulations.

As noted, a manufacturer has the option to choose any of the three sampling plans. EPA proposed that once PCA testing began, the manufacturer would not be able to change sampling plans. EPA requested comments on whether a manufacturer should be allowed the option of changing to the primary (non-parametric) sampling plan during the course of testing under either optional (parametric) sampling plan. Several manufacturers commented that they should be allowed this option because the primary sampling plan provides the most representative measure of the compliance level. EPA agrees with these comments and their

[3] Of course any individual HDEs or HDVs whose emissions during the PCA testing exceed the ultimate compliance level (the 60th percentile) would not be covered by a certificate and could not be sold until they are brought into conformity with the compliance level.

[3] In essence, the compliance level contained in the certificate under which such in-use engines or vehicles were sold is equivalent to an emission standard for those engines or vehicles. It will remain in effect during the entire useful lives of those engines or vehicles and be applicable to them for warranty and recall purposes, even though (as discussed below) another compliance level may be set subsequently for engines or vehicles of the same family produced later.

rationale and, accordingly, will allow this option.

One manufacturer commented that EPA should also allow a manufacturer to test engines/vehicles sequentially when using the fixed reduced sampling plan. EPA rejects this concept because it has already provided a sequential sampling plan and, by definition, the fixed reduced sampling plan is not valid when testing sequentially.

Following selection of the sampling plan, and of the specific sample size if a reduced sampling plan is elected, an appropriate sample of engines or vehicles is then drawn at random from the production line or storage lot and tested. The sample may be drawn all at one time, in groups, or as needed for testing provided that the testing requirements, as specified in these regulations, are satisfied.

Several manufacturers commented that they should be allowed the option to choose a compliance level higher than that calculated in the PCA so that they could mitigate their in-use liability (i.e., they would use a higher compliance level as a "cushion" in case production vehicles failed to meet the PCA level in-use). The Natural Resources Defense Council (NRDC) expressed opposition to this concept. EPA is also opposed to this concept and has not provided for it because it would allow the use of NCPs to reduce in-use liability and, as discussed previously, NCPs are not available as a remedy for in-use nonconformance. Furthermore, EPA is opposed to allowing emissions to exceed levels demonstrated to be achievable in the PCA.

Several manufacturers also commented that they should be allowed the option to forego PCA testing and choose the upper limit as the compliance level if certification or SEA test results show conformance with the upper limit. EPA will not allow this. The Clean Air Act requires that the NCP be based on production line testing, not solely on certification results. While SEA is a production line test, it would require more tests in an SEA to demonstrate conformance to the upper limit than is required in a PCA. Therefore, if enough tests were conducted to reach a decision during an SEA, a compliance level could be determined from the SEA data using one of three PCA sampling plans without further testing. The fixed reduced sampling plan only requires a minimun of three tests. In this manner, EPA is allowing manufacturers to use the SEA data to establish a compliance level.

A revised support document entitled "An Analytical Development of Sampling Plans for Production Compliance Auditing of Heavy-Duty Engines and Heavy-Duty Vehicles" is available in the Public Docket for this rulemaking. This document explains in greater detail the three PCA sampling plans.

b. Certification Failure

If an HDE or HDV manufacturer's certification test results exceed the emission standard for a particular pollutant, but do not exceed the upper limit associated with that pollutant, the manufacturer would have the following alternatives: remedy the nonconformity and seek certification, elect to pay an NCP, or not certify. If the manufacturer's certification test results are in excess of the upper limit, of course, no certificate would be offered and no NCP would be made available.

As proposed, if the manufacturer elects to pay an NCP and otherwise complies with the certification requirements, a qualified certificate will be offered to enable the manufacturer to introduce engines or vehicles into commerce while the manufacturer is expeditiously conducting PCA testing of those engines or vehicles. The qualified certificate will require payment of the NCP based on the result of PCA testing. It will also require an agreement by the holder of the certificate to recall all engines or vehicles that have been introduced into commerce under that certificate, without invoking the requirements of section 207(c) of the Clean Air Act, if the compliance level established during the PCA exceeds the upper limit. Failure of the manufacturer to implement the required recall or to pay the NCP in a timely manner (as discussed below), assuming the compliance level is below the upper limit, would result in voiding of the certificate for those specific engines or vehicles subject to nonpayment or to the recall. EMA commented that all qualifications, except the obligation to pay the NCP, should be removed from the certificate if the compliance level established during the PCA is below the upper limit. However, since the agreement to recall engines or vehicles would not be invoked in such a case, EPA does not believe that a new certificate need be issued.

EPA proposed that the qualified certificate would also require a manufacturer to agree to "any other terms and conditions the Administrator may require." Several manufacturers commented that EPA should not require such an agreement. EPA has decided to delete this requirement for an agreement under these Subpart L regulations, but points out that under existing certification regulations, 40 CFR 86.087-30, all certificates of conformity are issued "upon such terms as the [the Administrator] may deem necessary or appropriate to assure that any new motor vehicle (or new motor vehicle engine) covered by the certificate will meet the requirements of the Act and of this part." Thus, the proposed requirement has been deleted because EPA already has all the authority it needs to impose appropriate conditions.

EPA also proposed that the engine or vehicle configuration tested in the PCA be the one which was unable to conform with the emission standard during certification testing.

The PCA will be promptly initiated following the start of assembly line production of those engines or vehicles. Failure of a manufacturer to initiate the PCA as soon as practical could result in a suspension of the qualified certificate of conformity. The proposed regulatory language indicates that the manufacturer must initiate selection of engines or vehicles for PCA testing no later than five days after the start of assembly-line production, unless that period is extended by the Administrator. Onan Corporation commented that a manufacturer that depends on a contractor laboratory for PCA testing should be granted additional time, on request, to initiate the PCA. EPA does not believe that it is necessary to revise the proposed regulatory language, since it already allows the Administrator to delay the start of the PCA whenever circumstances make that appropriate. Thus, the proposed language has been incorporated in this rule.

In addition, as proposed, if as a result of the PCA the compliance level is determined to be at or below the standard, the NCP conditions contained in any qualified certificate will be inapplicable and no NCP will be paid.

c. SEA Failure

A manufacturer whose HDEs or HDVs fail an SEA with respect to a pollutant standard for which an upper limit has been provided, but do not fail with respect to that upper limit, has the following alternatives: remedy the nonconformity, elect to pay an NCP commensurate with the degree of the failure, or cease the introduction into commerce of the applicable engines or vehicles. EPA requested comments on whether a manufacturer that elects to pay an NCP should be required to continue SEA testing after a fail decision is reached with respect to the standard, if necessary to obtain enough data to determine whether a fail decision is also made with respect to the upper limit. Several manufacturers

commented that the continuation of the SEA should not be required because the PCA test procedures require a pass/fail determination with respect to the upper limit and requiring such a determination in the SEA would be redundant. GM also commented that a manufacturer should have the option to test, during the PCA, engines or vehicles selected but not tested in the SEA, as opposed to selecting a new sample from the production line. EPA agrees that requiring a pass/fail determination of the upper limit in both the SEA and the PCA would be redundant. Therefore, EPA will not require the continuation of a failed SEA so that a decision can be made with respect to the upper limit. Futhermore, EPA will allow a manufacturer to test in the PCA available SEA engines or vehicles not already tested in the SEA. Additional selection of engines or vehicles will be conducted during the PCA, if necessary, to allow the completion of testing.

A manufacturer could also be issued an SEA test order for a configuration for which an NCP has previously been assessed. If the SEA results in a fail decision with respect to the compliance level but not the associated upper limit, the manufacturer will be required to initiate a PCA to establish a new compliance level and NCP in order for that configuration to continue to be introduced into commerce. If the SEA results in a pass decision with respect to the emission standards, the manufacturer then could elect to perform a PCA to attempt to reduce or eliminate the penalty being paid.

GM commented that if a manufacturer passes an SEA with respect to the emission standards, the penalty being paid should automatically be eliminated without the need for a PCA to confirm the SEA results. EPA does not agree due to the relative "ease" by which an SEA can be passed. A manufacturer with 40 percent nonconformance has only a 5 percent chance of failing an SEA. Therefore, a manufacturer with significant nonconformance could manage to pass an SEA with respect to the standards, yet the results of the subsequent PCA could still be above the standard. EPA believes that since a PCA is required to establish an NCP, it should also be required to reduce or eliminate one. Thus, EPA's proposal on this matter remains unchanged.

If the SEA results in a fail decision with respect to the upper limit for that pollutant, no NCP will be available and the certificate for that configuration would be suspended not earlier than ten days from the date of the SEA failure, in accordance with 40 CFR 86.1012–84 of the SEA regulations. GM commented that a manufacturer should be allowed to request an NCP at any time (before a fail decision is reached) during an SEA. EPA cannot agree to this because, as discussed earlier in this preamble, NCPs are only available when a manufacturer has been shown, in fact, to be in nonconformance. Therefore, EPA will only allow a manufacturer to request an NCP following an SEA failure. A manufacturer could, however, concede an SEA failure and elect to pay an NCP.

A manufacturer that elects to pay an NCP after an SEA failure would be required to submit a written report to the Administrator within five days after completion of the SEA indicating that it does not intend to remedy the nonconformance on subsequently produced engines or vehicles and the date it intends to begin the PCA testing. EPA had proposed that the manufacturer include in the report the reason for the nonconformance. EMA commented that five days was not enough time to determine and report the reason for the nonconformance. EPA agrees with this comment and believes that the reason for the SEA failure is not essential for NCP purposes. Therefore, to reduce the reporting burden on the manufacturers, EPA will not require a manufacturer to report the reason for the nonconformance.

Failure to submit the report in the specified time period could result in the forfeiture of the NCP option. In accordance with the SEA regulations, this could result in the suspension of the certificate not earlier than ten days after the completion of the SEA.

As proposed, the configuration tested in the PCA will be the same configuration specified on the SEA test order. Failure to begin the PCA testing promptly after the manufacturer elects to pay an NCP could result in suspension of the certificate for the failed configuration. EPA would grant additional time to initiate the PCA if the production line that produces the NCP configuration were not operating.

All the SEA test results for the failed pollutants will be used as part of the PCA test sample. If a manufacturer elects the primary PCA sampling plan and there are 24 or more SEA test results, then no additional tests will be conducted to establish a compliance level during the PCA. A manufacturer that elects a reduced PCA sampling plan could not choose a sample size smaller than the number of engines or vehicles tested during the SEA, as all of the SEA test results will be used to establish the compliance level.

A manufacturer cannot pay an NCP for an individual nonconforming HDE or HDV discovered during SEA or PCA testing in lieu of bringing that engine or vehicle into conformance with the emission standard or compliance level, if applicable. The certificate of conformity covering an individual HDE or HDV whose final SEA or PCA test results, when adjusted by the emissions deterioration factor, exceed the specified emission standard, or compliance level ultimately established for that configuration, would be suspended for that HDE or HDV from the time that SEA or PCA testing is completed. Such a vehicle or engine would have to be brought into conformity with the emission standard, or applicable compliance level, before it could be distributed in commerce.

Several manufacturers commented that an engine or vehicle that exceeds the compliance level in SEA or PCA testing should not have to be brought into conformity. They commented that these engines or vehicles should not be considered to be in nonconformance and that payment of an NCP on them should be sufficient. EPA does not agree. For reasons discussed in detail in the NPRM, the compliance level is equivalent to an emission standard, and EPA cannot allow the sale of any engine or vehicle which has been shown to exceed its emission standard or compliance level. While EPA recognizes that approximately 40 percent of engines or vehicles theoretically may exceed the compliance level as a result of the PCA statistical method, EPA does not condone the sale of any engine or vehicle actually shown to be in nonconformance with the compliance level. Furthermore, under section 206(g)(4), the compliance level is the level at which the manufacturer incurs warranty and recall liability.

d. Production Running Change

As proposed, a manufacturer of HDEs or HDVs that elects to implement a running change on the assembly line, which it expects will cause emission levels to exceed a standard for which an NCP is available (but not the upper limit), may elect to conduct a PCA. Before implementing the running change, the manufacturer will have to submit a written report to EPA indicating the reason for the running change, the testing data and the date the manufacturer intends to begin the PCA testing. Several manufacturers commented that a manufacturer that is paying an NCP with respect to a previously established compliance level should be allowed to implement a

production running change that would reduce emissions without performing a PCA to establish a new compliance level. EPA agrees that changes that reduce emissions do not require a new PCA or compliance level as long as the manufacturer is required to pay the established NCP, and has provided for it in the regulations. EPA is allowing this so a manufacturer can avoid PCA testing costs, which may be higher than the amount that the penalty would be reduced.

As proposed, EPA will offer the manufacturer a qualified certificate to enable it to introduce engines or vehicles into commerce while the manufacturer is expeditiously conducting PCA testing of those engines or vehicles. The conditions in the certificate will be the same as those discussed earlier in the case of a certification failure. If the compliance level determined during the PCA is below the applicable standard, an NCP will not be established, or an existing NCP will be terminated, and the NCP qualification to pay the penalty will become inoperative.

e. Assessment and Payment of Penalty

In the case of a certification failure, EPA proposed that the NCP would be assessed against all HDEs or HDVs of the failed engine configuration(s) that are introduced into commerce since the beginning of the model year. Following a production running change that results in emission levels above the emission standard, or compliance level if applicable, the NCP would be assessed against all HDEs or HDVs of the new configuration introduced into commerce after the approved change is implemented. After an SEA failure, the NCP would be assessed against all those HDEs or HDVs of the nonconforming configuration introduced into commerce beginning 10 days after the completion of the SEA. This date was selected to coincide with the date in the SEA regulations for which a certificate of conformity may be suspended after failure to pass the SEA.

EMA and Volvo argued that all engines or vehicles produced prior to a failed SEA during the same model year should be eligible for NCPs. In the proposal, EPA precluded NCPs for most of these vehicles and engines because, as stated previously, NCPs cannot be used to remedy the nonconformities of in-use vehicles and engines. Since most vehicles and engines produced prior to an SEA have already passed into the stream of commerce, they would not be eligible for NCPs, and could be subject to recall and warranty under section 207 if they exceed the standard. However, consistent with that proposal, any vehicles or engines still in the hands of the manufacturer at least 10 days after completion of the SEA, even if produced prior to the failed SEA, would be eligible for NCPs. EMA argues that NCPs should be available for all pre-SEA vehicles, even those already in commerce, because section 206(g)(3)(E) requires NCPs to be set so as to "remove any competitive disadvantage to manufacturers whose engines or vehicles *achieve the required degree of emission reduction* . . . ." (emphasis added). EMA believes that a manufacturer who made a good faith effort to comply, but still failed an SEA, would be penalized in comparison to a manufacturer who made no such effort, failed during certification, and could then use NCPs for the full model year's production. Although it is questionable whether the first manufacturer would suffer any comparative disadvantage, it is ultimately irrelevant because a manufacturer who fails an SEA has not *achieved* the required degree of emission reduction. Thus, there is no statutory duty to protect it from any possible competitive disadvantage and EPA rejects EMA's suggestion.

As proposed, once an NCP is applied, it will continue to be assessed against each engine or vehicle produced for the rest of the model year unless the configuration or engine family is brought into conformance with applicable emission standards due to a production running change. If the NCP configuration is carried over during certification to a future model year, the amount of the penalty will increase according to the annual adjustment factor (see Section F of this preamble).

The regulations provide a payment schedule for the penalty, once assessed, based on calendar quarters. A manufacturer can request the establishment of a payment schedule based on other three-month periods or shorter intervals if approved by the Administrator. Failure to pay the penalty within the time limits established could result in a voiding of the certificate of conformity for those engines or vehicles for which the assessed penalty has not been paid.

The payee will be the United States Treasury and the payment will be sent to EPA's Manufacturers Operations Division along with a report from the manufacturer. The manufacturer's report and payment for all engines or vehicles produced during a calendar quarter will be due to EPA within 30 days after that calendar quarter ends. The manufacturer's report shall contain corporate identification, NCP engine or vehicle identification, certificate identification (number and date), NCP engine or vehicle quantities, and NCP payment calculations. The report will also have to contain an endorsement by a company representative acknowledging the penalties associated with violations of the requirements of the Clean Air Act and the regulations thereunder.

f. Request for Public Hearing

EMA and GM said that EPA should give a hearing right to a manufacturer whose PCA results exceed the upper limit. The proposal did not explicitly provide for a hearing in such a case. EPA has concluded that it is appropriate to grant a hearing if requested, to challenge all compliance levels, whether or not they exceed the upper limit. Under the final rule, the manufacturer may challenge any compliance level by written appeal to the Administrator or by public hearing.

If a manufacturer challenges a compliance level in excess of the upper limit, the Administrator still could suspend the certificate of conformity, pending the outcome of the manufacturer's challenge. This interim suspension is appropriate because of the possibility that the manufacturer could introduce into commerce, prior to the resolution of the manufacturer's challenge, vehicles or engines which actually exceed the upper limit.

The Agency has also made a few clarifications and technical changes in the hearing procedures. For instance, EPA is clarifying that a manufacturer can request a hearing under § 86.1115-87 pursuant to either 40 CFR §§ 86.087-30(e)(6)(i) or 86.087-30(e)(7). It must request the hearing within 15 days of the Administrator's notice of intent to suspend or void the certificate of conformity under § 86.087-30(e).

Also concerning time limits, EPA has lengthened the amount of time permitted for the Agency to commence a hearing, for the parties to submit proposed findings of facts and law, and for the administrative law judge to issue his opinion. In each case, the limit is now 30 days, allowing for a more realistic litigation schedule.

g. EPA Information

EPA will make available in years that NCPs are used by manufacturers the following information for subclasses of engines or vehicles for which NCPs have been used:

i. Estimated total emissions of the engines or vehicles as produced.

ii. Estimated total emissions of the engines or vehicles assuming that all met the standards.

iii. Estimated total emissions of the engines or vehicles assuming the old standard had been met.

iv. Total funds collected from NCPs.

EPA may separate the above information by state.

b. Other Implementation Aspects

Several provisions contained in the Subpart L regulations are being promulgated, as proposed, to make the NCP regulations consistent with the SEA regulations (Subparts G and K) for production line testing. These provisions are essentially identical and include:

Testing by the Administrator (§ 86.1107–87)
Maintenance of records (§ 86.1108–87)
Entry and access (§ 86.1109–87)
Sample selection (§ 86.1110–87)
Test procedures for PCA testing (§ 86.1111–87)

In reference to the "Maintenance of records" section, GM commented that a manufacturer should not be required to record the names of all personnel involved in the conduct of the PCA. EPA agrees that such detail is unnecessary and has modified this requirement in the final rule to require only that the names of supervisory personnel be recorded.

In addition, EPA is promulgating, as proposed, minor technical amendments to Subpart A (§ 86.085–22(e) and § 86.087–30(e)) to reference the Subpart L regulations. EPA is also promulgating, as proposed, minor technical amendments to Subpart K to allow SEAs to be conducted for engines or vehicles that have SEA liability with respect to a compliance level, as opposed to an emission standard, determined pursuant to Subpart L.

4. Other Public Comment

EPA received comments from Mack Trucks, MECA and NRDC on the relationship between the NCP program and the emissions averaging program. Mack Trucks and NRDC commented that both NCPs and emissions averaging should not be used by a manufacturer for the same engines or vehicles. MECA commented that if a manufacturer uses NCPs, it should be prohibited from using emissions averaging. While EPA views the relationship of these two programs as a generic issue, it is outside the scope of the present rulemaking action. EPA plans to examine this issue and address it in a subsequent rulemaking.

F. NCP Penalty Formula

As discussed above, the Clean Air Act sets three requirements for determining the amount of NCPs. First, the NCP is to remove any competitive disadvantage to manufacturers whose engines or vehicles conform to the relevant standard. Second, the penalty must take into account the extent to which actual emissions exceed a standard. Third, the NCP must be increased periodically to create incentives for conformance with the standards.

When EPA determines that NCPs will be available for a standard and specifies the HDE or HDV categories for which the NCP will be provided, a formula will be used to calculate the NCP for nonconforming engines or vehicles. These categories may comprise HDE or HDV subclasses, groups of subclasses, or subdivisions of subclasses. The basic form of the NCP formula will be the same for each HDE or HDV subclass and each pollutant, although the values of parameters in the formula may vary by engine and vehicle subclass and pollutant. There were very few comments on the proposed formula and this final rule adopts the proposal with no significant changes.

As proposed, the NCP formula will incorporate the following elements: (1) the compliance level determined in PCA testing, (2) penalty rates, expressed in dollars per unit of emissions, and (3) annual adjustment factors. Basing the penalty on the compliance level will insure that the NCP takes into account the extent to which actual emissions exceed the applicable standard. The penalty rate, because it is based on projected compliance costs, will remove the competitive advantage of not conforming by eliminating the cost savings associated with nonconformance. Annual adjustment factors will be used to increase the NCP from year to year to provide additional incentives for conformance and keep the penalty in current year dollars.

When a manufacturer elects to pay an NCP, the first step in determining the amount of the NCP will be to calculate the "initial penalty." The initial penalty is the penalty amount that would be paid if the nonconformity occurred in the first year that the penalty was available for a particular standard. To arrive at the penalty for the current year, the initial penalty is multiplied by the annual adjustment factors for each year since the first year the penalty was available. When payment of an NCP is elected in the first year in which the NCP is available, no annual adjustment factor is used in calculating the penalty amount for that year.

1. Penalty Rates

EPA will use a combination of a "marginal cost" approach and an "average cost" approach to set the penalty rates. Under a marginal cost approach, the penalty rate for each engine and vehicle category and pollutant combination would be the slope of the steepest segment of an estimated emission control cost curve for the category. The cost curve would depict the relationship between emission control cost and emission levels ranging from the upper limit down to the new standard for each pollutant. Its slope, the marginal cost, would be expressed in terms of cost per unit of emission reduction. If the marginal cost increased continuously as the emission level fell (as might be assumed in a simplified analysis), the steepest slope (greatest marginal cost) would be the slope of the curve at the new standard. However, since the relationship between emission control costs and emission rates (i.e., the marginal cost) may be discontinuous and "lumpy," the greatest marginal cost may instead occur elsewhere. For example, it may be associated with the addition of a significant emission control hardware item such as a catalyst or particulate trap.

Under an average cost approach, the penalty rate for each engine and vehicle category and pollutant combination would be based on an estimate for the category of the expected total incremental compliance cost per engine or vehicle for reducing emission levels from the upper limit to the new standard. The estimate used would be near the upper end of the range of the estimates of the cost of compliance among manufacturers. That total cost of compliance would then be divided by the emission reduction required to meet the new standard, resulting in a penalty rate equal to the average cost per unit of emissions reduction.

The initial penalty can be represented graphically by two linear segments as shown by the dashed lines in Figure 1. This form was chosen in order to satisfy two criteria simultaneously: (1) that the penalty rate near the new standard be steep enough to discourage voluntary noncompliance by manufacturers who are technologically able to conform, and (2) that the initial penalty faced by a technological laggard whose compliance level is significantly above the standard would not be substantially higher than the estimated total incremental cost of compliance with the new standard. Thus, for compliance levels that exceed but remain near the new emission standard, the penalty is based on an estimate of the 90th percentile marginal cost of compliance within the HDE or HDV category. EPA will first estimate the averge marginal cost of compliance

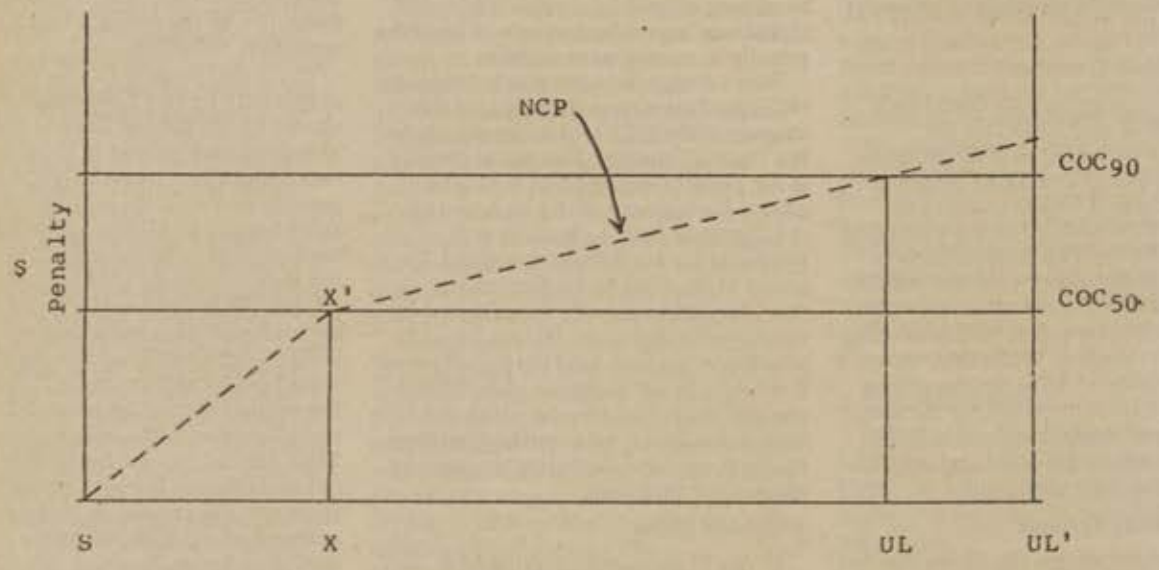
with the new standard for the category. EPA will then estimate the 90th percentile marginal cost by multiplying the average marginal cost by a factor, F. The 90th percentile is used in an effort to ensure that few manufacturers will use NCPs out of purely economic considerations. The value of F will be in the range of 1.1 to 1.3 and will be selected by EPA based on the best available cost data. Onan Corporation commented that the value of F should be presumptive at 1.1 unless statistically significant data justifies that it be set higher in the range. EPA has no basis to choose a presumptive value of 1.1, as opposed to any other value in the range, and will select a value in the range of 1.1 to 1.3.

As the compliance level increases above the standard (S in figure 1), the penalty increases at a constant rate up to the emission level (X) at which the penalty equals the estimated average total incremental cost of compliance (COC_{50}) for the category. The initial penalty then increases linearly at a constant rate from that point (X') to an amount at the upper limit (UL) equal to EPA's estimate of the 90th percentile total incremental cost of compliance (COC_{90}). However, where the upper limit is a prior emissions averaging family limit, as discussed in section E.2. of this preamble, the penalty will increase linearly at the same constant rate from COC_{90} (from the otherwise applicable upper limit, UL) to the value of the prior averaging family upper limit, UL'. In other words, in this case, UL and UL' will represent different values in Figures 1 and 2.

In evaluating the total and marginal costs of compliance with a particular standard under this approach, EPA will assess both manufacturers' and users' cost impacts. Manufacturers' costs include the incremental production costs involved in bringing an engine or vehicle into conformance with a standard and the additional warranty costs of keeping it there. The nonconforming manufacturer is avoiding these costs. EPA requested comments on what should be included in manufacturers' incremental production costs. Several manufacturers commented that engineering and development costs should be included in setting the penalty rates to prevent a nonconforming manufacturer that never spends these costs and elects to use NCPs from being placed at a competitive advantage. EPA agrees that such costs must be included in the NCP to protect against the possibility that some manufacturers might choose NCPs to avoid incurring such costs. As already discussed, EPA cannot allow a manufacturer that uses NCPs to gain a competitive advantage. General Motors commented, however, that a manufacturer in nonconformance has in all likelihood expended considerable engineering and development costs and should not have to pay these costs again in the form of an NCP. EPA agrees that a manufacturer should not be required to pay these costs twice. However, it would be difficult for EPA to be certain whether a manufacturer did indeed already spend these costs. Therefore, EPA will assume that a nonconforming manufacturer did not spend engineering and development costs, and they will be included in the NCP. However, EPA will include in the Phase II NCP NPRM a proposal that would allow a manufacturer that pays an NCP to be refunded a portion of the NCP if that manufacturer subsequently certifies the nonconforming configuration, thereby demonstrating that engineering and development costs were indeed expended.

Figure 1

Penalty vs. Compliance Level



Users' costs may include the present value of any fuel economy penalty, requirements for unleaded fuel, and changes in maintenance costs associated with operating a conforming engine or vehicle over its lifetime. To the extent that these cost impacts are known by potential buyers, a purchaser should be willing to pay more for an engine or vehicle with lower total user costs. Therefore, in order to remove a manufacturer's economic incentive for nonconformance and to prevent manufacturers of conforming engines or vehicles from being placed at a competitive disadvantage, the NCP must also reflect the user cost increase. Mack Truck commented that fuel economy penalties could be significant and should be included in the penalty calculations. EPA agrees and will include these penalties in the users' costs.

The data base used by EPA to establish the average cost of compliance and the penalty rate factors in a specific NCP rulemaking will be the cost data used by EPA in setting the emission standard for which the NCP will be available. However, when the rulemaking to establish a specific NCP occurs after the rulemaking to establish the standard, EPA could augment the data base used to establish the standard by including the best cost and emission performance data available to EPA during the specific NCP rulemaking.

Most cost analyses performed during the standard-setting process do not estimate the marginal cost of compliance. Doing so would require much more detailed knowledge of the emission control alternatives and costs facing manufacturers and the resulting impacts on the cost of ownership than is typically available. Therefore, it may not always be possible to use marginal costs exclusively. When use of marginal costs is not possible, EPA will estimate these marginal costs with the best available cost and emission performance data.

General Motors commented that if NCPs are determined by the Internal Revenue Service (IRS) not to be a tax deductible business operating expense, EPA should adjust the cost of compliance values since a manufacturer's compliance costs are ordinarily offset in part by tax deductions for such expenses. EPA has requested a ruling from the IRS on this matter. If the IRS rules that NCPs are tax deductible, EPA will use the cost of compliance values as described in this preamble; if they are not tax deductible, EPA will adjust the cost of compliance values.

2. Annual adjustments

Annual adjustment factors will be used to increase the amount of the nonconformance penalty from year to year, beginning with the second year that the NCP is available for a particular standard. The penalty per engine or vehicle in year n will be equal to the "initial penalty" multiplied by the cumulative product of the annual adjustment factors for years two through n. The annual adjustment factor will take into account inflation, the number of years the NCP has been available for the particular standard, and the fraction of subclass production for which NCPs have been assessed. The formula for the annual adjustment factor for year i (i>2) is as follows:

$$AAF_i = 1 + I_{i-1} + A_i \left[\frac{1}{1-(frac_{i-1})}\right]^i$$

$A^i = 0.10$ for $i = 2$
$A^i = 0.08$ for $i > 3$

In the formula, I_{i-1} is the rate of increase in an appropriate index of inflation during year i-1. EPA requested comments on which inflation index would be appropriate. Several manufacturers commented that the "overall consumer price index" should be used because it closely relates to customer costs. EPA has decided to use this index, but may address in a subsequent rulemaking action whether it would be more appropriate to use an inflation index more representative of the heavy-duty engine/vehicle industry (for example, the Bureau of Labor Statistics Fleet Activity Cost Index). The inflation increase is expressed as a decimal percentage (e.g., ten percent would be expressed as 0.10). The inflation rate will be included in the formula to insure that each year's penalty reflects estimated increases in compliance costs as a result of inflation during the period when the NCP has been available.

The variable A_i is the usage adjustment factor, which affects the impact of the prior year's NCP usage on the size of the annual adjustment factor. The variable "$frac_{i-1}$" in the formula is the fraction of NCP usage for the previous year. It will be calculated separately for each category of engines or vehicles and is the ratio of (1) the total number of HDEs or HDVs for which an NCP will be paid in year i-1 to (2) the total number of HDEs or HDVs that will be introduced into commerce in year i-1. If $frac_{i-1}$ is greater than 0.05, $frac_{i-1}$ would be set equal to 0.50 in calculating AAF_i.

The formula for AFF_i is structured so that the penalty increases as $frac_{i-1}$ increases and, for any given value of $frac_{i-1}$, the increase in the penalty will be greater in later years than in the initial years of availability. This structure was chosen in order to provide adequate incentives for eventual compliance. If the initial penalty were so low that many engines or vehicles were produced under the NCP, a relatively high value of $frac_{i-1}$ will protect the environment by increasing the penalty substantially in the next year and creating greater incentives for conformance. If, on the other hand, NCP usage is low, the HDE or HDV catetory is protected by a much smaller annual increase in the penalty.

The NCP usage fraction for calculating the next year's penalty will include actual NCP usage through March 31 of the current model year and EPA's estimate of additional usage for the remainder of the current model year. Each previous year's usage fraction will be corrected to reflect actual year-end usage of NCP's and this corrected AAF will be used in establishing the NCP for future years. The correction of the previous year's annual adjustment factor will not affect the previous year's penalty. Thus, when the running product of the annual adjustment factor is calculated to determine an NCP for year n, AAF_n will be based on the projected value of $frac_{n-1}$ and all other AAF_i (for $i < n$) will be calculated using the final corrected values of $frac_{i-1}$.

3. NCP Formula

The complete NCP formula incorporates both the initial penalty and the annual adjustment factors. It is given below along with definitions for the variables. As discussed in the penalty rate section above, the initial penalty is decribed by two linear segments (Figure 1). A separate formula is used for each segment. As described for Case 1 and Case 2 below, the formula used depends on the value of the compliance level, CL, determined in PCA testing. Figure 2 illustrates the relationship between an initial penalty, NCP_1, and a subsequent year's penalty, NCP_n.

Case (1): If the compliance level (CL) is greater than S and less than or equal to X (e.g., point CL_1 in figure 2), then:

$$NCP_n = (PR_1)(CL - S)\left(\prod_{i=1}^{n} AAF_i\right)$$

where:

$PR_1 = (F)(MC_{50})$

Case (2): If the compliance level is greater than X and less than or equal to the upper limit as determined by § 86.1104–87 (e.g., point CL_2 in figure 2), then:

$$NCP_n = (COC_{50} + (PR_2)(CL - X))\left(\prod_{i=1}^{n} AAF_i\right)$$

where:

$$PR_2 = \frac{COC_{90} - COC_{50}}{UL - X}$$

In Case (1) or Case (2), AAF_i has the following values:

If $frac_{i-1} = 0$, then $AAF_i = 1 + I_{i-1}$

If $frac_{i-1} > 0$, then:

$$AAF_i = 1 + I_{i-1} + A_i\left[\frac{1}{1 - (frac_{i-1})}\right]$$

If $frac_{i-1} > 0.50$, then $frac_{i-1}$ would be set equal to 0.50.

In the first year, $AAF_i = 1$

The terms in the above formulas have the following meanings and values:

NCP_n = NCP for year n for each engine or vehicle

CL = Compliance level for year n for applicable engines or vehicles

S = Emission standard

UL = Upper limit as determined by § 86.1104–87. Except, if the upper limit is determined by § 86.1104–87(c), the value of UL in case (2) will be the prior emission standard.

UL' = Upper limit as determined by § 86.1104–87(c). This value is not used in the above formulas.

X = Compliance level above the standard at which NCP_1 equals COC_{50}

$$X = \left[\frac{COC_{50}}{(F)(MC_{50})}\right] + S$$

PR_1 = Penalty rate for CL<X

PR_2 = Penalty rate for X < CL < applicable upper limit

$\prod_{i=1}^{n} AAF_i$ = Running Product, i.e., $(AAF_1)x(AAF_2)x..x(AAF_n)$

i = Index representing a year

n = Index representing the number of model years for which the NCP has been available for an engine or vehicle subclass, i.e., n = 1 for the first year that the NCP is available; . . . n = n for the nth year that the NCP is available

COC_{50} = Estimate of the average total incremental cost to comply with the standard relative to complying with the upper limit

COC_{90} = Estimate of the 90th percentile total incremental cost to comply with the standard relative to complying with the upper limit

MC_{50} = Estimate of the average marginal cost of compliance (dollars per emission unit) with the standard

F = Factor used to estimate the 90th percentile marginal cost based on the average marginal cost (the minimum value of F is 1.1, the maximum value of F is 1.3)

AAF_i = Annual adjustment factor in year i

$frac_{i-1}$ = Fraction of engines or vehicles of a subclass using NCPs in previous year (i–1)

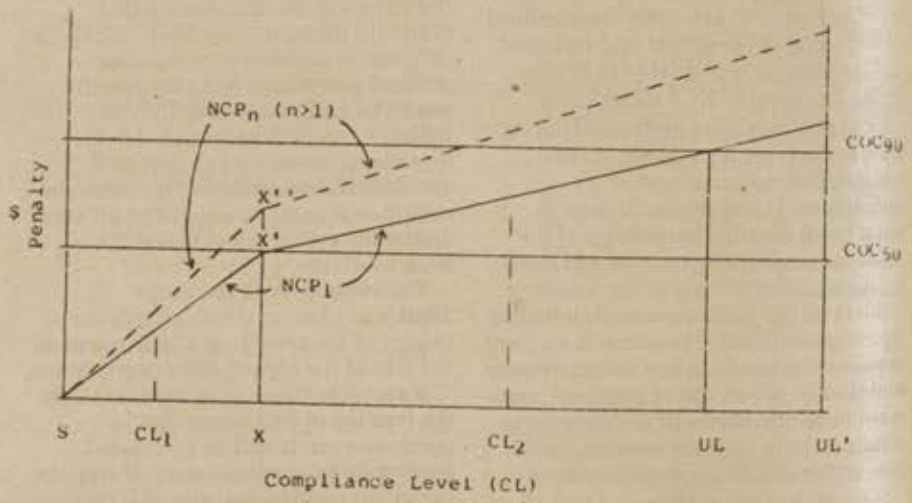
A_i = Usage adjustment factor in year i: $A_i = 0.10$ for i = 2; $A_i = 0.08$ for i > 2

I_i = Percentage increase in overall consumer price index in year i

Onan supported EPA's proposal to use average costs as opposed to 50th percentile costs in determining COC_{50}, MC_{50} and F. The final rule incorporates that proposal.

Figure 2

Penalty vs. Compliance Level



G. Administrative Designation

Under the criteria provided in Executive Order 12291, the Administrator has determined that this regulation is "non-major" and therefore not subject to the requirement of a Regulatory Impact Analysis. This determination is based on the following:

(1) The NCP program will not result in an annual adverse effect on the economy of $100 million or more. The NCP merely provides an economically reasonable alternative to other possible actions, at least as costly as NCPs, that may be utilized when a manufacturer is unable to comply with a standard. This concept is more fully discussed in the ECONOMIC IMPACT section.

(2) The NCP program will not result in adverse cost or price impacts (above those that would otherwise occur from compliance with the emission standards themselves).

(3) The NCP program provides manufacturers relief from the inability to market nonconforming HDEs or HDVs. Presently a manufacturer experiencing difficulty in certifying or producing HDEs or HDVs in conformance with emission standards, has only two alternatives: fix the nonconforming configuration or prevent the HDE or HDV's introduction into commerce. In some cases, a fix may not be readily available, and a manufacturer may have to prevent its introduction into commerce. NCPs provide relief from these disruptions. Therefore, NCPs will not have significant adverse effects 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.

As required by Executive Order 12291, this Final Rulemaking has been reviewed by the Office of Management and Budget (OMB) for compliance with regulatory development criteria and for general content. Any written OMB comments and the EPA's response to those comments are available for inspection in the public docket for this rulemaking.

H. Economic Impact

Because of the optional nature of the use of NCPs, manufacturers have flexibility and will likely choose whether or not to use NCPs based on their capability to comply with emission standards. If no HDE or HDV manufacturers elects to use NCPs, these manufacturers or the users of their products will not incur any additional costs related to NCPs.

The existence of an NCP program may provide some direct cost savings to HDE or HDV manufacturers that lack the technological capability to conform with emission standards immediately. In the absence of NCPs, a manufacturer which has difficulty certifying HDEs or HDVs in conformance with emission standards or which fails an SEA has only two alternatives: fix the nonconforming engines or vehicles, perhaps at prohibitive cost, or prevent their introduction into commerce. The availability of NCPs provides manufacturers with a third alternative with some potential cost savings: continue production and introduce into commerce a unit that exceeds the standard until an emission conformance technique is developed.

Therefore, NCPs represent a regulatory mechanism that allows affected manufacturers increased flexibility. A decision to use NCPs may be the manufacturer's only course of action that would allow it to continue to introduce HDEs or HDVs into commerce. Hence, NCPs may be considered to have no adverse economic impact.

I. Environmental Impact

Because the use of NCPs is an option elected by affected manufacturers, EPA cannot be sure to what extent NCPs will be used.

If no manufacturer elects to use NCPs, all HDEs and HDVs produced will need to be in conformance with the regulatory requirements. In this situation, the environmental benefits estimated during the rulemakings establishing the emission regulations will not be affected.

If some HDE and/or HDV manufacturers do elect to participate in the NCP program, some HDEs and/or HDVs will be introduced into commerce that will be emitting pollutants above applicable standards (as Congress contemplated when it mandated that EPA provide NCPs). The magnitude of this reduced environmental benefit is proportional to the number of HDEs and HDVs subject to NCPs and their degree of nonconformance. (Of course, the upper limits exclude gross emitters from being introduced into commerce.) EPA estimates that an NCP will not be used for more than ten percent of the HDE's and HDV's for which NCPs are provided in the first year that they are available and that they will be used by less than one percent in the third year. The long term environmental impact from NCP usage is expected to be relatively very small, if any, due to the relatively high penalty rates and the annual adjustment factor that rapidly increases those penalty rates when NCP usage is significant. Of course, any reduction in environmental benefit refers not to an increase in emissions from current levels, but from levels that would otherwise occur from reduced emission standard without NCPs.

Because emission impacts are anticipated to be very small, if any, compared to the total emissions of HDEs and HDVs which in fact comply with emission standards, and because the extent of NCP usage in any specific model year cannot be accurately predicted at this time, no specific air quality impact analysis has been made regarding this rule.

J. Compliance with Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, EPA is required to determine whether this regulation will have a significant economic impact on a substantial number of small business entities. None of the affected entitles could be classified as a small business. (Even if some were considered small, there would not be a substantial number of those.) Morever, as already discussed, the NCP program can be expected to have salutary effects on manufacturers. Thus, I certified that this rule will not have a significant adverse economic impact on a substantial number of small entities.

K. Information Collection Requirements

This rule (Phase I) requires that manufacturers perform certain recordkeeping and submit certain reports to EPA. However, these requirements will not become effective until the Phase II NCP rulemaking. The Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*, requires that reporting and recordkeeping requirements be approved by OMB before they are imposed on the public. The information collection requirements in this rule will be submitted to OMB under the Paperwork Reduction Act during the proposal for the Phase II NCP rulemaking, at which time EPA will better be able to predict the extent of NCP usage.

L. List of Subjects in 40 CFR Part 86

Administrative practice and procedure, Labeling, Motor vehicle pollution, Reporting and recordkeeping requirements, Air pollution control, Environmental protection, Gasoline, Motor vehicles.

Dated: August 23, 1985.

Lee M. Thomas,

Administrator.

PART 86—[AMENDED]

For the reasons set forth in the preamble, Part 86, Subparts A, K and L, Chapter I of Title 40, Code of Federal Regulations, is amended as follows:

1. The authority citation for Part 86 is revised to read as follows:

Authority: Secs. 206(g) and 301 of the Clean Air Act, as amended, 42 U.S.C. 7525(g), 7601.

2. Paragraph (e)(3)(ii)(A) of § 86.085–22 of Subpart A is revised to read as follows:

§ 86.085–22 Approval of application for certification; test fleet selections; determinations of parameters subject to adjustment for certification, Selective Enforcement Audit, and Production Compliance Audit, adequacy of limits, and physically adjustable ranges.

* * * * *

(e) * * *

(3) * * *

(ii)(A) In the case of a parameter determined to be adequately inaccessible or sealed, the Administrator shall include within the physically adjustable range applicable to testing under Subpart G, K or L (Selective Enforcement Audit and Production Compliance Audit) only the actual setting to which the parameter is adjusted during production.

* * * * *

3. The introductory text of paragraph (e), paragraphs (e)(1) (iii) through (vii), (e)(5), (e)(6)(i), and (e)(7) of § 86.087–30 of Subpart A are revised to read as follows:

§ 86.087–30 Certification.

* * * * *

(e) For light-duty trucks, heavy-duty engines, and heavy-duty vehicles

(1) * * *

(iii) The manufacturer submits false or incomplete information in any report or information provided pursuant to the requirements of § 86.1009 or § 86.1112–87; or

(iv) The manufacturer renders inaccurate any test data submitted pursuant to § 86.1009 or § 86.1112–87; or

(v) Any EPA Enforcement Officer is denied the opportunity to conduct activities related to entry and access as authorized in § 86.1006 or § 86.1109–87 and in a warrant or court order presented to the manufacturer or the party in charge of the facility in question; or

(vi) EPA Enforcement Officers are unable to conduct activities related to entry and access as authorized in § 86.1006 or § 86.1109–87 because a manufacturer has located a facility in a foreign jurisdiction where local law prohibits those activities; or

(vii) The manufacturer refuses to or in fact does not comply with the requirements of §§ 86.1004(a), 86.1005, 86.1007, 86.1008, 86.1010, 86.1011, 86.1013, 86.1107(a), 86.1108–87, 86.1110–87, 86.1111–87, 86.1112–87 or § 86.1113–87.

* * * * *

(5) In any case in which certification of a light-duty truck, heavy-duty engine, or heavy-duty vehicle is proposed to be suspended under paragraph (e)(1)(v) of this section and in which the Administrator has presented to the manufacturer involved reasonable evidence that a violation of § 86.1006 or § 86.1109–87 in fact occurred, if the manufacturer wishes to contend that, although the violation occurred, the vehicle or engine configuration or engine family in question was not involved in the violation to a degree that would warrant suspension of certification under paragraph (e)(1)(v) of this section, he shall have the burden of establishing that contention to the satisfaction of the Administrator.

(6) * * *

(i) Be made only after the manufacturer concerned has been offered an opportunity for a hearing conducted in accordance with § 86.1014 or § 86.1115–87, and

* * * * *

(7) Any voiding of a certificate of conformity under paragraph (e)(4) of this section shall be made only after the manufacturer concerned has been offered an opportunity for a hearing conducted in accordance with § 86.1014 or § 86.1115–87.

4. Section 86.1002–84 of Subpart K is amended by adding the following definition:

§ 86.1002–84 Definitions.

* * * * *

"Compliance level" means an emission level determined during a Production Compliance Audit pursuant to Subpart L of this Part.

* * * * *

5. Paragraph (b)(2) of § 86.1008–84 is revised to read as follows:

§ 86.1008–84 Test procedures.

* * * * *

(b) * * *

(2) For 1984 and later model years the Administrator may adjust or cause to be adjusted any engine parameter which the Administrator has determined to be subject to adjustment for certification, Selective Enforcement Audit, and Production Compliance Audit testing in accordance with § 86.084–22(e)(1), to any setting within the physically adjustable range of that parameter, as determined by the Administrator in accordance with § 86.084–22(e)(3)(ii), prior to the performance of any tests. However, if the idle speed parameter is one which the Administrator has determined to be subject to adjustment, the Administrator shall not adjust it to any setting which causes a lower engine idle speed than would have been possible within the physically adjustable range of the idle speed parameter if the manufacturer had accumulated 125 hours of service on the engine or 4,000 miles on the vehicle under paragraph (c) of this section, all

other parameters being identically adjusted for the purpose of the comparison. The manufacturer may be requested to supply information to establish such an alternative minimum idle speed. The Administrator, in making or specifying these adjustments, may consider the effect of the deviation from the manufacturer's recommended setting on emissions performance characteristics as well as the likelihood that similar settings will occur on in-use heavy-duty engines or light-duty trucks. In determining likelihood, the Administrator may consider factors such as, but not limited to, the effect of the adjustment on engine or vehicle performance characteristics and surveillance information from similar in-use engines or vehicles.

* * * * *

6. Paragraph (d)(2) of § 86.1009–84 is revised to read as follows:

§ 86.1009–84 Calculation and reporting of test results.

* * * * *

(d) * * *

(2) The applicable standards or compliance levels against which the engines or vehicles were tested;

* * * * *

7. Paragraphs (b) and (c) of § 86.1010–84 are revised to read as follows:

§ 86.1010–84 Compliance with acceptable quality level and passing and failing criteria for Selective Enforcement Audits.

* * * * *

(b) A failed engine or vehicle is one whose final deteriorated test results pursuant to paragraph 86.1009–84(c), for one or more of the applicable exhaust pollutants, exceed the applicable emission standard or compliance level.

(c) The manufacturer shall test heavy-duty engines or light-duty trucks comprising the test sample until a pass decision is reached for all pollutants, or a fail decision is reached for one pollutant. A pass decision is reached when the cumulative number of failed engines or vehicles, as defined in paragraph (b) of this section, for each pollutant is less than or equal to the past decision number appropriate to the cumulative number of engines or vehicles tested. A fail decision is reached when the cumulative number of failed engines or vehicles for one or more pollutants is greater than or equal to the fail decision number appropriate to the cumulative number of engines or vehicles tested. The pass and fail decision numbers associated with the cumulative number of engines or vehicles tested are determined by using the tables in Appendix X of this part appropriate to the projected sales as made by the heavy-duty engine manufacturer in its Application for Certification or as made by the light-duty truck manufacturer in its report submitted under paragraph (a)(2) of § 600.207–80 of the Automobile Fuel Economy Regulations. In the tables in Appendix X to this part, sampling plan "stage" refers to the cumulative number of engines or vehicles tested. Once a pass or fail decision has been made for a particular pollutant, the number of engines or vehicles whose final deteriorated test results exceed the emission standard or compliance level, if applicable, for that pollutant shall not be considered any further for the purposes of the audit.

* * * * *

8. Paragraphs (i)(1)(ii), (j)(2), (k)(2) and (m) of § 86.1012–84 are revised to read as follows:

§ 86.1012–84 Suspension and revocation of certificates of conformity.

* * * * *

(i) * * *

(1) * * *

(ii) Demonstrate that the engine or vehicle conforms to applicable standards or compliance levels by retesting the engine or vehicle in accordance with these regulations; and

* * * * *

(j) * * *

(2) Demonstrate that the engine or vehicle configuration for which the certificate of conformity has been suspended does in fact comply with these regulations by testing engines or vehicles selected from normal production runs of that engine or vehicle configuration, at the plant(s) or associated storage facilities specified by the Administrator, in accordance with the conditions specified in the initial test order. If the manufacturer elects to continue testing individual engines or vehicles after suspension of a certificate, the certificate is reinstated for any engine or vehicle actually determined to be in conformance with the applicable standards or compliance levels through testing in accordance with the applicable test procedures, provided that the Administrator has not revoked the certificate pursuant to paragraph (h) of this section.

(k) * * *

(2) After implementing the change or changes intended to remedy the nonconformity, the manufacturer shall demonstrate that the modified engine or vehicle configuration does in fact conform with these regulations by testing engines or vehicles selected from normal production runs of that modified engine or vehicle configuration in accordance with the conditions specified in the initial test order. This testing will be considered by the Administrator to satisfy the testing requirements of § 86.078–32 or § 86.079–33 if the Administrator has so notifed the manufacturer. If the subsequent audit results in passing of the audit at the level of the standards or compliance levels, if applicable, the Administrator shall reissue or amend the certificate, as the case may be, to include that configuration, provided that the manufacturer has satisfied the testing requirements of paragraph (k)(1) of this section. If the subsequent audit is failed, the revocation remains in effect. Any design change approvals under this subpart are limited to the configuration affected by the test order.

* * * * *

(m) After the Administrator suspends or revokes a certificate of conformity pursuant to this section or notifies a manufacturer of his intent to suspend, revoke or void a certificate of conformity under paragraph § 86.087–30(e), and prior to the commencement of a hearing under § 86.1014–84, if the manufacturer demonstrates to the Administrator's satisfaction that the decision to suspend, revoke or void the certificate was based on erroneous information, the Administrator shall reinstate the certificate.

* * * * *

9. Paragraphs (a) and (d)(2) of § 86.1014–84 are revised to read as follows:

§ 86.1014–84 Hearings on suspension, revocation and voiding of certificate of conformity.

(a) *Applicability.* The procedures prescribed by this section apply whenever a manufacturer requests a hearing pursuant to § 86.087–30 (e)(6)(i), § 86.087–30(e)(7), or § 86.1012–84(1).

* * * * *

(d) * * *

(2) In the case of a hearing requested under § 86.087–30(e)(6)(i), to challenge a proposed suspension of a certificate of conformity for the reasons specified in § 86.087–30(e)(1)(i) or (e)(1)(ii), when it clearly appears from the data and other information contained in the request for the hearing that there is no genuine and substantial question of fact with respect to the issue of whether the refusal to comply with the provisions of a test order or any other requirement of § 86.1003–84 was caused by conditions and circumstances outside the control of the manufacturer, the Administrator shall enter an order denying the request

for a hearing and suspending the certificate of conformity.

* * * * *

10. The table of contents of Subpart L is added as follows:

Subpart L—Nonconformance Penalties for Gasoline-Fueled and Diesel Heavy-Duty Engines and Heavy-Duty Vehicles, Including Light-Duty Trucks

Sec.
86.1101–87 Applicability.
86.1102–87 Definitions.
86.1103–87 Criteria for availability of nonconformance penalties.
86.1104–87 Determination of upper limits.
86.1105–87 [Reserved]
86.1106–87 Production Compliance Auditing.
86.1107–87 Testing by the Administrator.
86.1108–87 Maintenance of records.
86.1109–87 Entry and access.
86.1110–87 Sample selection.
86.1111–87 Test procedures for PCA testing.
86.1112–87 Determining the compliance level and reporting of test results.
86.1113–87 Calculation and payment of penalty.
86.1114–87 Suspension and voiding of certificates of conformity.
86.1115–87 Hearing procedures for nonconformance determinations and penalties.

11. Subpart L is added to read as follows:

Subpart L—Nonconformance Penalties for Gasoline-Fueled and Diesel Heavy-Duty Engines and Heavy-Duty Vehicles, Including Light-Duty Trucks

§ 86.1101–87 Applicability.

The provisions of this subpart are applicable for 1987 and later model year gasoline-fueled and diesel heavy-duty engines and heavy-duty vehicles. These vehicles include light-duty trucks rated in excess of 6,000 pounds gross vehicle weight.

§ 86.1102–87 Definitions.

(a) The definitions in this section apply to this subpart.

(b) As used in this subpart, all terms not defined herein have the meaning given then in the Act.

"Compliance level" means the deteriorated pollutant emissions level at the 60th percentile point for a population of heavy-duty engines or heavy-duty vehicles subject to Production Compliance Audit testing pursuant to the requirements of this subpart. A compliance level can only be determined for a pollutant for which an upper limit has been established in this subpart.

"Configuration" means a subdivision, if any, of a heavy-duty engine family for which a separate projected sales figure is listed in the manufacturer's Application for Certification and which can be described on the basis of emission control system, governed speed, injector size, engine calibration, or other parameters which may be designated by the Administrator, or a subclassification of light-duty truck engine family emission control system combination on the basis of engine code, inertia weight class, transmission type and gear ratios, rear axle ratio, or other parameters which may be designated by the Administrator.

"NCP" means a nonconformance penalty as described in section 206(g) of the Clean Air Act and in this subpart.

"PCA" means a Production Compliance Audit as described in § 86.1106–87 of this subpart.

"Subclass" means a classification of heavy-duty engines or heavy-duty vehicles based on such factors as gross vehicle weight rating, fuel usage, vehicle usage, engine horsepower or additional criteria that the Administrator shall apply. Subclasses include, but are not limited to:

Light-duty gasoline trucks (6,001–8,500 lb. GVW)
Light-duty diesel trucks (6,001–8,500 lb. GVW)
Light heavy-duty gasoline engines (for use in vehicles of 8,501–14,000 lb. GVW)
Heavy heavy-duty gasoline engines (for use in vehicles of 14,001 lb. and above GVW)
Light heavy-duty diesel engines (see § 86.085–2(a)(1))
Medium heavy-duty diesel engines (see § 86.085–2(a)(2))
Heavy heavy-duty diesel engines (see § 86.085–2(a)(3))

"Test Sample" means a group of heavy-duty engines or heavy-duty vehicles of the same configuration which have been selected to receive emission testing.

"Upper limit" means the emission level for a specific pollutant above which a certificate of conformity may not be issued or may be suspended or revoked.

§ 86.1103–86 Criteria for availability of nonconformance penalties.

(a) EPA shall establish for each subclass of heavy-duty engines and heavy-duty vehicles (other than motorcycles), an NCP for a motor vehicle pollutant, when any new or revised emission standard is more stringent than the previous standard for the pollutant, or when an existing standard for that pollutant becomes more difficult to achieve because of a new or revised standard, provided that EPA finds:

(1) That for such subclass of engines or vehicles, substantial work will be required to meet the standard for which the NCP is offered, and

(2) That there is likely to be a technological laggard.

(b) Substantial work, as used in paragraph (a)(1) of this section, means the application of technology not previously used in an engine or vehicle class or subclass, or the significant modification of existing technology or design parameters, needed to bring the vehicle or engine into compliance with either the more stringent new or revised standard or an existing standard which becomes more difficult to achieve because of a new or revised standard.

§ 86.1104–87 Determination of upper limits.

(a) The upper limit applicable to a pollutant emission standard for a subclass of heavy-duty engines or heavy-duty vehicles for which an NCP is established in accordance with § 86.1103–87, shall be the previous pollutant emission standard for that subclass.

(b) If no previous standard existed for the pollutant under paragraph (a), the upper limit will be developed by EPA during rulemaking.

(c) If a manufacturer participates in the emissions averaging program and carries over certification of an engine family from the prior model year, the upper limit for that engine family shall be the family emission limit of the prior model year, unless the family emission limit is less than the upper limit determined in paragraph (a).

§ 86.1105–87 [Reserved]

§ 86.1106–87 Production compliance auditing.

For a model year in which upper limits for heavy-duty engine or heavy-duty vehicle emission standards for one or more exhaust pollutants are specified in § 86.1105–87, a manufacturer may elect to conduct a Production Compliance Audit (PCA) for each engine or vehicle configuration satisfying the following conditions:

(a) Certification test results, pursuant to § 86.082–23, exceed the emission standard for a particular pollutant but do not exceed the upper limit established for that pollutant. In that event, the manufacturer will be offered a qualified certificate of conformity allowing for the introduction into commerce of the specified engine family, *provided that:*

(1) The manufacturer must agree to conduct a PCA of those engines or vehicles;

(2) PCA testing must be conducted on the same configuration tested in certification;

(3) The selection of engines or vehicles for PCA testing must be initiated no later than five (5) days after the start of assembly-line production of the specified engine or vehicle configuration, unless that period is extended by the Administrator;

(4) The manufacturer must agree:

(i) To pay the NCP amount calculated as a result of PCA testing on each engine or vehicle, unless the manufacturer successfully challenges the Administrator's determination of the compliance level or penalty calculation or both under § 86.1115–87(c);

(ii) To recall any engines or vehicles introduced into commerce, without invoking the procedural requirements of section 207(c) of the Clean Air Act, if the compliance level for the engine or vehicle configuration of (a)(2) exceeds the upper limit as determined by the PCA;

(5) If the compliance level determined in the PCA is below the emission standard, no NCP will be offered, and all appropriate qualifications will be removed from the qualified certificate of conformity.

(b) An engine or vehicle configuration fails a Selective Enforcement Audit (SEA) under subpart K of 40 CFR Part 86 with respect to the standard for a particular pollutant but does not fail with respect to the upper limit established for that pollutant, and no NCP has been previously assessed for that configuration, *provided that:*

(1) The manufacturer must submit a written report to the Administrator within five (5) days after failure to pass the audit containing the following:

(i) A statement that the manufacturer does not intend, at that time, to make any engine and/or emission control system design changes that may remedy the nonconformity; and

(ii) A request from the manufacturer to conduct the PCA, including the date the testing will begin;

(2) Failure to submit the report within five (5) days after the SEA failure will result in the forfeiture of the NCP option, unless a satisfactory justification for the delay is provided to the Administrator;

(3) The selection of any required engines or vehicles for PCA testing must be initiated no later than ten (10) days after the SEA failure unless extended by the Administrator; otherwise, the manufacturer may forfeit the option to elect an NCP;

(4) PCA testing must be conducted on the same configuration that failed the SEA;

(5) Test results from the SEA, together with any additional test results required during the PCA, will be used in establishing a compliance level for the configuration pursuant to § 86.1112–87(a); and

(6) The manufacturer, upon approval by the Administrator to conduct a PCA on a failed SEA engine or vehicle configuration, must agree:

(i) To pay the NCP amount calculated as a result of PCA testing on each engine or vehicle introduced into commerce after the tenth day of the SEA failure, unless the manufacturer successfully challenges the Administrator's determination of the compliance level or penalty calculation or both under § 86.1115–87(c);

(ii) To recall any engines or vehicles introduced into commerce after the tenth day of the SEA failure, without invoking the procedural requirements of section 207(c) of the Clean Air Act, if the compliance level of the engine or vehicle configuration exceeds the upper limit as determined by the PCA.

(c) An engine or vehicle configuration, for which an NCP has been previously assessed for a particular pollutant, either passes an SEA with respect to the particular pollutant standard, fails an SEA with respect to the particular pollutant standard but not the previous compliance level, or fails an SEA with respect to the previous compliance level but not the associated upper limit, *provided that:*

(1) The manufacturer must submit a written statement to the Administrator within five (5) days of the conclusion of the SEA requesting a PCA, including the date the PCA testing will begin; otherwise, the manufacturer forfeits the option to establish a new compliance level;

(2) The selection of any required engines or vehicles for PCA testing must be initiated no later than ten (10) days after the conclusion of the SEA unless the period is extended by the Administrator; otherwise, the manufacturer forfeits the option to establish a new compliance level;

(3) PCA testing must be conducted on the same configuration tested during the SEA, and all conditions in the SEA test order must apply to the PCA;

(4) Test results for the SEA, together with any additional test results required during the PCA, will be used in establishing a new compliance level for the configuration pursuant to § 86.1112–87(a);

(5) The manufacturer must agree:

(i) To pay the NCP amount calculated as a result of PCA testing on each engine or vehicle introduced into commerce after the tenth day of the conclusion of the SEA, unless the manufacturer successfully challenges the Administrator's determination of the compliance level or penalty calculation or both under § 86.1115–87(c);

(ii) To recall any engines or vehicles introduced into commerce after the tenth day after the conclusion of the SEA, without invoking the procedural requirements of section 207(c) of the Clean Air Act, if the engine or vehicle configuration exceeds the upper limit as determined by the PCA;

(6) A previously assessed NCP will be terminated and no NCP will be established as a result of the new PCA if the compliance level is determined to be below the applicable emission standards.

(d) The implementation of a production running change that causes the emission level for a particular pollutant to be either above the emission standard but below the associated upper limit for a vehicle or engine configuration for which an NCP has not been previously assessed, or below the associated upper limit for a vehicle or engine configuration for which an NCP has been previously assessed, regardless of the previous compliance level. In that event, the manufacturer will be offered a qualified certificate of conformity allowing for the introduction into commerce of the engine or vehicle configuration resulting from the running change, *provided that:*

(1) The manufacturer must submit a written report to the Administrator outlining the reason for the running change and the date the manufacturer will begin PCA testing;

(2) The manufacturer must agree:

(i) To pay the NCP amount calculated as a result of PCA testing on each engine or vehicle, unless the manufacturer successfully challenges the Administrator's determination of compliance level or penalty calculation or both under § 86.1115–87(c);

(ii) To recall any engines or vehicles introduced into commerce, without invoking the procedural requirements of section 207(c) of the Clean Air Act, if the engine or vehicle configuration exceeds the upper limit as determined by the PCA;

(3) The selection of engines or vehicles for PCA testing must be initiated no later than five (5) days after the start of assembly line production of the engine or vehicle configuration resulting from the running change unless that period is extended by the Administrator; and

(4) If the compliance level is determined to be below the applicable emission standard, a previously

assessed NCP will be terminated, an NCP will not be established as a result of the PCA testing, and all qualifications will be removed from the qualified certificate of conformity.

(e) The following requirements are applicable to each PCA under this subpart.

(1) The manufacturer shall make the following documents available to EPA Enforcement Officers upon request:

(i) A properly filed and current application for certification, following the format prescribed by the EPA for the appropriate model year; and

(ii) A copy of the shop manual and dealer service bulletins for the configurations being tested.

(2) Only one mechanic at a time per engine or vehicle shall make authorized checks, adjustments, or repairs, unless a particular check, adjustment, or repair requires a second mechanic as indicated in the shop manual or dealer service bulletins.

(3) A mechanic shall not perform any check, adjustment, or repair without an Enforcement Officer present unless otherwise authorized.

(4) The manufacturer shall utilize only those tools and test equipment utilized by its dealers or those dealers using its engines when performing authorized checks, adjustments, or repairs.

§ 86.1107-87 Testing by the Administrator.

(a) The Administrator may require that engines or vehicles of a specified configuration be selected in a manner consistent with the requirements of § 86.1110-87 and submitted to him at such place as he may designate for the purpose of conducting emission tests in accordance with § 86.1111-87 to determine whether engines or vehicles manufactured by the manufacturer conform with the regulations of this subpart.

(b)(1) Whenever the Administrator conducts a test on a test engine or vehicle or the Administrator and manufacturer each conduct a test on the same test engine or vehicle, the results of the Administrator's test will comprise the official data for that engine or vehicle.

(2) Whenever the manufacturer conducts all tests on a test engine or vehicle, the manufacturer's test data will be accepted as the official data, provided that if the Administrator makes a determination based on testing under paragraph (a) of this section that there is a substantial lack of agreement between the manufacturer's test results and the Administrator's test results, no manufacturer's test data from the manufacturer's test facility will be accepted for purposes of this subpart.

(c) If the Administrator determines that testing conducted under paragraph (a) of this section demonstrates a lack of agreement under paragraph (b)(2) of this section, the Administrator shall:

(1) Notify the manufacturer in writing of his determination that the manufacturer's test facility is inappropriate for conducting the tests required by this subpart and the reasons therefore; and

(2) Reinstate any manufacturer's data only upon a showing by the manufacturer that the data acquired under paragraph (a) of this section was erroneous and the manufacturer's data was correct.

(d) The manufacturer may request in writing that the Administrator reconsider his determination in paragraph (b)(2) of this section based on data or information which indicates that changes have been made to the test facility and that these changes have resolved the reasons for disqualification.

§ 86.1108-87 Maintenance of records.

(a) The manufacturer of any new gasoline-fueled or diesel heavy-duty engine or heavy-duty vehicle subject to any of the provisions of this subpart shall establish, maintain, and retain the following adequately organized and indexed records:

(1) *General records.* A description of all equipment used to test engines or vehicles in accordance with § 86.1111-87, pursuant to PCA testing under this subpart, specifically:

(i) If testing heavy-duty gasoline engines, the equipment requirements specified in §§ 86.1306-84 and 86.1506-84 of this part.

(ii) If testing heavy-duty diesel engines, the equipment requirements specified in §§ 86.1306-84, 86.1506-84, 86.879-6, 86.879-8 and 86.879-9 of this part;

(iii) If testing light-duty gasoline-fueled trucks, the equipment requirements specified in §§ 86.106 (excluding all references to particulate emission testing) and 86.1506-84 of this part; and

(iv) If testing light-duty diesel trucks, the equipment requirements specified in § 86.106 (excluding all references to evaporative emission testing) of this part.

(2) *Individual records.* These records pertain to each Production Compliance Audit conducted pursuant to this subpart.

(i) The date, time, and location of each test;

(ii) The number of hours of service accumulated on the engine or the number of miles on the vehicle when the test began and ended;

(iii) The names of all supervisory personnel involved in the conduct of the Production Compliance Audit;

(iv) A record and description of any repair performed, giving the date and time of the repair, the reason for it, the person authorizing it, and the names of all personnel involved in the supervision and performance of the repair;

(v) The date when the engine or vehicle was shipped from the assembly plant or associated storage facility and when it was received at the testing facility;

(vi) A complete record of all emission tests performed pursuant to this subpart (except tests performed by EPA directly), including all individual worksheets and/or other documentation relating to each test, or exact copies thereof, specifically—

(A) If testing heavy-duty gasoline engines, the record requirements specified in §§ 86.1342-84 and 86.1542-84 of this part;

(B) If testing heavy-duty diesel engines, the record requirements specified in §§ 86.1342-84, 86.1542-84, and 86.879-10; (§ 86.337-79 for Subpart D testing only).

(C) If testing light-duty gasoline fueled trucks, the record requirements specified in §§ 86.142 (excluding all references to diesel vehicles) and 86.1542-84; and

(D) If the testing light-duty diesel trucks, the record requirements specified in § 86.142; and

(vii) A brief description of any significant Production Compliance Audit events commencing with the test engine or vehicle selection process, but not described by any subparagraph under paragraph (a)(2) of this section, including such extraordinary events as engine damage during shipment or vehicle accident.

(3) The manufacturer shall record the test equipment description, pursuant to paragraph (a)(1) of this section, for each test cell that was used to perform emission testing under this subpart.

(b) The manufacturer shall retain all records required to be maintained under this subpart for a period of six (6) years after completion of all testing. Records may be retained as hard copy or reduced to microfilm, punch cards, etc., depending upon the manufacturer's record retention procedure, provided that in every case all the information contained in the hard copy is retained.

§ 86.1109-87 Entry and access.

(a) To allow the Administrator to determine whether a manufacturer is complying with the provisions of this subpart, EPA Enforcement Officers are authorized to enter any of the following

(during operating hours and upon presentation of credentials):

(1) Any facility where any engine or vehicle to be introduced into commerce or any emission related component is manufactured, assembled, or stored;

(2) Any facility where any tests conducted pursuant to a PCA request or any procedures or activities connected with these tests are or were performed;

(3) Any facility where any engine or vehicle which is being tested, was tested, or will be tested is present; and

(4) Any facility where any record or other document relating to any of the above is located.

(b) Upon admission to any facility referred to in paragraph (a) of this section, EPA Enforcement Officers are authorized to perform the following inspection-related activities:

(1) To inspect and monitor any aspects of engine or vehicle manufacture, assembly, storage, testing and other procedures, and the facilities in which these procedures are conducted.

(2) To inspect and monitor any aspect of engine or vehicle test procedures or activities, including, but not limited to, monitoring engine or vehicle selection, preparation, service or mileage accumulation, preconditioning, repairs, emission test cycles, and maintenance; and to verify calibration of test equipment;

(3) To inspect and make copies of any records or documents related to the assembly, storage, selection and testing of an engine or vehicle; and

(4) To inspect and photograph any part or aspect of any engine or vehicle and any component used in the assembly thereof that is reasonably related to the purpose of the entry.

(c) EPA Enforcement Officers are authorized to obtain reasonable assistance without cost from those in charge of a facility to help them perform any function listed in this subpart and are authorized to request the manufacturer conducting the PCA to make arrangement with those in charge of a facility operated for its benefit to furnish reasonable assistance without cost to EPA, whether or not the manufacturer controls the facility.

(d) EPA Enforcement Officers are authorized to seek a warrant or court order authorizing the EPA Enforcement Officers to conduct activities related to entry and access as authorized in this section, as appropriate, to execute the functions specified in this section. EPA Enforcement Officers may proceed ex parte to obtain a warrant whether or not the Enforcement Officers first attempted to seek permission of the manufacturer conducting the PCA or the party in charge of the facilities in question to conduct activities related to entry and access as authorized in this section.

(e) A manufacturer that conducts a PCA shall permit EPA Enforcement Officers who present a warrant or court order as described in paragraph (d) of this section to conduct activities related to entry and access as authorized in this section and as described in the warrant or court order. The manufacturer shall cause those in charge of its facility or a facility operated for its benefit to permit EPA Enforcement Officers to conduct activities related to entry and access as authorized in this section pursuant to a warrant or court order whether or not the manufacturer controls the facility. In the absence of such a warrant or court order, EPA Enforcement Officers may conduct activities related to entry and access as authorized in this section only upon the consent of the manufacturer or the party in charge of the facilities in question.

(f) It is not a violation of this part or the Clean Air Act for any person to refuse to permit EPA Enforcement Officers to conduct activities related to entry and access as authorized in this section without a warrant or court order.

(g) A manufacturer is responsible for locating its foreign testing and manufacturing facilities in jurisdictions in which local foreign law does not prohibit EPA Enforcement Officers from conducting the entry and access activities specified in this section. EPA will not attempt to make any inspections which it has been informed that local foreign law prohibits.

(h) For purposes of this section, the following definitions are applicable:

(1) "Presentation of Credentials" means display of the document designating a person as an EPA Enforcement Officer.

(2) Where engine or vehicle storage areas or facilities are concerned, "operating hours" means all times during which personnel other than custodial personnel are at work in the vicinity of the area or facility and have access to it.

(3) Where facilities or areas other than those covered by paragraph (h)(2) of this section are concerned, "operating hours" means all times during which an assembly line is in operation, engine or vehicle assembly is taking place, testing repair, service accumulation, preparation or compilation of records is taking place, or any other procedure or activity related to engine or vehicle manufacture, assembly or testing is being carried out in a facility.

(4) "Reasonable assistance" includes, but is not limited to, clerical, copying, interpreting and translating services, and making personnel of the facility being inspected available during their working hours on an EPA Enforcement Officer's request to inform the EPA Enforcement Officer of how the facility operates and to answer his or her questions. Any employee whom an EPA Enforcement Officer requests the manufacturer to cause to appear for questioning will be entitled to be accompanied, represented and advised by counsel.

§ 86.1110-87 Sample selection.

(a) Engines or vehicles comprising a test sample which are required to be tested pursuant to a PCA in accordance with this subpart will be selected at the location and in the manner specified by EPA. If a manufacturer determines that the test engines or vehicles cannot be selected in the manner specified by EPA, an alternative selection procedure may be employed, provided that the manufacturer requests approval of the alternative procedure in advance of the start of test sample selection and that the Administrator approves the procedure.

(b) The manufacturer shall have assembled the test engines or vehicles of the configuration selected for testing using its normal mass production processes for engines or vehicles to be distributed into commerce. In the case of heavy-duty engines, if the test engines are selected at a location where they do not have their operational and emission control systems installed, EPA will specify the manner and location for selection of components to complete assembly of the engines. The manufacturer shall assemble these components onto the test engines using normal assembly and quality control procedures as documented by the manufacturer.

(c) No quality control, testing, or assembly procedures will be used on the completed test engine or vehicle or any portion thereof, including parts and subassemblies, that will not be used during the production and assembly of all other engines or vehicles of that configuration.

(d) The EPA Enforcement Officers may specify that they, rather than the manufacturer, will select the test engines or vehicles.

(e) The order in which test engines or vehicles are selected determines the order in which test results are to be used in applying the PCA testing plan in accordance with § 86.1112-87.

(f) The manufacturer shall keep on hand all engines or vehicles comprising the test sample until such time as a compliance level is determined in

accordance with § 86.1112–87(a) except that the manufacturer may ship any tested engine or vehicle which has not failed in accordance with § 86.1112–87(f)(1). However, once the manufacturer ships any test engine or vehicle, it relinquishes the prerogative to conduct retests as provided in § 86.1111–87(i).

§ 86.1111–87 Test procedures for PCA testing.

(a)(1) For heavy-duty engines, the prescribed test procedure for PCA testing is the Federal Test Procedure as described in Subparts N, I, and P of this part.

(2) For heavy-duty vehicles, the prescribed test procedure for PCA testing is described in Subpart M of this part.

(3) For light-duty trucks, the prescribed test procedure for PCA testing is the Federal Test Procedure as described in Subparts B and P of this part.

(4) When testing light-duty trucks, the following exceptions to the test procedures in Subpart B are applicable:

(i) The manufacturer may use gasoline test fuel meeting the specifications of paragraph (a) of § 86.113 for mileage accumulation. Otherwise, the manufacturer may use fuels other than those specified in this section only with advance approval of the Administrator.

(ii) The manufacturer may measure the temperature of the test fuel at other than the approximate midvolume of the fuel tank, as specified in paragraph (a) of § 86.131, and may drain the test fuel from other than the lowest point of the fuel tank, as specified in paragraph (b) of § 86.131, with the advance approval of the Administrator.

(iii) The manufacturer may perform additional preconditioning on PCA test vehicles other than the preconditioning specified in § 86.132 only if the additional preconditioning has been performed on certification test vehicles of the same configuration.

(iv) The manufacturer shall perform the heat build procedure 11 to 34 hours following vehicle preconditioning rather than according to the time period specified in paragraph (a) of § 86.133.

(v) The manufacturer may substitute slave tires for the drive wheel tires on the vehicle as specified in paragraph (e) of § 86.135, provided that the slave tires are the same size as the drive wheel tires.

(vi) The cold start exhaust emission test described in § 86.137 shall follow the heat build procedure described in § 86.133 by not more than one hour.

(vii) In performing exhaust sample analysis under § 86.140:

(A) When testing diesel vehicles, the manufacturer shall allow a minimum of 20 minutes warm-up for the HC analyzer, and a minimum of 2 hours warm-up for the CO, CO_2 and NO_x analyzers. [Power is normally left on for infrared and chemiluminescent analyzers. When not in use, the chopper motors of the infrared analyzers are turned off and the phototube high voltage supply to the chemiluminescent analyzers is placed in the standby position.]

(B) The manufacturer shall exercise care to prevent moisture from condensing in the sample collection bags.

(viii) The manufacturer need not comply with § 86.142, since the records required therein are provided under other provisions of this subpart.

(ix) In addition to the requirements of Subpart B of this part, the manufacturer shall prepare gasoline-fueled vehicles as follows prior to exhaust emission testing:

(A) The manufacturer shall inspect the fuel system to insure the absence of any leaks of liquid or vapor to the atmosphere by applying a pressure of 14.5 ± 0.5 inches of water to the fuel system, allowing the pressure to stabilize, and isolating the fuel system from the pressure source. Following isolation of the fuel system, pressure must not drop more than 2.0 inches of water in 5 minutes. If required, the manufacturer shall perform corrective action in accordance with paragraph (d) of this section.

(B) When performing this pressure check, the manufacturer shall exercise care to neither purge nor load the evaporative emission control system.

(C) The manufacturer shall not modify the test vehicle's evaporative emission control system by component addition, deletion, or substitution, except to comply with paragraph (a)(4)(ii) of this section if approved in advance by the Administrator.

(b)(1) The manufacturer shall not adjust, repair, prepare, or modify the engines or vehicles selected for testing and shall not perform any emission tests on engines or vehicles selected for testing pursuant to a PCA request unless the adjustment, repair, preparation, modification, or tests are documented in the manufacturer's engine or vehicle assembly and inspection procedures and are actually performed on all engines or vehicles produced or unless these adjustments or tests are required or permitted under this subpart or are approved in advance by the Administrator.

(2) For 1984 and later model years the Administrator may adjust or cause to be adjusted any engine parameter which the Administrator has determined to be subject to adjustment for certification, Selective Enforcement Audit and Production. Compliance Audit testing in accordance with § 86.084–22(e)(1), to any setting within the physically adjustable range of that parameter, as determined by the Administrator in accordance with § 86.084–2(e)(3)(ii), prior to the performance of any tests. However, if the idle speed parameter is one which the Administrator has determined to be subject to adjustment, the Administrator shall not adjust it to any setting which causes a lower engine idle speed than would have been possible within the physically adjustable range of the idle speed parameter if the manufacturer had accumulated 125 hours of service on the engine or 4,000 miles on the vehicle under paragraph (c) of this section, all other parameters being identically adjusted for the purpose of the comparison. The manufacturer may be requested to supply information to establish such an alternative minimum idle speed. The Administrator, in making or specifying these adjustments, may consider the effect of the deviation from the manufacturer's recommended setting on emissions performance characteristics as well as the likelihood that similar settings will occur on in-use heavy-duty engines or light-duty trucks. In determining likelihood, the Administrator may consider factors such as, but not limited to, the effect of the adjustment on engine or vehicle performance characteristics and surveillance information from similar in-use engines or vehicles.

(c) Prior to performing emission testing on a PCA test engine, the manufacturer may accumulate on each engine a number of hours of service equal to the greater of 125 hours or the number of hours the manufacturer accumulated during certification on the emission-data engine corresponding to the configuration tested during PCA. Prior to performing emission testing on a PCA test vehicle, the manufacturer may accumulate a number of miles equal to the greater of 4,000 miles or the number of miles the manufacturer accumulated during certification on the emission-data vehicle corresponding to the configuration tested during PCA. Service or mileage accumulation may be performed in any manner the manufacturer desires.

(d) No maintenance shall be performed on test engines or vehicles after selection for testing nor will any test engine or vehicle substitution or replacement be allowed, unless

requested of and approved by the Administrator in advance of the performance of any maintenance or engine or vehicle substitution.

(e) The manufacturer shall expeditiously ship test engines or vehicles from the point of selection to the test facility or other location to meet any other requirements of this subpart. If the test facility is not located at or in close proximity to the point of selection, the manufacturer shall assure that test engines or vehicles arrive at the test facility within 24 hours of selection, except that the Administrator may approve more time based upon a request by the manufacturer accompanied by a satisfactory justification.

(f) If an engine or vehicle cannot complete the service or mileage accumulation or emission tests because of engine or vehicle malfunction, the manufacturer may request that the Administrator authorize the repair of the engine or vehicle. If the engine or vehicle cannot be repaired expeditiously, EPA may delete it from the test sequence.

(g)(1) Heavy-duty engine manufacturers with projected sales bound for the United States market for that year of 30,000 or greater, as made in their respective Applications for Certification, shall complete emission testing at their testing facility on a minimum of two engines per 24 hour period, including voided tests.

(2) Heavy-duty engine manufacturers with projected sales bound for the United States market for that year of less than 30,000, as made in their respective Applications for Certification, Shall complete emission testing at one engine per 24 hour period, including voided tests.

(3) Light-duty truck manufacturers shall complete emission testing on a minimum of four vehicles per 24 hour period, including voided tests.

(4) The Administrator may approve a longer period of time for conducting emission tests based upon a request by a manufacturer accompanied by a satisfactory justification.

(h) The manufacturer shall perform test engine or vehicle selection, shipping, preparation, service or mileage accumulation, and testing in such a manner as to insure that the audit is performed in an expeditious manner.

(i) The manufacturer may retest any engines or vehicles tested during a Production Compliance Audit once a compliance level has been established in accordance with § 86.1112–87 based on the first test on each engine or vehicle. The Administrator may approve retesting at other times based upon a request by the manufacturer accompanied by a satisfactory justification. The manufacturer may test each engine or vehicle a total of three times. The manufacturer shall test each engine or vehicle the same number of times. The manufacturer may accumulate additional service or mileage before conducting a retest, subject to the provisions of paragraph (c) of this section.

§ 86.1112–87 Determining the compliance level and reporting of test results.

(a) A manufacturer that has elected to conduct a PCA in accordance with § 86.1106–87 may establish the compliance level for a pollutant for any engine or vehicle configuration by using the primary PCA sampling plan or either of two optional reduced PCA sampling plans (the fixed reduced sampling plan or the sequential reduced sampling plan) described below. A manufacturer that uses either of the two optional reduced PCA sampling plans may elect to continue testing and establish a compliance level under the primary PCA sampling plan.

(1) A manufacturer that elects to conduct a PCA for a pollutant using the primary PCA sampling plan shall:

(i) Conduct emission tests on 24 engines or vehicles in accordance with § 86.1111–87 for the pollutants for which the PCA was initiated. If the PCA follows an SEA failure, the number of additional tests conducted shall be the difference between 24 and the number of engines or vehicles tested in the SEA. If 24 or more engines or vehicles were tested in the SEA, no additional tests shall be conducted; and

(ii) Rank the final deteriorated test results, as defined by paragraph (e) of this section, obtained for that pollutant in order from the lowest to the highest value. If the PCA follows an SEA failure, all SEA test results for that pollutant shall be included in this ranking.

(iii) The compliance level for that pollutant is the final deteriorated test result in the sequence determined from Table 1 of Appendix XII of these regulations.

(2) A manufacturer that elects to conduct a PCA for a pollutant using the fixed reduced PCA sampling plan shall:

(i) Select a sample size between 3 and 23 engines or vehicles. If the PCA follows an SEA failure, the sample size selected cannot be less than the number of engines or vehicles tested during the SEA; and

(ii) Conduct emission tests on the selected sample in accordance with § 86.1111–87 for the pollutants for which the PCA was initiated.

(iii) The compliance level for the pollutant is the result of the following equation, using the test results obtained in (a)(2)(ii) and all SEA test results for that pollutant if the PCA follows an SEA failure:

$$CL = \bar{X} + Ks$$

where:

CL = The compliance level.

$\bar{X}$ = The mean of the final deteriorated test results, as defined by paragraph (e) of this section.

K = A value that depends on the size of the test sample. See Table 2 of Appendix XII of this part for the value of K that corresponds to the size of the test sample.

s = The sample standard deviation.

The compliance level is rounded to the same number of significant figures contained in the applicable standard in accordance with ASTM E29–67.

(3) A manufacturer that elects to conduct a PCA for a pollutant using the sequential reduced PCA sampling plan shall perform the following:

(i) Select a sample size of 4, 8, 12, 16 or 20 engines or vehicles. If the PCA follows an SEA failure, the sample size selected cannot be less than the number of engines or vehicles tested during the SEA.

(ii) Conduct emission tests on the selected sample in accordance with § 86.1111–87 for the pollutants for which the PCA was initiated.

(iii) The compliance level for the pollutant is the result of the following equation, using the test results obtained in (a)(3)(ii) and all SEA test results for that pollutant if the PCA follows an SEA failure:

$$CL = \bar{X} + Ks$$

where:

CL = The compliance level.

$\bar{X}$ = The mean of the final deteriorated test results, as defined by paragraph (e) of this section.

K = A value that depends on the size of the test sample. See Table 3 of Appendix XII of this part for the value of K that corresponds to the size of the test sample.

s = The sample standard deviation.

The compliance level is rounded to the same number of significant figures contained in the applicable standard in accordance with ASTM E29–67.

(iv) After calculating a compliance level in accordance with (a)(3)(iii), a manufacturer may elect to increase the sample size by 4 engines or vehicles, or a multiple thereof, up to the maximum, including SEA engines or vehicles if any, of 20. Upon that election, the manufacturer shall add the additional engines or vehicles to the sample and perform (a)(3)(ii) and (a)(3)(iii). This election may be repeated if appropriate. A compliance level determined under

this election shall replace a previously determined compliance level.

(b) A fail decision is reached with respect to the upper limit when the compliance level determined in paragraph (a) of this section exceeds the applicable upper limit.

(c) Initial test results are calculated following the Federal Test Procedure specified in § 86.1111–87(a).

(d) Final test results are calculated by summing the initial test results derived in paragraph (c) of this section for each test engine or vehicle, dividing by the number of tests conducted on the engine or vehicle, and rounding in accordance with ASTM E29–67 to the same number of decimal places contained in the applicable standard expressed to one additional significant figure.

(e) Final deteriorated test results.(1) The final deteriorated test results for each heavy-duty engine or light-duty truck tested according to Subparts B, I, N, or P of this part are calculated by applying the final test results by the appropriate deterioration factor, derived from the certification process for the engine family control system combination and model year for the selected configuration to which the test engine or vehicle belongs. If the deterioration factor computed during the certification process is multiplicative and it is less than one, that deterioration factor will be one. If the deterioration factor computed during the certification process is additive and it is less than zero, that deterioration factor will be zero.

(2) The final deteriorated test results are rounded to the same number of significant figures contained in the applicable standard in accordance with ASTM E29–67.

(f) A failed engine or vehicle is one whose final deteriorated test results, for one or more of the applicable exhaust pollutants, exceed:

(1) The applicable emission standard, or

(2) The compliance level established in paragraph (b) of this section.

(g) Within five working days after completion of PCA testing of all engines or vehicles, the manufacturer shall submit to the Administrator a report which includes the following information:

(1) The location and description of the manufacturer's emission test facilities which were utilized to conduct testing reported pursuant to this section;

(2) The applicable standards against which the engines or vehicles were tested;

(3) Deterioration factors for the engine family to which the selected configuration belongs;

(4) A description of the engine or vehicle and any emission-related component selection method used;

(5) For each test conducted:

(i) Test engine or vehicle description, including:

(A) Configuration and engine family identification,

(B) Year, make and build date,

(C) Engine or vehicle identification number, and

(D) Number of hours of service accumulated on engine or number of miles on vehicle prior to testing;

(ii) Location where service or mileage accumulation was conducted and description of accumulation procedure and schedule;

(iii) Test number, date, initial test results before and after rounding, final test results and final deteriorated test results for all emission tests, whether valid or invalid, and the reason for invalidation, if applicable;

(iv) A complete description of any modification, repair, preparation, maintenance, and/or testing which was performed on the test engine or vehicle and has not been reported pursuant to any other paragraph of this subpart and will not be performed on all other production engines or vehicles; and

(v) Any other information the Administrator may request relevant to the determination as to whether the new heavy-duty engines or heavy-duty vehicles being manufactured by the manufacturer do in fact conform with the regulations of this subpart; and

(6) The following statement and endorsement:

This report is submitted pursuant to section 206 of the Clean Air Act. This Production Compliance Audit was conducted in complete conformance with all applicable regulations under 40 CFR Part 86 et seq. All data and information reported herein is, to the best of

———— —'s

(Company Name)————

knowledge, true and accurate. I am aware of the penalties associated with violations of the Clean Air Act and the regulations thereunder.

————————

(Authorized Company Representative)

§ 86.1113–87 Calculation and payment of penalty.

(a) The NCP for each engine or vehicle for which a compliance level has been determined under § 86.1112–87 is calculated according to the formula in paragraph (a)(1) or (a)(2) of this section depending on the value of the compliance level. Each formula contains an annual adjustment factor (AAF_i) which is defined in paragraph (a)(3) of this section. Other terms in the formulas are defined in paragraph (a)(4) of this section.

(1) If the compliance level (CL) is greater than the standard and less than or equal to X (e.g., point CL_1 in figure 1), then:

$$NCP_n = (PR_1)(CL - S)\left(\prod_{i=1}^{n} AAF_i\right)$$

where:

$PR_1 = (F)(MC_{80})$

(2) If the compliance level is greater than X and less than or equal to the upper limit as determined by § 86.1104–87 (e.g., point CL_2 in figure 1), then:

$$NCP_n = \{COC_{80} + (PR_2)(CL - X)\}\left(\prod_{i=1}^{n} AAF_i\right)$$

where:

$$PR_2 = \frac{COC_{80} - COC_{50}}{UL - X}$$

(3) AAF_i has the following values:

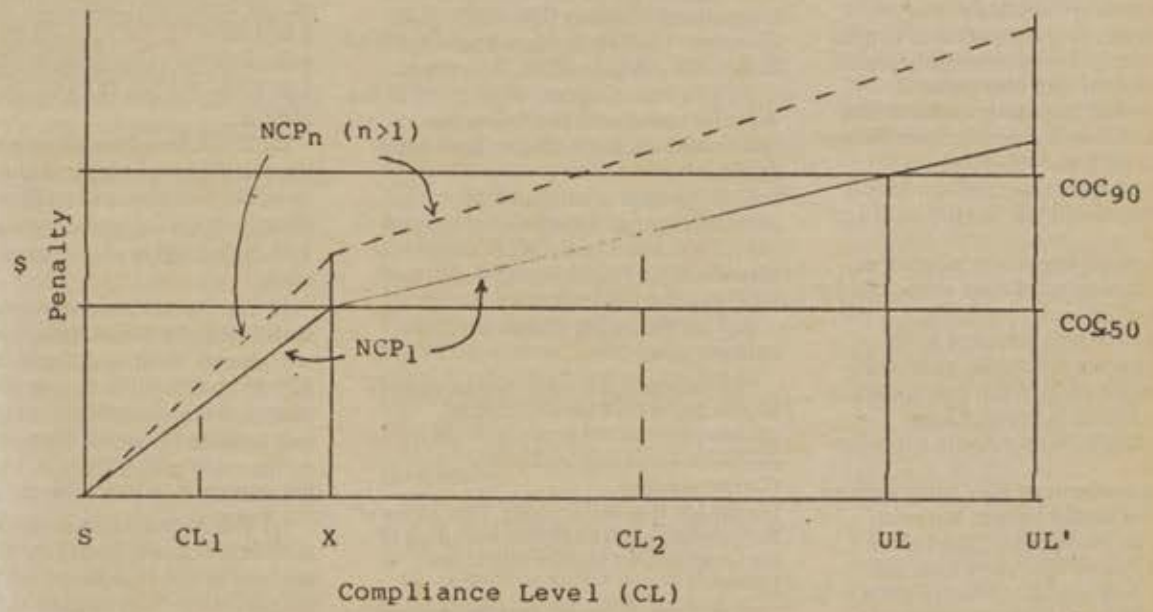
(i) If $frac_{i-1} = 0$, then $AAF_i = 1 + I_{i-1}$

(ii) If $frac_{i-1} > 0$, then:

$$AAF_i = 1 + I_{i-1} + A_i\left[\frac{1}{1 - (frac_{i-1})}\right]$$

Figure 1

Penalty vs. Compliance Level



If $frac_{i-1} > 0.50$, then $frac_{i-1}$ will be set equal to 0.50.

(iii) $AAF_1 = 1$

(iv) In calculating the NCP for year n, the value of $frac_{i-1}$ for i=n will include actual NCP usage through March 31 of model year n–1 and EPA's estimate of additional usage for the remainder of model year n–1. The value of $frac_{i-1}$ will be corrected to reflect actual year end usage of NCPs and a corrected AAF_i will be used to establish NCPs in future years. The correction of the previous year's AAF will not affect the previous year's penalty.

(4) The terms in the above formulas have the following meanings and values which may be determined separately for each subclass and pollutant for which an NCP is offered:

NCP_n = NCP for year n for each applicable engine or vehicle

CL = Compliance level for year n for applicable engines or vehicles

S = Emission standard

UL = Upper limit as determined by § 86.1104–87. Except, if the upper limit is determined by § 86.1104–87(c), the value of UL in paragraph (a)(2) of this section shall be the prior emission standard for that pollutant.

UL' = Upper limit as determined by § 86.1104–87(c). This value is not used in the above formulas.

X = Compliance level above the standard at which NCP_1 equals COC_{50}

$$X = \left(\frac{COC_{50}}{(F)(MC_{50})} \right) + S$$

PR_1 = Penalty rate when CL<X

PR_2 = Penalty rate when X<CL< applicable upper limit

$\prod_{i=1}^{n} AAF_i$ = Running product, i.e., $(AAF_1)x(AAF_2)x \ldots x(AAF_n)$

i = An index representing a year

n = Index representing the number of model years for which the NCP has been available for an engine or vehicle subclass, i.e., n=1 for the first year that the NCP is available; . . . n=n for the nth year that the NCP is available

COC_{50} = Estimate of the average total incremental cost to comply with the standard relative to complying with the upper limit

COC_{90} = Estimate of the 90th percentile total incremental cost to comply with the standard relative to complying with the upper limit

MC_{50} = Estimate of the average marginal cost of compliance (dollars per emission unit) with the standard

F = Factor used to estimate the 90th percentile marginal cost based on the average marginal cost (the minimum value of F is 1.1, the maximum value of F is 1.3)

AAF_i = Annual adjustment factor for year i

$frac_{i-1}$ = Fraction of engines or vehicles of a subclass using NCPs in previous year (year i–1)

A_i = Usage adjustment factor in year i: $A_i = 0.10$ for i=2; $A_i = 0.08$ for i > 2

I_i = Percentage increase in overcome consumer price index in year i

(5) The values of COC_{50}, COC_{90}, MC_{50} and F will be determined for each applicable subclass by EPA based on the cost data used by EPA in setting the applicable emission standard. However, where the rulemaking to establish a specific NCP occurs after the rulemaking to establish the standard, EPA may

augment the data base used to establish the standard by including the best cost and emission performance data available to EPA during the specific NCP rulemaking.

(6) Any NCP calculated under paragraph (a) of this section will be rounded to the nearest dollar in accordance with ASTM E29–67.

(b) The NCP determined in paragraph (a) of this section is assessed against all those engines or vehicles of the nonconforming configuration or engine family produced at all assembly plants and distributed into commerce—

(1) Since the beginning of the model year in the case of a certification failure described by § 86.1106–87(a).

(2) Beginning ten days after an SEA failure described by § 86.1106–87 (b) or (c).

(3) Following implementation of a production running change described by § 86.1106–87(d).

(c) The NCP will continue to be assessed during the model year, until such time, if any, that the configuration or engine family is brought into conformance with applicable emission standards.

(d) A manufacturer may carry over an NCP from a model year to the next model year. There is no limit to the number of years that carryover can continue. The amount of the penalty will increase each year according to paragraph (a).

(e) The Administrator shall notify the manufacturer in writing of the nonconformance penalty established under paragraph (a) of this section after the completion of the PCA under § 86.1112–87.

(f) A manufacturer may request a hearing under § 86.1115–87 as to whether the compliance level (including a compliance level in excess of the upper limit) was determined in accordance with the procedures in § 86.1112–87(a) or whether the nonconformance penalty was calculated in accordance with the procedures in § 86.1113–87(a). If a nonconformance penalty has been established, such hearing must be requested within fifteen (15) days or such other period as may be allowed by the Administrator after the notification of the nonconformance penalty. If a manufacturer wishes to challenge a compliance level in excess of the upper limit, he must request a hearing within fifteen (15) days or such other period as may be allowed by the Administrator after the completion of the Production Compliance Audit.

(g)(1) The nonconformance penalty or penalties assessed under this subpart must be paid within 30 days of the end of each calendar quarter (March 31, June 30, September 30 and December 31), or according to such other payment schedule as the Administrator may approve pursuant to a manufacturer's request, for all nonconforming engines or vehicles produced by a manufacturer in accordance with paragraph (b) of this section and distributed into commerce for that quarter. Payment must be made to the United States Treasury and delivered to: Director, Manufacturers Operations Division (EN–340F), U.S. Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460.

(2) The manufacturer shall provide the Administrator with the following information along with payment under (g)(1):

(i) Corporate identification, identification and quantity of engines or vehicles subject to the NCP, certificate identification (number and date), and NCP payment calculations.

(ii) The following statement and endorsement:

This information is submitted pursuant to section 206 of the Clean Air Act. All information reported herein is, to the best of

_____ —'s

(Company name)

knowledge, true and accurate. I am aware of the penalties associated with violations of the Clean Air Act and the regulations thereunder.

_____

(Authorized Company Representative)

(3) The Administrator may verify the production figures or other documentation submitted under paragraph (g)(2) of this section.

§ 86.1114–87 Suspension and voiding of certificates of conformity.

(a) The certificate of conformity is suspended with respect to any engine or vehicle failing pursuant to paragraph (f) of § 86.1112–87 effective from the time that a fail decision is made for that engine or vehicle.

(b) Once a certificate has been suspended for a failed engine or vehicle as provided for in paragraph (a) of this section, the manufacturer shall take the following actions:

(1) Before the certificate is reinstated for that failed engine or vehicle,

(i) Remedy the nonconformity, and

(ii) Demonstrate that the engine or vehicle conforms to the applicable standards or compliance levels by retesting the engine or vehicle in accordance with these regulations; and

(2) Submit a written report to the Administrator within five working days after successful completion of testing on the failed engine or vehicle, which contains a description of the remedy and test results for each engine or vehicle in addition to other information that may be required by this regulation.

(c) The Administrator may suspend the certificate of conformity if the manufacturer, after electing to conduct a PCA, fails to adhere to the requirements stated in § 86.1106–87(b)(3), (b)(6)(iii), (c)(2), or (c)(5)(iii).

(d) The Administrator may suspend the qualified certificate of conformity issued under the conditions specified in § 86.1106–87 if the manufacturer fails to adhere to the requirements stated in § 86.1106–87(a)(3), (a)(4)(iii), (d)(2)(iii), or (d)(3).

(e) The Administrator may suspend the certificate of conformity or the qualified certificate of conformity if the compliance level as determined in § 86.1112–87(a) is in excess of the upper limit.

(f) The Administrator may void the certificate of conformity if the compliance level as determined in § 86.1112–87(a) is in excess of the upper limit and the manufacturer fails to recall any engines or vehicles introduced into commerce pursuant to § 86.1106–87(a)(4)(ii), (b)(6)(ii), (c)(5)(ii) or (d)(2)(ii).

(g) The Administrator may void the certificate of conformity for those engines or vehicles for which the manufacturer fails to meet the requirements of § 86.1106–87(a)(4)(i), (b)(6)(i), (c)(5)(i), or (d)(2)(i).

(h) The Administrator shall notify the manufacturer in writing of any suspension or voiding of a certificate of conformity in whole or in part, except as provided for in paragraph (a) of this section.

(i) A certificate of conformity suspended or voided under paragaphs (c), (d), (e), (f) or (g) of this section may be reinstated after a written request by the manufacturer and under such terms and conditions as the Administrator may require and after the manufacturer demonstrates compliance with applicable requirements.

(j) After the Administrator suspends or voids a certificate of conformity pursuant to this section or notifies a manufacturer of his intent to suspend or void a certificate of conformity under § 86.087–30(e), and prior to the commencement of a hearing, if any, under § 86.1115–87, if the manufacturer demonstrates to the Administrator's satisfaction that the decision to suspend or void the certificate was based on erroneous information, the Administrator shall reinstate the certificate.

§ 86.1115–87 Hearing procedures for nonconformance determinations and penalties.

(a) *Applicability.* The procedures prescribed by this section shall apply whenever a manufacturer requests a hearing pursuant to § 86.087–30(e)(6)(i), § 86.087–30(e)(7), or § 86.1113–87(f).

(b) *Definitions.* The following definitions shall be applicable to this section:

(1) "Hearing Clerk" shall mean the Hearing Clerk of the Environmental Protection Agency.

(2) "Manufacturer" means a manufacturer contesting a compliance level or penalty determination sent to the manufacturer.

(3) "Party" means the Agency and the manufacturer.

(4) "Presiding Officer" shall mean an Administrative Law Judge appointed pursuant to 5 U.S.C. 3105 (see also 5 CFR Part 930 as amended).

(5) "Judicial Officer" shall mean an officer or employee of the Agency appointed as a Judicial Officer by the Administrator pursuant to this section who shall meet the qualifications and perform functions as follows:

(i) *Officer.* There may be designated for purposes of this section one or more Judicial Officers. As work requires, there may be a Judicial Officer designated to act for the purposes of a particular case.

(ii) *Qualifications.* A Judicial Officer may be a permanent or temporary employee of the Agency who performs other duties for the Agency. Such Judicial Officer shall not be employed by the Office of Air and Radiation or have any connection with the preparation or presentation of evidence for a hearing held pursuant to this subpart.

(iii) *Functions.* The Administrator may consult with a Judicial Officer or delegate all or part of his authority to act in a given case under this section to a Judicial Officer, *provided* that this delegation shall not preclude the Judicial Officer from referring any motion or case to the Administrator when the Judicial Officer determines such referral to be appropriate.

(c) *Request for public hearing.* (1) A manufacturer may request a hearing pursuant to § 86.1113–87(f) if it disagrees with the Administrator's determination of compliance level or penalty calculation or both, or pursuant to §§ 86.085–30(e)(6)(i) or 86.085–30(e)(7) if it disagrees with the Administrator's proposed suspension or voiding of a certificate of conformity. Requests for such a hearing shall be filed no later than 15 days:

(i) After receipt of the Administrator's notification of NCP, if the compliance level is in the allowable range of nonconformity, or

(ii) After completion of the Production Compliance Audit, if the compliance level exceeds the upper limit, or

(iii) After receipt of the Administrator's notification of a proposed suspension or voiding of a certificate of conformity if the hearing is requested pursuant to §§ 86.085–30(e)(6)(i) or 86.085–30(e)(7), unless otherwise specified by the Administrator. The manufacturer shall simultaneously serve two copies of this request upon the Director of the Manufacturers Operations Division and file two copies with the Hearing Clerk. Failure of the manufacturer to request a hearing within the time provided constitutes a waiver of the right to a hearing. Subsequent to the expiration of the period for requesting a hearing as of right, the Administrator may, in his discretion and for good cause shown, grant the manufacturer a hearing to contest the compliance level or penalty calculation.

(2) The request for a public hearing shall contain:

(i) A statement as to which vehicle or engine subclasses or configurations are to be the subject of the hearing;

(ii) A concise statement of the issues to be raised by the manufacturer at the hearing for each vehicle or engine subclass or configuration for which the manufacturer has requested the hearing. Provided, however, that in the case of a hearing requested under § 86.1113–87(f), the hearing shall be restricted to the following issues:

(A) Whether the compliance level was determined in accordance with the procedures in § 86.1112–87(a); or

(B) Whether the penalty was calculated in accordance with the procedures in § 86.1113–87(a).

(iii) A statement specifying reasons why the manufacturer believes it will prevail on the merits on each of the issues so raised; and

(iv) A summary of the evidence which supports the manufacturer's position on each of the issues so raised.

(3) A copy of all requests for public hearings shall be kept on file in the Office of the Hearing Clerk and shall be made available to the public during Agency business hours.

(d) *Summary decision.* (1) In the case of a hearing requested under § 86.1113–87(f) when it clearly appears from the data and other information contained in the request for a hearing that there is no genuine and substantial question of fact with respect to the issues specified in § 86.1115–87(c)(2)(ii), the Administrator will enter an order denying the request for a hearing, and reaffirming the original compliance level determination or penalty calculation.

(2) Any order issued under paragraph (d)(1) of this section shall have the force and effect of a final decision of the Administrator, as issued pursuant to paragraph (v)(4) of this section.

(3) If the Administrator determines that a genuine and substantial question of fact does exist with respect to any of the issues referred to in paragraph (d)(1) of this section, he shall grant the request for a hearing and publish a notice of public hearing in accordance with paragraph (h) of this section.

(e) *Filing and service.* (1) An original and two copies of all documents or papers required or permitted to be filed pursuant to this section shall be filed with the Hearing Clerk. Filing shall be deemed timely if mailed, as determined by the postmark to the Hearing Clerk within the time allowed by this section. If filing is to be accomplished by mailing, the documents shall be sent to the address set forth in the notice of public hearing as described in paragraph (h) of this section.

(2) To the maximum extent possible, testimony shall be presented in written form. Copies of written testimony shall be served upon all parties as soon as practicable prior to the start of the hearing. A certificate of service shall be provided on or accompany each document or paper filed with the Hearing Clerk. Documents to be served upon the Director of the Manufacturers Operations Division shall be sent by registered mail to: Director, Manufacturers Operations Division, U.S. Environmental Protection Agency (EN–340F), 401 M Street, S.W., Washington, D.C. 20460. Service by registered mail is complete upon mailing.

(f) *Time.* (1) In computing any period of time prescribed or allowed by this section, except as otherwise provided, the day of the act or event from which the designated period of time begins to run shall not be included. Saturdays, Sundays, and Federal legal holidays shall be included in computing any such period allowed for the filing of any document or paper, except that when such a period expires on a Saturday, Sunday, or Federal legal holiday, such period shall be extended to include the next following business day.

(2) A prescribed period of time within which a party is required or permitted to do an act shall be computed from the time of service, except that when service is accomplished by mail, three days shall be added to the prescribed period.

(g)(1) *Consolidation.* The Administrator of the Presiding Officer in his discretion may consolidate two or more proceedings to be held under this section for the purpose of resolving one or more issues whenever it appears that such consolidation will expedite or simplify consideration of such issues. Consolidation shall not affect the right of any party to raise issues that could have been raised if consolidation had not occurred.

(2) If a vehicle or engine is determined to be in nonconformity during certification testing under Subpart A of this part, then the manufacturer may wait to challenge the determination until after production compliance auditing and calculation of his penalty and may consolidate challenges to the determination of nonconformity and the compliance level determination or the penalty calculation, without losing any rights he would otherwise have had.

(3) If a vehicle or engine is determined to be in nonconformity during selective enforcement auditing under Subpart K of this part, then the manufacturer must wait to challenge the determination until after the compliance level determination and the penalty calculation, and must consolidate challenges to the determination of nonconformity and the compliance level determination or the calculation of the penalty.

(h) *Notice of public hearings.* (1) Notice of public hearing under this section shall be given by publication in the **Federal Register** and by such other means as the Administrator finds appropriate to provide notice to the public. To the extent possible, hearings under this section shall be scheduled to commence within 30 days of receipt of the application in paragraph (c) of this section.

(i) *Amicus curiae.* Persons not parties to the proceeding wishing to file briefs may do so by leave of the Presiding Officer granted on motion. A motion for leave shall identify the interest of the applicant and shall state the reasons why the proposed amicus brief is desirable.

(j) *Presiding Officer.* The Presiding Officer shall have the duty to conduct a fair and impartial hearing in accordance with 5 U.S.C. §§ 554, 556 and 557 and to take all necessary action to avoid delay in the disposition of the proceedings and to maintain order. He shall have all power consistent with Agency rules and with the Administrative Procedure Act necessary to this end, including the following:

(1) To administer oaths and affirmations;

(2) To rule upon offers of proof and exclude irrelevant or repetitious material;

(3) To regulate the course of the hearings and the conduct of the parties and their counsel therein;

(4) To hold conferences for simplification of the issues or any other proper purpose;

(5) To consider and rule upon all procedural and other motions appropriate in such proceedings;

(6) To require the submission of direct testimony in written form with or without affidavit whenever, in the opinion of the Presiding Officer, oral testimony is not necessary for full and true disclosure of the facts;

(7) To enforce agreements and orders requiring access as authorized by law;

(8) To require the filing of briefs on any matter on which he is required to rule;

(9) To require any party or any witness, during the course of the hearing, to state his position on any issue;

(10) To take or cause depositions to be taken whenever the ends of justice would be served thereby;

(11) To make decisions or recommend decisions to resolve the disputed issues on the record of the hearing;

(12) To issue, upon good cause shown, protective orders as described in paragraph (n) of this section.

(k) *Conferences.* (1) At the discretion of the Presiding Officer, conferences may be held prior to or during any hearing. The Presiding Officer shall direct the Hearing Clerk to notify all parties of the time and location of such conference. At the discretion of the Presiding Officer, persons other than parties may attend. At a conference the Presiding Officer may:

(i) Obtain stipulations and admissions, receive requests and order depositions to be taken, identify disputed issues of fact and law, and require or allow the submission of written testimony from any witness or party;

(ii) Set a hearing schedule for as many of the following as are deemed necessary by the Presiding Officer:

(A) Oral and written statements;

(B) Submission of written direct testimony as required or authorized by the Presiding Officer;

(C) Oral direct and cross-examination of a witness where necessary as prescribed in paragraph (p) of this section; and

(D) Oral argument, if appropriate.

(iii) Identify matters of which official notice may be taken;

(iv) Consider limitation of the number of expert and other witnesses;

(v) Consider the procedure to be followed at the hearing; and

(vi) Consider any other matter that may expedite the hearing or aid in the disposition of the issue.

(2) The results of any conference including all stipulations shall, if not transcribed, be summarized in writing by the Presiding Officer and made part of the record.

(l) *Primary discovery (exchange of witness lists and documents).* (1) At a prehearing conference or within some reasonable time set by the Presiding Officer prior to the hearing, each party shall make available to the other parties the names of the expert and other witnesses the party expects to call, together with a brief summary of their expected testimony and list of all documents and exhibits which the party expects to introduce into evidence. Thereafter, witnesses, documents, or exhibits may be added and summaries of expected testimony amended upon motion by a party.

(2) The Presiding Officer, may upon motion by a party or other person, and for good cause shown, by order

(i) Restrict or defer disclosure by a party of the name of a witness or a narrative summary of the expected testimony of a witness, and

(ii) Prescribe other appropriate measures to protect a witness. Any party affected by any such action shall have an adequate opportunity, once he learns the name of a witness and obtains the narrative summary of this expected testimony, to prepare for the presentation of this case.

(m) *Other discovery.* (1) Except as provided by paragraph (m)(1) of this section, further discovery under this paragraph shall be permitted only upon determination by the Presiding Officer:

(i) That such discovery will not in any way unreasonably delay the proceeding;

(ii) That the information to be obtained is not obtainable voluntarily; and

(iii) That such information has significant probative value. The Presiding Officer shall be guided by the procedures set forth in the Federal Rules of Civil Procedure, where practicable, and the precedents thereunder, except that no discovery shall be undertaken except upon order of the Presiding Officer or upon agreement of the parties.

(2) The Presiding Officer shall order depositions upon oral questions only upon a showing of good cause and upon a finding that:

(i) The information sought cannot be obtained by alternative methods; or

(ii) There is a substantial reason to believe that relevant and probative

evidence may otherwise not be preserved for presentation by a witness at the hearing.

(3) Any party to the proceeding desiring an order of discovery shall make a motion or motions therefor. Such a motion shall set forth:

(i) The circumstances warranting the taking of the discovery;

(ii) The nature of the information expected to be discovered; and

(iii) The proposed time and place where it will be taken. If the Presiding Officer determines the motion should be granted, he shall issue an order for the taking of such discovery together with the conditions and terms thereof.

(4) Failure to comply with an order issued pursuant to this paragraph may lead to the inference that the information to be discovered would be adverse to the person or party from whom the information was sought.

(n) *Protective orders, in camera proceedings.* (1) Upon motion by a party or by the person from whom discovery is sought, and upon a showing by the movant that the disclosure of the information to be discovered, or a particular part thereof (other than emission data), would result in methods or processes entitled to protection as trade secrets of the person being divulged, the Presiding Officer may enter a protective order with respect to such material. Any protective order shall contain such terms governing the treatment of the information as may be appropriate under the circumstances to prevent disclosure outside the hearing, *provided* that the order shall state that the material shall be filed separately from other evidence and exhibits in the hearing. Disclosure shall be limited to parties to the hearing, their counsel and relevant technical consultants, and authorized representatives of the United States concerned with carrying out the Act. Except in the case of the government, disclosure may be limited to counsel for parties who shall not disclose such information to the parties themselves. Except in the case of the government, disclosure to a party or his counsel shall be conditioned on execution of a sworn statement that no disclosure of the information will be made to persons not entitled to receive it under the terms of the protective order. (No such provision is necessary where government employees are concerned because disclosure by them is subject to the terms of 18 U.S.C. 1905.)

(2)(i) A party or person seeking a protective order may be permitted to make all or part of the required showing in camera. A record shall be made of such in camera proceedings. If the Presiding Officer enters a protective order following a showing in camera, the record of such showing shall be sealed and preserved and made available to the Agency or court in the event of appeal.

(ii) Attendance at any in camera proceeding may be limited to the Presiding Officer, representatives of the Agency, and the person or party seeking the protective order.

(3) Any party, subject to the terms and conditions of any protective order issued pursuant to paragraph (n)(1) of this section, that desires to make use of any in camera documents or testimony in the presentation of his case shall apply to the Presiding Officer by motion for permission to do so, and shall state the justification for the motion. The Presiding Officer, in granting any such motion, shall enter an order protecting the rights of the affected persons and parties as far as is practicable, and preventing unnecessary disclosure of such information and testimony concerning such information.

(4) In the submittal of proposed findings, briefs, or other papers, counsel for all parties shall make a good faith attempt to refrain from disclosing the specific details of in camera documents and testimony. This shall not preclude references in such proposed findings, briefs, or other papers to such documents or testimony. This shall not preclude references in such proposed findings, briefs, or other papers marked "confidential," which shall become part of the in camera record.

(o) *Motions.* (1) All motions, except those made orally during the course of the hearing, shall be in writing and shall state with particularity the grounds therefore, shall set forth the relief or order sought, and shall be filed with the Hearing Clerk and served upon all parties.

(2) Within such time as may be fixed by the Administrator, the judicial officer, or the Presiding Officer, as appropriate, any party may serve and file an answer to the motion. The motion shall, if requested by the Administrator, the judicial officer, or the Presiding Officer, as appropriate, serve and file reply papers, within the time set by the request.

(3) The Presiding Officer shall rule upon all motions filed or made prior to the filing of his decision or accelerated decision, as appropriate. The Administrator of the judicial officer, as appropriate, shall rule upon all motions filed prior to the appointment of a Presiding Officer and all motions filed after the filing of the decision of the Presiding Officer or accelerated decision. Oral argument of motions will be permitted only if the Presiding Officer, the Administrator or the judicial officer, as appropriate, deems it necessary.

(p) *Evidence.* (1) The official transcripts and exhibits, together with all papers and requests filed in the proceeding, shall constitute the record. Immaterial or irrelevent parts of an admissible document shall be segregated and excluded so far as practicable. Documents or parts thereof subject to a protective order under paragraph (n) of this section shall be segregated. Evidence may be received at the hearing even though inadmissible under the rules of evidence applicable to judicial proceedings. The weight to be given evidence shall be determined by its reliability and probative value.

(2) The Presiding Officer shall allow the parties to examine and cross-examine a witness to the extent that such examination and cross-examination is necessary for a full and true disclosure of the facts.

(3) Rulings of the Presiding Officer on the admissibility of evidence, the propriety of examination and cross-examination and other procedural matters shall appear in the record.

(4) Parties shall automatically be presumed to have taken exception to an adverse ruling.

(q) *Record.* (1) Hearings shall be stenographically reported and transcribed and the original transcripts shall be part of the record. Copies of the records shall be filed with the Hearing Clerk and made available during Agency business hours for public inspection. Any person who wants a copy of the record of the hearing or any part thereof, except as provided in paragraph (n) of this section, shall be entitled to the same upon payment of the cost thereof.

(2) The official transcripts and exhibits, together with all papers and requests filed in the proceeding, shall constitute the record.

(r) *Proposed findings, conclusions.* (1) Within 30 days of the close of the reception of evidence, or within such longer time as may be fixed by the Presiding Officer, any party may submit for the consideration of the Presiding Officer proposed findings of fact, conclusions of law, and a proposed order, together with reasons therefore and briefs in support thereof. Such proposals shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied upon.

(2) The record shall show the Presiding Officer's ruling on the proposed findings and conclusions except when his order disposing of the

proceeding otherwise informs the parties of the action taken by him.

(s) *Decision of the Presiding Officer.* (1) Unless extended by the Administrator, the Presiding Officer shall issue and file with the Hearing Clerk his decision within 30 days after the period for filing proposed findings has expired, as provided for in paragraph (r) of this section.

(2) The Presiding Officer's decision shall become the decision of the Administrator (i) 10 days after issuance thereof, if no notice of intention to appeal as described in paragraph (t) of this section is filed, unless in the interim the Administrator shall have taken action to review or stay the effective date of the decision; or (ii) 5 days after expiration of the period allowed by paragraph (t)(1) of this section for perfection of an appeal, if a notice of intention to appeal is filed but the appeal is not perfected, unless within that 5 day period the Administrator shall have taken action to review or stay the effective date of the decision;

(3) The Presiding Officer's decision shall include a statement of findings and conclusions, as well as the reasons or basis therefore, upon all the material issues of fact or law presented on the record and an appropriate rule or order. Such decision shall be supported by substantial evidence and based upon a consideration of the whole record.

(4) At any time prior to the issuance of his decision, the Presiding Officer may reopen the proceeding for the reception of further evidence. Except for the correction of clerical errors, the jurisdiction of the Presiding Officer is terminated upon the issuance of his decision.

(t) *Appeal from the decision of the Presiding Officer.* (1) Any party to a proceeding may appeal the Presiding Officer's decision to the Administrator, *provided* that within 10 days after issuance of the Presiding Officer's decision such party files a notice of intention to appeal and an appeal brief within 20 days of such decision.

(2) When an appeal is taken from the decision of the Presiding Officer, any party may file a brief with respect to such appeal. The brief shall be filed within the same time limits as the appellant's brief.

(3) Any brief filed pursuant to this paragraph shall contain in the order indicated, the following:

(i) A subject index of the matter in the brief, with page references, and a table of cases (alphabetically arranged), textbooks, statutes, and other material cited, with page references thereto;

(ii) A specification of the issues intended to be appealed;

(iii) The argument, presenting clearly the points of fact and law relied upon in support of the position taken on each issue, with specific page references to the record and legal or other material relied upon; and

(iv) A proposed order for the Administrator's consideration if different from the order contained in the Presiding Officer's decision.

(4) No brief in excess of 15 pages shall be filed without leave of the Administrator.

(5) Oral argument will be allowed only in the discretion of the Administrator.

(u) *Review of the Presiding Officer's decision in absence of appeal.* (1) If, after the expiration of the period for taking an appeal as provided for by paragraph (t) of this section, no notice of intention to appeal the decision of the Presiding Officer has been filed, or if filed, not perfected, the Hearing Clerk shall so notify the Administrator.

(2) The Administrator, upon receipt of notice from the Hearing Clerk that no notice of intention to appeal has been filed, or if filed, not perfected pursuant to paragraph (t)(1) of this section, may, on his own motion, within 14 days after notice from the Hearing Clerk, review the decision of the Presiding Officer. Notice of the intention of the Administrator to review the decision of the Presiding Officer shall be given to all parties and shall set forth the scope of such review and the issues which shall be considered and shall make provisions for filing of briefs.

(v) *Decision of appeal or review.* (1) Upon appeal from or review of the Presiding Officer's decision, the Administrator shall consider such parts of the record as are cited or as may be necessary to resolve the issues presented and in addition shall, to the extent necessary or desirable, exercise all the powers which he could have exercised if he had presided at the hearing.

(2) In rendering his decision, the Administrator shall adopt, modify or set aside the findings, conclusions, and order contained in the decision of the Presiding Officer and shall set forth in his decision a statement of the reasons or bases for this action.

(3) In those cases where the Administrator believes that he should have further information or additional views of the parties as to the form and content of the rule or order to be issued, the Administrator, in his discretion, may withhold final action pending the receipt of such additional information or views, or may remand the case to the Presiding Officer.

(4) Any decision rendered under this paragraph which completed disposition of a case shall be a final decision of the Administrator.

(w) *Reconsideration.* Any party may file with the Administrator a petition for reconsideration of such decision, setting forth the relief desired and the grounds in support thereof. This petition must be filed within 20 days of the issuance of the Administrator's decision, and must be confined to new questions raised by the decision or final order and which the petitioner had no opportunity to argue before the Presiding Officer or the Administrator, unless otherwise specified by the Administrator. Subsequent to the expiration of the period for petitioning for reconsideration, the Administrator may, in his descretion and for good cause shown, grant the manufacturer a hearing to contest the compliance level or the penalty calculation, even though such issues may have been raised in the previous proceeding. Any party desiring to oppose such a petition, shall file an answer thereto within 10 days after the filing of the petition. The filing of a petition for reconsideration shall not operate to stay the effective date of the decision or order or to toll the running of any statutory time period affecting such decision or order unless specifically so ordered by the Administrator.

(x) *Accelerated decision, dismissal.* (1) The Presiding Officer, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the Agency or the manufacturer as to all or any part of the proceeding, without further hearing or upon such limited additional evidence such as affidavits as he may require, or dismiss any party with prejudice, for any of the following reasons:

(i) Failure to state a claim upon which relief can be granted, or direct or collateral estoppel;

(ii) The lack of any genuine issue of material fact, causing a party to be entitled to judgment as a matter of law; or

(iii) Such other and further reasons as are just, including specifically, failure to obey a procedural order of the Presiding Officer.

(2) If under this paragraph an accelerated decision is issued as to all the issues and claims joined in the proceeding, the decision shall be treated for the purposes of these procedures as the decision of the Presiding Officer, as provided in paragraph (s) of this section.

(3) If under this paragraph, judgment is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material

facts exist without substantial controversy and what material facts are actually and in good faith controverted. He shall thereupon issue an order specifying the facts which appear without substantial controversy, and the issues and claims upon which the hearing will proceed.

(y) *Conclusion of hearing.* (1) If, after the expiration of the period for taking an appeal as provided by paragraph (t) of this section, no appeal has been taken from the Presiding Officer's decision, and after the expiration of the period for review by the Administrator on his own motion as provided for by paragraph (u) of this section, the Administrator does not move to review such decision, the hearing will be deemed to have ended at the expiration of all periods allowed for such appeal and review.

(2) If an appeal of the Presiding Officer's decision is taken pursuant to paragraph (t) of this section, or if, in the absence of such appeal the Administrator moves to review the decision of the Presiding Officer pursuant to paragraph (u) of this section, the hearing will be deemed to have ended upon issuance of a final decision by the Administrator.

(z) *Judicial review.* (1) The Administrator hereby designates the General Counsel, Environmental Protection Agency, as the officer upon whom copies of any petition for judicial review shall be served. Such officer shall be responsible for filing in the court the record on which the order of the Administrator is based.

11. The table of contents of Part 86 is amended by adding the following appendix:

* * * * *

Appendix XII—Tables for Production Compliance Auditing of Heavy-Duty Engines and Heavy-Duty Vehicles, Including Light-Duty Trucks.

12. Part 86 is amended by adding Appendix XII as follows:

Appendix XII—Tables for Production Compliance Auditing of Heavy-Duty Engines and Heavy-Duty Vehicles, Including Light-Duty Trucks

TABLE I.—COMPLIANCE LEVEL DETERMINATION USING THE PRIMARY PCA SAMPLING PLAN

PCA test sample size.[1]	Compliance level [2]
24	15
25	15
26	16
27	17
28	17
29	18
30	18
31	19
32	20
33	20
34	21
35	21
36	22
37	23
38	23
39	24
40	24
41	25
42	26
43	26
44	27
45	27
46	28
47	29
48	29
49	30
50	30
51	31
52	32
53	32
54	33
55	33
56	34
57	35
58	35
59	36
60	36

[1] Including the number of SEA tests if applicable.
[2] Is the test result of the sequence number: (The lowest test result is sequence No. 1).

TABLE 2.—VALUES OF K FOR THE REDUCED FIXED PCA SAMPLING PLAN

Sample size:	Value of K
3	1.602
4	1.114
5	0.895
6	0.764
7	0.674
8	0.608
9	0.555
10	0.513
11	0.478
12	0.448
13	0.422
14	0.399
15	0.379
16	0.360
17	0.343
18	0.328
19	0.314
20	0.301
21	0.289
22	0.277
23	0.268

TABLE 3.—VALUES OF K FOR THE REDUCED SEQUENTIAL PCA SAMPLING PLAN

Sample size:	Value of K
4	1.671
8	0.912
12	0.672
16	0.540
20	0.451

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 86

[FRL-2871-4]

Control of Air Pollution From New Motor Vehicles and New Motor Vehicle Engines; Nonconformance Penalties for Heavy-Duty Engines and Heavy-Duty Vehicles, Including Light-Duty Trucks

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed rulemaking.

SUMMARY: EPA is proposing that nonconformance penalties (NCPs) be made available for specific emission standards taking effect in model years 1987 and 1988. The availability of NCPs would allow a manufacturer of heavy-duty engines (HDEs) or heavy-duty vehicles (HDVs) whose engines or vehicles fail to conform with certain applicable emission standards, but which do not exceed a designated upper limit, to be issued a certificate of conformity upon payment of a monetary penalty. An "upper limit" is an emission level, established by regulation and appropriate to a specific pollutant, above which an HDE or HDV could not be issued a certificate.

This notice proposes specific emission standards for which NCPs would be made available, as well as specific upper limits and penalty rates for those emission standards. It follows the generic NCP rule, published elsewhere in today's **Federal Register**, which established the criteria for the availability of NCPs, the method of establishing upper limits, a testing program called Production Compliance Auditing (PCA), a penalty formula to determine the dollar amount of the NCP, and other general aspects of an NCP rule. This notice also proposes a few general aspects of an NCP rule which were not fully addressed in the generic rule.

Regulations affected by this rulemaking are codified in Subpart L of 40 CFR Part 86.

DATES: *Public Hearing:* EPA will hold a public hearing on this notice on September 19, 1985 beginning at 9:00 a.m., provided that it is requested. Any person desiring to request the hearing must notify the Agency by September 9, 1985. If the hearing is not requested, it will be cancelled by a separate notice in the **Federal Register**. Requests for or questions about the hearing should be directed to the EPA contact person listed below. To the extent possible, any person desiring to participate in the hearing should, prior to the hearing, notify the EPA contact person of his or her intention and submit an outline of the points to be discussed and the time needed to discuss these points. Pursuant to section 307 of the Clean Air Act, the record of the hearing, if held, will be kept open for 30 days following its conclusion to provide an opportunity for submission of rebuttal and other information.

Public Comment: All comments should be received on or before September 30, 1985 or within 30 days following the conclusion of the public hearing, if held, whichever is later. If the hearing is not requested, it will be cancelled by a separate notice in the **Federal Register**.

ADDRESSES: The hearing will take place in the conference room at the EPA Motor Vehicle Emissions Laboratory, 2565 Plymouth Road, Ann Arbor, MI, 48105.

Send written comments to: Public Docket EN-85-02, Central Docket Section [A-130], Environmental Protection Agency, 401 M Street, SW., Washington, D.C., 20460. If possible, a copy of the written comments should be submitted to the EPA contact person listed below.

Public Docket: Copies of materials relevant to this rulemaking proceeding are contained in Public Docket EN-85-02 at the Central Docket Section of the U.S. Environmental Protection Agency, West Tower Lobby/Gallery 1, 401 M Street, SW., Washington, D.C. 20460, and are available for review between the hours of 8:00 a.m. and 4:00 p.m., Monday through Friday. As provided in 40 CFR Part 2, a reasonable fee may be charged for copying services.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Montgomery or Mr. Claude Magnuson, Manufacturers Operations Division [EN-340F], Environmental Protection Agency, 401 M Street, SW., Washington, D.C., 20460, telephone (202) 382-2487 or (202) 382-2547.

SUPPLEMENTARY INFORMATION

A. Statutory Authority

Section 206(g) of the Clean Air Act (the Act), 42 U.S.C. 7525(g), requires EPA to issue a certificate of conformity for heavy-duty vehicles or engines which exceed a section 202(a) emissions standard, but do not exceed an upper limit associated with that standard, if the manufacturer pays a nonconformance penalty (NCP) established by rulemaking. In placing section 206(g) in the Clean Air Act amendments of 1977, Congress intended NCPs as a response to perceived problems with technology-forcing heavy-duty emissions standards.* Following *International Harvester* v. *Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973), Congress realized the dilemma that technology-forcing standards were likely to cause. If strict standards were maintained, then some manufacturers (technological laggards) might be unable to comply initially and would be forced out of the marketplace. NCPs were intended to remedy this potential problem; the laggards would have a temporary alternative to permit them to sell their engineers or vehicles through payment of a penalty, yet leaders would not suffer an economic disadvantage compared to nonconforming manufacturers, because the NCP would be based, in part, on the amount of money the laggard and his customer saved from the nonconforming engine or vehicle.

Under section 206(g)(1), NCPs may be offered for heavy-duty vehicles (HDVs) and heavy-duty engines (HDEs), which are engines to be installed in heavy-duty vehicles. HDVs are defined by section 202(b)(3)(C) as vehicles in excess of 6,000 pounds gross vehicle weight rating (GVWR). They include the part of the light-duty truck (LDT) class between 6,001 and 8,500 pounds GVWR—the heavy light-duty trucks. The penalty may vary by pollutant and by class or category of vehicle or engine.

Section 206(g)(3) requires NCPs to be designed so as to:

- Increase with the degree of emission nonconformity;
- Increase periodically to provide incentive for nonconforming manufacturers to achieve the emission standards; and
- Remove and competitive disadvantage to conforming manufacturers.

Section 206(g) authorizes EPA to require testing of production vehicles or engines in order to determine the emission level on which the penalty is based. This emission level, the "compliance level," becomes the benchmark for warranty and recall liability; the manufacturer who elects the NCP may be responsible for warranty or recall liability if its vehicle or engine exceeds the compliance level in-use. It would not have in-use warranty or recall liability for emissions levels above the standard but below the compliance level.

However, if the emission level of a vehicle or engine exceeds the upper

* The existence of NCPs, however, will not change the criteria under which the standards have been and will be set under section 202.

limit of nonconformity, the vehicle or engine would not qualify for an NCP under section 206(g) and no certificate of conformity could be issued to the manufacturer.

B. Background

This notice of proposed rulemaking (NPRM) follows the recently completed generic phase (Phase I) of the NCP rulemaking published elsewhere in this issue. During the generic phase, EPA published regulations concerning when NCPs will be made available for emissions standards, how upper limits will be chosen, the general formula for calculating the penalties, and procedures for testing the degree of emissions nonconformity.

This proposal begins the second phase (Phase II) of the NCP rulemaking. EPA has applied the Phase I concepts and is proposing particular emissions standards for which NCPs will be available, the upper limits for those standards, and numerical values for the variables in the penalty rate formula for particular subclasses of engines. EPA is also proposing a few general aspects of an NCP rule which were not fully addressed in Phase I.

The U.S. District Court for the District of Columbia in *Natural Resources Defense Council* v. *Ruckelshaus*, No. 84-758 (D.D.C. Sept. 14, 1984), ordered EPA to publish the proposed rule for Phase II by August 31, 1985. Under the same court order, EPA must publish the final rule for Phase II by December 31, 1985.

C. Eligibility for Nonconformance Penalties

1. Review of NCP Eligibility Criteria

The Phase I NCP rulemaking established three "generic" criteria for determining the emission standards for which NCPs will be offered.

First, the emission standard in question must become significantly more difficult to meet. This criterion may be met when either the standard itself becomes more stringent or compliance with it is made more difficult because another standard has become more stringent. In the latter case, an NCP for either standard may be appropriate.

Second, substantial work must be required for compliance with the standard. "Substantial work" is defined as the application of technology not previously used in that vehicle/engine class or subclass or the significant modification of existing technology or design parameters needed to bring the vehicle or engine into compliance. Obviously, substantial effort would not be required if many manufacturers' vehicles/engines were already meeting the revised standard or could do so with relatively minor calibration changes or modifications.

Finally, EPA must determine that a technological laggard is likely to develop. A technological laggard is a manufacturer who cannot meet the particular emission standard due to technological (not economic) difficulties and who consequently might be forced out of the marketplace. EPA's determination will be based on an evaluation of the two criteria discussed above. However, even when these criteria are met, EPA may find that no technological laggard is likely. For example, a standard may become significantly more stringent and substantial effort might be required for compliance, but if that significant effort involves transfer of technology already well-developed for other vehicle classes, a technological laggard probably would not develop.

2. Review of Emission Standards for NCP Eligibility

This section of the preamble reviews the new and revised 1987 and 1988 heavy light-duty truck (HLDT) and heavy-duty engine (HDE) emission standards and indicates which of them EPA believes should be eligible for NCPs. Eligibility for NCPs is determined by evaluating the requirements of each new or revised standard against the criteria discussed above.

Seven new or revised standards effective in 1987 and 1988 are potentially eligible for NCPs. These are:

—1987 diesel HLDT (HLDDT) particulate standard: 0.26 grams per mile (g/mi)
—1987 gasoline-fueled light HDE (LHDGE) HC standard: 1.1 grams per brake horsepower-hour (g/BHP-hr)
—1987 LHDGE CO standard: 14.4 g/BHP-hr
—1988 HLDT NO_x standard: 1.7 g/mi
—1988 gasoline-fueled HDE (HDGE) NO_x standard: 6.0 g/BHP-hr
—1988 diesel HDE (HDDE) NO_x standard: 6.0 g/BHP-hr
—1988 HDDE Particulate standard: 0.60 g/BHP-hr

Eligibility for NCPs for longer term (1989 and later) standards will be determined in subsequent rulemaking(s).

a. 1987 HLDDT Particulate Standard

Tightening of the diesel HLDT (HLDDT) particulate standard from 0.60 g/mi to 0.26 g/mi results in a standard that is significantly more difficult to meet. EPA's technological feasibility analysis indicates that most manufacturers will have to use trap oxidizers on a significant percentage of their production vehicles (even assuming use of the averaging provisions of the new regulations) to comply with this standard. Use of trap oxidizers represents the application of new technology to HLDDTs and thus a technological laggard may exist. Although trap oxidizers have seen limited usage on one manufacturer's production vehicles designed to meet the 1985 California diesel light-duty vehicle particulate standard (0.4 g/mile), trap oxidizers have yet to be employed on any LDDTs and particularly on the heavier, potentially higher-emitting HLDDTs that are the subject of this rulemaking. Given the significant decrease in the 1987 HLDDT particulate standard and the likelihood that a new technology will be needed for HLDDTs to meet the standard, EPA believes it is appropriate to offer an NCP for the 1987 HLDDT particulate emission standard.

b. 1987 LHDGE HC/CO Standard

The more stringent standards for gasoline-fueled HDEs (HDGEs) in 1987 apply only to engines intended for use in vehicles rated between 8,501–14,000 lbs. GVWR, the light HDGEs (LHDGEs). Engines for the heavier weight class (above 14,000 lbs. GVWR) will continue to comply with the 1985 HC and CO standards of 1.9 and 37.1 g/BHP-hr, respectively, while LHDGE's will have to comply with lower HC and CO emission standards of 1.1 and 14.4 g/BHP-hr, respectively. The 1.1/14.4 g/BHP-hr HC/CO standards represent the 90 percent reduction from uncontrolled levels required by the Act and are considerably more difficult to meet than the 1985 standards. While one or two LHDGE families may be able to meet the 1987 standards in their present configurations, EPA expects that most if not all LHDGE families will add oxidation catalysts to meet the standards. Although this involves transfer of technology developed for LDVs and LDTs, it represents the first application of such technology to LHDGEs certified under transient operating conditions.**

While some LHDGEs may be able to directly apply LDT catalyst technology, EPA expects that there may be LHDGEs requiring unique catalyst designs. For example, manufacturers have expressed concern that the heavier vehicle weight,

** For several model years, one manufacturer has used a catalyst to meet the California HDE HC standard, but this was to be met in the steady state test instead of in the more demanding transient test cycle.

greater frontal area and more extreme overall operating conditions of some HDGEs may lead to catalyst durability problems due to potentially higher exhaust system temperatures.

Given that the 1987 LHDGE HC and CO standards represent significant reductions over 1985 levels and that the primary control technique (oxidation catalysts) has essentially not been used previously on LHDGEs, EPA believes a technological laggard may develop and proposes that NCPs be made available for the 1987 LHDGE HC and CO emission standards.

c. 1988 HLDT NO_x Standard

Reduction in the HLDT NO_x emission standard from the current 2.3 g/mi to 1.7 g/mi represents an approximately 25 percent increase in stringency.

However, EPA does not believe at this time that a technological laggard is likely to develop. In the Regulatory Impact Analysis (RIA) supporting the 1988 NO_x standard, EPA found that all current manufacturers of gasoline-fueled HLDTs (HLDGTs) are in compliance with a 1985 California NO_x standard that is slightly more stringent than the 1988 federal standard. California allows certification to a NO_x standard of 1.0 g/mi over 50,000 miles or 1.5 g/mi over 100,000 miles. These California HLDGTs use 3-way closed loop catalyst technology to achieve California NO_x certification levels below 1.0 g/mi over 50,000 miles. Given the California experience, no technological laggards among HLDGTs are likely.

The problem of compliance for diesel-fueled HLDTs (HLDDTs) is somewhat complicated by a stringent particulate standard. There is currently one HLDDT manufacturer affected, and this manufacturer's California versions have been certified for 1985 at NO_x levels of 1.3 – 1.7 g/mi using electronically controlled EGR systems, with particulate levels of 0.32 g/mi for both configurations tested. Application of trap oxidizers to achieve compliance with the particulate standard of 0.26 g/mi may indirectly affect NO_x controls, but probably not to an extent that compliance with the NO_x standard will be jeopardized.

EPA tentatively concludes that no technological laggards will likely develop in meeting the 1988 HLDT NO_x standard. Therefore, EPA proposes not to offer NCPs for the 1988 HLDT NO_x standard.

d. 1988 HDGE NO_x Standard

Although the NO_x standard for gasoline-fueled HDs (HDGEs) drops from the current level of 10.6 g/BHP-hr to 6.0 g/BHP-hr, the actual reductions required are substantially less. The highest 1985 NO_x certification level on HDGEs is about 8.5 g/BHP-hr and the mean is about 7.0 g/BHP-hr. EPA expects that manufacturers will utilize EGR and timing calibration changes and possibly some other engine modifications, rather than new technology, for compliance. In the RIA supporting the standard, EPA estimated that only about one-third of current models would require engine modifications, the remainder being able to achieve compliance through calibration changes.

Under the generic NCP rules, calibration changes do not qualify as "substantial work". On the other hand, engine modifications may require substantial effort on the part of some manufacturers. However, EPA does not now believe that any technological laggards are likely. Thus, EPA proposes not to offer NCPs for the 1988 HDGE NO_x standard.

e. 1988 HDDE Particulate Standard

Prior to the 1988 model year, diesel HDEs (HDDEs) have not been required to comply with a particulate standard. Thus, with the exception of the diesel smoke standards, HDDE particulate has essentially been uncontrolled. Taken alone, the fact that this is a new standard for HDDEs would not be adequate reason to make NCPs available. However, there are several other factors which must be considered.

First, coupled with the new standard is a new test procedure requiring the acquisition of several new equipment items and the development of expertise in running the procedure. Second, there are a large variety of engine designs in use with a variety of control techniques to be evaluated. In some cases these control techniques represent new technology for HDDEs. Given this variety of engine designs and the control techniques to consider, there is a possibility that in the near term a manufacturer may choose and develop an unsuccessful control strategy. These control technology considerations are exacerbated by the fact that a number of manufacturers have little particulate control experience. Finally, the control techniques used to meet the 1988 HDDE NO_x standard are likely to put upward pressure on particulate levels and make compliance with the particulate standard somewhat more difficult.

Given these considerations, EPA cannot at this time preclude the development of a technological laggard and therefore proposes that an NCP be made available for the 1988 HDDE particulate standard of 0.60 g/BHP-hr.

f. 1988 HDDE NO_x Standard

For the 1988 model year, the NO_x standard for HDDEs drops from 10.7 g/BHP-hr to 6.0 g/BHP-hr. For 1985, HDDE NO_x levels ranged from around 6.0 g/BHP-hr to 10.1 g/BHP-hr for federal families, with an average of about 8 g/BHP-hr. Thus, the reductions required range from 0 to 41 percent with an average of 20 percent. While these reductions are relatively large on a percentage basis, EPA does not expect new control technology will be needed to achieve these reductions. Indeed, 1985 California certification information indicates that many HDDE models can meet the 1988 Federal NO_x standard. However, in the past these models have not had to meet NO_x and particulate standards simultaneously. Some particulate control strategies may have an adverse effect on current NO_x levels, thus making compliance with the 1988 HDDE NO_x standard more difficult. Some NO_x control strategies may also adversely affect fuel consumption.

While EPA believes that most manufacturers will be able to meet both the NO_x and particulate standards in 1988, concerns about fuel consumption and the potential difficulties in meeting the particulate standard described above may lead to the development of a technological laggard for NO_x. Consequently, EPA proposes that an NCP be made available for the 1988 HDDE NO_x standard.

3. Interaction With Other Standards

As discussed above, emission control strategies sometimes exhibit various "tradeoffs", i.e., those strategies that decrease emissions of one pollutant may increase emissions of another pollutant. For example, modifications that reduce NO_x emissions may increase HC emissions in gasoline engines or HC and particulate emissions in diesel engines. This section reviews the 1987 and 1988 HLDT and HDE emission standards discussed above in terms of whether the trade-off effects of complying with them are significant enough to warrant offering NCPs for other standards.

a. 1987 HLDDT Particulate Standard

On some engine models, modifications used to reduce particulate emissions may increase HC or NO_x emissions. However, EPA expects that the primary means of achieving compliance with the particulate standard will be trap-oxidizers. After-treatment devices such as these should not significantly affect engine-out HC or NO_x emissions. Consequently, no major adverse effects due to emission trade-off effects appear likely, and EPA proposes not to offer

NCPs for the HC or NO_x emission standards in 1987 or for the 1988 HLDDT NO_x standard.

b. 1987 LHDGE HC/CO Standards

A possible interaction could occur because some control techniques used to meet more stringent HC/CO standards could result in an increase in NO_x emissions. EPA believes that this possibility is unlikely, however, because the primary means of achieving compliance with the more stringent HC/CO standards will be oxidation catalysts, which are after treatment devices. As such, they should have no significant negative effects on NO_x emissions. Thus, EPA does not now believe that the more stringent 1987 HC/CO emission standards will cause any NO_x compliance problems, and therefore proposes not to offer an NCP for the 1987 HDGE NO_x standard.

c. 1988 HLDT NO_x Standard

For the 1988 HLDT NO_x standard, the possible interactions are with HC emissions from HLDGTS and with HC and particulate emissions (discussed previously) from HLDDTs. Again, however, EPA believes that HLDT manufacturers will elect to utilize after-treatment devices and trade-off effects will thus not be significant.

HLDGT manufacturers are expected to use 3-way closed loop (3WCL) control systems, which control HC, CO and NO_x emissions, while HLDDT manufacturers are expected to use trap-oxidizers for particulate control. In the case of HLDGTs, the 3WCL systems reduce emission levels of all three major pollutants, so controlling NO_x should not increase HC levels. Therefore, EPA does not forsee any interaction problems for HLDGTs.

For HLDDTs, EPA does not anticipate that the trade-off effects of controlling NO_x will raise HC emissions significantly. In fact, some trap-oxidizer designs which will be used to meet the 1988 particulate standard will also reduce HC emissions slightly. The primary current HLDDT family, which is certified for sale in California at NO_x levels at or below the 1988 standard, exhibits HC certification levels of 0.21–0.22 g/mi, while the Federal HC standard is 0.80 g/mi. For these reasons, EPA does not expect any problems due to interaction of the standards for HLDDTs. Therefore, EPA proposes not to offer NCPs for 1988 HLDT HC emission standard.

d. 1988 LHDGE NO_x Standard

Although a more stringent 1988 LHDGE NO_x standard could theoretically make it more difficult for manufacturers to meet the 1987 and later model year LHDGE HC standard, EPA does not believe such problems will actually occur. Since after-treatment devices (oxidation catalysts) are expected to be the control technology used to meet the 1987 HC/CO standards, manufacturers will then have the flexibility to calibrate their engines for lower NO_x emissions. The RIA supporting the NO_x standard estimated that combining EGR with a small amount of timing retard would enable manufacturers to make the reductions in NO_x emissions required. Such modifications should not increase HC emissions beyond the control capabilities of typical oxidation catalysts. HC certification levels for 1987 LHDGEs equipped with catalysts are expected to be below the standard. EPA therefore expects no interaction problems for LHDEs due to the more stringent 1988 NO_x standards, and proposes not to offer NCPs for the LHDGE HC emission standard in 1988.

e. 1988 HHDGE NO_x Standard

Even though the 1988 HDGE HC standard does not change over 1985 levels for HHDGEs, it may be more difficult to meet in 1988 as a result of the increased stringency of the 1988 NO_x standard. While some of the NO_x control techniques for HDGEs outlined in the HDGE NO_x RIA may put upward pressure on HC emission levels, the RIA mentions several other modification and calibration changes which manufacturers can take to eliminate any such impact. This is demonstrated by the 1985 HDGE certification information for those engine families expected to be certified as HHDGEs. In two cases, these engines demonstrate both NO_x and HC levels below the 1988 standards, attributable to minor modifications and calibration changes. EPA believes that the remaining HHDGE families will be able to meet the 1988 NO_x standard without large effects on HC emissions levels by using similar minor modifications and calibrations, and therefore proposes not to make NCPs available for the 1988 HHDGE HC standard.

f. 1988 HDDE NO_x and Particulate Standards

In addition to the interaction between NO_x and particulate emissions which forms much of the basis for the NCPs that are proposed for the 1988 NO_x and particulate emission standards, there is also the possibility that reducing NO_x and particulate emissions will affect HC emission levels. However, EPA believes that compliance with the 1988 NO_x and particulate standards is likely to have little effect on HDDE HC levels. While some NO_x control strategies tend to increase HC emissions levels, particulate control techniques tend to decrease HC emissions. EPA also received no technically supportable comments in the NO_x/particulate standard rulemaking to indicate that compliance with the those standards would significantly increase HC emissions of HDDEs. Moreover, 1985 certification data indicate that many of the California versions of current engines are capable of meeting both the HC and NO_x standards. EPA does not believe that any significant problems will develop due to emission trade-off effects. Therefore, EPA proposes not to offer NCPs for the HDDE HC standard.

D. Upper Limits for NCPs

1. Introduction

An upper limit is an emission level above which heavy-duty vehicles or engines cannot be certified or introduced into commerce. As described in the NCP Phase I final rulemaking, upper limits are determined in two ways. (1) In most instances the previously applicable emission standard serves as the upper limit, e.g., for the 6.0 g/BHP-hr 1988 HDE NO_x standard, the previous standard of 10.7 g/BHP-hr serves as the upper limit. (2) In cases where there is no previous standard, EPA proposes the upper limit. The statutory provision governing upper limits (section 206(g)(2) of the Act as amended in 1977) provides that the upper limit shall be established as a percentage above the emission standard that corresponds to an emission level that is determined by EPA to be "practicable". Thus, the upper limit is to be set at an emission level above the emission standard which EPA believes is reasonably achievable and thus "practicable". Using these guidelines, EPA is proposing two alternative upper limits for the NCPs offered for the 0.60 g/BHP-hr 1988 model year HDDE particulate standard.

2. Proposed Upper Limit

EPA has considered two alternative approaches to setting a "practicable" upper limit for the HDDE particulate standard NCP and is proposing both for comment. The first approach is to establish a level that would achieve some reduction from uncontrolled emission levels, without making it unreasonably difficult for even a technological laggard to achieve the requisite levels. The second approach is simply to set a level equivalent to that from the highest-emitting current engine,

based on particulate emissions data currently available to EPA. Such an upper limit would be unlikely to force any possible technological laggard from the marketplace. In either case, one must consider current particulate emission levels of HDDEs, the relative degree of difficulty of achieving reductions, and the trade-off effects of NO_x/particulate controls at the 1988 emission standard levels in order to determine the practicable level for the upper limit. These considerations are discussed below.

a. HDDE Particulate Emission Rates

In order to characterize uncontrolled HDDE particulate emission rates at current NO_x emissions levels, EPA gathered data on 28 federal engine families from confidential submissions supplied by the five major domestic HDDE manufacturers. Although the sample was somewhat limited, constituting only about 40 percent of the 1985 HDDE families, these families represent over 80 percent of projected 1985 HDDE sales.

Figure 1 presents a distribution of the particulate emission rates for these families. Specific emission levels, manufacturer identification, or subclass-specific data have not been presented in order to avoid compromising the confidentiality of the data. The mean/median particulate emission level for these 28 families is approximately 0.5 g/BHP-hr at an average NO_x emission level of 7.5 g/BHP-hr. The worst case family particulate level was 0.82 g/BHP-hr at a NO_x level of 5.9 g/BHP-hr. It is very important to note that these emissions data are from relatively new engines and the levels do not reflect the effects of deterioration and other factors. Thus, the emission levels represent low mileage rates which are comparable to achievable target levels, rather than to possible certification levels.

b. Proposals for the Upper Limit

Based on a review of the data presented in Figure 1, EPA proposes an upper limit emission level for each of the alternative approaches outlined above. Under the first approach, an upper limit of 0.80 g/BHP-hr represents a level that would achieve some reduction in particulate emissions without making compliance unduly difficult for the technological laggard. Given variability effects of about ten percent and a full-life deterioration factor of 0.05 g/BHP-hr as described in the regulatory impact analysis (RIA) supporting the final rule for the 1988 particulate standard, achieving this upper limit would require target levels of 0.65–070 g/BHP-hr. This would necessitate reductions of 0.2 g/BHP-hr or less from approximately 18 percent of the sample engines. Under the second approach, an upper limit of 0.95 g/BHP-hr would allow the current worst-case engine, with a low mileage emission level of 0.82 to achieve compliance with the upper limit.

In determining a practicable upper limit, the trade-off effect of the lower 1988 NO_x standard must also be considered. As stated above, the mean NO_x level for the sample was 7.5 g/BHP-hr, also representing low mileage emission levels. Thus, on average, NO_x reductions of 2 to 2.5 g/BHP-hr would be needed to meet the target level for the 6.0 g/BHP-hr 1988 HDDE NO_x standard. While EPA expects that most manufacturers will be able to overcome the potentially adverse effects of the NO_x-particulate trade-off using the control approaches described in the RIA, this may be more difficult for the technological laggard and should be considered in the selection of the upper limit. The 0.95 g/BHP-hr limit would ensure that the effect of the NO_x-particulate trade-off would not force any engine family from the marketplace, however, there would be essentially no reduction in particulate emissions from current uncontrolled levels for those families certifying at the upper limit.

While neither of these proposed upper limits may appear to be overly stringent, it should be noted that as a percentage of the standard, they are much less generous than the comparable upper limits for NO_x and other standards eligible for NCPs. For example, the 0.60 gram upper limit for HDDE particulate exceeds the new standard by 33 percent, while the 0.95 gram upper limit exceeds the standard by 58 percent. By way of contrast, the HDDE NO_x upper limit exceeds the new standard by 78 percent.

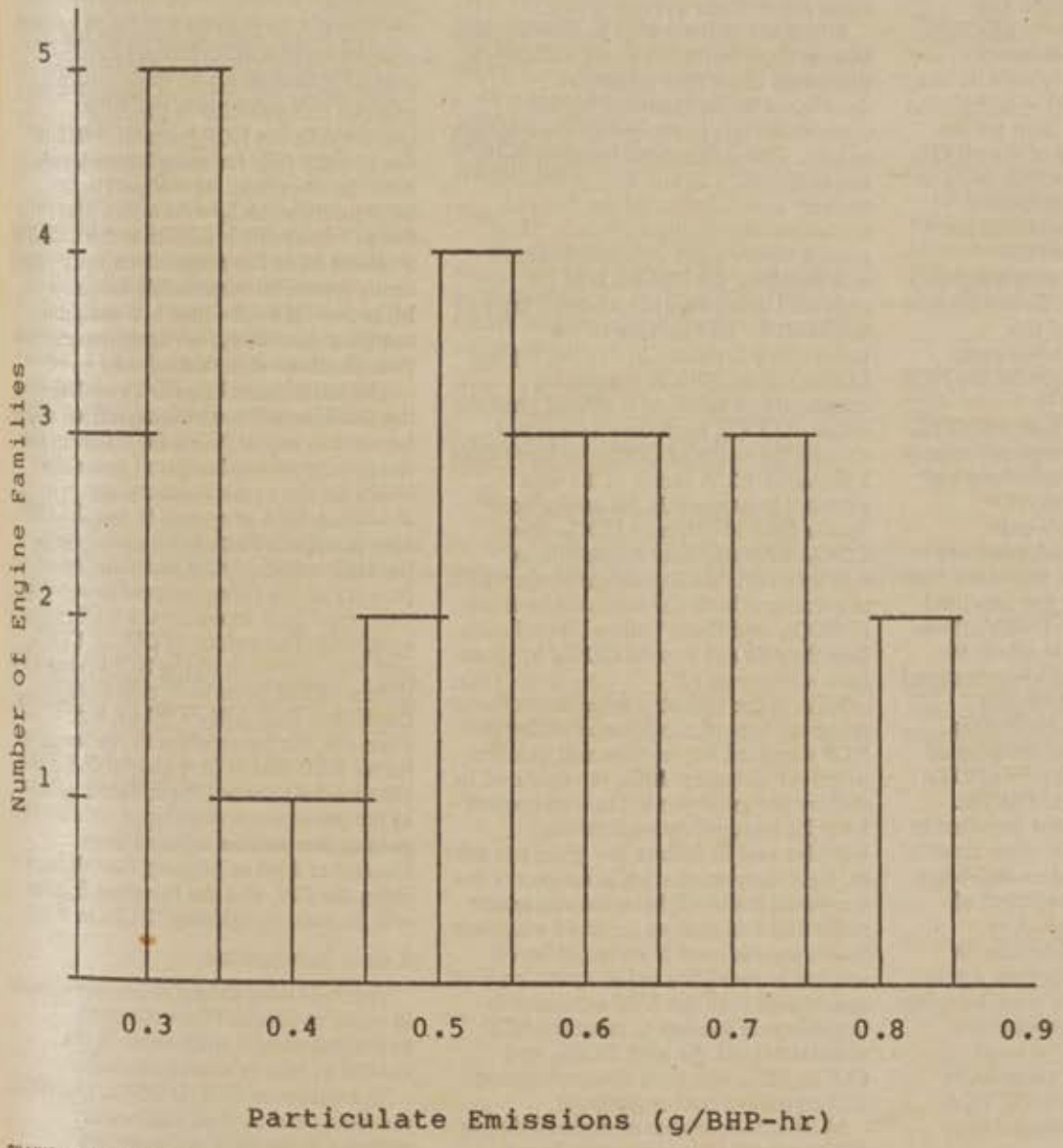
In terms of applicability, EPA proposes that either of these upper limits would apply to all HDDEs, regardless of subclass. Separate upper limits for the three HDDE subclasses were considered, but sufficient particulate emissions data are presently not available for LHDDEs and MHDDEs to allow establishment of separate upper limits for the three subclasses. Moreover, the data that are available indicate that the higher emitting engines in each of the three subclasses have similar particulate levels. Thus, these limited data indicate that separate upper limits may not be necessary. For these reasons, it is proposed that only one upper limit be applicable for all HDDEs, unless additional emissions data become available which indicate that the HDDE subclasses should have separate upper limits.

In conclusion, EPA invites comment on the particulate upper limit issue from manufacturers and other concerned parties. The Agency requests comments as to which of these approaches represents the better alternative and on the appropriateness of the levels proposed.

BILLING CODE 6560-50-M

Figure 1

HDDE Particulate Emission Data



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E. Penalty Rates

1. General Approach

For those standards for which EPA is proposing that NCPs be made available (the NCP standards), EPA is proposing values for the following parameters in the NCP formula for each standard: COC_{50}, COC_{90}, MC_{50}, and F. The NCP formula was promulgated in the Phase I final rule published elsewhere in this issue.

COC_{50} is an estimate of the industry-wide average incremental per engine or per vehicle cost associated with meeting the NCP standard for engines and vehicles in the NCP category. COC_{50} generally measures the difference between the cost of complying with the NCP standard and the cost of complying with the upper emissions limit for the NCP standard. In the case of the HDDE particulate standard, for which there is no prior emission standard, COC_{50} measures the difference between the cost of complying with the NCP standard and the cost of complying with uncontrolled HDDE particulate emission levels. COC_{50} is the sum of the manufacturer costs and owner costs associated with complying with the NCP standard.

The manufacturer cost component of COC_{50} represents the average per engine or per vehicle cost to manufacturers of engines complying with the NCP standard. It is derived from cost estimates prepared for analyses used in setting the NCP standard. When the cost estimates in the analyses are provided as retail price equivalents (RPEs), those costs have been reduced to eliminate manufacturer profit and dealer overhead and profit. Based on the formulas normally used by EPA in estimating RPEs, this adjustment is accomplished by dividing the RPE by 1.16 for LDDTs and by 1.10 for HDGEs and HDDEs.

Certification costs are not included in COC_{50}. Manufacturers will often incur certification costs even when NCPs are used, for instance when payment of NCPs is elected after a Selective Enforcement Audit (SEA) failure. In some cases they may carry over a prior year's certification results, thus delaying or avoiding certification procedures during the period the NCP is used. However, manufacturers using NCPs will incur the additional cost of PCA testing, which may be comparable to certification costs.

Owner costs include additional expenses for maintenance, parts replacement, and fuel that will be incurred throughout the useful life of the vehicle. These costs are also derived from analyses prepared in support of the NCP standard setting process and, as in the analyses, are discounted to the year of purchase using a 10 percent discount rate.

COC_{90} is an estimate of the 90th percentile incremental per engine or per vehicle cost associated with meeting the NCP standard within an NCP category. Thus, COC_{90} should be selected so that compliance costs exceed COC_{90} for only 10 percent of engines or vehicles in the NCP category. COC_{90}, like COC_{50}, includes both manufacturer and owner costs. These cost components are defined similarly to those for COC_{50} except that they are 90th percentile costs rather than average costs.

EPA has not been able to identify 90th percentile compliance costs with much precision. Most cost estimates developed in the standard setting process are averages or expected ranges of cost. The cost estimation process is not sufficiently detailed or precise to support development of the desired statistical distribution of costs. Thus, except where more detailed analysis was feasible, the high ends of the expected cost ranges have been used as the basis for COC_{90}. Due to the uncertainty involved in developing the COC_{90} values, EPA is requesting comments on whether it should limit the value of COC_{90} such that it does not exceed the value of COC_{50} by more than a factor of 1.3. A factor of 1.3 was selected because it is the same factor that is used to estimate COC_{90} from COC_{50}. EPA requests comments on whether 1.3 is an appropriate value. EPA is proposing both the estimated values of COC_{90} and those values limited such that they do not exceed COC_{50} by more than a factor of 1.3.

MC_{50} is the industry-wide average marginal cost of compliance with the NCP standard for engines and vehicles in the NP category. MC_{50} is measured in dollars per gram per brake horsepower hour for heavy-duty engines and vehicles and in dollars per gram per mile for light-duty trucks. MC_{50} measures the economic trade-off between emissions reduction and cost as certified emission levels are reduced from target levels needed to meet this upper emission limit associated with the NCP standard to target levels needed to meet the NCP standard itself. As with COC_{50} and COC_{90}, MC_{50} has both a manufacturer and an owner cost component.

Most cost analyses performed during the standard-setting process do not estimate the marginal cost of compliance. Doing so would require much more detailed knowledge of the emission control alternatives and costs facing manufacturers and the resulting impacts on the cost of ownership than is typically available. Marginal cost estimates have thus been obtained indirectly, from one of two sources. Current emission levels can be compared to emission levels under the new standard COC_{50} can be divided by the emission reduction required to determine the cost per unit (g/BHP-hr or g/mi.) of achieving compliance. In other cases, costs of ownership are expected to rise due to fuel economy reductions that sometimes accompany lower emission levels, and the marginal cost (rate of change) of fuel economy as a function of the emissions level can be estimated in the vicinity of the NCP standard.

F is a factor used to estimate MC_{90}, the 90th percentile marginal cost of compliance with the NCP standard for engines and vehicles in the NCP category. In the NCP formula, MC_{90} is the penalty rate for compliance levels near the standard. As defined in the NCP formula, $MC_{90}=F\times MC_{50}$. The Phase I final rule stated that the value of F would be in the range of 1.1 to 1.3. In cases where no reasonable estimate of MC_{90} can be made based on existing marginal cost data, EPA proposes a presumptive value of 1.2 for F.

The NCP Phase I final rule stated that the Consumer Price Index (CPI) would be used to adjust NCPs for inflation for the second and subsequent years that NCPs for the same standard are available. EPA proposes to use the CPI also to adjust the penalty parameters developed in this rule to dollars as of January of the calendar year preceding the model year in which the NCP is first available. The values of COC_{50}, COC_{90} and MC_{50} for each of the NCPs proposed in this NPRM have been calculated in December 1984 dollars. Thus, for example, the parameters in the formula for an NCP that is first available for the 1988 model year will be inflated values of the parameters developed below. The parameters will be inflated from December 1984 to January 1987 dollars using the CPI, and the resulting figures will be used to calculate NCPs in 1988.

2. Cost Assumptions

The following assumptions were made in order to account for emissions averaging and/or joint costs in the control of two or more pollutants.

The values of COC_{50}, COC_{90} and MC_{50} are estimated as if all engines or vehicles in the NCP category are required to meet the NCP standard, whether or not emissions averaging is allowed. Thus, no specific allowance is made for emissions averaging in this proposal.

The term "joint costs" is used to described the costs attributable to a

single control device or technique which simultaneously reduces emissions of two or more pollutants.

It also describes the cost of controlling one pollutant when the cost depends on the degree of control of another pollutant. Where joint cost issues arise in the calculation of the parameters for the NCP formula, the general approach has been to calculate the cost of compliance with the NCP standard on the assumption that all pollutants for which NCPs are not available are controlled to their respective standards. Where NCPs are available for two pollutants, the cost of compliance for each pollutant is based on the assumption that manufacturers intend to comply with each of the two NCP standards.

3. Parameter Values

The derivation of each of the proposed cost parameters is described in detail in a support document entitled "Development of Nonconformance Penalty Rates", which is available in the public docket for this rulemaking. The values of COC_{90} listed below are those estimated by EPA and they have not been limited to a percentage of COC_{50}.

a. Light-Duty Diesel Trucks

EPA proposes that the following values (in 1984 dollars) be used in the NCP formula for the 1987 0.26 gram per mile particulate standard for heavy light-duty diesel truck configurations in the 6,000 to 8,500 pound GVW range.

COC_{50} = $368
COC_{90} = $541
MC_{50} = $3200 per gram/mile
F = 1.2

b. Heavy-Duty Diesel Engines

The cost of meeting the 1988 HDDE NO_x and particulate standards varies significantly among engine families in the heavy-duty diesel engines class, and NCPs have therefore been set separately for the three HDDE subclasses: light HDDEs (LHDDEs), medium HDDEs (MHDDEs), and heavy HDDEs (HHDDEs).

NO_x

EPA proposes that the following values (in 1984 dollars) be used in the NCP formula for the 1988 6.0 g/BHP-hr HDDE NO_x standard for the three HDDE subclasses:

	LHDDE	MHDDE	HHDDE
COC_{50}	$18	$1,175	$1,340.
COC_{90}	$41	$1,540	$1,980.
MC_{50}	$40/g/BHP-hr.	$870/g/BHP-hr.	$1,750/g/BHP-hr.
F	1.2	1.2	1.2

Particulate Standard

EPA proposes that the following values (1984 dollars) be used in the NCP formula for the 1988 0.60 g/BPH-hr HDDE particulate standard for the three HDDE subclasses:

	LHDDE	MHDDE	HHDDE
COC_{50}	$71	$84	$87.
COC_{90}	$83	$97	$101.
MC_{50}	$340/g/BHP-hr.	$382/g/BHP-hr.	$725/g/BHP-hr.
F	1.2	1.2	1.2

c. Heavy-Duty Gasoline Engines

EPA proposes that the following values (1984 dollars) be used in the NCP formulas for the 1987 LHDGE HC and CO emission standards of 1.1 g/BPH-hr and 14.4 g/BHP-hr, respectively.

	HC	CO
COC_{50}	$75	$90.
COC_{90}	$159	189.
MC_{50}	$139/g/BHP-hr.	9/g/BHP-hr.
F	1.2	1.2.

4. Alternative COC_{90} Values

The following values of COC_{90} were estimated using the same procedure as above but have been limited such that they do not exceed COC_{50} by more than a factor of 1.3. EPA requests comments on whether it should use these values or those estimated above.

	COC_{90}		COC_{90}		COC_{90}
1987 LDDT particulate	$478	1988 LHDDE Nox	$23	1988 LHDDE particulate	$83
1987 HDGE HC	$98	1988 MHDDE NOx	$1,528	1988 MHDDE particulate	$97
1987 HDGE CO	$117	1988 HHDDE NOx	$1,742	1988 HHDDE particulate	$101

F. Penalty Calculation Example

Following is an example of how a penalty amount would be calculated for engines exceeding a standard based on a compliance level determined in a PCA. The Phase I regulations promulgated the method for determining the compliance level and a generic penalty formula to calculate the penalty. This Phase II NPRM proposes specific values for the cost parameters in the penalty formula so that a specific dollar penalty can be calculated.

The generic penalty formula promulgated in Phase I is expressed in two different forms, depending on the relationship of the value of the compliance level to the value of X for that pollutant. X is the emission level at which the penalty is equal to COC_{50}. In this example, which is set in the 1988 model year, the compliance level for a configuration of MHDDEs which is in nonconformance with the NOx standard is 7.5 g/BHP-hr. The proposed values of COC_{50}, MC_{50} and F, which are expressed in December 1984 dollars, would have to be adjusted by the consumer price index (CPI) to reflect August 1987 dollars. For the purpose of this example, the CPI is assumed to increase by 13 percent between December 1984 and January 1987. Therefore, the proposed values of COC_{50}, MC_{50} and F would be increased by 13 percent.

From Phase I, the value of X is calculated as follows:

$$X = \frac{COC_{50}}{F \times MC_{50}} + \text{the applicable emission standard}$$

Substituting the (adjusted) proposed values of COC_{50}, MC_{50} and F, the MHDDE NOx emission standard into the above equation results in the following:

$$X = \frac{\$1.328}{1.2 \times \$983/\text{g/BHP-hr}} + 6.0\ \text{g/BHP-hr} = 7.1\ \text{g/BHP-hr}$$

Since the compliance level (7.5 g/BHP-hr) is greater than the value of X (7.1 g/BHP-hr), the following NCP formula from Phase I is used to calculate the penalty:

$$NCP_n = \{COC_{50} + [PR_2][CL - X]\} \left(\prod_{i=1}^{n} AAF_i \right)$$

where:

$$PR_2 = \frac{COC_{90} - COC_{50}}{UL - X}$$

AAF_i has the following values:

If $frac_{i-1} = 0$, then $AAF_i = 1 + I_{i-1}$
If $frac_{i-1} > 0$, then:

$$AAF_i = 1 + I_{i-1} + A_i \quad \left[\frac{1}{1 - (frac_{i-1})}\right]$$

If $frac_{i-1} > 0.50$, then $frac_{i-1}$ would be set equal to 0.50.
In the first year, $AAF_1 = 1$.

The terms in the above formula have the following meanings and values:

NCP_n = NCP for year n for each engine or vehicle
CL = Compliance level for year n for applicable engines or vehicles
S = Emission Standard
UL = Upper Limit
PR_2 = Penalty rate for $X < CL \leq UL$

X = Compliance level above the standard at which NCP_1 equals COC_{50}

$$X = \left(\frac{COC_{50}}{(F)(MC_{50})}\right) + S$$

AAF_i = Annual adjustment factor in year i

n
If AAF_i =
Running Product, i.e., $(AAF_1) \times (AAF_2) \times \ldots \times (AAF_n)$
i=1

i = index representing a year

n = Index representing the number of model years for which the NCP has been available for an engine or vehicle subclass, i.e., n=1 for the first year that the NCP is available; . . . n=n for the nth year that the NCP is available

COC_{50} = Estimate of the average total incremental cost to comply with the standard relative to complying with the upper limit

COC_{90} = Estimate of the 90th percentile total incremental cost to comply with the standard relative to complying with the upper limit

MC_{50} = Estimate of the average marginal cost of compliance (dollars per emission unit) with the standard

F = Factor used to estimate the 90th percentile marginal cost based on the average marginal cost (the minimum value of F is 1.1, the maximum value of F is 1.3)

$frac_{i-1}$ = Fraction of engines or vehicles of a subclass using NCPs in previous year (i-1)

A_i = Usage adjustment factor in year i: $A_i = 0.10$ for $i = 2$; $A_i = 0.08$ for $i > 2$

I_i = Percentage increase in overall consumer price index in year i

Since this is the first year that the NCP is available, the value of AAF_i is 1. Substituting this and the adjusted values of the other parameters in the NCP formula results in the following:

$$NCP_1 = \$1328 + \frac{\$1,740 - \$1,328}{10.7 \text{ g/BHP-hr} - 7.1 \text{ g/BHP-hr}} \times (7.5 \text{ g/BHP-hr} - 7.1 \text{ g/BHP-hr}) \times (1)$$
$$= \$1,374$$

The NCP for each engine introduced into commerce in the 1988 model year would be $1,374. If this manufacturer decided to carry-over this configuration to the next model year, the penalty of $1,374 would be multiplied by the AAF which incorporates inflation and the fraction of the industry that used an NCP for the MHDDE subclass for NOx in the first year. If we assume that the CPI increased by 6 percent between January 1987 and January 1988 and that the fraction of MHDDEs using an NCP for NOx in the 1988 model year was 25 percent, the value of AAF_2 would be calculated as follows:

$$AAF_2 = (1 + 0.06) + 0.08 \left(\frac{1}{1 \times 0.25}\right) 2$$
$$= 1.20$$

The NCP for each engine introduced into commerce in the 1989 model year (NCP_2) would be calculated as follows:

$NCP_2 = NCP_1 \times AAF_2$
$= \$1,374 \times 1.20$
$= \$1,649$

G. General NCP Provisions

This action also proposes a few general NCP provisions that were not fully addressed in the Phase I rulemaking. EPA is proposing that a manufacturer be required to place a lable on each engine/vehicle (or make an addition to the existing label) for which an NCP is paid. The manufacturer would be required to begin labeling production engines/vehicles within 10 days after completion of the PCA. The label would contain the applicable compliance level for that engine/vehicle at the time of its introduction into commerce. This would allow EPA to easily associate every individual engine/vehicle with its proper compliance level, even if the compliance level is changed part way through the model year. If a manufacturer introduces engines/vehicles into commerce prior to the compliance level determination for

that configuration, the manufacturer would be required to provide a label to each engine/vehicle owner (to be affixed to that engine/vehicle) containing the applicable compliance level. The manufacturer would be required to provide owners with the label within 30 days after completion of the PCA.

In the Phase I final rule, EPA stated that it had requested a ruling from the Internal Revenue Service (IRS) on whether NCPs would be a tax deductible business operating expense. EPA has not received a decision from the IRS; however, the penalty rates that EPA has proposed are based on the assumption that the NCP would be a tax deductible business operating expense. If the IRS decides otherwise, EPA will adjust the penalty rates to compensate for the non-deductibility of the NCP.

In the Phase I final rule, EPA stated that it had received comments on the relationship between NCPs and the emissions averaging program and that although the issue was a generic one, it was outside the scope of the Phase I rulemaking. Similiarly, for Phase II, EPA is proposing that manufacturers not be allowed to elect both NCPs and emissions averaging for use on the same engines/vehicles for the same pollutant. EPA is proposing that these two programs not be combined because of the short time frame available to proceed with these regulations and the added complexity associated with applying NCPs to engines/vehicles which are in nonconformance with an averaging engine family emission limit. The NCP penalty rates have been developed to account for nonconformance with the emission standard, not with an averaging engine family emission limit, which may be above or below the emission standard. Thus, as structured, the difference between the emission standard and the averaging engine family emission limit would cause the penalty rates developed in this rulemaking to be invalid. EPA plans to consider more specifically the technical and legal difficulties associated with incorporating NCPs into an averaging program in Phase III of the NCP rulemaking process.

EPA is also proposing to amend the administrative hearing procedures published in § 86.1115–87 during Phase I. Under the proposal, if a manufacturer elects an administrative hearing to contest an NCP assessment, EPA would collect interest on the challenged NCPs from the date the payments are originally due until the Presiding Officer or the Administrator delivers the Agency's final decision in the hearing. The NPRM for Phase I proposed requiring a manufacturer to place NCP amounts in escrow as a condition of obtaining a hearing, but EPA now believes that collecting interest on the final NCP amount is preferable.

The purpose of this provision is to recapture the economic benefit that a manufacturer gains by withholding NCP payments during an administrative hearing. This interest provision is supported by section 206(g)(3)(E) of the Clean Air Act, which requires that NCPs "shall remove *any* competitive disadvantage to manufacturers whose engines or vehicles achieve the required degree of emission reduction . . ." (emphasis added). It is further supported by legislative history which makes clear Congress' fundamental concern that NCPs not help technological laggards at the expense of technological leaders. H.R. Rep. No. 95–294, 95th Cong., 1st Sess. 275–76 (1977); Conference Report, H.R. Rep. No. 95–564, 95th Cong., 1st Sess. 163–64 (1977); 50 F.R. 9204, 9204 (March 6, 1985). A technological leader will suffer a competitive disadvantage if a laggard manufacturer has the use of his NCP payments for the duration of an administrative hearing. This provision removes the competitive disadvantage by imposing interest on the withheld NCP payments at rates representing a return on a secure, short-term investment. The purpose of this provision, like the purpose of the NCP concept itself, is not to penalize nonconforming manufacturers, but rather to *remove* a competitive penalty from conforming manufacturers.

Since manufacturers must make NCP payments each quarter, based on that quarter's production of nonconforming vehicles or engines, interest will be calculated on each quarterly payment from the date it is due until the date the Presiding Officer or the Administrator renders the Agency's final decision. (In case of conflict, the cut-off date for interest calculation is the date on which the Agency delivers its final opinion, not when the hearing is deemed final for purposes of § 86.1115–87(y).) The interest rate for any particular quarterly payment will be the discount rate at auction (as quoted by the Secretary of the Treasury) for the last auction of six-month United States Treasury bills settled immediately prior to the payment due date for that quarterly payment. This rate can be ascertained by calling the United States Department of the Treasury, Bureau of the Public Debt, at (202) 287–4113. For each quarterly payment outstanding on the date the Agency renders its final decision, the combined principal plus interest will be calculated according to the following formula:

$$QNCP(1+R)^{.25n}$$

where:

QNCP = the quarterly NCP payment
R = the interest rate applicable to that quarter
n = the number of quarters for which the quarterly NCP payment is outstanding

A manufacturer who pursues an administrative hearing must still make quarterly submittals of the information required by § 86.1113–87(g)(3).

In the Phase I final rule, EPA stated that it would propose in this Phase II NPRM a proposal that would allow a manufacturer that pays an NCP to be refunded a portion of the NCP if that manufacturer subsequently certifies the nonconforming configuration in conformance with the applicable standards, thereby demonstrating that engineering and development costs were expended. EPA is proposing this because engineering and development costs are included in the NCP and EPA believes that a manufacturer that demonstrates that it has indeed expended these costs should be entitled to a monetary refund. In addition to certifying the nonconforming configuration in conformance with applicable standards, EPA would require the manufacturer to conduct a PCA of the new configuration. If the resulting compliance level is below the applicable standards, the manufacturer would be eligible for the refund.

In the Phase I final rule, EPA established a formula which determines the dollar amount of the NCP. As stated above, the NCP includes engineering and development costs. The final rule states that the NCP payment will be payable to the United States Treasury and the payment will be sent to the EPA's Manufacturers Operations Division. EPA is now proposing that the penalty calculated from the formula be divided into two components: the engineering and development component and the remaining component. The engineering and development portion of the NCP payment would be payable to EPA and the remaining portion of the NCP payment would be payable to the United States Treasury. Both payments would be sent to EPA's Manufacturers Operations Division. EPA would place the engineering and development amount into an escrow account so that it could potentially be refunded to the manufacturer.

To calculate the engineering and development portion of the NCP, the following factors would be multiplied by

the penalty calculated from the NCP formula: (These factors represent the percentage of the engineering and development costs in relationship to COC_{50}.)

1987 LDDT particulate: 0.11
1987 HDGE HC: 0.07
1987 HDGE CO: 0.06
1988 LHDDE NOx: 0.38
1988 MHDDE NOx: 0.02
1988 HHDDE NOx: 0.02
1988 LHDDE particulate: 0.64
1988 MHDDE particulate: 0.62
1988 HHDDE particulate: 0.60

For example, in section F of the preamble an example was given in which the penalty for a MHDDE in nonconformance with the NOx standard as calculated to be $1374 per engine in the 1988 model year. That penalty amount would be multiplied by the above factor of 0.02, resulting in an engineering and development component of $27 per engine.

EPA is not proposing that the entire engineering and development component of the NCP potentially be refunded. Since a manufacturer that is eligible for such a refund expended the engineering and development costs at a later date, EPA believes that it is appropriate to subtract from the entire component an amount which reflects the manufacturer's financial benefit of delaying these costs. EPA proposes that 10 percent compounded annually be subtracted from the engineering and development component refund. EPA also proposes that an additional portion of this component not be refunded to reflect the manufacturer's benefit of focusing its engineering and development efforts on the results already achieved by conforming manufacturers. EPA proposes that 20 percent annually be subtracted from the engineering and development component to relect this benefit, but requests comments on whether it is appropriate to do so, and if so whether 20 percent per year is an appropriate amount.

If both the time value of money and the value for the focusing of engineering and development efforts are subtracted from the engineering and development component, the following percentages of that component would not be refunded:

Model year	1	2	3	4
Time value of money (%)	10	21	33	46
Focusing of efforts (%)	20	40	60	60
Not refunding (%)	31	61	93	100

After the third model year, the manufacturer would no longer be eligible for a refund of engineering and development costs.

If only the time value of money is subtracted from the engineering and development component, the following percentages of that component would not be refunded:

Model year	1	2	3	4	5	6	7	8
Not refunded (%)	10	21	33	46	61	77	95	100

After the seventh model year, the manufacturer would no longer be eligible for a refund of engineering and development costs.

EPA would transfer funds to the United States Treasury when the manufacturer became ineligible for a refund of those funds.

H. Administrative Designation

Under Executive Order 12291, the Administrator has determined that this proposed regulation is not "major" and therefore not subject to the requirement that a Regulatory Impact Analysis be prepared. This determination is based on the following:

(1) The proposed NCP program will not result in an annual adverse effect on the economy of $100 million or more. NCPs merely provide an economically reasonable alternative to other possible actions, at least as costly as NCPs, that may be utilized when a manufacturer is unable to comply with a standard. This concept is more fully discussed in the Economic Impact section.

(2) The NCP program will not result in adverse cost or price impacts (above those that would otherwise occur from compliance with the emission standards themselves).

(3) The NCP program provides manufacturers with relief from the current prohibition against selling nonconforming HDEs or HDVs. Presently, a manufacturer experiencing difficulty in certifying or producing HDEs or HDVs in conformance with emission standards has only two alternatives: fix the nonconforming configuration or prevent its introduction into commerce. In some cases, a fix may not be readily available, and a manufacturer may have to prevent the HDE or HDV's introduction into commerce. NCPs provide relief from these disruptions. In addition, NCPs are calculated to deprive nonconforming manufacturers of any cost savings and competitive advantage stemming from nonconformance. Therefore, NCPs will not have significant adverse effects 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.

As required by Executive Order 12291, this Notice of Proposed Rulemaking has been reviewed by the Office of Management and Budget (OMB) for compliance with regulatory development criteria and for general content. Any written OMB comments and EPA's response to those comments are available for inspection in the public docket for this rulemaking.

I. Economic Impact

Because the use of NCPs is optional, manufacturers have flexibility and will likely choose whether or not to use NCPs based on their ability to comply with emission standards. If no HDE or HDV manufacturer elects to use NCPs, these manufacturers and the users of their products will not incur any additional costs related to NCPs.

The existence of an NCP program may provide some direct cost savings to HDE or HDV manufacturers that lack the technological capability to conform with emission standards immediately. In the absence of NCPs, a manufacturer which has difficulty certifying HDEs or HDVs in conformance with emission standards or which fails an SEA has only two alternatives: fix the nonconforming engines or vehicles, perhaps at prohibitive cost, or prevent their introduction into commerce. The availability of NCPs provides manufacturers with a third alternative with some potential cost savings: continue production and introduce into commerce upon payment of a penalty a unit that exceeds the standard until an emission conformance technique is developed.

Therefore, NCPs represent a regulatory mechanism that allows affected manufacturers increased flexibility. A decision to use NCPs may be the manufacturer's only way to continue to introduce HDEs or HDVs into commerce. Hence, NCPs may be considered to have no adverse economic impact.

J. Environmental Impact

Because the use of NCPs is an option elected by affected manufacturers, EPA cannot be sure to what extent NCPs will be used.

If no manufacturer elects to use NCPs, all HDEs and HDVs produced will need to be in conformance with the regulatory requirements. In this situation, the environmental benefits estimated during the rulemakings establishing the emission regulations will not be affected.

If some manufacturers do elect to participate in the NCP program, some HDEs and/or HDVs will be introduced into commerce that will be emitting pollutants above applicable standards (as Congress contemplated when it mandated that EPA provide NCPs). The magnitude of this reduced environmental benefit is proportional to the number of HDEs and HDVs subject to NCPs and their degree of nonconformance. (Of course, the upper limits exclude gross emitters from being introduced into commerce.) EPA estimates that an NCP will not be used for more than ten percent of the HDE's and HDV's for which NCPs are provided in the first year that they are available and that they will be used for less than one percent in the third year. The long term environmental impact from NCP usage is expected to be relatively very small, if any, due to the relatively high penalty rates and the annual adjustment factor that rapidly increases those penalty rates when NCP usage is significant. Of course, any reduction in environmental benefit refers not to an increase in emissions from current levels, but from levels that would otherwise occur from tightened emission standards without NCPs.

Because the emission impacts of the NCPs are anticipated to be very small, if any, compared to the total emissions of HDEs and HDVs which in fact comply with emission standards, and because the extent of NCP usage in any specific model year cannot be accurately predicted at this time, no specific air quality impact analysis has been made regarding this proposal.

K. Compliance with Regulatory Flexibility Act

Under section 605 of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the Administrator is required to certify that this regulation will not have a significant economic impact on a substantial number of small business entities. None of the affected entities could be classified as a small business. Even if some were considered small, there would not be a substantial number of those. Moreover, as already discussed, the NCP program can be expected to have salutary effects on manufacturers. Thus, I certify that this rule will not have a significant adverse economic impact on a substantial number of small entities.

L. Information Collection Requirements

The proposed rule requires that manufacturers perform certain recordkeeping and submit certain reports to EPA. The Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*, provides that reporting and recordkeeping requirements be approved by OMB before they can be imposed on the public. The information collection requirements in this proposed rule have been submitted to OMB. Comments on these requirements should be submitted to OMB, Office of Information and Regulatory Affairs, Attention: Desk Officer for EPA. The final rule package will respond to any OMB or public comments on the information collection provisions.

M. List of Subjects in 40 CFR, Part 86:

Administrative practice and procedure, Labeling, Motor vehicle pollution, Reporting and recordkeeping requirements, Air pollution control, Environmental protection, Gasoline, Motor vehicles.

Dated: August 23, 1985.

Lee M. Thomas,

Administrator.

PART 86—[AMENDED]

For the reasons set forth in the preamble, Part 86, Subparts A and L, Chapter I of Title 40, Code of Federal Regulations, is proposed to be amended as follows:

1. The authority citation for Part 86 would continue to read as follows:

Authority: Section 206(g) and 301 of the Clean Air Act, as amended, 42 U.S.C. 7525(g), 7601.

2. Paragraph (h) of § 86.087–35 of Subpart A is proposed to be added as follows:

§ 86.087–35 Labeling.

* * * * *

(h)(1) Light-duty trucks and heavy-duty vehicles and engines for which nonconformance penalties are to be paid in accordance with § 86.1113–87(b) shall have the following information printed on the label required in paragraph (a) of this section or on a separate permanent legible label in the English language and located in proximity to the label required in paragraph (a) of this section. The manufacturer shall begin labeling production engines or vehicles within 10 days after the completion of the PCA.

(i) The statement: "The manufacturer of this engine/vehicle will pay a nonconformance penalty to be allowed to introduce it into commerce at an emission level higher than the applicable emission standard. The compliance level (or new emission standard) for this engine/vehicle is _____." (The manufacturer shall insert the applicable pollutant and compliance level calculated in accordance with § 86.1112–87(a)).

(2) If a manufacturer introduces an engine or vehicle into commerce prior to the compliance level determination of § 86.1112–87(a), it shall provide the engine or vehicle owner with a label as described above to be affixed in a location in proximity to the label required in paragraph (a) of this section within 30 days of the completion of the PCA.

3. § 86.1105–87 of Subpart L is proposed to be added as follows:

§ 86.1105–87 Emission standards for which nonconformance penalties are available.

(a) Effective in the 1987 model year, NCPs will be available for the following emission standards:

(1) Diesel light-duty truck (rated in excess of 6000 pounds GVWR) particulate emission standard of 0.26 grams per vehicle mile.

(i) The following values shall be used to calculate an NCP in accordance with § 86.1113–87(a):

(A) COC_{50}: $368;

(B) COC_{90}: $541;

(C) MC_{50}: $3200 per gram per vehicle mile; and

(D) F: 1.2.

(ii) The following factor shall be used to calculate the engineering and development component of the NCP in accordance with § 86.1113–87(g): 0.11

(2) Gasoline-fueled heavy-duty engine hydrocarbon emission standard of 1.1 grams per brake horsepower-hour for engines intended for use in vehicles rated in excess of 14,000 pounds GVWR.

(i) The following values shall be used to calculate NCP in accordance with § 86.1113–87(a):

(A) COC_{50}: $75;

(B) COC_{90}: $159;

(C) MC_{50}: $139 per gram per brake horsepower-hour; and

(D) F: 1.2.

(ii) The following factor shall be used to calculate the engineering and development component of the NCP in accordance with § 86.1113–87(g): 0.07

(3) Gasoline-fueled heavy-duty engine carbon monoxide emission standard of 14.4 grams per brake horsepower-hour for engines intended for use in vehicles rated in excess of 14,000 pounds GVWR.

(i) The following values shall be used to calculate an NCP in accordance with § 86.1113–87(a):

(A) COC_{50}: $90;

(B) COC_{90}: $189;

(C) MC_{50}: $9 per gram per brake horsepower-hour; and

(D) F: 1.2.

(ii) The following factor shall be used to calculate the engineering and development component of the NCP in accordance with § 86.1113–87(g): 0.06

(b) Effective in the 1988 model year, NCPs will be available for the following emission standards:

(1) Diesel heavy-duty engine oxides of nitrogen emission standard of 6.0 grams per brake horsepower-hour.

(i) For light heavy-duty diesel engines:

(A) The following values shall be used to calculate an NCP in accordance with § 86.1113–87(a):

(1) COC_{50}: $18;

(2) COC_{90}: $41;

(3) MC_{50}: $40 per gram per brake horsepower-hour; and

(4) F: 1.2.

(B) The following factor shall be used to calculate the engineering and development component of the NCP in accordance with §86.1113–87(g): 0.36

(ii) For medium heavy-duty diesel engines:

(A) The following values shall be used to calculate an NCP in accordance with § 86.1113–87(a):

(1) COC_{50}: $1,175;

(2) COC_{90}: $1,540;

(3) MC_{50}: $870 per gram per brake horsepower-hour; and

(4) F: 1.2.

(B) The following factor shall be used to calculate the engineering and development component of the NCP in accordance with §86.1113–87(g): 0.02

(iii) For heavy heavy-duty diesel engines:

(A) The following value shall be used to calculate an NCP in accordance with § 86.1113–87(a):

(1) COC_{50}: $1,340;

(2) COC_{90}: $1,980;

(3) MC_{50}: $1,750; and

(4) F: 1.2.

(B) The following factor shall be used to calculate the engineering and development component of the NCP in accordance with §86.1113–87(g): 0.02

(2) Diesel heavy-duty engine particulate emission standard of 0.60 grams per brake horsepower-hour.

(i) For light heavy-duty diesel engines:

(A) The following values shall be used to calculate an NCP in accordance with § 86.1113–87(a):

(1) COC_{50}: $70;

(2) COC_{90}: $83;

(3) MC_{50}: $340 per gram brake horsepower-hour;

(4) F: 1.2; and

(5) UL: 0.80 grams per brake horsepower-hour.

(B) The following factor shall be used to calculate the engineering and development component of the NCP in accordance with §86.1113–87(g): 0.64

(ii) For medium heavy-duty diesel engines:

(A) The following values shall be used to calculate an NCP in accordance with § 86.1113–87(a):

(1) COC_{50}: $84;

(2) COC_{90}: $97;

(3) MC_{50}: $382 per gram per brake horsepower-hour;

(4) F: 1.2; and

(5) UL: 0.80 grams per brake horsepower-hour.

(B) The following factor shall be used to calculate the engineering and development component of the NCP in accordance with §86.1113–87(g): 0.62

(iii) For heavy heavy-duty diesel engines:

(A) The following values shall be used to calculate an NCP in accordance with § 86.1113–87(a):

(1) COC_{50}: $87;

(2) COC_{90}: $101;

(3) MC_{50}: $725 per gram per brake horsepower-hour;

(4) F: 1.2; and

(5) UL: 0.80 grams per brake horsepower-hour.

(B) The following factor shall be used to calculate the engineering and development component of the NCP in accordance with §86.1113–87(g): 0.60

(c) The values of COC_{50}, COC_{90}, MC_{50}, in paragraphs (a) and (b) of this section are expressed in December 1984 dollars. These values shall be adjusted for inflation to dollars as of January of the calendar year preceding the model year in which the NCP is first available by using the change in the overall Consumer Price Index.

4. In § 86.1113–87 of subpart L paragraph (g) is revised and (h) is added to read as follows:

§ 86.1113–87 Calculation, payment and refund of penalty.

* * * * *

(g)(1) Except as provided in paragraph (g)(2) of this section, the nonconformance penalty or penalties assessed under this subpart must be paid by the quarterly due dates, i.e., within 30 days of the end of each calendar quarter (March 31, June 30, September 30 and December 31), or according to such other payment schedule as the Administrator may approve pursuant to a manufacturer's request, for all nonconforming engines or vehicles produced by a manufacturer in accordance with paragraph (b) of this section and distributed into commerce for that quarter. The penalty amount will be divided into two components: the engineering and development component and the remaining component. The engineering and development component will be determined by multiplying the penalty amount by the factor for the appropriate subclass and pollutant in § 86.1105–87. Payment of the engineering and development penalty component must be made to EPA. Payment of the remaining penalty component must be made to the United States Treasury. Both payments must be delivered to: Director, Manufacturers Operations Division (EN–340F), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460.

(2) When a manufacturer has requested a hearing under § 86.1115–87, it must pay the nonconformance penalty, and any interest, within ten days after the Presiding Officer renders his decision, unless the manufacturer first files a notice of intention to appeal to the Administrator pursuant to § 86.1115–87(t)(1), or, if an appeal of the Presiding Officer's decision is taken, within ten days after the Administrator renders his decision, unless the manufacturer first files a petition for judicial review.

(3) A manufacturer making payment under paragraphs (g)(1) or (g)(2) of this section shall provide the Administrator with the following information by each quarterly due date:

(i) Corporate identification, identification and quantity of engineers or vehicles subject to the NCP, certificate identification (number and date), and NCP payment calculations, if applicable.

(ii) The following statement and endorsement: This information is submitted pursuant to section 206 of the Clean Air Act. All information reported herein is, to the best of

_____'s

(Company name)

knowledge, true and accurate. I am aware of the penalties associated with violations of the Clean Air Act and the regulations thereunder.

_____

(Authorized Company Representative)

For a manufacturer making payment under paragraph (g)(1) of this section, such information shall accompany payment.

(4) The Administrator may verify the production figures or other documentation submitted under paragraph (g)(3) of this section.

(h) A manufacturer that certifies the nonconforming configuration with applicable standards and performs a PCA in accordance with § 86.1112–87(a) that results in a compliance level below the applicable standard will receive a refund of a portion of the engineering and development penalty component of

paragraph (g)(1). The amount refunded will depend on which model year the certification and PCA take place and will be as follows:

(1) In the first model year that the NCP is available, 69 percent will be refunded.

(2) In the second model year that the NCP is available, 39 percent will be refunded.

(3) In the third model year that the NCP is available, 7 percent will be refunded.

(4) In the fourth and subsequent model years that the NCP is available, none of the engineering and development component will be refunded.

5. Paragraph (z) of § 86.1115–87 of Subpart L is proposed to be removed, and new paragraphs (z) and (aa) are proposed to be added to read as follows:

§ 86.1115–87 Hearing procedures for nonconformance determinations and penalties.

* * * * *

(z) *Interest on NCPs.* (1) Interest shall be assessed on any nonconformance penalty for which payment has been withheld pursuant to § 86.1113–87(g)(2). Interest shall be calculated form the due date for the first quarterly NCP payment, as determined under § 86.1113–87(g)(1), until the date on which the Presiding Officer or the Administrator renders the final decision of the Agency.

(2) The combined principal plus interest on each quarterly NCP payment withheld pursuant to § 86.1113–87(g)(2) shall be calculated according to the following formula:

$$QNCP\,(1+R)^{-n}$$

where

QNCP = the quarterly NCP payment

R = the interest rate applicable to that quarter

n = the number of quarters for which the quarterly NCP payment is outstanding

(3) The number of quarters for which payment is outstanding for purposes of this paragraph shall be the number of quarterly NCP payment due dates, as determined under § 86.1113–87(g)(1), which have elapsed before the Presiding Officer or the Administrator renders the final decision of the Agency under this section.

(4) The interest rate applicable to a quarter for purposes of this paragraph shall be the coupon issue yield equivalent (as quoted by the Secretary of the Treasury) of the average accepted auction price for the last auction of twenty-six week United States Treasury bills settled immediately prior to the quarterly NCP payment due date on which the payment was originally due.

(aa) *Judicial review.* (1) The Administrator hereby designates the General Counsel of the Environmental Protection Agency as the officer upon whom any copies for judicial review shall be served. Such officer shall be responsible for filing in the court the record on which the order of the Administrator is based.

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Friday
August 30, 1985

Part V

Federal Communications Commission

General Fairness Doctrine Obligations of Broadcast Licensees

FEDERAL COMMUNICATIONS COMMISSION

[Gen. Docket No. 84-282; FCC 85-459]

General Fairness Doctrine Obligations of Broadcast Licensees

AGENCY: Federal Communications Commission.

ACTION: Report.

SUMMARY: The Commission undertook a comprehensive reexamination of the statutory, constitutional and policy implications underlying the fairness doctrine. In stark contravention of its purpose, the Commission determined that the fairness doctrine, in operation, inhibited the presentation of controversial issues of public importance. In light of the explosive growth in the number and types of information sources, the Commission also found that the fairness doctrine is not needed to assure that the public has access to the marketplace of ideas. As a consequence, the Commission concluded that the fairness doctrine as a matter of policy disserves the public interest. In addition, the Commission questioned whether the doctrine is consistent with the strictures of the First Amendment. Nonetheless, recognizing that there are viable arguments on both sides of the issue concerning whether or not the doctrine is codified, that various legislative proposals concerning the doctrine are before Congress and the Congress has expressed intense interest in the doctrine, the Commission chose not to eliminate or alter the fairness doctrine. The Commission decided that it would be appropriate to afford Congress the opportunity to review the doctrine in light of the record compiled in this proceeding.

ADDRESS: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Laurel R. Bergold, Robert E. Branson, David L. Donovan or Marcia C. Alterman, Legal Branch, Policy and Rules Division, Mass Media Bureau (202) 632-7792.

SUPPLEMENTARY INFORMATION:

In the matter of inquiry into § 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees; Gen. Docket No. 84-282.

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Report; Proceeding Terminated

Adopted: August 7, 1985.
Released: August 23, 1985.

By the Commission: Chairman Fowler issuing a separate statement; Commissioner Quello concurring and issuing a statement; Commissioner Rivera not participating.

I. Introduction

1. Before the Commission for consideration are the matters raised by the *Notice of Inquiry* in the above-captioned proceeding [1] in which the Commission solicited comments on the statutory, constitutional, and policy implications underlying this fairness doctrine. Specifically, the Commission questioned whether the doctrine is constitutionally permissible under current marketplace conditions and First Amendment jurisprudence. Moreover, as a policy matter, the Commission inquired whether the doctrine remains necessary to further the governmental interest in an informed electorate and solicited comment on whether or not the doctrine, in operation, has an impermissible "chilling" effect on the free expression of ideas. Finally, the Commission queried whether the fairness doctrine is codified either by Section 315 or by the general public interest standard embodied in the Communications Act.

2. More than one hundred parties submitted formal comments and reply comments in this proceeding.[2] Many other persons participated in this proceeding through the submission of informal comments. In addition, the Commission, *en banc*, on February 7 and 8, 1985, heard oral presentations on the issues raised by the *Notice*.

3. The fairness doctrine, as developed by the Commission, imposes upon broadcasters a two-pronged obligation. Broadcast licensees are required to provide coverage of vitally important controversial issues of interest in the community served by the licensees and to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues.[3] An examination of the genesis of the fairness doctrine reveals an evolutionary process, spanning a considerable period of time, and marked by a considerable uncertainty as to the proper approaches to insure that licensees operate in the public interest.[4] This inquiry is a further step in a continuing process in evaluating the fairness doctrine.[5] In undertaking this

[1] *Notice of Inquiry* in Gen. Docket No. 84-282, FCC 84-140, 49 FR 20317 (May 14, 1984) [hereinafter cited as "*Notice*"].

[2] A list of all the parties which filed formal comments and reply comments in this proceeding is contained in the attached Appendix.

[3] *Fairness Report* in Docket No. 19260, 48 FCC 2d 1 (1974), *recon. denied*, 58 FCC 2d 691 (1976), *aff'd sub nom. National Citizens Committee for Broadcasting* v. *FCC*, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978) ["hereinafter cited as "*1974 Fairness Report*"].

[4] For a detailed examination of the history of the fairness doctrine, *see Notice*, *supra* n.1.

[5] In light of the fact that "the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance" *FCC* v. *National Citizens Committee*

Continued

reexamination, we will first determine the purposes underlying promulgation of the fairness doctrine and then assess, in light of current marketplace conditions, whether or not its retention is consistent with the public interest.

4. Our past judgment that the fairness doctrine comports with the public interest was predicted upon three factors. First, in light of the limited availability of broadcast frequencies and the resultant need for government licensing, we concluded that the licensee is a public fiduciary, obligated to present diverse viewpoints representative of the community at large. We determined that the need to effectuate the right of the viewing and listening public to suitable access to the marketplace of ideas justifies restrictions on the rights of broadcasters.[6] Second, we presumed that a governmentally imposed restriction on the content of programming is a viable mechanism—indeed the best mechanism—by which to vindicate this public interest.[7] Third, we determined, as a factual matter, that the fairness doctrine, in operation, has the effect of enhancing the flow of diverse viewpoints to the public.[8]

5. On the basis of the voluminous factual record compiled in this proceeding, our experience in administering the doctrine and our general expertise in broadcast regulation, we no longer believe that the fairness doctrine, as a matter of policy, serves the public interest. In making this determination, we do not question the interest of the listening and viewing public in obtaining access to diverse and antagonistic sources of information.[9] Rather, we conclude that the fairness doctrine is no longer a necessary or appropriate means by which to effectuate this interest. We believe that the interest of the public in viewpoint diversity is fully served by the multiplicity of voices in the marketplace today and that the intrusion by government into the content of programming occasioned by the enforcement of the doctrine unnecessarily restricts the journalistic freedom of broadcasters. Furthermore, we find that the fairness doctrine, in operation, actually inhibits the presentation of controversial issues of public importance to the detriment of the public and in degradation of the editorial prerogative of broadcast journalists.

6. We believe that the same factors which demonstrate that the fairness doctrine is no longer appropriate as a matter of policy also suggest that the doctrine may no longer be permissible as a matter of constitutional law. We recognize that the United States Supreme Court, in *Red Lion Broadcasting Co.* v. *FCC*[10] upheld the constitutionality of the fairness doctrine. But in the intervening sixteen years the information services marketplace has expanded markedly, thereby making it unnecessary to rely upon intrusive government regulation in order to assure that the public has access to the marketplace of ideas. In addition, the compelling evidence adduced in this proceeding demonstrates that the fairness doctrine, in operation, inhibits the presentation of controversial issues of public importance; this fact impels the dual conclusion that the doctrine impedes the public's access to the marketplace of ideas and poses an unwarranted intrusion upon the journalistic freedom of broadcasters.

7. While we are firmly convinced that the fairness doctrine, as a matter of policy, disserves the public interest, the issue as to whether or not Congress has empowered us to eliminate the doctrine is not one which is easily resolved. The fairness doctrine evolved as an administrative policy promulgated by the Commission pursuant to congressionally delegated power. While we do not believe that the fairness doctrine is a necessary component of the general "public interest" standard contained in the Communications Act,[11] the question of whether or not Congress in amending section 315 in 1959 codified the doctrine, thereby requiring us to retain it, is more problematic. In any event, the fairness doctrine has been a longstanding administrative policy and central tenent of broadcast regulation that Congress has chosen not to eliminate. Moreover, there are proposals pending before Congress to repeal the doctrine. As a consequence, we believe that it would be inappropriate at this time for us to either eliminate or significantly restrict the scope of the doctrine. Instead, we will afford Congress an opportunity to review the fairness doctrine in light of the evidence adduced in this proceeding.

II. The Constitutionality of the Fairness Doctrine Is Suspect

8. As we stated in the *Notice*,[12] the fairness doctrine, as a governmentally imposed regulation affecting the content of speech, has significant constitutional ramifications. Because "the 'public interest' standard necessarily invites reference to First Amendment principles," [13] it is appropriate for us to consider the constitutional implications of the doctrine.

9. The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ." [14] As Justice White noted in *Miami Herald* v. *Tornillo:*

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.[15]

10. The means chosen by the Founders to promote the free discussion of public issues was to prohibit the government from intruding into the marketplace of ideas. As the Supreme Court has stated, "the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of

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for Broadcasting, 436 U.S. 775, 810 (1978)], we have an affirmative duty periodically to reassess the wisdom of our rules, even those of long standing, and to determine whether or not they should be altered or even eliminated in light of changed circumstances. *See, e.g., NAACP* v. *FCC*, 682 F.2d 993 (D.C. Cir. 1982). The Supreme Court has recognized that "[r]egulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and for fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy." *American Trucking Association, Inc.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397, 416, *reh. denied*, 389 U.S. 889 (1967). *See Motor Vehicle Manufacturers Association of the United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

[6] We stated that it is necessary to vindicate:

> * * * the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitude and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community. It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.

Report of the Commission in Docket No. 8516, 13 FCC 1246, 1249 (1949) [hereinafter cited as "*1949 Fairness Report*"]. *See 1974 Fairness Report*, 48 FCC 2d at 2–3.

[7] *1974 Fairness Report*, 48 FCC 2d at 6.

[8] *Id.* at 7.

[9] As the Supreme Court has stated, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74–75 (1966).

[10] 395 U.S. 367 (1969).

[11] 47 U.S.C. 309 (1982).

[12] *See Notice*, *supra* n. 1 at ¶¶ 81–95.

[13] *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 122 (1973). *See also American Security Council Education Foundation* v. *FCC*, 607 F. 2d 438, 443 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980).

[14] *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

[15] 418 U.S. 241, 250 (1974), *quoting Mills* v. *Alabama*, 384 U.S. 214, 218–19 (1966) (White J., concurring).

the press.' " [16] The framers of the First Amendment proscribed the government from placing its official imprimatur on any particular viewpoint; they presumed that the marketplace of ideas would flourish best without the necessity or danger of governmental intervention.[17]

11. Under the First Amendment the expression of opinion on matters of public concern "is entitled to the most exacting degree of First Amendment protection." [18] As the United States Supreme Court has stated, the "[d]iscussion of public issues . . . are integral to the operation of the system of government established by our Constitution," [19] and, therefore, essential to an informed democratic citizenry.[20] In addition, as Justice Brennan has recently observed, a "general proscription against unnecessarily broad content-based regulation permeates First Amendment jurisprudence." [21]

12. The United States Supreme Court upheld the constitutionality of the fairness doctrine in *Red Lion Broadcasting Co.* v. *FCC*,[22] "despite the general [F]irst [A]mendment prohibition on government regulation of speech and press"[23] because the Court, at that time, perceived that the doctrine furthered "the paramount [F]irst [A]mendment right of viewers and listeners to receive 'suitable access to . . . ideas and experiences.'"[24] For several reasons, however, the Court's decision in *Red Lion*, was narrowly circumscribed. First, in its opinion, the Court expressly stated that its holding did not constitute approval of every aspect of the fairness doctrine.[25] Second, relying upon our representation that there was no validity to the contention that the fairness doctrine, in operation, lessens the coverage of controversial issues on the nation's airwaves,[26] the Court asserted that,

> If experience with the administration of these doctrines indicates that they have the net affect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications.[27]

Third, the Court's decision was necessarily premised upon the broadcasting marketplace as it existed more than sixteen years ago.[28]

13. As a consequence, serious questions regarding the constitutionality of the fairness doctrine continued in spite of the Supreme Court's decision in *Red Lion*. Indeed, as the United States Court of Appeals stated in referring to that decision:

> [d]espite this holding, important constitutional questions continue to haunt this area of the law. The doctrine and the rule do, after all, involve the Government to a significant degree in policing the content of communication . . . [and there are] abiding First Amendment difficulties. . . .[29]

14. Subsequent to *Red Lion*, the Court in *Miami Herald Publishing Co.* v. *Tornillo* [30] invalidated, on First Amendment grounds, a Florida statute which gave political candidates a right to reply to criticisms and attacks by a newspaper. In that case the Court, in a unanimous opinion, determined that the inevitable effect of a governmentally imposed right of reply requirement would be to reduce the amount of controversial issues of public importance presented in the press. The Court concluded that:

> Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate."[31]

Indeed, the Court, in *Miami Herald*, intimated that the regulatory requirements that we impose may be even more inhibiting than those contained in the "right of reply" statute because print journalists are not subject to the finite technological limitations of time that confront a broadcaster. . . ."[32]

15. In *FCC* v. *League of Women Voters* [33] the Court has recently reaffirmed that the constitutional permissibility of the fairness doctrine is predicated upon a factual presumption that the doctrine has the effect of enhancing the coverage of controversial issues available to the viewing and listening public. Indeed, the Court stated that it would be obligated to reevaluate the constitutionality of the doctrine if the Commission demonstrated the falsity of this assumption.[34] In addition,

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[16] *Bridges* v. *California*, 314 U.S. 252, 263 (1941). As Justice Potter Stewart has stated: Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that "fairness" was too fragile to be left for a government bureaucracy to accomplish.

Columbia Broadcasting System, Inc., v. *Democratic National Committee*, 412 U.S. at 145 (Stewart H., concuring).

[17] The United States Supreme Court has stated that "in the realm of ideas [the Constitution] protects expression which is eloquent no less than that which is unconvincing." *Kingsley International Pictures Corp.* v. *Regents of the University of the State of New York*, 360 U.S. 684, 689 (1959).

[18] *FCC* v. *League of Women Voters of California*, —— U.S. ——, 104 S. Ct. 3106, 3115 (1984). *See First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776–77, *reh. denied*, 438 U.S. 907 (1978); *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976).

[19] *Buckley* v. *Valeo*, 424 U.S. at 14.

[20] The United States Supreme Court has recently reaffirmed that: It is speech on " 'matters of public concern' " that is "at the heart of the First Amendment's protection." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776 (1978), *quoting Thornhill* v. *Alabama*, 310 U.S. 88, 101 (1940). As we stated in *Connick* v. *Myers*, 461 U.S. 138, 145 (1983). . . . "the Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection. *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey* v. *Brown*, 447 U.S. 445, 467 (1980)."

Dunn & Bradstreet, Inc. v. *Greenmoss Builders, Inc.*, —— U.S. ——, 53 U.S.L.W. 4886, 4869 (U.S. June 26, 1985) [No. 83–16].

[21] *Id.* at 4874 [Brennan, J., dissenting]. *See also Banzhaf* v. *FCC*, 405 F. 2d 1082, 1100 (D.C. Cir. 1968), *cert. denied sub nom. American Broadcasting Companies* v. *FCC*, 396 U.S. 842 (1969) ["The First Amendment is unmistakably hostile to governmental controls over the content of the press"].

[22] *Red Lion Broadcasting Co.* v. *FCC*, *supra* n.10.

[23] *American Security Council Education Foundation* v. *FCC*, 607 F.2d at 443–44.

[24] *Id.*, *quoting Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. at 389–90 [ellipses in original].

[25] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. at 396.

[26] In *Red Lion*, the Court stated that if broadcasters' . . . coverage of controversial public issues will be eliminated or at least rendered wholly ineffective [by the doctrine] [s]uch a result would indeed be a serious matter, for . . . the purposes of the doctrine would be stifled.

At this point, however, as the Federal Communications Commission has indicated, that possibility is at best speculative.

Id. at 393. *See also American Security Council Education Foundation* v. *FCC*, 607 F.2d at 444.

[27] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. at 393. Similarly, the United States Court of Appeals has stated that "[i]f the fairness doctrine cannot withstand First Amendment scrutiny, the reason is that to insure a balanced presentation of controversial issues may be to insure no presentation, or no vigorous presentation, at all." *Banzhaf* v. *FCC*, 405 F.2d at 1102–03.

[28] As the Supreme Court has recognized: Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of a great delicacy and difficulty. . . . The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence.

Columbia Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. at 102.

[29] *Straus Communications, Inc.* v. *FCC*, 530 F.2d 1001, 1008 (D.C. Cir. 1976).

[30] *Miami Herald Publishing Co.* v. *Tornillo*, *supra* n.15.

[31] *Id* at 257, *quoting New York Times Co.* v. *Sullivan*, 376 U.S. at 279.

[32] *Id.* at 256–57.

[33] *FCC* v. *League of Women Voters of California*, *supra* n.18.

[34] The Court asserted that: As we recognized in *Red Lion*, however, were it to be shown by the Commission that the fairness doctrine "has the effect of reducing rather than enhancing" speech,

Continued

the Court indicated that it may be willing to reassess the constitutional standards traditionally applied in broadcast regulation. The Court stated that:

> The prevailing rationale for broadcast regulation based upon spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete. *See, e.g.*, Fowler & Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex. L. Rev. 207, 221–226 (1982). We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.[35]

Our reading of this language is that the decision in *Red Lion*, as well as the level of constitutional scrutiny applied to content regulation of broadcast speech, could change if the factual predicates which the Supreme Court relied upon in that case have changed. As a consequence, while we recognize that the Supreme Court's decision in *Red Lion* is controlling law unless the Court expressly states otherwise, we do not agree with the position of some commenters that the mere recitation of the Court's decision in *Red Lion* is sufficient to definitively resolve the complex constitutional issues presented by the doctrine.[36]

16. We now turn to identifying the standard of review appropriate to restraints on broadcast speech. In ascertaining whether or not a particular broadcast regulation comports with the First Amendment, the United States Supreme Court historically has applied standards which are different from those governing "the traditional free speech case." [37] Specifically, the Court has asserted that the utilization by the broadcast media of a public resource justifies the application of what it characterizes as "an unusual order of First Amendment values." [38] Under this bipartite standard, the interest of the public under the First Amendment is paramount.[39] The second part of this standard recognizes the substantial rights of broadcasters under the First Amendment.[40] As the Court has recently stated, "broadcasters are 'entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public [duties].' " [41] Indeed, restrictions on the First Amendment rights of broadcasters are upheld only if these are found to be narrowly tailored regulations necessary to vindicate the public's paramount right to receive information essential to a functional democracy.[42] This standard of review appears to have left broadcast speech in a position of protection less favorable than the printed media. This dichotomy if vividly presented by comparing the *Red Lion* and *Miami Herald* cases, decided within five years of each other. Had the *Red Lion* court required of the Commission a showing of compelling state interest, as it required of the state of Florida in *Miami Herald*, it is doubtful that the fairness doctrine would have survived. But the *Red Lion* court found that scarcity and its effects had made a licensing scheme necessary and went on to conclude that that scheme afforded broadcasters a standard of review less protective than that accorded the print media.[43]

17. In light of the significant changes that have occurred in the communications marketplace, a number of commenters have taken the position that the application of a disparate First Amendment standard to cases involving broadcast journalists is no longer appropriate. These parties argue that the constitutionality of the fairness doctrine and other cases involving broadcast journalists should be evaluated under the general constitutional standards that apply to the print media.[44] We would agree that the courts may well be persuaded that the transformation in the communications marketplace justifies the adoption of a standard that accords the same degree of constitutional protection to broadcast journalists as currently applies to journalists of other media. We do not believe, however, that it is necessary or appropriate for us to make that determination in this proceeding.

18. Administrative agencies are not tasked with the duty to adjudicate the constitutionality of a federal statute.[45]

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we would then be *forced* to reconsider the constitutional basis of our decision in that case. *Id.* at 3117 n.12, *quoting Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. at 393 (emphasis added).

[35] *Id.* at 3115 n.11. The United States Court of Appeals has also indicated that the proliferation of broadcast outlets may affect the extent to which the speech of broadcasters is protected by the First Amendment: [t]oday when the number of broadcast stations not only far exceeds the number when the Communications Act was adopted and the number when the *National Broadcasting Co.* case was decided and rivals and perhaps surpasses the number of newspapers and magazines in which political messages may effectively be carried, it seems unlikely that the First Amendment protections of broadcast political speech will contract further, and they may well expand. *Loveday* v. *FCC*, 707 F.2d 1443, 1459 (D.C. Cir. 1983), *cert. denied*, 104 S.CT. 1907 (1984); *See also Banzhaf* v. *FCC*, *supra* n.21; *Quincy Cable, TV Inc.* v. *FCC*, No. 83–1283 (D.C. Cir. July 19, 1985).

[36] Similarly, we do not believe that the mere fact that the fairness doctrine is a regulation of long-standing makes it invulnerable to First Amendment challenge. The United States Court of Appeals has stated that: It may well be that some venerable FCC policies cannot withstand constitutional scrutiny in light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets. *Banzhaf* v. *FCC*, 405 F.2d at 1100.

[37] *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. at 101.

[38] *Id.*

[39] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. at 390. Contrary to the position of some commenters (*See, e.g.*, Reply Comments of Ecumedia) the general public has no First Amendment right to speak on broadcast frequencies. *See, e.g., Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, *supra* n.13. The juxtaposing of speakers' and listeners' rights provides an important underpinning of the framework the Supreme Court has employed in analyzing constitutional constraints in the broadcast regulatory area. It suggests that some lessening of the rights of one group (speakers) is necessary to increase the rights of another (listeners and viewers). While such an analysis initially appears to provide a useful insight into why broadcast licensees receive differential treatment under the First Amendment, it conflicts fundamentally with what would appear to be the historic philosophy underlying the First Amendment. That is, that it is through the protection of the rights of speakers that the interest of society as a whole will best be protected.

[40] *See, e.g., Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, *supra* n.13; *League of Women Voters of California* v. *FCC*, 104 S.Ct. at 3116–17.

[41] *FCC* v. *League of Women Voters of California*, 104 S.Ct. at 3116–17, *quoting CBS, Inc.* v. *FCC*, 453 U.S. 395 (1981), *quoting Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. at 110.

[42] *Id.* at 3118.

[43] Although *Red Lion* was a unanimous decision, Justic William O. Douglas did not participate and four years later wrote "[m]y conclusion is that TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. at 148. (Douglas, J., concurring). Justice Douglas added, "I did not participate in that decision [*Red Lion*] and, with all respect, would not support it. The Fairness Doctrine has no place in our First Amendment regime." *Id.* at 154. And compare: We have been beginning, so to speak, in the wrong corner. The question is not what does the need for licensing permit the Commission to do in the public interest; rather it is what does the mandate of the First Amendment inhibit the Commission from doing even though it is to license.

H. Kalven, Jr., "Broadcasting, Public Policy and the First Amendment," 10 J.L. & Econ. 15, 37 (1967).

[44] *See generally* ¶¶ 9–11, *supra*.

[45] As the United States Supreme Court has stated, "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Johnson* v. *Robison*, 415 U.S. 361, 368 (1974), quoting *Oesterreich* v. *Selective Service Board*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring in result). *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975).

For the reasons set forth in detail below,[46] the issue as to whether or not the fairness doctrine is codified is not one which is susceptible of an easy resolution. Moreover, we are mindful that it is the province of the federal judiciary—and not this Commission—to interpret the Constitution.[47] We do not purport, therefore, to definitively resolve whether or not the fairness doctrine is constitutional. However, for several reasons we believe that it is appropriate for us to state our opinion on this issue. First, as noted above, constitutional considerations are an intergral component of the public interest standard and we believe that an evaluation of the constitutionality of the doctrine is necessary in order to make a meaningful evaluation as to whether or not retention of the doctrine is in the public interest. Second, as the expert administrative agency charged by the Congress with the day-to-day implementation of broadcast regulation, we believe that our opinions on these matters provide a unique perspective which may prove useful.[48] Third, as noted above, in upholding the constitutionality of the fairness doctrine in the *Red Lion* decision, the Supreme Court relied upon our representation that the fairness doctrine did not operate to inhibit the coverage of controversial issues of public importance; the evidence in this proceeding, however, compels the conclusion that this assumption is no longer valid.

19. We believe that there are serious questions raised with respect to the constitutionality of the fairness doctrine whether or not the Supreme Court chooses to continue to apply the less exacting standard which it has traditionally employed in assessing the constitutionality of broadcast regulation. As demonstrated *infra*, the compelling evidence in this proceeding demonstrates that the fairness doctrine, in operation, inhibits the presentation of controversial issues of public importance. As a consequence, even under a standard of review short of the strict scrutiny standard applied to test the constitutionality of restraints on the press, we believe that the fairness doctrine can no longer be justified on the grounds that it is necessary to promote the First Amendment rights of the viewing and listening public. Indeed, the chilling effect on the presentation of controversial issues of public importance resulting from our regulatory policies affirmatively disserves the interest of the public in obtaining access to diverse viewpoints. In addition, we believe that the fairness doctrine, as a regulation which directly affects the content of speech aired over broadcast frequencies, significantly impairs the journalistic freedom of broadcasters. As set forth in detail below, in light of the substantial increase in the number of types of information sources, we believe that the artificial mechanism of interjecting the government into an affirmative role of overseeing the content of speech is unnecessary to vindicate the interest of the public in obtaining access to the marketplace of ideas. Were the balance ours alone to strike, the fairness doctrine would thus fall short of promoting those interests necessary to uphold its constitutionality. And because the constitutionality of the fairness doctrine, in our view, is suspect under the less searching broadcast standard of review, *a fortiori*, it would prove constitutionally infirm under the more stringent First Amendment standard applicable in cases involving the print media.[49]

20. A number of commenters have argued that the limited availability of the electromagnetic spectrum is sufficient to justify the fairness doctrine. For example, the Media Access Project and the Telecommunications Research and Action Center ("MAP/TRAC") argue that:

> The most important justification for the fairness doctrine is that there are more individuals who want to broadcast than there are broadcast frequencies for the Commission to allocate. This continuing outstripping of supply by demand is the basis of the so-called "scarcity" rationale.[50]

While it is true that the limited availability of the electromagnetic spectrum may constitute a *per se* justification for certain types of government regulation, such as licensing, it does not follow that all other types of governmental regulation, particularly rules which affect the constitutionally sensitive area of content regulation, are similarly justified. As the United States Court of Appeals stated:

> First Amendment complaints against FCC regulation of content are not adequately answered by mere recitation of the technically imposed necessity for *some* regulation of broadcasting and the conclusory propositions that "the public owns the airwaves" and that a broadcast license is a "revocable privilege." [51]

21. In sum, while we recognize that the United States Supreme Court found that the fairness doctrine was constitutionally permissible sixteen years ago, we believe that the transformation of the broadcast marketplace and the compelling documentation of the "chilling effect" undermine the factual predicate of that decision. We will now specifically address the factors which, in our view, mandate a reassessment of our historical position that the fairness doctrine is consistent with the public interest.

III. A Number of Factors Justify a Reassessment of the Fairness Doctrine

A. The Need for and Costs of the Fairness Doctrine and Its Actual Effect on the Coverage of Controversial Issues of Public Importance

22. As we stated in our *Notice*, the purpose in instituting this inquiry was to undertake a "searching and comprehensive reexamination of the fairness doctrine. . . ." [52] This reappraisal will consist of three parts: an exploration as to whether the doctrine furthers or impedes the regulatory and constitutional objectives it seeks to promote, an assessment of the potential costs and other detriments which may arise from the operation of the doctrine and an evaluation as to whether or not the communications marketplace has undergone such a transformation that the doctrine is no longer warranted or supportable.

23. As we stated above, the historic justification of the retention of the fairness doctrine, as a matter of policy, has been that government regulation is necessary to assure access to the

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[46] *See* Section V, *infra*.

[47] *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803).

[48] The Supreme Court has stated that "in evaluating First Amendment claims . . . we must afford great weight to the . . . experience of the Commission." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. at 102. Moreover, in *FCC* v. *League of Women Voters of California*, the Court indicated that it may reevaluate the standard utilized in First Amendment cases if, *inter alia*, the Commission provides it with a "signal" that technological advancements warrant such a reevaluation. *League of Women Voters*, 104 S. Ct. at 3116 n.11.

[49] Indeed, in light of the Supreme Court's decision in *Miami Herald Publishing Co.* v. *Tornillo*, *supra* n.15, it is clear that the fairness doctrine would not be constitutional were the Court to apply the general First Amendment standards governing the print media.

[50] "Comments of Media Access Project and Telecommunications Research and Action Center" at 61 [hereinafter cited as "MAP/TRAC Comments"].

[51] *Banzhof* v. *FCC*, 405 F.2d at 1100 (emphasis in original) (footnotes omitted). Indeed, notwithstanding its express recognition of the limited availability of the electromagnetic spectrum in *FCC* v. *League of Women Voters of California*, the Court invalidated a statutory prohibition on editorializing by funded, non-commercial broadcast stations on the grounds that the statute violated the First Amendment rights of broadcasters. *FCC* v. *League of Women Voters of California*, *supra* n.18.

[52] *Notice*, *supra* n.1, at ¶ 4.

"widest possible dissemination of information from diverse and antagonistic sources," [53] to the listening and viewing public. While we have historically expressed our belief that the fairness doctrine, in operation, had the effect of expanding coverage of controversial issues on the nation's airwaves,[54] we have never specifically made an empirical assessment as to the efficacy of this chosen regulatory mechanism to promote access by the public to the marketplace of ideas. As a consequence, in this proceeding, we believe that it is essential to undertake a detailed evaluation as to whether or not the fairness doctrine in operation, enhances or inhibits the presentation of diverse views on public issues. In undertaking this evaluation, we will assess both the potential for the doctrine to chill the speech of broadcasters and review the actual evidence presented by the commenting parties to determine whether the fairness doctrine impedes or inhibits access by the public to the marketplace of ideas.

24. Because a meaningful evaluation of an administrative policy necessarily involves an assessment of regulatory burdens, we shall also evaluate the costs and other potential detriments directly and indirectly borne by broadcasters, the Commission and the public at large which arise from the operation of the fairness doctrine. These costs do not merely include financial expenses but may also involve a restriction of cherished First Amendment values and an increased danger of government abuse.

25. Finally, in our comprehensive reappraisal of the fairness doctrine, we shall determine whether active government intervention in this constitutionally sensitive area involving content regulation is necessary or appropriate in promoting access to the marketplace of ideas. In determining whether or not there is a need to retain the fairness doctrine, we shall initially assess the nature and scope of the relevant market and then evaluate the sufficiency of antagonistic viewpoints available to the public in that market. We are particularly interested in ascertaining whether there have been significant changes in the number and variety of information sources available to the public which would attenuate the need for an artificial regulatory mechanism to assure that the public has access to diverse viewpoints on controversial and important issues.

B. The Fairness Doctrine in Operation Lessens the Amount of Diverse Views Available to the Public

1. Broadcasters Perceive That the Fairness Doctrine Involves Significant Burdens

26. A licensee may be inhibited from presenting controversial issues of public importance by operation of the fairness doctrine even though the first prong of that doctrine affirmatively requires the licensee to broadcast such issues.[55] The reason underlying this apparent paradox is that the two parts of the fairness doctrine differ markedly in the scope of the controversial issues that they encompass, the ease by which a licensee can meet the requirements embodied in the two prongs and the degree to which the Commission, in the past, has taken affirmative action to enforce compliance with them.

27. It is well-established that a licensee, in complying with the first prong of the fairness doctrine, has broad discretion in determining the specific controversial issues of public importance that it chooses to present.[56] Indeed, in our *1974 Fairness Report*, we stated that "we have no intention of becoming involved in the selection of issues to be discussed, nor do we expect a broadcaster to cover each and every important issue which may arise in his community." [57] Rather, with respect to the affirmative obligation to cover controversial issues of public importance, "[a] presumption of compliance exists" [58] and only "in *rare instances*, where a licensee has failed to give coverage to an issue found to be of critical importance to its particular community, would questions be raised as to whether a licensee had fulfilled its fairness obligations." [59] Indeed, the United States Court of Appeals has characterized this requirement as one which is "not extensive and [can be] met by presenting a minimum of controversial subject matter." [60]

28. In contrast to the paucity of challenges under the first part of the fairness doctrine, "[t]he usual fairness complaint . . . concerns a claim that the licensee has presented one viewpoint on a 'controversial issue of public importance' and has failed to afford a 'reasonable opportunity for the presentation of contrasting viewpoints.' " [61] The responsive programming obligation embodied in the second prong of the fairness doctrine arises whenever the licensee airs any controversial issue of public importance, even in situations where the issue broadcast is not "so critical or of such great public importance" [62] to trigger a requirement under the first part of the fairness doctrine.[63] An overwhelming majority of the complaints we receive and virtually all our orders directing licensees to take corrective action to conform to the requirements of the fairness doctrine involve the second prong of that doctrine.[64]

29. As a result of the asymmetry between its two components, the fairness doctrine in its operation encourages broadcasters to air only the minimal amount of controversial issue programming sufficient to comply with the first prong. By restricting the amount

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[53] *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945); *1974 Fairness Report*, 48 FCC 2d at 3.

[54] *1974 Fairness Report*, 48 FCC 2d at 7. We have, however, always recognized the dangerous potential that the fairness doctrine, in operation, could have a "chilling effect" on the coverage of controversial issues of public importance. In fact, in the *1974 Fairness Report*, we stated that: There exists within the framework of fairness doctrine administration and enforcement the potential for undue governmental interference in the processes of broadcast journalism, and the concomitant diminution of the broadcaster's and the public's First Amendment interests.

Id. at 6. We have also indicated that if it were shown in actual operation that the doctrine either unnecessarily restricted the journalistic freedoms of broadcasters or impeded the right of the public to obtain access to diverse viewpoints on public issues, we would be compelled to reassess the policy. *See Notice of Inquiry* in Docket No. 19260, 30 FCC 2d 26, 28 (1971).

[55] Under the first prong of the fairness doctrine the licensee is required to provide coverage of controversial issues of vital importance to the community. *See, e.g., Friends of the Earth*, 24 FCC 2d 743, 750–51 (1970); *1974 Fairness Report*, 48 FCC 2d at 9–10; *Representative Patsy Mink*, 59 FCC 2d 987 (1976).

[56] *See, e.g., 1949 Fairness Report*, 13 FCC at 1251.

[57] *1974 Fairness Report*, 48 FCC 2d at 10.

[58] *Memorandum Opinion and Order* in BC Docket No. 78–60, 89 FCC 2d 916, 925 (1982) (emphasis added).

[59] *Brent Buell*, 97 FCC 2d 55, 57 (1984) (emphasis added). *See Memorandum Opinion and Order* in BC Docket No. 78–60, 89 FCC 2d at 925; *1974 Fairness Report*, 48 FCC 2d at 10. As the United States Court of Appeals has stated: "Throughout the history of fairness doctrine enforcement, much more attention has been given to th[e] second obligation—the provision of opposing points of view on controversial issues about which only one viewpoint has been broadcast—than to the first, namely, the affirmative obligation to provide coverage of controversial and important issues. The FCC has only once sustained a complaint relating to the part one obligation." *National Citizens Committee for Broadcasting* v. *FCC*, 567 F.2d 1095, 1100 n.13 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978).

[60] *American Security Council Education Foundation* v. *FCC*, 607 F.2d at 444.

[61] *1974 Fairness Report*, 48 FCC 2d at 10.

[62] *Id.*

[63] As the Court of Appeals has stated: ". . . issues giving rise to the part two obligation would not necessarily be required to be covered under the first obligation; the threshold which triggers the second fairness obligation is lower than that which triggers the first." *National Citizens Committee for Broadcasting* v. *FCC*, 567 F.2d at 1100 n.13.

[64] *See generally* n. 59, *supra*.

and type of controversial programming aired, a broadcaster minimizes the potentially substantial burdens associated with the second prong of the doctrine while remaining in compliance with the strict letter of its regulatory obligations.[65] Therefore, despite the first prong obligation, in net effect the fairness doctrine often discourages the presentation of controversial issue programming.[66]

30. There are a variety of reasons why a broadcaster might be inhibited from providing comprehensive coverage of controversial issues of public importance by operation of the fairness doctrine. One reason is the fear of government sanction. Under our regulatory scheme, a broadcaster must obtain a license from the Commission prior to entry into the broadcast field.[67] Because broadcast licenses are granted only for limited periods of time, all broadcasters must periodically renew that license if they wish to remain in business.[68] Compliance with the fairness doctrine is an important consideration in our determination as to whether renewal of a broadcast license is in the public interest.[69] Indeed, we have characterized the "strict adherence to the fairness doctrine . . . as the *sine qua non* for grant of a renewal of license."[70]

31. Because a decision by this Commission to deny the renewal of a broadcast license is "a sanction of tremendous potency"[71] which can be triggered by a finding by this Commission that the licensee failed to comply with the fairness doctrine, a licensee has the incentive to avoid even the potential for such a determination.[72] Therefore, in order to attenuate the possibility that opponents, in a renewal proceeding, will challenge the manner in which a licensee provides balance with respect to the controversial issues it chooses to cover, a broadcaster may be inhibited from presenting controversial issue programming in excess of the minimum required to satisfy the first prong of the fairness doctrine.[73] As Chief Judge David Bazelon has stated, "[w]hen the right to continue to operate a lucrative broadcast facility turns on periodic government approval, even a governmental 'raised eyebrow' can send otherwise intrepid entrepreneurs running for the cover of conformity."[74]

32. While denial of a license renewal is the most severe sanction we can impose for failure to abide by the fairness doctrine,[75] it is not the only sanction.[76] Typically, upon a finding that a licensee has violated the fairness doctrine, we order the broadcaster to provide additional programming in order to redress the imbalance in time and frequency given to one side of a controversial issue.[77] Since broadcast time is a valuable resource, such a requirement imposes costs upon the licensee. In order to avoid these costs, a broadcaster may be inhibited from presenting more than a minimal amount of controversial issue programming.

33. The potential of a "chilling effect," however, is not restricted to the fear by a broadcaster that the Commission will find a violation of the fairness doctrine and impose sanctions on the licensee. A licensee may also be inhibited from presenting controversial issue programming by the fear of incurring the various expenses and other burdens which may arise in the context of fairness doctrine litigation regardless of whether or not it is ultimately found to be in violation of the doctrine.

34. As one broadcaster noted, licensees are "conscious of the probability that coverage of a highly controversial issue will trigger an avalanche of protests"[78] demanding air

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[65] One commentator has noted that:

> [L]icensees risk more by providing programming on controversial issues than by ignoring such issues; in only one case in the FCC's history has a complaint relating to the coverage requirement been resolved against a licensee. Hence, licensees are likely to assume that it is safer to ignore the coverage requirement than to risk balancing complaints. . . .
>
> [This] can only have the effect of encouraging licensees to avoid all but the most significant community concerns, discouraging the open debate of many important issues.

B. Chamberlin, "The FCC and the First Principle of the Fairness Doctrine: A History of Neglect and Distortion," 31 Fed. Comm. L.J. 361, 408–09 (1979) (footnotes omitted). *See also American Security Council Education Foundation* v. *FCC*, 607 F.2d at 459 n.5 (Bazelon, J., concurring).

[66] We do not believe that more stringent enforcement of the first prong would be an appropriate remedial response to the existence of a "chilling effect." Indeed, such an approach increases the severity of major detriments associated with the fairness doctrine. For example, contrary to the principles of the First Amendment, a stricter regulatory approach would increase the government's intrusion into the editorial decisionmaking process of broadcast journalists. It would enlarge the opportunity for governmental officials to abuse the doctrine for partisan political purposes. Were the chilling effect of the government sanction removed, the result might well be greater coverage of issues and thus more satisfaction of the policy behind the fairness doctrine's first prong. Moreover, a more stringent enforcement of first prong obligations would merely increase the economic costs that are borne both by broadcasters and the Commission.

[67] 47 U.S.C. 301 (1982).

[68] Section 307(c) of the Communications Act prohibits the Commission from granting a television license for a period exceeding five years or a radio license for a period in excess of seven years. 47 U.S.C. § 307(c) (1982).

[69] *See* 47 U.S.C. 309 (1982).

[70] *Committee for the Fair Broadcasting of Controversial Issues*, 25 FCC 2d 283, 292 (1970); *Office of Communication of the United Church of Christ* v. *FCC*, 359 F. 2d 994, 1008 (D.C. Cir. 1966) (Burger, C.J.). *See also 1974 Fairness Report*, 48 FCC 2d at 10.

[71] *Business Executives' Move for Vietnam Peace* v. *FCC*, 450 F.2d 642, 666 (D.C. Cir. 1971), *rev'd sub nom. Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973) (McGowan, J., dissenting).

[72] As Judge Leventhal recognized, "[f]airness rulings raise the problem of a chilling effect on broadcast journalism; the licensee "faces the possibility that the [controversial programming] will haunt [its] renewal applications." *National Broadcasting Company, Inc.* v. *FCC*, 516 F.2d 1180 (D.C. Cir. 1975), *cert. denied*, 436 U.S. 926 (1976) (Leventhal, C.J. concurring in part and dissenting in part).

[73] The evidence of record from a fairness doctrine supporter demonstrates that organizations have effectively used the threat of license revocation in fairness doctrine negotiations in order to pressure broadcasters to give them air time for their specific programming. The Public Media Center ("PMC"), an organization which utilizes the fairness doctrine "to help various organizations secure air time for the expression of their views via the electronic media," ["Comments of the Public Media Center" at 1, n.1 (hereinafter cited as "PMC Comments")] has recounted one such instance in which an anti-nuclear coalition sought to obtain free advertising time from broadcast stations in order to present its views on a nuclear dumping controversy. PMC stated that: "COND [the anti-nuclear coalition] made it clear that a Petition to Deny License Renewal would be filed if the fairness doctrine question went unresolved. *While it's unlikely the FCC would pull a license solely because of a fairness violation, most stations will do everything they can to avoid any kind of license challenge.* The cost of fighting a Petition to Deny is, after all, much higher than the price of complying." *Id.* at 14. (emphasis added). Although the stations offered to present the anti-nuclear viewpoint by means of a talk show, the coalition took the position that this offer was insufficient; instead it demanded that the responsive programming requirement of the fairness doctrine be met by the broadcast of specific spot advertising prepared by them. *Id.* at 14. The stations ultimately acceded to the coalition's demand. As PMC admitted, it was "[t]he implied threat of a license renewal challenge [which] increased the stations' desire for a negotiated settlement." *Id.* at 15.

[74] D. Bazelon, "The First Amendment and the 'New Media'—New Directions in Regulating Telecommunications," 31 Fed. Comm. L.J. 201, 206 (1979).

[75] A number of parties disagree that the power of the Commission to refuse to renew a station license has an inhibiting effect because the exercise of this power is sparingly used. For example, MAP/TRAC contend that "[l]icensees do not lose licenses for violation of the fairness doctrine in the coverage of an issue and the Commission knows it." MAP/TRAC Comments, *supra* n.50 at 137. We disagree. First, contrary to MAP/TRAC's assertion, we have in fact denied a license renewal on the basis of a fairness doctrine violation. *Brandywine Main-Line Radio, Inc.* 24 FCC 2d 18 (1970), *Reconsideration denied*, 27 FCC 2d 565 (1971), *aff'd on other grounds*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973). Second, while we perceive the denial of a license renewal to be an extreme remedy which should not be lightly assessed, in light of the severity of this sanction, we believe that its mere potential has an inhibiting effect.

[76] *See* ¶ 52, *infra*.

[77] *See, eg.*, Public Notice, "Controversial Issue Programming, Fairness Doctrine," FCC 63–734 (July 26, 1963), 25 RR 1899 (1963). *See generally Syracuse Peace Council*, FCC 84–518 (released December 20, 1984), 57 RR 2d 519 (1984).

[78] "Comments of Tribune Broadcasting Co." at 9 [hereinafter cited as "Tribune Comments"].

time for the presentation of opposing viewpoints. While most requests may be made in good faith, there is evidence that some complainants invoke a licensee's fairness doctrine obligations in an attempt either to pressure a broadcaster to censor specific programming [79] or to harass licensees into presenting a particular spokesman or broadcast.[80] Whether or not the requests are legitimate, a station nonetheless may incur additional personnel costs in negotiating with the group seeking responsive programming.

35. Broadcasters can also be deterred by the finanical costs involved in defending a fairness doctrine complaint. The record reflects that such costs can be substantial. For example, a fairness doctrine complaint was brought against KREM–TV, a television station in Spokane, Washington charging the station with unbalanced coverage of a bond issue for an international exposition entitled "Expo–74." [81] While the Commission ultimately made the determination that the licensee did not violate the fairness doctrine, the administrative process extended for more than 20 months.[82] The licensee incurred legal costs of at least $20,000 and other expenses, such as travel expenses, significantly added to that total.[83] As the total profits reported by all three Spokane television stations in 1972 were approximately $494,000,[84] the financial burden borne by the station in defending this single fairness doctrine complaint was considerable. Moreover, in addition to the legal costs and other out-of-pocket expenses incurred by the station, the licensee was further burdened by the dislocation of normal operational functions that necessarily resulted from the significant amount of time expended by high-level management and station employees with respect to this matter.[85]

36. Another example of the significant financial burdens which can result from fairness doctrine litigation is the NBC award-winning[86] documentary on abuses in the private pension industry entitled "Pensions: the Broken Promise." [87] Determining that the program presented one side of the controversial issue of the "performance and need for regulation of private pension plans," [88] the Commission found NBC was required to present contrasting viewpoints. While NBC was ultimately vindicated,[89] the administrative and judicial proceedings extended for four years and NBC incurred approximately $100,000 in legal costs in defense of the fairness doctrine complaint.[90]

37. Certain parties take issue with the contention that the fear of fairness doctrine litigation can have an inhibiting effect on the presentation of controversial issues of public importance.[91] In support of their

[79] For example, PMC, a fairness doctrine supporter, describes a situation in which a coalition of organizations supporting legalized abortion invoked the fairness doctrine in their efforts to convince a Washington, D.C. television station, WJLA–TV, to cancel an anti-abortion film. PMC Comments, *supra* n.73 at 12. While the group was unsuccessful, in its comments PMC recounts several situations, which are described *infra* at ¶¶ 48–49, in which complainants did in fact dissuade broadcasters from airing advertisements supporting or opposing ballot propositions. Similarly, as described at ¶ 44, *infra*, the National Association of Broadcasters ("NAB") recounts an instance in which a member of a religious cult, threatening to file a fairness doctrine complaint, successfully demanded the station to cancel a series on the religious organization. "Comments of the National Association of Broadcasters", App. Vol., App. D at 2 (Example No. 1) [hereinafter cited as "NAB comments"].

[80] PMC describes the following situation in which an anti-nuclear group used the fairness doctrine to have its ballot propositions aired:

> Schwartzman [a Washington, D.C. communications attorney] applied muscle in Washington.
>
> Inside forty-eight hours, every radio station had been contacted to find out which were running the industry ads. . . . [A] few refused to negotiate, claiming their news and public affairs coverage gave adequate balance.
>
> With Schwartzman's aid, a preliminary complaint was filed against the largest station by telegram on Thursday night.
>
> MNRC [the anti-nuclear group] also called the Chief of the FCC's fairness/political broadcast branch at home. On Friday morning, MNRC and the station's attorneys negotiated a settlement and the complaint was withdrawn.
>
> With this precedent, and more pressure from Schwartzman, every station that had carried the industry's ads was airing MNRC ads for free by Friday night.

PMC Comments, *supra* n.73 at 31. It is significant that PMC, in describing this scenario, does not dispute the stations' contention that they already were in compliance with the fairness doctrine by virtue of the fact that their news and public affairs programming provided adequate balance to the industry's advertisements. Rather, the objective of the anti-nuclear group, as expressed by PMC, was to have the stations broadcast their particular advertisements rather than to have the stations comply with the requirements of the fairness doctrine. It is also noteworthy that the complaint—which was withdrawn in less than one day—was filed against the "largest" station; the commenter did not state that the anti-nuclear coalition perceived that this station was in violation of the fairness doctrine. A number of other examples in which complainants invoked the fairness doctrine to demand that a licensee air a specific broadcast or present a specific spokesperson are described elsewhere in this *Report*. *See* ¶¶ 49–50, *infra*.

[81] *Sherwyn M. Heckt*, 40 FCC 2d 1150 (1973).

[82] The complaint was filed on September 8, 1971; the station responded on October 12, 1971, and the complainant replied seventeen days later. The licensee made further responses on December 2, 1971 and May 11, 1972. The Commission initiated a four-day field investigation on June 5, 1972. The Commission made an additional inquiry to the licensee on December 6, 1972 and the licensee responded on February 6, 1973. The Commission's staff issued a ruling vindicating the licensee on May 17, 1973. *Id.*

[83] *See* "Comments of Henry Geller and Donna Lampert," App. B at 2 [hereinafter cited as "Geller/Lampert Comments"]; "Comments of CBS, Inc." at 83 [hereinafter cited as "CBS Comments"]; "Comments of the Freedom of Expression Foundation" at 75 [hereinafter cited as "FEF Comments"]; NAB Comments, *supra* n.79 at 42.

[84] *See* Geller/Lampert Comments, *supra* n.83, App. B at 2; CBS Comments, *supra* n.83 at 84. Indeed, the station manager of KREM–TV testified that the fairness doctrine complaint resulted in a severe personal financial loss. *Freedom of Expression Act of 1983: Hearings Before the Senate Committee on Commerce, Science and Transportation*, 98th Cong., 2d Sess. 129, 227 (1984) [hereinafter cited as *"1983 Hearings"*].

[85] The President and Vice-President of KREM–TV devoted 80 hours to the fairness doctrine complaint. In addition, the station manager and six members of the news staff spent 207 hours and 194 hours, respectively, on this matter. *See* Geller/Lambert Comments, *supra* n.83, App. B at 2–3; NAB Comments, *supra* n.79 at 42 and App. Vol., App. D at 19 [Example No. 17]; CBS Comments *supra* n.83 at 84, n.**. Additional time was incurred by secretarial or clerical employees.

[86] NBC received a Christopher Award, a National Headliner Award, an American Bar Association Award and the George Foster Peabody Award for its investigative documentary. "Comments of the National Broadcasting Co., Inc." at 16 [hereinafter cited as "NBC Comments"].

[87] *See, e.g., Notice*, *supra* n.1 at ¶¶ 73–75; NBC Comments, *supra* n.86 at 14–36; NAB Comments, *supra* n.79 App. Vol., App. D at 18 (Example No. 16).

[88] *Accuracy in Media, Inc. Against National Broadcasting Co.*, 44 FCC 2d 1027, 1043 (1973), *rev'd sub nom. National Broadcasting Co.* v. *FCC*, 516 F.2d 1101 (D.C. Cir. 1974), *reversal vacated and hearing en banc granted*, 516 F.2d 1155 (D.C. Cir.), *rehearing en banc vacated*, 516 F.2d 1156 (D.C. Cir. 1975), *second reversal vacated as moot and remanded with direction to vacate initial order and dismiss complaint*, 516 F.2d 1180 (D.C. Cir.), *cert. denied*, 424 U.S. 910 (1976). The Commission subsequently vacated its order and dismissed the case as moot. *Accuracy in Media, Inc. Against National Broadcasting Co.*, 58 FCC 2d 361 (1976).

[89] The United States Court of Appeals reversed the Commission's *Order* but that decision was in turn vacated because the passage of legislation on private pension plans had rendered the decision moot. *See* n.88, *supra*.

[90] A further example involves the series of editorials critical of the Mayor of Milwaukee, other government officials and the city management aired by WTMJ. The Mayor, Henry Maier, filed a complaint with the Commission on June 5, 1981, arguing, *inter alia*, that the station had violated the fairness doctrine. This complaint was denied by the Broadcast Bureau; application for review of this *Order* filed by the complainant was denied by the Commission and the United States Court of Appeals affirmed the Commission's *Order*. *Maier* v. *FCC*, 735 F.2d 220 (7th Cir. 1984). The administrative and judicial proceedings, however, extended for a period of three years. During the pendency of the appellate case, the Manager of Public Affairs of WTMJ, Mr. Ed Hinshaw, testified that defense of the fairness doctrine complaint had already caused the station to incur legal expenses in excess of $17,000. He also estimated that the management and staff time expended on the complaint to be more than two person months. *1983 Hearings*, *supra* n.84 at 146; NAB Comments, *supra* n.79 App. Vol., App. D at 21 (Example No. 18).

[91] "Reply Comments of Black Citizens for a Fair Media, Citizens Communications Center, League of United Latin American Citizens, National Association for the Advancement of Colored

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position, these parties argue that the Commission requests broadcasters to respond to only a small number of the complaints it receives annually and, as a consequence, most broadcasters do not in fact incur such costs. The evidence of record in this proceeding, however, reflects that broadcasters are convinced that these costs can in fact be a significant inhibiting factor in the presentation of controversial issues.[92] Moreover, while it may be true that most broadcasters may not be confronted with actual fairness doctrine litigation, virtually all broadcasters do incur administrative and financial costs which result from presenting responsive programming and negotiating with complainants. Furthermore, in light of the fact that the costs involved in fairness doctrine cases which do proceed beyond the complaint stage can be prohibitively expensive, particularly to smaller stations, we believe that there is a substantial danger that many broadcasters are inhibited from providing controversial issues of public importance by operation of the fairness doctrine.

38. We also reject the contention that we should be unconcerned with the administrative and financial burdens that result from the fairness doctrine because they merely represent the cost of doing business. Indeed, the United States Supreme Court has recognized that financial considerations "may be markedly more inhibiting than the fear of prosecution under a criminal statute." [93] To the extent that the fear of incurring financial expenses discourages the presentation of controversial issues of public importance, important constitutional principles are thwarted; indeed such inhibition directly and adversely impacts upon "the principle [underlying the First Amendment] that debate on public issues should be uninhibited, robust and wide-open. . . ." [94]

39. In addition to the fear of incurring the administrative and financial costs attributable to fairness doctrine obligations, the mere accusation by a federal agency or even a complainant that a broadcast station has not abided by its responsibility to provide balanced coverage of controversial issues can have an inhibiting effect. A station is dependent upon the good will of its viewing or listening audience; as a consequence, a station has a positive incentive to avoid a charge which may have the effect of lowering its reputation in the community. Broadcasters are acutely aware of the harm which may result from even a frivolous charge that the station violated the fairness doctrine. For example, WINZ, a radio station in Miami, Florida, initiated a petition drive in conjunction with the Dade County Consumer Affair's Office that was designed to persuade the Florida Public Service Commission to reduce or reject a rate increase proposed by Florida Power and Light Company. Despite the fact that the radio station was ultimately vindicated of any wrongdoing by the Commission, the general manager of the station testified that:

I feel that Florida Power & Light used the fairness doctrine to provide themselves with a way to create adverse publicity for WINZ. The simple fact that they accused us of violating this rule created the impression we were wrong in undertaking the issue, even if that wasn't the case. Often the accused party suffers, whether right or wrong, only because they have been accused.[95]

40. Similarly, Mr. Bos Johnson, News Director of WSAZ–TV in Huntington, West Virginia, recounted a situation in which his station was subject to a fairness doctrine complaint during negotiations for the transfer of that station. He stated that:

It was a serious embarrassment to me professionally to feel responsible for the cost and effort of a Fairness Doctrine complaint in the midst of delicate business negotiations. And for the duration of those negotiations, while sitting at my desk working as a journalist, I was always aware of the large file containing information relating to the complaint.[96]

41. In sum, with the potential of government sanction; administrative, legal, and personnel expenses; and reputational costs, there is a significant danger that broadcasters will minimize their presentation of controversial issue programming in order to avoid the substantial dangers associated with the fairness doctrine. In the following section we shall evaluate the record evidence in order to ascertain whether or not broadcasters are in fact deterred from presenting controversial issue programming by operation of the fairness doctrine.

2. The Record Demonstrates that The Fairness Doctrine Causes Broadcasters To Restrict Their Coverage of Controversial Issues

42. The record reflects that, in operation, the fairness doctrine—in stark contravention of its purpose—operates as a pervasive [97] and significant impediment to the broadcasting of controversial issues of public importance.[98] In spite of the difficulty generally encountered in establishing a "chilling effect," [99] we

People, and National Association for Better Broadcasting" at 59 [hereinafter cited as "BCFM Reply Comments"]. For the reasons described above, we also reject the assertion of BCFM that the expenses incurred in responding to fairness doctrine complaints are not substantial. *Id.* at 59–60.

[92] *See, e.g.*, NAB Comments, *supra* n.79, App. Vol., App. D at 5, 7, 21–22, 25–26 (Example Nos. 4, 6, 18, 20).

[93] *New York Times Co.* v. *Sullivan*, 376 U.S. at 277.

[94] *Id.* at 270.

[95] *1983 Hearings*, *supra* n.84 at 29 (testimony of Stan Cohen). *See also* FEF Comments, *Supra* n.83 at 73–74; NAB Comments, *supra* n.79, App. Vol., App. D at 27–28 (Example No. 21). In addition to the damage to the reputation of the station, the stigma arising from an accusation that the station violated the fairness doctrine can have an adverse effect upon the station's employees. For example, Mr. Eugene Wilkin, the former general manager of KREM–TV in Spokane, Washington testified that the financial and emotional strain arising from an accusation that he violated the fairness doctrine was the main reason that he left broadcasting management, despite a career in that field spanning more than a decade. *See, e.g.*, FEF Comments, *supra* n.83 at 75–76; NAB Comments, *supra* n.70, App. Vol., App. D at 32–33 (Example No. 24).

[96] NAB Comments, *supra* n.83, App. Vol., App. D at 34 (Example No. 25).

[97] The record reflects that the chilling effect resulting from fairness doctrine obligation is widespread. A recent survey of broadcasters in the Houston area revealed that the majority of responding parties with opinions stated that they were personally aware of instances in which programming has been suppressed as a direct result of the inhibiting effect of the fairness doctrine. "Comments of the Society of Professional Journalists, Sigma Delta Chi and the Legal Foundation of America" at 5–6 [hereinafter cited as "Society of Professional Journalists' Comments"].

[98] In our *1974 Fairness Report* we rejected the arguments of some broadcasters that in operation the fairness doctrine inhibited the coverage of controversial issues of importance to the public. In that proceeding, we stated that we have seen "no credible evidence that our policies have in fact had 'the net effect of reducing rather than enhancing the volume and quality of coverage.' *1974 Fairness Report*, 48 FCC 2d at 8, *quoting Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. at 393. As set forth in this section, however, the substantial and significant evidence presented in this proceeding demonstrates the existence of a pervasive and substantial "chilling effect" on the presentation of controversial issues by broadcasters. As a consequence, we can no longer conclude that the fairness doctrine operates to enhance, in either quantitative or qualitative terms, the amount of controversial issue programming available to the public.

[99] The United States Court of Appeals has stated that: "Chilling effect is, by its very nature, difficult to establish in concrete and quantitative terms; the absence of any direct actions against individuals assertedly subject to a chill can be viewed as much as proof of the success of the chill as of evidence of the absence of any need for concern. To be sure, where actual instances of harrassment are established, or where past experience with similar regulation yields concrete evidence of a successful chill, the case is a stronger one. . . ." *Community Service Broadcasting of Mid-America, Inc.* v. *FCC*, 593 F.2d 1102, 1118 (D.C. Cir. 1978).

find that the evidence of record mandates the conclusion that the requirement that broadcasters provide balance in their overall coverage of controversial public issues in fact makes them more timid than they would otherwise be in airing programming that involves such issues.[100] We recognize that the first prong of the fairness doctrine requires licensees to present controversial issues of public importance to their viewers and listeners; as a consequence, we do not believe that the fear of fairness doctrine obligations typically results in a systematic avoidance of all controversial issues by broadcasters.[101] The record reflects, however, that the intrusion by government into the editorial decisions of broadcast journalists occasioned by fairness doctrine requirements overall lessens the flow of diverse viewpoints to the public to the detriment of the broadcasters and the public alike.

43. Journalists who have worked in both the broadcast and print media have testified that the very existence of the fairness doctrine creates a climate of timidity and fear, unexperienced by print journalists, that is antithetical to journalistic freedom. The inhibitions resulting from the interjection of a ubiquitous and brooding governmental presence into the editorial decisionmaking process is vividly described by Mr. Dan Rather, Managing Editor and Anchor of CBS News, as follows:

> When I was a young reporter, I worked briefly for wire services, small radio stations, and newspapers, and I finally settled into a job at a large radio station owned by the Houston Chronicle. Almost immediately on starting work in that station's newsroom, I became aware of a concern which I had previously barely known existed—the FCC. The journalists at the Chronicle did not worry about it; those at the radio station did. Not only the station manager but the newspeople as well were very much aware of this Government presence looking over their shoulders. I can recall newsroom conversations about what the FCC implications of broadcasting a particular report would be. Once a newsperson has to stop and consider what a Government agency will think of something he or she wants to put on the air, and invaluable element of freedom has been lost.[102]

44. The record reflects that broadcasters from television network anchors to small radio station journalists perceive the fairness doctrine to operate as a demonstrable deterrent in the coverage of controversial issues. Indeed, the record is replete with descriptions from broadcasters who have candidly recounted specific instances in which they decided not to air controversial matters of public importance because such broadcasts might trigger fairness doctrine obligations. For example, fearing the imposition of onerous regulatory burdens, Meredith Corporation states that one of its stations elected not to air a paid program on the nuclear arms race.[103] As a result of this decision, the public was deprived of information on an important public issue. Similarly, Mr. J. T. Whitlock, the President and General Manager of the Lebanon-Springfield Broadcasting Company, testified that the fear of having to defend a fairness doctrine complaint was the reason that his station did not editorialize on an important local issue even though, in his editorial judgment, the situation ". . . cried for editorials by the station." [104]

45. As a further example, after work had begun in the preparation of a series on religious cults, the manager of a Southern California radio station decided that the series would not be broadcast. The decision to cancel this series was not based upon the editorial judgment of the broadcaster but rather upon an assessment of the legal and personnel costs associated with defending a possible fairness doctrine complaint.[105] Similarly, Mr. Paul Jenson,

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[100] One example of this "timid" approach is recounted by the station manager of the Cornhusker Television Corporation. With the exception of programming produced by the network, he states that it is standard practice for the station not to accept nationally produced programming which discusses controversial subjects: "The reason for this [policy] is although the producer says the program is objective in nature, we as licensees must be the sole judge of what is or is not controversial in order to act properly under the Fairness Doctrine. Also, is it true that what a producer in New York or Washington D.C. may consider objective, may not be defined in the same way in Nebraska because as you know viewpoints vary drastically from one section of the country to another. Therefore, there are probably some good Public Affairs programs which we have decided not to run because the Fairness Doctrine might come into play and we would not be prepared to give reasonable access to opposing viewpoints." NAB Comments, *supra* n.79, App. Vol., App. D at 38 (Example No. 27) (emphasis omitted). Notwithstanding the station manager's express representation that the avoidance of fairness doctrine obligation was the reason that the station rejected all non-network nationally-produced programming, BCFM nonetheless contends that this policy must be based on some other reason. BCFM argues that "if the station truly wished to avoid controversial subjects, it would review each program independently," whether or not it was locally or nationally produced. BCFM Reply Comments, *supra* n.91 at 65. BCFM's argument, however, ignores the fact that a station may wish to lessen the amount of controversial public issue programming in order to minimize the burdens associated with providing access to opposing viewpoints without totally eliminating such programming, particularly in light of the fact a total elimination would subject the station to charges that it violated the first prong on the fairness doctrine. Furthermore, as noted above, the station manager affirmatively stated that the reason that station adopted this policy was to minimize the regulatory burdens associated with the fairness doctrine.

[101] At least one broadcaster, however, has candidly admitted that "his news staff avoids controversial issues as a matter of routine because of the Fairness Doctrine." NAB Comments, *supra* n.79, App. D at 5 (Example No. 4).

[102] CBS Comments, *supra* n.83 at 72–73. Similar sentiments have been expressed by Mr. Bill Monroe, moderator and executive producer of the popular show "Meet the Press." He has stated that: "Some years ago as a young man I worked for a newspaper. I was very impressed with the spirit of independence on the part of the editors of the newspaper. They didn't care if something they put in the paper offended a major political figure. Later I went to a television station and slowly I discovered that the managers of the television station were a little afraid of government. They were timid, conscious of government looking over their shoulder in a way that the newspaper publisher and editor for whom I had worked had not been. I began to feel I was a little bit less than free, and it worried me." FEF Comments, *supra* n.83 at 69, *quoting* American Enterprise Institute Roundtable, *Freedom of the Press* (July 29 and 30, 1975) published by the American Enterprise Institute for Public Policy Research, Washington, D.C. (Statement of Bill Monroe before the National Press Club).

[103] "Meredith Corporation's Comments Regarding Notice of Inquiry" at 3. [hereinafter cited as "Meredith Comments"].

[104] NAB Comments, *supra* n.79, App. Vol., App. D at 29 (Example No. 22). BCFM contends that the decision not to editorialize "appears" to be based upon an incorrect perception that the "equal time" requirements of the political editorial rules are applicable in this situation. BCFM Reply Comments, *supra* n.91 at 69 n.32. *See* 47 CFR 73.1930 (1984). It also asserts that any fairness doctrine obligations incurred by the station in the broadcast of this editorial "would probably have been met by its news coverage." BCFM Reply Comments, *supra* n.91 at 69 n.32. In our view, both arguments are speculative. There is nothing in the example to suggest either that the concern of the broadcaster was based upon the requirements of the political editorial rule or that the station's news coverage would have provided opposing viewpoints sufficient to meet the requirements of the fairness doctrine.

[105] NAB Comments, *supra* n.79, App. Vol., Vol D at 2 (Example No. 1). Two parties contend that this example lends no support for the existence of a "chilling effect," but we believe that their arguments lack merit. Citing *Religion and Ethics Institute, Inc.*, 42 RR 2d 1957 (1978), a Broadcast Bureau decision, MAP/TRAC argue that "[t]he Commission has repeatedly held . . . that discussion of religious doctrine and related issues are matters of private, not public controversy, and do not involve application of the fairness doctrine" ("Reply Comments of Media Access Project and Telecommunications Research and Action Center" at 39 [hereinafter cited as "MAP/TRAC Reply Comments]); as a consequence, MAP/TRAC contend that it was not reasonable for the broadcasters to be concerned about potential fairness doctrine litigation. The assertion that we have held that issues concerning religious doctrine to be *per se* beyond the scope of the fairness doctrine, however, is clearly erroneous. In fact, even *Religion and Ethics Institute*—the case cited by MAP/TRAC—noted that some issues concerning religious doctrine "must be considered controversial and of importance to the community at large" (42 RR 2d at 1659), thereby triggering fairness doctrine obligations. Indeed, the Commission has long asserted that "[t]he fairness doctrine extends to all expressions of views on controversial issues of public importance, whether or not they [would] be

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the station manager of Cornhusker Television Corporation, asserted that the fear of fairness doctrine obligations precipitated his cancellation of a series of public announcements concerning inflation. Mr. Jenson testified that the only reason that these announcements were not aired was to avoid the presentation of opposing announcements mandated by the requirements of the fairness doctrine.[106] Another example in the record is the cancellation of a series on the B'nai B'rith by a Pennsylvania radio station. The series was not broadcast because the licensee felt that it could not afford the personnel time to respond to the complaints, the broadcast time to provide responsive programming or the potential legal fees resulting from complaints by perceived extremist groups.[107] In addition, a major Houston television station invited a former city official to address the issue of pay raises for police officers but, during the course of the interview, the former official also expressed his views on the issues of pay increases for firefighters and other municipal workers. Fearing to trigger additional fairness doctrine obligations, the station refused to air his views on these additional topics.[108]

46. Equally or perhaps even more disturbing than the self-censorship of individual broadcasts is the fact that the avoidance of fairness doctrine burdens has precipitated specific "policies" on the part of broadcast stations which have the direct effect of diminishing, on a routine basis, the amount of controversial material presented to the public on broadcast stations. For example, the owner of a broadcast station and two newspapers regularly prints editorials in his newspapers but, inhibited by regulatory restrictions, is reluctant to repeat the same editorials on his radio station.[109]

Similarly, the Meredith Corporation acknowledges that one of its television stations has chosen "not to editorialize on matters of public importance, because of its concern that it does not have the resources necessary to seek out and provide exposure to opposing viewpoints in all instances."[110] Unfortunately, the policies of these stations are not atypical. In fact, a survey conducted by NAB in 1982 found that only 45 percent of responding stations had presented editorials in the preceding two years.[111] Moreover, the record reflects that even stations which do elect to editorialize are inhibited by fairness doctrine requirements. According to Mr. Donald Gale, News Director of KSL–AM, the regulatory burdens associated with the fairness doctrine were a crucial factor in the decision of his station not to air "guest editorials."[112]

47. Policies of stations that restrict public issue programming are not limited to editiorals; they extend to the airing of political advertisements.[113] For example, as a direct result of fairness doctrine obligations, CBS acknowledges that its owned and operated stations, as a general matter, limit the amount of time they will sell both to persons seeking to place advertisements relating to ballot propositions and to political parties attempting to purchase broadcast time outside of campaign periods. CBS states that many of the television stations in four of the five markets in which those stations operate also either refuse or severely limit the sale of time for ballot proposition advertising.[114] Ms. Harriet Kaplan, the Chief Executive Officer of Station WAYS and WROQ–FM in Charlotte, North Carolina states that as a result of the regulatory obligations associated with the fairness doctrine, "I do not even let our sales department pursue political advertising. It is handled by a separate person. . . ." [115] The President and General Manager of WNJR Radio in Union, New Jersey also testified that she is "inclined to steer away from [political advertisements] because of the [regulatory] problems."[116] Similarly, Ms. Karen Maas, Vice President and General Manager of KIUP–AM and KRSJ–FM in Durango, Colorado states that her stations "thinks twice" about covering state ballot and related political issues.[117]

48. Moreover, the evidence of the "chilling effect" of the fairness doctrine, as applied to political advertisements, is not limited to the statements of broadcasters. For example, in its comments the Glass Packaging Institute ("GPI"), a trade association of the container glass industry which supports the retention of the fairness doctrine,[118] recounts its difficulties in placing advertisements on ballot issues:

When various coalitions of which GPI was a member have sought to buy broadcast time for the presentation of views on ballot initiatives, many broadcasters have refused to consider their proposals. This refusal generally was occasioned not by normal market forces or broadcaster bias, but by broadcaster's unwillingness to assume the financial cost of providing free response time.

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deemed religious views by some persons." *Brandywine Main-Line Radio, Inc.*, 27 FCC 2d 565, 570 (1971), *aff'd*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973). Indeed, in *Brandywine*, we refused to renew the station's license on the basis, *inter alia*, that it had violated the fairness doctrine with respect to its religious programming. Therefore, the argument of MAP/TRAC that it was patently unreasonable in this situation for the broadcaster to be concerned about potential fairness doctrine litigation is without merit.

BCFM argues that the broadcaster's fear of incurring the legal and administrative costs in defending a fairness doctrine complaint is irrational; Therefore, it contends that the broadcaster was not reasonably inhibited by fairness doctrine obligations and, consequently, this example is not probative of a "chilling effect." BCFM Reply Comments, *supra* n.91 at 67. We have addressed the manner in which legal and administrative costs can result in a "chilling effect," *supra* at ¶¶ 35–36. We believe, therefore, that BCFM's assertion also is without merit.

[106] NAB Comments, *supra* n.79, App. Vol., App. D at 38–39 (Example No. 27). In an attempt to discredit this example, BCFM contends that the station manager was not reasonably inhibited by fairness doctrine obligations; it argues that no equal access for opposing views was required and contends that the station's obligation to provide reasonable access for opposing views "probably" would have been met by its news coverage. BCFM Reply Comments, *supra* n.91 at 69. BCFM provides no support for its assertion concerning the adequacy of the station's news coverage in meeting the station's fairness doctrine obligations on this issue. In any event, we have no basis for disregarding the station manager's explanation for the reason for the cancellation of the series.

[107] NAB Comments, *supra* n.79, App. Vol., App. D at 62 (Example No. 42). While acknowledging that this example "implies" that the broadcaster's cancellation was induced by the fairness doctrine, BCFM contends that the braodcaster's actual concern was to avoid harassment by extremist groups and that this concern would exist without regard to fairness doctrine obligations. BCFM Reply Comments, *supra* n.91 at 62–63 n.30. We disagree. While a station may have to incur personnel costs in order to respond generally to complaints by the public in the absence of the fairness doctrine, the number of compliants—and consequently the amount of personnel costs—are necessarily increased when a station is obligated to comply with the fairness doctrine; moreover, the costs resulting from a requirement to provide additional "balanced" programming and the costs incurred in defending broadcast decisions clearly are attributable directly to fairness doctrine obligations.

[108] Society of Professional Journalists' Comments, *supra* n.97 at 7–8.

[109] NAB Comments, *supra* n.79, App. Vol., App. D at 61 (Example No. 41). In its Reply Comments, MAP/TRAC characterize this example as "ignorant and meaningless" but provide no support for this pejorative appellation. MAP/TRAC Reply Comments, *supra* n. 105 at 29.

[110] Meredith Comments *supra* n.103 at 3. *See also* "Comments of Arizona Television Company."

[111] NAB Comments, *supra* n.79 at 38. Moreover, in it Comments NAB describes an informal survey conducted its the Northwest regional conference which found at least 95 percent of the broadcasters, inhibited by regulatory concerns, did not speak out on local issues. *Id.*, App. Vol., App. D at 52 (Statement of Rev. Jim Nicholls) at 52 (Example No. 36).

[112] *Id.*, App. Vol., App. D at 11 (Example No. 11).

[113] *See, e.g.*, FEF Comments, *supra* n.83 at 64–65.

[114] CBS Comments, *supra* n.83 at 77, n.*.

[115] 1983 Hearings, *supra* n.84 at 224.

[116] *Id.*

[117] NAB Comments, *supra* n.79, App. Vol., App. D at 8 (Example No. 7).

[118] The Glass Packaging Institute, however, has urged the Commission to modify the Cullman Doctrine. "Comments of the Glass Packaging Institute" at 13.

as required by *Cullman*. In other instances, the coalitions' requests were met not by a broadcaster refusal to sell time, but, instead, by a rate purposely inflated to cover the anticipated cost of free response time being demanded by the coalitions' opponents on the ballot proposals. The result of these factors was that the coalitions found themselves unable to purchase broadcast time within which to address ballot issues, either because of a broadcast licensee's refusal to sell time, or because the time costs were prohibitive, both obstacles being the result of the broadcasters' fear of resulting *Cullman* obligations.[119]

Similarly, in its comments, the National Rifle Association of America ("NRA"), an organization which has also urged the Commission to retain the fairness doctrine, documented its difficulties in placing advertisements on ballot propositions. Like the GPI, the NRA attributed the reluctance of broadcasters to accept these advertisements on the fact that their acceptance would subject broadcasters to the responsive requirements of the fairness doctrine.[120]

49. The most compelling evidence of the existence of a "chilling effect" with respect to ballot advertising is presented in the Comments of the Public Media Center ("PMC"), an organization which, as noted above,[121] is actively involved in prosecuting complaints under the fairness doctrine. In its Comments, PMC vividly illustrates the manner in which a complainant can successfully pressure broadcasters into refusing to sell advertising on ballot issues. For example, PMC recounts the tactics of a pro-bottle bill coalition as follows:

> Ads opposing the beverage deposit—sponsored by an industry front group . . . hit the air in early August. Within ten days, [the pro-bottle bill coalition] sent a letter to all 500 California stations asking for a 2 to 1 ratio in free spot time. *[The coalition] urged broadcasters to refuse to sell time and therefore avoid a fairness situation at all.*[122]

The majority of the California stations followed the coalition's exortation. Less than one-third of the stations contacted by the coalition sold ballot advertising to the industry group.[123]

50. Similarly, PMC describes the successful invocation of the fairness doctrine by anti-smoking group in order to pressure broadcasters into refusing to sell advertising time to their opponents. PMC recounts that the anti-smoking group:

> . . . mailed "pre-emptive" letters to every local broadcast station, remarking on the upcoming vote and asking to be notified as soon as the tobacco industry bought airtime. . . . *[T]en Miami stations, seeking to avoid [the group's] predictable demands, simply refused to sell time to the industry front.*[124]

As a consequence, the public was denied information on a matter of important local concern.

51. In addition to political advertisements, the record reflects that the onerous requirements associated with the fairness doctrine have resulted in the widespread practice of many broadcasters to refuse to air any public issue advertisements. For example, one broadcaster employed by a large television station states that his station and six others under common ownership have a "company policy" not to accept issue advertising.[125] A number of trade associations have also documented that broadcast licensees, inhibited by the requirements of the fairness doctrine, have refused to air issue-oriented advertisements. The comments of the American Association of Advertising Agencies are illustrative:

> Many large corporations, consistent with a special expertise or interest in a specific public policy or issue, occasionally approach the broadcast media seeking to purchase air time for dissemination of public interest advertisements. . . . [B]roadcast licensees have regularly rejected offers for such advertisements—*not* because of some defect in the ads themselves, but rather because the Fairness Doctrine requires broadcasters carrying paid public interest advertisements to carry opposing viewpoints as well—even if no one steps forward to pay for them.[126]

Similarly, the Association of National Advertisers, a trade association composed of companies which employ advertising in the marketing of goods and services to the public, documents that its members wish to present their views on issues of public controversy but are often "frustrated by rejections at the hands of broadcast licensees who claim that to accept such paid communications will subject them to onerous balancing obligations because of the Fairness Doctrine. . . ."[127]

52. The inhibiting effect of the fairness doctrine on the presentation of issue-oriented advertising is vividly illustrated in the comments of Mobil Corporation, another party who actively supports the retention of the fairness doctrine. Relying on its "considerable experience" in this area, Mobil recounts that it has been thwarted in its efforts to provide the public with its side of public issue as a result of "the broadcasters' outright refusal to permit the presentation of conflicting views on particular issues of public importance."[128] In stark contrast to this experience, Mobil states that the "print media has been willing to sell space for Mobil to present its views, and has never disagreed with the substance or placement of materials. . . ."[129] While Mobil itself does not attribute its difference in treatment to the regulatory burdens associated with complying with the requirements of the fairness doctrine, evidence in the record, which we find persuasive, indicates that the refusal of many broadcasters to air Mobil's advertisements was in fact based upon a concern that the commercial would trigger requests for the broadcast of responsive viewpoints under the fairness doctrine.[130]

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[119] *Id.* at 11–12. In *Cullman Broadcasting Co.*, 40 FCC 576 (1963), we stated that: "Where the licensee has chosen to broadcast a sponsored program which for the first time presents one side of a controversial issue, has not presented (or does not plan to present) contrasting viewpoints in other programming, and has been unable to obtain paid sponsorship for the appropriate presentation of the opposing viewpoint or viewpoints, he cannot reject a presentation otherwise suitable to the licensee — and *thus leave the public uninformed* — on the ground that he cannot obtain paid sponsorship for that presentation." *Id.* at 577 (emphasis in original).

[120] In its Comments, the NRA stated that: "In attempting to address controversial issues, including ballot propositions affecting the Second Amendment, *ad hoc* organizations formed by local firearms owners and other citizens often have been faced with a broadcast licensee who has elected to exercise its right to refuse all advocacy advertising. Invariably, this refusal is based . . . on an unwillingness of the broadcast licensee to risk the imposition of the financial penalty inherent in the *Cullman* obligation to invade its limited stock of commercial time in order to provide free response time to opponents on the issue." "Comments of the National Rifle Association of America" at 32–33.

[121] *See* n.73, *supra*.

[122] PMC Comments, *supra* n.73 at 28 (emphasis added).

[123] *See id.*

[124] *Id.* at 16–17 (emphasis added).

[125] NAB Comments, *supra* n.79, App. Vol., App. D at 11 (Example No. 10). Similarly, as noted by the United States Court of Appeals in *Maier* v. *FCC*, 735 F.2d 220, 234 n.19 (7th Cir. 1984), WTMJ–TV, a broadcast station in Milwaukee, Wisconsin has a "station policy that '[t]ime is not sold for the discussion of controversial issues.' "

[126] "Comments of the American Association of Advertising Agencies in Furtherance of the Commission's Inquiry to Support Repeal of the Fairness Doctrine" at 3–4 (emphasis in original). *See also* "Comments of the American Advertising Federation"; "Comments of the Association of National Advertisers Inc." [hereinafter cited as "ANA Comments"]. *See also* NAB Comments, *supra* n.79, App. Vol., App. D at 30–31 (Example No. 23).

[127] ANA Comments, *supra* n.126 at 2.

[128] "Comments of Mobil Corporation," at 3–4 [hereinafter cited as "Mobil Corp. Comments"].

[129] *Id.* at 4.

[130] NAB Comments, *supra* n.79, App. Vol., App. D at 60 (Example No. 40).

[131] *See, e.g., Brent Buell*, 97 FCC 2d 55, 57 (1984). As we stated in our *1974 Fairness Report*, "the usual fairness complaint does not involve an allegation that the licensee has not devoted sufficient time to the discussion of public issues." *1974 Fairness Report*, 48 FCC 2d at 10. Indeed, on only one occasion have we determined that the licensee acted unreasonably in failing to cover a specific controversial issue of paramount importance to the community. *Representative Patsy Mink*, 59 FCC 2d 987 (1976).

53. Further evidence of the demonstrable inhibiting effect of the fairness doctrine is documented by our own administrative decisions. Except in extremely rare situations, a licensee is not challenged under the fairness doctrine for a failure to air a specific controversial issue of importance to the community;[131] rather, the typical fairness doctrine case addresses whether the licensee provided overall balanced coverage with respect to those issues which, in its discretion, it chose to present. As a consequence, in those instances in which we determined that the licensee failed to broadcast a sufficient amount of responsive programming which is mandated under the second prong of the fairness doctrine, we have imposed sanctions—including the ultimate penalty of non-renewal—upon broadcasters who have actually provided large amounts of controversial issue programming. With respect to these broadcasters, the anomalous result of enforcing the second prong of the fairness doctrine is to inhibit or silence licensees who make significant contributions to the marketplace of ideas.[132]

54. *Brandywine-Main Line Radio Inc.*,[133] a case involving the license renewal of WXUR, is a vivid illustration of the way in which application of the fairness doctrine has operated to stifle controversial issue programming. The uncontroverted evidence of that case demonstrated that "controversial issue programming was a substantial part of WXUR's total programming"[134] during its term of license. The Commission also found that the station did provide some coverage of opposing viewpoints, but the Commission determined that the station did not satisfy the requirement of overall balance in its public issue programming, as "those holding viewpoints contrary to those of the moderator were forced to give their views in an antagonistic setting."[135] As a consequence, the Commission refused to renew the license of WXUR.

55. The Commission's decision in that case had the direct result of reducing the amount of controversial issue programming available to the public. Chief Judge David Bazelon, in dissent to the Court of Appeals' affirmance, stated that WXUR was:

> a radio station devoted to speaking out and stirring debate on controversial issues. The station . . . propogate[d] a viewpoint which was not being heard in the greater Philadelphia area. The record is clear that through its interview and call-in shows it did offer a variety of opinions on a broad range of public issues, and that it never refused to lend its broadcast facilities to spokesman of conflicting viewpoints. . . .
>
> The Commission's . . . decision, has removed WXUR from the air. This has deprived the listening public not only of a viewpoint but also of robust debate on innumerable controversial issues. It is beyond dispute that the public has lost access to information and ideas. This is not a loss to be taken lightly, however unpopular or disruptive we might judge these ideas to be.[136]

56. A number of parties characterize the statements made by broadcasters that document the existence of "chilling effect" as mere "self-serving" utterances to which the Commission should accord little probative value.[137] Because these broadcasters at most merely recount their "personal beliefs about the effect of the Doctrine on programming practices,"[138] these parties argue that their statements do not substantiate the proposition that the overall effect of the fairness doctrine is to inhibit the presentation of controversial issues of public importance.

57. We disagree. Because the existence of a "chilling effect" is a subjective perception, the statements of broadcasters who are personally subject to its requirements on a daily basis are able to present some of the best evidence on whether or not the doctrine, in operation, inhibits the presentation of controversial issues of public importance. We also believe that this evidence is more probative than the statements of persons who, by necessity, have to second-guess the broadcaster's state of mind.

58. In addition, we reject the proposition that the evidentiary value of these statements is undercut by their alleged "self serving" nature. A statement by a broadcaster that he or she is inhibited from presenting controversial issues of public importance is, in a very real sense, an admission against interest. Such a statement may constitute an acknowledgement that the broadcaster may not be abiding by the highest standards of professional journalism, thereby potentially diminishing his or her standing in the profession. In addition, it could create potential regulatory problems for the broadcaster.[139] Further, while it is true that these statements evidencing a "chilling effect" are "self-serving" in the sense that the broadcasters who made them have a direct interest in the outcome of this proceedings, the identical charge could be leveled against every statement of every commenting party. We have never held that the evidence of interested parties lack probity; indeed, were we to adopt such a rule it would be virtually impossible for us to come to any conclusions about any issues raised in this proceeding.

59. Some parties to this proceeding attempt to support the absence of a "chilling effect" by asserting that most

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[131] In making this assertion, we do not—and cannot—pass judgment on the wisdom or propriety of the viewpoints expressed. Indeed, the Commission may conclude that a licensee makes a significant contribution to the marketplace of ideas, even though the Commission—or a majority of the public—may disagree or even abhor the opinions expressed by the licensee. As the United States Supreme Court has stated, "it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 745–46 (1978). The presentation of diverse viewpoints on controversial issues of public importance enables members of the public, rather than any governmental entity, to accept or reject the different attitudes and viewpoints; the exposure to the marketplace of ideas, therefore, provides the public with the means to understand the vital issues of the day.

[132] *Brandywine-Main Line Radio Inc.*, *supra* n.75.

[133] *Id.*, 24 FCC 2d at 22. Indeed, the Initial Decision noted that:

> In the broad perspective of this record, it is almost inconceivable that any station could have broadcast more variegated opinions upon so many issues than WXUR. . . . The multitudinous seas of opinion were navigated in what seemed to be a breathtaking course and this, indeed, was a main cause of the station's difficulties—not that it was narrowly partisan but that it sought and received too much controversy.
>
> There is a strange irony in the fact that WXUR has attempted to do what broadcasters have been exorted to do and that is to offer vigorous discussion of controversial issues. *The station has, in fact, presented such discussion in about the some degree that most stations offer entertainment.*

Brandywine-Main Line Radio Inc., 24 FCC 2d 42, 130–131 (1970), *rev'd*, 24 FCC 2d 18 (1970), *recon. denied*, 27 FCC 2d 565 (1971), *aff'd*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973). (Initial Decision of Hearing Examiner H. Gifford Irion) (emphasis added).

[134] *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 70 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973) (Bazelon, C.J., dissenting) (emphasis omitted).

[135] *See, e.g.*, "Reply Comments of the American Civil Liberties Union" at 9 [hereinafter cited as "ACLU Reply Comments"]; MAP/TRAC Reply Comments, *supra* n.105 at 38.

[136] *See* ACLU Reply Comments, *supra* n.137 at 10.

[137] The United States Supreme Court has stated that "if present licensees should suddenly prove timorous [in presenting controversial issues of public importance], the Commission is not powerless [to redress the situation]." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 391. In light of this judicial warning, a licensee may believe it imprudent to acknowledge that it has in fact been timorous, thereby inviting potential regulatory litigation.

broadcasters either support the doctrine or at a minimum deny that it inhibits their speech.[140] We find this argument to be unpersuasive. Virtually all broadcasters or their trade associations which commented on this issue took the position that the fairness doctrine operates as a significant deterrent to the presentation of controversial issues of public importance.[141] There was only one broadcaster on the record of this proceeding which voiced its support for the fairness doctrine as a matter of policy.[142] Moreover, the second-hand accounts of support of the doctrine by broadcasters that are contained in the pleadings of some proponents of the doctrine are directly contradicted by the statements of the broadcasters themselves in this proceeding.[143] Furthermore, we do not believe that the isolated representations of some broadcasters to the effect that the doctrine does not have any effect on the type, frequency or duration of the controversial viewpoints they air are probative of an absence of chilling effect within the industry as a whole; the fact that some broadcasters may not be inhibited in the presentation of controversial issues of public importance does not prove that broadcasters in general are similarly uninhibited.

60. Some parties assert that any inhibiting effect of the fairness doctrine is not attributable to the actual requirements of the doctrine itself but rather to the misperception of broadcasters as to their precise obligations under the doctrine. These commenters contend that broadcasters are not inhibited by the fear of incurring fairness doctrine obligations unless regulatory requirements in fact attach to their programming.[144] However, broadcasters are not lawyers. A broadcaster may be uncertain as to the precise boundaries of our detailed and complex regulatory scheme[145] or may be uncertain as to whether he or she will be able to convince us, in the course of fairness doctrine litigation, that the station's overall programming complies with our regulatory requirements. As a consequence, a broadcaster, in order to avoid even the possibility of litigation, may be deterred from airing material even though the Commission, after hearing all the evidence, would have concluded that the program did not trigger fairness doctrine obligations.[146] Indeed, the uncertainty as to whether or not a broadcast contains information which rises to the level of a controversial issue of public importance may itself have an inhibiting effect.[147] In any event, it is the fact of deterrence—not whether or not the Commission, in making an adjudicatory determination on the substantive law would in fact find a fairness doctrine obligation—which is relevant in ascertaining the existence of a chilling effect. As the United States Court of Appeals stated:

> In seeking to identify the chilling effect . . . our ultimate concern is not so much with what government officials will actually do, but with how reasonable broadcasters will perceive regulations, and with the likelihood they will censor themselves to avoid official pressure and regulation.[148]

61. A number of commenters argue that there is no inhibiting effect because the Commission has been careful to administer the fairness doctrine in a manner which attenuates the regulatory burdens on broadcasters.[149] It is true that we have enforced the doctrine with a view toward minimizing editorial intrusion on broadcast journalists.[150] But

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[140] *See, e.g.*, BCFM Reply Comments, *supra* n.91 at 50–54; PMC Comments, *supra* n.73 at 7–9.

[141] *See, e.g.* "Comments [of National Radio Broadcasters Association] on Reassessment of the Fairness Doctrine," at 8; NAB Comments, *supra* n.79, App. Vol., App. D; "Joint Comments of Radio-Television News Directors Association" at 60–65; CBS Comments, *supra* n.83 at 70–96; NBC Comments, *supra* n.86 at 9–52; Tribune Comments, *supra* n.78 at 8.

[142] "Comments of Group W [Westinghouse Broadcasting & Cable Co.]" at 6–7 [hereinafter cited as "Group W Comments"].

[143] For example, in its Reply Comments, BCFM contends that it "is not the case" that "a majority of licensees, or at least the major networks, . . . oppose the [fairness] doctrine." BCFM Reply Comments, *supra* n.91 at 50. It states further that "NBC, CBS and ABC do not share NAB's view that the doctrine inhibits their speech." *Id.* at 50–51. Based upon the pleadings submitted by broadcasters in this proceeding, these representations appear erroneous. As noted above, the record reflects that the overwhelming majority of broadcasters participating in this inquiry oppose retention of the fairness doctrine. Moreover, with respect to the networks, NBC and CBS filed lengthy comments in this proceeding urging the Commission to eliminate the doctrine; one reason that these parties took this position was that they perceived the doctrine to have a chilling effect upon the speech of broadcasters. NBC Comments, *supra* n.86 at 8–9; CBS Comments, *supra* n.83 at 70–77. Furthermore, expressing the view that the total repeal of the fairness doctrine is a long term goal, ABC urged the Commission to adopt proposals for "major overhaul of the fairness doctrine" to "further enhance the First Amendment rights of broadcast journalists. "Reply Comments of American Broadcasting Companies, Inc." at 5. Indeed, BCFM actually characterizes ABC's proposals as designed "to exempt broadcasters from every meaningful obligation under the fairness doctrine. . . ." BCFM Reply Comments, *supra* n.91 at 74. It is clear, therefore, that the statement of the networks in the record of this proceeding are directly at odds with BCFM's representation that these parties support the fairness doctrine.

[144] *See, e.g.*, BCFM Reply Comments, *supra* n.91 at 66–89; MAP/TRAC Reply Comments, *supra* n.105 at 36–40.

[145] The regulatory requirements associated with the fairness doctrine are not as clear and unambiguous as the parties making this argument would have us believe. As noted in n.105 *supra*, BCFM argued that it was patently absurd for a broadcaster to decide not to air a series on religious cults on the basis that the series would trigger fairness doctrine obligations because religious matters are clearly beyond the scope of the fairness doctrine. Yet, contrary to BCFM's assertions, we have affirmatively stated that matters of religious doctrine, in appropriate circumstances, could precipitate fairness doctrine obligations. *See* n.105, *supra*; *Brandywine Main-Line Radio, Inc.*, 27 FCC 2d at 570.

[146] As the United States Supreme Court has stated: "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone. . . . This is especially to be feared when the complexity of the proofs and the generality of the standards applied provide but shifting sands on which the litigant must maintain his position."

[147] We have traditionally recognized that: "One of the most difficult problems involved in the administration of the fairness doctrine is the determination of the *specific* issue or issues raised by a particular program. Those would seem to be a simple task, but in many cases it is not".

Speiser v. *Randall*, 357 U.S. 513, 526 (1958) (citation omitted). *See also New York Times Co.* v. *Sullivan*, 376 U.S. at 279. *See generally Central Intelligence Agency against American Broadcasting Companies, Inc.*, No. 1862 (released Jan. 10, 1985), *application for review denied*, FCC No. 85–374 (adopted July 12, 1985).

[148] *1974 Fairness Report*, 48 FCC 2d at 12 (emphasis in original). As Chief Judge J. Skelly Wright of the United States Court of Appeals stated, "issue ambiguity in the fairness doctrine context is a certainty to lessen the free flow of information favored by the First Amendment, and is therefore unacceptable." *American Security Council Education Foundation* v. *FCC*, 607 F.2d at 458 (J. Skelly Wright, C.J., concurring). In enforcing the fairness doctrine, we are required, *inter alia*, to determine whether or not issues are "publicly important," "controversial," *etc.* Because our experience indicates that identifying and characterizing issues is inherently subjective, issue ambiguity under the fairness doctrine scheme appears unavoidable.

[149] *Community-Service Broadcasting of Mid-America, Inc.* v. *FCC*, 593 F.2d at 1116.

[150] *See, e.g.*, Mobil Corp. Comments *supra* n.128 at 25–30; MAP/TRAC Comments *supra* n.50 at 128–133.

[150] *1974 Fairness Report*, *supra* n.3. Historically we have been concerned over the dangerous potential of the fairness doctrine to chill the speech of broadcasters. Consequently, in enforcing the doctrine we have adopted a number of procedural rules in an attempt to attenuate the intrusion on the editorial freedom of broadcast journalists. *Id.* For example, the Commission, as a condition precedent to filing a fairness doctrine complaint, requires a viewer or listener to first present his or her grievance to the broadcaster. *See, e.g., American Security Council Education Foundation* v. *FCC*, 607 F.2d at 445. We have also required a person filing a fairness doctrine complaint to establish a *prima facie* case. *See, e.g., Memorandum Opinion and Order on Reconsideration of the Fairness Doctrine Report* in Docket No. 19260 58 FCC 2d 691, 696 (1976), *Aff'd sub nom. National Citizens Committee for Broadcasting* v. *FCC*, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1976), *American Security Council Education Foundation* v. *FCC* 607 F.2d at 447. In addition, in implementing the doctrine, we have traditionally accorded a significant amount of discretion to broadcasters in the selection of the issues, the manner of coverage, the appropriate spokespersons, and the amount of

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the record in this proceeding has convinced us that the fairness doctrine generally operates to inhibit the presentation of controversial issues of public importance on the airwaves. Because the inhibiting effect is an inevitable result of the substantive rule itself, even carefully crafted implementing mechanisms have not been successful in preventing the fairness doctrine from operating to deter broadcasters from airing important and controversial issues. The mere fact that a more intrusive implementing approach might result in even greater restrictions on the editorial discretion of broadcasters does not negate the existence of a demonstrable "chilling effect" under the present regulatory scheme.

62. Furthermore, noting that the Commission only forwards a small amount of complaints it receives to broadcasters for justification, several fairness doctrine proponents assert that Commission fails to enforce its rules and, consequently, broadcasters are not reasonably deterred from airing controversial issues of public importance by operation of the fairness doctrine. We disagree. While it is true that we do not often determine, after review of a fairness doctrine complaint, that it is appropriate for us to request the broadcaster to explain how its programming comports with the fairness doctrine,[151] this fact merely demonstrates that the vast majority of fairness doctrine complaints we receive lack colorable validity. Instead of the improper action ascribed by some commenters, we believe that the paucity of actionable fairness doctrine complaints is probative of the fact that most licensees comply with the fairness doctrine.

63. In addition, several supporters of the retention of the fairness doctrine argue that the record in this proceeding provides inadequate support of a "chilling effect" on the grounds that the NAB, in the appendix to its comments, "merely" provided 45 examples of the way in which the fairness doctrine chills broadcasters' speech. These parties contend that the allegedly small number of examples are "wholly insufficient to suggest that the fairness doctrine has any inherent chilling effect on broadcasters." [152]

64. We find that this contention lacks merit for several reasons. First, the evidentiary support for our conclusion concerning the existence of a "chilling effect" is based, *inter alia*, on the pleadings of numerous parties, including individual broadcasters, corporations, industry groups, trade associations, non-profit corporations as well as the comments of the NAB. Second, even if the evidence of record were limited to the 45 examples contained in the appendix to NAB's comments—which it is not—we do not believe that 45 examples of chill can be discounted on the grounds that they are merely isolated incidents that are unrepresentative of the industry as a whole. This is particularly true in light of the fact that, as noted above, an admission by a broadcaster that the fairness doctrine inhibits the presentation of controversial issues could be construed as involving a potential rule violation which broadcasters may be reluctant to acknowledge, especially in the record of the licensing regulatory agency.[153]

65. In addition, several parties challenge some of NAB's examples on the grounds that they involve application of the personal attack or political editorializing rule.[154] Noting that these specific applications of the fairness doctrine are the subject of a separate rulemaking,[155] they assert that these examples lack evidentiary value as to the "chilling effect" of the general fairness doctrine. To the contrary, we believe that examples of a "chilling effect" which involve application of the personal attack and political editorializing components of the fairness doctrine contained in the comments of NAB and other parties are probative of the general proposition that intrusive content-based regulation like the fairness doctrine and its ancilliary doctrines inhibit the presentation of controversial issues of public importance on broadcast frequencies.[156] In any event, while these examples do provide evidentiary support regarding the inhibiting effect of the doctrine, our conclusion as to the existence of a "chilling effect" is in no way dependent upon these examples.[157]

66. Finally, in its Reply Comments, the Media Access Project and the Telecommunications Research and Action Center ("MAP/TRAC") contend that many of the examples of "chilling effect" contained in the NAB's Comments are merely "recycled material" which is of little evidentiary value. In support of this contention, MAP/TRAC recount that a number of these examples have been the subject of published books and articles, Commission proceedings or congressional testimony. With respect to the examples derived from the congressional hearings, MAP/TRAC assert that Congress, by rejecting or failing to enact legislation, found these examples to be unpersuasive.

67. We disagree. In our own view, the probity of these examples is not diminished merely because they have been published, formed the factual basis of an administrative proceeding or presented to Congress. To the extent that any evidentiary relevance attaches to the fact that the contents of a pleading has formed the subject matter of testimony presented under oath to the Nation's lawmakers, this fact would appear to enhance rather than lessen its probative value. Furthermore, contrary to MAP/TRAC's suggestions, the mere fact that Congress chose not to enact

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time devoted to a specific matter. *See 1974 Fairness Report*, 48 FCC 2d at 16. *See also Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 FCC 598 (1964).

[151] *See, e.g., American Security Council Education Foundation v. FCC*, 607 F.2d at 447.

[152] MAP/TRAC Reply Comments, *supra* n.105 at 29. *See also* "Reply Comments of the United States Catholic Conference" at 8 [hereinafter cited as "USCC Reply Comments"].

[153] Contending that some of the examples cited by NAB are overly vague, anonymous, or otherwise fail to demonstrate that the fairness doctrine in actuality inhibits the presentation of controversial issues of public importance, certain parties argue that the Commission should accord little, if any, probative value to these examples. Contrary to this assertion, we believe that many of the examples contained in NAB's Comments provide substantial and convincing proof of the existence of a "chilling effect" and that the examples set forth by NAB are not so vague as to lack probative value. While some of the sources are unnamed, we note that the examples set forth by anonymous sources are similar to those which are attributed to specific broadcasters. Moveover, as noted above at ¶ 58 *supra*, there are legitimate reasons, unrelated to the probity of the representations, why some broadcasters may desire anonymity with respect to their statements that they were inhibited, by the fear of incurring fairness doctrine obligations, in their presentation of controversial issues of public importance. Furthermore, as noted in ¶ 64 *supra*, our concern is with the evidence contained in the record as a whole rather than with whether each example described by NAB contains specific evidentiary documentation of a "chilling effect."

[154] *See, e.g.*, MAP/TRAC Reply Comments, *supra* n.105 at 30; BCFM Reply Comments, *supra* n.91 at 66–69; ACLU Reply Comments, *supra*, n.137 at 10.

[155] *Notice of Proposed Rule Making* in Gen. Docket No. 83–484, FCC 83–218 (released June 14, 1983).

[156] *See, e.g.*, NAB Comments, *supra* n.79, App. Vol., App. D at 35–37, 40–41, 46 and 62 (Example Nos. 28, 29, 31, and 42). *See also* "Comments of KIPR/95 FM"; "Comments of KGRL 940–AM Radio"; CBS Comments, *supra* n.83 at 77–78, n.*; FEF Comments, *supra* n.83 at 71–72, *citing Freedom of Expression Act of 1983: Hearings Before the Senate Committee on Commerce, Science & Transportation*, 98th Cong. 2d Sess. 125–126 (1984).

[157] In this regard, we note that none of the evidence of record demonstrating the existence of a "chilling effect" that is described in this section involves an application of the personal attack rule or the political editorializing rule.

legislation does not constitute an affirmative determination on the part of the governing legislative body that the examples lack probity.[158]

68. In sum, we find the evidence, derived from the record as a whole, leads us to conclude that the fairness doctrine chills speech. As a result of this finding alone we no longer believe that the fairness doctrine, as a matter of policy, furthers the public interest and we have substantial doubts that the fairness doctrine comports with the strictures of the First Amendment. Because the fairness doctrine inhibits the presentation of controversial and important issues, in operation, it actually disserves the purpose it was designed to achieve. In our view, an elimination of the doctrine would result in greater discussion of controversial and important public issues on broadcast facilities. While we believe that the existence of a "chilling effect" is sufficient to support our policy conclusion, it is not the only basis upon which we make this determination. In the following sections we shall discuss other detriments attributable to the fairness doctrine.

C. The Administration of the Fairness Doctrine Operates to Inhibit the Expression of Unorthodox Opinions

69. While the fairness doctrine has the laudatory purpose of encouraging the presentation of diverse viewpoints, we fear that in operation it may have the paradoxical effect of actually inhibiting the expression of a wide spectrum of opinion on controversial issues of public importance.[159] In this regard, our concern is that the administration of the fairness doctrine has unintentionally resulted in stifling viewpoints which may be unorthodox, unpopular or unestablished.

70. First, the requirement to present balanced programming under the second prong of the fairness doctrine is in itself a government regulation that inexorably favors orthodox viewpoints.[160] As we stated in our *1974 Fairness Report*, it is only "major" [161] or "significant" [162] opinions which are within the scope of the regulatory obligation to provide contrasting viewpoints. As a consequence, the fairness doctrine makes a regulatory distinction between two different categories of opinions: those which are "significant enough to warrant broadcast coverage [under the fairness doctrine]" [163] and opinions which do not rise to the level of a major viewpoint of sufficient public importance [164] that triggers responsive programming obligations. While the broadcaster in the first instance is responsible for evaluating the "viewpoints and shades of opinion which are to be presented," [165] we are obligated to review the reasonableness of the broadcaster's evaluation. As a consequence, the fairness doctrine in operation inextricably involves the Commission in the dangerous task of evaluating the merits of particular viewpoints. This evaluation has serious First Amendment ramifications. As the Supreme Court has stated:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . .[166]

71. Second, as Chief Judge David Bazelon has stated, our own administrative enforcement of the doctrine provides some support for the contention that some "controversial viewpoint[s] [are] being screened out in favor of the dreary blandness of a more acceptable opinion."[167] Broadcasters who have been denied or threatened with a denial of the renewal of their licenses due to fairness doctrine violations have generally not been those which have provided only minimal coverage of controversial and important public issues. Indeed, some licensees that we have not renewed or threatened with non-renewal have presented controversial issue programming far in excess of that aired by the typical licensee.[168] In a number of situations it was the licenses of broadcasters who aired opinions which many in society found to be abhorrent or extreme which were placed in jeopardy due to allegations of fairness doctrine violations.[169] In conclusion, we are extremely concerned over the potential of the fairness doctrine, in operation, to interject the government, even unintentionally, into the position of favoring one type of opinion over another.[170] To the extent that the

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[158] MAP/TRAC Reply Comments, *supra* n. 105 at 27-28.

[159] Governmental policy which has the effect of inhibiting the expression of specific points of view presents grave First Amendment concerns. As the United States Supreme Court has stated: "the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *FCC* v. *Pacifica Foundation*, 438 U.S. at 745.

[160] Justice William Brennan has noted that the fairness doctrine may operate to disfavor viewpoints outside the mainstream of public opinion: "Under the Fairness Doctrine, a broadcaster is required to present only *"representative* community views and voices on controversial issues" of public importance. Thus, by definition, the Fairness Doctrine tends to perpetuate coverage of those "views and voices" that are already established, while failing to provide for exposure to the public to those "views and voices" that are novel, unorthodox or unrepresentative of prevailing opinion." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 190 (1973), *quoting Democratic National Committee*, 25 FCC 2d 216, 222 (1970) (Brennan, J., dissenting) (emphasis in original).

[161] *1974 Fairness Report*, 48 FCC 2d at 15.

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943).

[167] *Brandywine-Main Line Radio, Inc.*, v. *FCC*, 473 F.2d at 78 (Bazelon, C.J. dissenting).

[168] A discussion of our decision not to renew the license of WXUR on the basis, *inter alia*, of failing to comply with the fairness doctrine is described in detail at ¶¶ 54–55, *supra*. As noted below, in the name of the fairness doctrine we silenced WXUR, a station which had provided an enormous amount of controversial issue programming during its term of license. Similarly, in *Capitol Broadcasting Co.*, 2 RR 2d 1104 (1964), the Commission deferred action on the renewal applications of WRAL during a pendency of an inquiry into the station's compliance with the fairness doctrine notwithstanding the fact that the station's editorials, voiced by its Vice-President, Jesse Helms, presented views "on a *great number of controversial issues* of national and regional importance." *Id.* at 1106 (emphasis added.).

[169] *See, e.g., Lamar Life Broadcasting Co.*, 38 FCC 1143 (1965), *rev'd sub nom. Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966) (FCC refusal to grant a full term license to a station which espoused racially segregationist viewpoints); *Brandywine-Main Line Radio, Inc., supra* n.75 (FCC refusal to grant a license renewal to an evangelist station; the Hearing Examiner in *Brandywine* stated that the licensee's "style of presentation over the air—sometimes so racy as to make the gorge rise—was not what men of refined tastes would deem expedient. . . ." *Brandywine-Main Line Radio Inc.*, 24 FCC 2d at 130). *See also Trinity Methodist Church, South* v. *Federal Radio Commission*, 62 F.2d 850, 851 (D.C. Cir.), *cert. denied*, 284 U.S. 685 (1932) (Federal Radio Commission denied license renewal in a situation in which "the station had been used to attack a religious organization . . . [and where] the broadcasts [aired by the licensee] were sensational rather than instructive. . . .")

[170] In its Comments, the Office of Communication of the United Church of Christ—a party which intervened in opposition of a grant of renewal in the *Lamar Life* case—argues that in the 1960s extreme right wing broadcasters with odious racial and religious views gained an inordinate amount of influence in large sections of the country. Observing that these broadcasters were subject to fairness doctrine challenges, the United Church of Christ states that "[i]f the doctrine was successfully used to moderate abuses of that period, it served its purpose. . . ." "Comments of the Office of Communication of the United Church of Christ, the Unitarian Universalist Association, the Communication Commission of the National Council of the Churches of Christ in the U.S.A., Everett C. Parker and Al Swift" at 51 [hereinafter referred to as "UCC Comments"]. In our view, use of the fairness doctrine to suppress any point of view, however abhorrent, contravenes the purpose of the doctrine and raises serious constitutional implications.

doctrine has this effect it both disserves the interest of the public in an unencumbered marketplace of ideas and contravenes the fundamental purposes of the First Amendment.

D. In Operation the Fairness Doctrine Places the Government into the Intrusive and Constitutionally Disfavored Role of Scrutinizing Program Content

72. Although we have traditionally attempted to minimize our role in evaluating program content in administering the fairness doctrine,[171] the doctrine has the inexorable effect of interjecting the Commission into the editorial decisionmaking process.[172] In evaluating whether or not a broadcaster has met his or her balanced programming obligations under the fairness doctrine,[173] we are obligated to determine whether or not the broadcaster made a reasonable determination as to whether or not the programming presented controversial issues of public importance, and if so, we must assess whether or not the broadcaster provided reasonable opportunities for the presentation of contrasting viewpoints. In evaluating the adequacy of the responsive programming, we have had to draw conclusions as to the reasonableness of the selected program formats and spokespersons.

73. Moreover, in making these assessments, we must necessarily take into account the amount of time in which a specific viewpoint was broadcast. Our staff often performs this task by mechanistically weighing the minutes and even the seconds of time devoted to each expression of opinion.[174] In addition, we must assess the frequency of the broadcast and the degree of audience exposure. Further, because the opportunity to present responsive programming may lose its utility if the controversial issue of public importance triggering the obligation subsequently becomes moot, we must also make judgments as to the timeliness of the opportunity for the discussion of contrasting viewpoints. The minute and subjective scrutiny of program content resulting from the enforcement of the fairness doctrine is at odds with First Amendment principles.[175] For example, in *Miami Herald*, the United States Supreme Court expressed concern that a governmentally mandated right of reply statute applicable to newspapers constituted an unwarranted intrusion on the editorial freedoms of journalists

> because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper, and the decisions made as to the limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of free press as they have evolved to this time.[176]

E. The Fairness Doctrine Creates the Opportunity For Intimidation of Broadcasters by Governmental Officials

74. Notwithstandig our recent efforts to reduce unnecessary regulatory burdens on licensees,[177] the broadcast industry is one which is characterized by pervasive regulation. The fact of this pervasive regulatory authority, including the intrusive power over program content occasioned by the fairness doctrine, provides governmental officials with the dangerous opportunity to abuse their position of power in an attempt either to stifle opinion with which they disagree or to coerce broadcasters to favor particular viewpoints which further partisan political objectives. In this regard, Chief Judge Bazelon has observed that "the potential to subject the 'fairness' theory to political abuse is inherent in the operation of the doctrine."[178]

75. Political officials have not been loathe to criticize the manner in which broadcasters have aired controversial matters of public concern [179] and at times the criticism has been accompained by overt pressure to influence the manner in which these issues are covered.[180] For example, a White House official during the Nixon Administration suggested to the President's Chief of Staff that the Administration respond to the alleged "unfair coverage" of the broadcast media by showing "favorites within the media," establishing "an official monitoring system through the FCC" and

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[171] *See, e.g., 1974 Fairness Report* at 8. *See American Security Council Education Foundation* v. *FCC*, 607 F.2d at 445.

[172] *See Notice, supra* n.1 at ¶ 71.

[173] Both prongs of the fairness doctrine have the potential to interject the government into the decisionmaking process as to the content of programming. The first prong of the fairness doctrine sanctions governmental intrusion by enabling the Commission to prescribe directly the coverage of a specific controversial issue of public importance whether or not the broadcaster, in the exercise of his or her journalistic judgment, would choose to cover the issue. As noted *supra* at n.59, however, we impose affirmative programming obligations on broadcasters under the first part of the fairness doctrine only in very rare instances. Because it is the second prong of the doctrine that typically involves the government into the editorial decisionmaking process, this section will address the intrusion resulting from the enforcment of that prong of the doctrine.

[174] At the *en banc* hearing, James C. McKinney, Chief of the Mass Media Bureau, described the detailed scrutiny of program content that necessarily results from the enforcement of the fairness doctrine:

> [I]t might be interesting for you to know the process that we go through here at the agency at the lower staff level before the Commissioners get [a case] for final decision. We . . . sit down with tape recordings [and] video tapes of : . . what has been broadcast on a specific station. We compare that to newspapers [and] other public statements that are made in the community. We try to make a decision as to whether the issue is controversial and whether it is of public importance in that community, which may be 2000 miles away. . . . [W]hen it comes down to the final analysis, we take out stop watches and we start counting [the] seconds and minutes that are devoted to one issue compared to [the] seconds and minutes devoted to the other side of that issue. . . . [I]n the final analysis we start giving our judgment as what words mean in the context of what was said on the air. What was the twist that was given that specific statement, or that commercial advertisement? Was it really pro-nuclear power or was it pro some other associated issue? Hearings on the Fairness Doctrine: Panel IV (Statement of James C. McKinney) (February 8, 1985).

[175] Justice William O. Douglas has expressed concern over the intrusive nature of the fairness doctrine:

> [T]he prospect of putting government in a position of control over publishers is to me an appalling one, even to the extent of the Fairness Doctrine. The struggle for liberty has been a struggle against Government. . . .
>
> The Court in today's decision by endorsing the Fairness Doctrine sanctions a federal saddle on broadcast licensees that is agreeable to the traditions of nations that never have known freedom of press and that is tolerable in countries that do not have a written constitution containing prohibitions as absolute as those in the First Amendment. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. at 162–63 (Douglas J., concurring).

[176] *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. at 258.

[177] *See, e.g., Report and Order* in MM Docket No. 83–670, 98 FCC 2d 1076 (1984) [hereinafter cited as *"Television Deregulation"*]; *Report and Order* in MM Docket No. 84–19, FCC 84–156 (released May 9, 1984), 55 RR 2d 1389 (1984), *recon. denied*, FCC 85–225 (released May 8, 1985) (Elimination of Regional Concentration Rule) [hereinafter cited as *"Regional Concentration"*].

[178] *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d at 78 n.82 (Bazelon, C.J., dissenting).

[179] Chief Judge Bazelon has stated that: "In the past years, networks have come under repeated attacks from government spokesmen who did not like the way television reported a variety of hot public issues. These attacks did not focus on inaccuracies but on the "bias" or lack of "fairness" in the presentation". *Id.* at 78.

[180] An internal memorandum of one high level official of the Nixon Administration reveals that the President directed his staff on twenty-one occasions during a single thirty-day period to take "specific action relating to what could be considered unfair news coverage." Memorandum to H.R. Haldeman from Jeb S. Magruder. "The Shot-gun Versus the Rifle" (Oct. 17, 1969), *reprinted in* D. Bazelon, "FCC Regulation of the Telecommunications Press," 1975 Duke L.J. 213, 247–51 (1975).

making "official complaints from the FCC." [181] The attempts to coerce broadcast journalists, moreover, have not been restricted to specific partisan viewpoints or politicians of a particular political party. As described in the *Notice*, a government official in another Administration was reported to state that the:

> massive strategy [of the Administration] was to use the fairness doctrine to challenge and harass the right-wing broadcasters and hope that the challenges would be so costly to them that they would be inhibited, and decide that it was too expensive to continue.[182]

We believe that the potential for the fairness doctrine to be abused in order to further partisan political purposes [183] has dangerous policy ramifications. As Justice William O. Douglas has stated:

> the regime of federal supervision under the Fairness Doctrine is contrary to our constitutional mandate and makes the broadcast licensee an easy victim of political pressures and reduces him to a timid or submissive segment of the press whose measure of the public interest will now be echos of the dominant political voice that emerges after every election.[184]

76. Several parties contend that we should not be concerned that the fairness doctrine has the potential to be used as a vehicle for governmental officials to improperly affect the viewpoints aired over broadcast frequencies because such governmental officials have other means, such as the license renewal process and Internal Revenue Service audits, by which to improperly attempt to exert control over broadcasters.[185] We disagree. While the commenters are correct in their assertion that governmental abuse may be effectuated by other mechanisms, we do not have plenary power to safeguard against all types of potential governmental abuse. Certainly the mere fact that alternative means of intimidation may be available does not provide justification for us to blithely ignore the fact that the fairness doctrine provides the dangerous potential for governmental abuse. As Chief Judge Bazelon has stated, "[w]ithout the FCC lever to manipulate, we could hope that there would be less chance that the licensees would be forced to kowtow to the wishes of an incumbent politician."[186]

F. The Fairness Doctrine Imposes Unnecessary Economic Costs Upon Broadcasters and the Commission.

77. In addition to the detriments described above, a further consequence of the fairness doctrine is the economic burdens imposed upon broadcasters and the Commission. As described above, the doctrine places significant economic costs upon a licensee. Such costs are incurred, for example, in negotiating with the public regarding responsive programming obligations, in defending fairness doctrine challenges in both administrative and judicial forums, in complying with the requirement to broadcast controversial issues of public importance, and in airing alternative viewpoints to these controversial issues.[187]

78. In addition to these economic burdens, the administration and enforcement of the doctrine imposes regulatory costs upon the Commission. We receive thousands of inquiries and complaints concerning the fairness doctrine annually,[188] each of which requires an individualized evaluation or response by our staff. In the course of assessing the merits of a complaint, the Commission's staff may seek further information from the complainant. If it determines that the complainant has established a *prima facie* case, the staff may request justification from the licensee, thereby precipitating potentially costly administrative litigation, which, when terminated, is subject to judicial review, with its attendant costs.[189] Contrary to the position of some commenters,[190] therefore, we do not believe that the economic burdens incurred by the Commission in administering the fairness doctrine are *de minimus*.

79. In evaluating the propriety of a policy, the costs associated with the rule are to be balanced against its benefits. As a consequence, the significant economic costs associated with the administration of the fairness doctrine are a necessary factor in a considered evaluation of whether or not retention of the fairness doctrine comports with the public interest. By this assertion we do not imply that the administrative costs standing alone would be sufficient to justify the elimination of the doctrine. To the contrary, these costs might be justified were it demonstrated that the doctrine increased the amount of controversial issue programming and that its retention was necessary to assure that the public had access to the marketplace of ideas. In a situation in which there are no countervailing justifications, however, we believe that even a moderate amount of administrative costs may constitute substantial justification for the elimination of regulation. For example, we have recently stated that regulatory costs are a significant criterion in justifying repeal of a rule "especially when the other factors considered indicate that the need for the rule has been effectively eliminated and that the rule imposes significant costs on both the public and the broadcast industry." [191] We find that these factors

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[181] *Id.* at 248.

[182] *Notice*, *supra* n.1 at ¶78.

[183] Even where there has been no explicit threats by governmental officials, a mere perception that such abuse could occur may itself have an inhibiting effect. Broadcasters may be inhibited from airing viewpoints distasteful to those in power to avoid potential retaliation. As Chief Judge David Bazelon has observed: "The tremendous stakes in the highly concentrated television medium make the networks particularly sensitive to the prevailing political winds at the FCC, in Congress, and in the White House. And the government has fostered network sensitivity to government wishes by making clear that the failure to respond to the government's concept of appropriate program content would jeopardize the all-valuable license. I am reminded by one broadcaster who observed: 'We live or die . . . by the FCC gun.'" Bazelon, "First Amendment and the New Media," *supra* n.74 at 78 (ellipsis in original).

[184] *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 164–65 (Douglas, J., dissenting).

[185] *See, e.g.*, Geller/Lampert Comments, *supra* n.83 at 10–11 n.4.

[186] Bazelon, "FCC Regulation," *supra* n.180 at 239.

[187] *See* Section III, B.1, *supra*.

[188] For example, in 1984 our staff received 6,787 inquiries and complaints regarding the fairness doctrine.

[189] The United States Court of Appeals has recently determined that a complainant whose fairness doctrine claim is denied by the Commission has the right to seek judicial review (*Maier v. FCC*, *supra* n.125) and it is possible that this determination will increase the amount of appellate litigation, with its attendant costs, involving the fairness doctrine. Because appellate fairness doctrine litigation necessarily entails the involvement of Commission, the United States Department of Justice and the courts, the administrative expenses of each of these governmental agencies must be taken into account in assessing the economic burdens associated with the fairness doctrine.

[190] *See, e.g.*, MAP/TRAC Comments, *supra* n.50 at 134; "Comments of the American Civil Liberties Union" at 11 [hereinafter cited as "ACLU Comments"].

[191] *Memorandum Opinion and Order* in MM Docket No. 84–19 FCC 85–225 (released May 8, 1985) at ¶ 17. It is well-established that if the benefits of retaining a policy are minimal or non-existent, even a relatively small administrative burden may be sufficient to justify repeal. For example, in assessing whether or not to eliminate the regional concentration rule, one factor which we considered was the regulatory costs associated that rule. Finding that the administration of that rule had resulted in a staff analysis of 71 construction permits or assignment applications annually, we determined that "this expenditure of staff time . . . constitute[d] an appreciable burden on the Commission" (*id.*) despite the fact that there only were three reported cases involving the regional concentration rule over a two-year period. *Id.*

are applicable with respect to the fairness doctrine because, as discussed, the doctrine "chills" the broadcast of controversial issue programming and, as explained below, is not required to assure that the public has access to diverse viewpoints.

80. For the reasons set forth above, we find that the fairness doctrine, in operation, has the effect of inhibiting the presentation of controversial issues of public importance. We also believe that the doctrine operates to favor the expression of orthodox viewpoints and to require unwarranted scrutiny by the Commission into program content. In addition, we find it provides a vehicle by which governmental officials can intimidate broadcasters for partisan political purposes. Moreover, we determine that the doctrine, in operation, imposes significant economic costs upon the Commission and the broadcasting industry. As a consequence, on the basis of the record in this proceeding, we conclude that there are a number of significant detriments associated with the fairness doctrine. In the following section we will evaluate, in light of the current communications marketplace, whether or not there is any need for us to retain the doctrine.

G. Need for the Fairness Doctrine In Light of the Increase in the Amount and Type of Information Sources in the Marketplace

81. Our conclusions regarding the disutility of the fairness doctrine find further support by examining the current amount of diverse and antagonistic sources of information available in the marketplace. As we observed in the *Notice*, significant increases in the number and variety of information sources attenuates the need for a system of government imposed "fairness" with its corollary duty to discover and present controversial issues of public importance. The Commission's last assessment of the information marketplace, and its necessary relationship to the legal and policy underpinnings of the fairness doctrine, occurred in 1974. At that time the Commission concluded:

> The effective development of an electronic medium with an abundance of channels through the use of cable or otherwise is still very much a thing of the future. *For the present*, we do not believe that it would be appropriate—or even permissible—for a government agency charged with the allocation of the *channels now available* to ignore the legitimate First Amendment interests of the public. (*emphasis added*) [192]

[192] *1974 Fairness Report*, 48 FCC 2d at 6.

82. More than a decade has passed since this examination. During this time, we have witnessed explosive growth in various communications technologies. We find the information marketplace of today different from that which existed in 1974, as many of the "future" electronic technologies have now become contributors to the marketplace of ideas. As will be discussed below, the growth of traditional broadcast facilities, as well as the development of new electronic information technologies, provides the public with suitable access to the marketplace of ideas so as to render the fairness doctrine unnecessary. Moreover, we find that the dynamics of the information services marketplace overall insures that the public will be sufficiently exposed to controversial issues of public importance.[193] Accordingly, we no longer believe it appropriate to continue a system of government imposed obligations requiring licensees to discover and "fairly" address controversial issues of public importance. We believe that elimination of the fairness doctrine would not only promote discussion of such issues, but also pay greater fidelity to fundamental First Amendment values.[194]

83. Our analysis of the growth in the information services marketplace and the impact of this development on the underpinnings of the fairness doctrine shall begin with a discussion of the nature and scope of that market. We shall then evaluate the current status of this marketplace. Special emphasis will be given to the growth of information sources since the Supreme Court's decision in *Re Lion Broadcasting* and our previous evaluation of the communications marketplace in the *1974 Fairness Report*. As a final matter, we will address the availability of these information sources and the incentives to provide coverage to controversial issues of public importance.

1. Nature and Scope of the Information Services Marketplace

84. The Commission has previously addressed this specific issue in the context of a television station licensee's programming obligations. In our decision deregulating the programming guidelines for commercial television, we noted that the relevant information marketplace includes a variety of information sources such as cable television, Low Power Television (LPTV), Multipoint Distribution Service (MDS), Multichannel Multipoint Distribution Service (MMDS), Satellite Master Antenna Service (SMATV), and other electronic technologies.[195] Moreover, the Commission, in formulating its policy concerning a licensee's responsibility to provide programming directed at children, stated that broadcasters could consider the programming alternatives available on both cable and public television in deciding how to meet their own nondelegable duty.[196] This policy was later affirmed by the United States Court of Appeals.[197]

85. The Commission has also addressed the issue of determining the relevant information marketplace in fashioning its rules regarding concentration of ownership. For example, we took particular note of the rise in the multiplicity of nonbroadcast media voices when eliminating the regional concentration of control rules.[198] More recently, the Commission addressed this issue in a proceeding revising its national multiple ownership rules.[199] In this context the Commission noted:

> The record in this proceeding supports the conclusion that the information market relevant to diversity includes not only TV and radio outlets, but cable, other video media and numerous print media as well. In the *Notice*, we took account of the fact that these other media compete with broadcast outlets for the time that citizens devote to acquiring the information they desire. That is cable, newspapers, magazines and periodicals are substitutes in the provision of such information.[200]

That the various media are in fact information substitutes in the marketplace of ideas is further reflected in our local cable and television, newspaper and broadcast, radio and television cross-ownership rules.[201]

[193] *See WNCN Listener's Guild* v. FCC, 450 U.S. 582, 594 (1981); *Office of Communications of the United Church of Christ* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983) [hereinafter cited as "*UCC* v. *FCC*"].

[194] *See FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. at 795. (the public interest necessarily invites reference to First Amendment principles).

[195] *Television Deregulation*, 98 FCC 2d at 1096 and 1138.

[196] *Report and Order* in MM Docket No. 19142, 96 FCC 2d 634 (1984), *aff'd sub nom. Action for Children's Television* v. *FCC*, 750 F.2d 899, 901 (D.C. Cir. 1985) (per curiam) [hereinafter cited as "*ACT* v. *FCC*"].

[197] *ACT* v. *FCC*, 756 F.2d at 901.

[198] *See Regional Concentration*, *supra* n.177.

[199] *Report and Order* in Gen. Docket No. 83-1008, FCC 84-350, 49 Fed. Reg. 31877 (August 9, 1984), *recon. granted in part, Memorandum Opinion and Order*, FCC 84-636, 50 Fed. Reg. 4696 (February 1, 1985), *appeal docketed sub nom. National Association of Black Owned Broadcasters* v. *FCC*, No. 85-1139 (D.C. Cir. filed March 4, 1985).

[200] *Id.* at 31860.

[201] *See* 47 C.F.R., § 73.3555(b) [one to a market]; 47 C.F.R. § 76.501 [co-located cable-broadcast TV cross-ownership]; and 47 C.F.R. § 73.3555(c) [co-located newspaper-broadcast cross-ownership.]

86. Against this background, the issue in this proceeding is whether or not there are inherent differences among various media outlets so as to prevent substitutability with respect to the presentation of controversial issues of public importance. We find nothing in this record which would cause us to arrive at a conclusion different from these prior decisions.[202] Accordingly, for the purpose of analyzing the fairness doctrine, we believe it is appropriate to consider traditional broadcast services, new electronic media and print as all part of the information services marketplace.

87. Several commenters argued that broadcasting, particularly television, is such a dominant information source that there are no other realistic information alternatives.[203] These commenters frequently point to studies indicating that television is both the primary and most believed source of information in the country.[204] We do not believe that the purported dominance of one media voice necessarily detracts from the significance of other voices with respect to the availability of antagonistic and diverse sources of information. The success of one particular medium in attracting large audiences does not necessarily provide an appropriate justification for imposing governmently mandated fairness. Moreover, the data do not suggest that other media voices are somehow unavailable. Studies demonstrating the alleged dominance of television broadcasting are based on data in which television was selected as one of several information sources used by the respondents.[205] Such data merely serve to demonstrate the interchangeability of information options.[206]

88. Similarly, we are not persuaded by those who argue that newspapers and broadcast facilities are in different information markets because newspapers must be read as opposed to television or radio which may be casually watched or monitored.[207] For the purposes of the policies adopted herein, we can find no important regulatory distinction in the fact that an individual watches television, listens to the radio or reads a newspaper. That individuals edit and process information from the various media using different senses or while performing different tasks does not suggest that the information sources exist in separate isolated corners within the marketplace of ideas. In this regard, we believe that our regulatory concerns are best limited to considerations involving the *availability* of information sources. Concerns involving the manner in which the individuals mentally process the information form these outlets generally should not be of regulatory significance.[208]

89. A related argument concerns the fact that broadcasting, unlike almost all other media sources, is subject to substantial and direct government regulation.[209] we do not believe that a system of government licensing affects the substitutability of information among the various media voices. While such a system may influence entry into the information services marketplace, a licensing scheme, in and of itself, does not provide a proper distinction for the purpose of assessing the impact of broadcasting as a diverse information voice.[210] Moreover, as we observed when adopting our co-located newspaper cross-ownership rules, nonregulated information sources may be considered in formulating Commission policy.

90. In addition, we do not believe that purported price differences among the various information sources necessarily place them in separate information markets. While programming from traditional advertiser based broadcast facilities has been considered a "zero priced good," there is no evidence in the record suggesting that the alleged price differentials between these facilities and other "pay" media are significant enough to preclude interchangeability among information systems.[211] Indeed, the monthly cost of a daily newspaper may be comparable to or even less than the monthly cost of basic cable service.

91. Several commenters suggested that newer technologies such as pay cable, STV, MDS, DBS are not adequate information substitutes with respect to the provision of issue related programming. As will be discussed *infra*, we believe there are sufficient incentives to insure the presentation of programming that addresses controversial issues of public importance. These incentives exist not only for traditional broadcast facilities, but also for the newer electronic technologies.[212]

92. In sum, we find the record in this proceeding supports the conclusion that the various print and electronic media exist in a widely diverse and competitive information marketplace. We now turn to a consideration of the current availability of these diverse media outlets.

2. Status of the Information Service Marketplace

93. As we observed in the *Notice*, there has been explosive growth in the communications marketplace since the

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[202] Indeed, as we will discuss, *infra*, growth in the television and radio services alone may obviate the need for the fairness doctrine. *See* ¶ 104, *infra*.

[203] *See, e.g.*, "Comments of General Motors Corporation, International Paper Company and Campbell-Ewald Company on Notice of Inquiry" at 10, [hereinafter cited as "GM comments"]; "comments of the Democratic National Committee, Democratic Congressional Campaign Committee and Democratic Senatorial Campaign Committee at 7–8, [hereinafter cited as "DNC Comments"].

[204] Commenters generally cite to the *Roper Study* for the proposition that broadcasting, especially television, is the most utilized and the most believed source of news and informational programming. *See* The Roper Organization Inc., *"Public Attitudes Toward Television and Other Media in Time of Change"* May 1985 [hereinafter cited as the *"Roper Study"*].

[205] In this regard, the *Roper Study* acknowledges that multiple answers have been accepted when people have named more than one medium. *Id.* at 3.

[206] Indeed, it appears that reliance on a particular media voice may depend on the type of issue *e.g.*, national, local etc. For example, a recent study published by the American Society of Newspaper Editors found that 50 percent of the respondents trusted newspapers more than television in trying to understand a difficult local news story. Only 37 percent of all respondents said they would trust television more in understanding local news. *Editor and Publisher*, Apr. 13, 1985, at 9.

[207] *See* MAP/TRAC Comments, *supra* n.50 at 75.

[208] Furthermore, we disagree with MAP/TRAC's contention that television broadcasting is unique because it has a captive audience. *Id.* at 76 n.76. MAP/TRAC's own analysis regarding the ability to listen to broadcasting while resting, working or driving is inconsistent with the captive audience hypothesis. Moreover, reliance on the Supreme Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. at 749, as evidence of the captive audience theory is misplaced. The Supreme Court has acknowledged that the decision is limited to situations involving children and indecent language. *See FCC v. League of Women Voters*, 104 S.Ct. at 3118.

[209] *See, e.g.*, MAP/TRAC Comments, *supra* n.50 at 61.

[210] In this regard, we note that even assuming costs associated with the limitations of the Commission allocations scheme, the actual barriers to entry in terms of capital costs, may be lower for radio and television broadcasting than for daily newspapers. *See* Wirth, Michael. *Economic Barriers to Entry Daily Newspapers vs. Television Stations vs. radio Stations*, August 1984, *cited* in NAB Comments, *supra* n.79 App. Vol., App. C.

[211] We note that while there are no subscription fees for over-the-air broadcasting, there may be costs involved in viewing "free" over-the-air television. Such costs would take the form of opportunity costs lost while watching unwanted program material.

[212] *See* ¶¶ 129–131, *infra*. Some Commenters also argued that the newer electronic technologies will not provide coverage to local controversial issues. We find this argument unpersuasive. Existing fairness obligations regarding the coverage of controversial issues of public importance do not necessarily require that the issue be solely of local importance. In this regard, controversial issues confronting a particular community may be national in scope and may be sufficiently addressed by "national programming." Moreover, we note our prior decisions in which we observed that programming addressing local issues need not be produced at the local level. *See Television Deregulation*, 98 FCC 2d at 1085, *citing WPIX, Inc.*, 68 FCC 2d 381, 402 (1978)

inception of the fairness doctrine in 1949. Of particular significance is the development of the marketplace since the Supreme Court's decision in *Red Lion Broadcasting* in 1969 and our subsequent analysis of the market in the *1974 Fairness Report*.[213] In the following analysis, we will focus on the major participants in the information services marketplace: (a) over-the-air broadcasting, (b) substitute electronic technologies and (c) the print media.

(a) Broadcasting

94. The growth and development of radio broadcasting since the inception of the fairness doctrine has been dramatic. The total number of radio stations has increased by 280 percent since the *1949 Fairness Report*. Moreover, there has been a 48 percent increase in the number of radio stations since the Supreme Court's decision in *Red Lion* and a 30 percent increase since the Commission's *1974 Fairness Report*. During this period the most significant growth occurred in the FM service where there has been a 113 percent increase since *Red Lion* and a 60 percent increase since our *1974 Fairness Report*.

	Number of radio stations			
	1949	1969	1974	1985
AM	1,677	4,265	4,407	4,787
FM	887	2,330	3,094	4,979
Total	2,564	6,595	7,501	9,766

SOURCE: 1949, 1969, 1974 (on-air stations) data from *Television and Cable Factbook*, Cable and Services Volume No. 52 (1984); 1985 data from FCC release No. 5080, June 11, 1985.

95. Of particular significane is the fact that the number of radio voices available in each local market has grown.[214] In this regard, we note that competition resulting from an increase in the number of radio outlets was the primary factor in our decision to deregulate the program guidelines, commercial limitations and formal ascertainment requirements for commercial radio.[215] Moreover, there has also been a fundamental change in the structure of the radio market. Once predominently an AM only service, radio is now composed of two very competitive services. For example, at the time of the *1974 Fairness Report* there were over a thousand more on-air AM stations than FM stations. Since that time, however, FM has eclipsed AM as the largest radio service. Because of its higher fidelity, the growth of FM constitutes a significant improvement in the quality of radio service to the public. The development of radio can also be seen in the diversity of its program distribution systems. At the present time, there are approximately 11 national radio networks and 90 regional radio networks.[216]

96. We also note that the number of radio outlets will continue to increase with the further development of spectrum efficient technologies. Recently, the Commission allocated 689 new FM channels and adopted new procedures to assist in the development of these allotements. [217] In addition, we have recently adopted new application procedures which are designed to streamline the processing of these new FM allotments as well as the existing 152 vacant FM allotments.[218] With respect of AM service, the Commission in 1980 acted to limit the protection from interference afforded Class I–A clear channel stations so as to increase spectrum availability for new AM radio services.[219] More recently, the Commission in various proceedings has adopted policies making more efficient use of existing spectrum as well as enlarging that portion of the spectrum available for AM broadcast use.[220]

97. Equally significant has been the dynamic growth of over-the-air television broadcasting. The statistics presented below show the development of this medium.

	Number of television stations			
	1949	1969	1974	1985
VHF (Total)	51	577	605	654
Commercial		499	513	541
Educational		78	92	113
UHF (Total)	0	260	333	554
Commercial	0	163	184	369
Educational	0	97	149	185
Total	51	837	938	1,208

SOURCE: 1949, 1969 and 1974 (on-air stations) data from *Television Factbook*, Cable and Services Volume No. 52 (1984); 1985 data from FCC publicason No. 5080 June 11, 1985.

98. As the above data demonstrate, there has been a 44.3 percent increase in the overall number of television stations since the Supreme Court's decision in *Red Lion Broadcasting*. This represents a 13.3 percent increase in VHF stations and dramatic 113 percent increase in UHF stations. Television growth since the Commission's *1974 Fairness Report* has also been significant, amounting to a 28 percent increase in the overall number of television stations with a 66.4 percent increase in UHF stations.

99. The continued growth in television broadcasting has led directly to an increase in signal availability in local markets.

	Stations receivable per TV household—number of stations receivable						
	1 to 4	5 to 6	7 to 8	9 to 10	11 to 14	15 to 19	20+
	In percentage						
1984	4	11	21	22	24	15	3
1972	17	22	30	[1]51			
1964	41	33	18	[1]8			

[1] 9+ stations
SOURCE: *Nielson Report on Television*, 1985 at 2.

[213] *See Red Lion Broadcasting Co.* v. *FCC*, *supra* n.10; *1974 Fairness Report*, *supra* n.3.

[214] Date submitted by NAB demonstrates that generally the growth of radio voices has generally occurred throughout the various radio markets. *See* NAB Comments, *supra* n.79 App. Vol., App. A at 19–63. These data confirm the Commission's previous conclusions regarding overall growth in radio markets. *See Inquiry and Notice of Proposed Rule Making* in BC Docket No. 79–219, 73 FCC 2d 457, 548–551 (1979).

[215] *Report and Order* in Docket No. 79–219, 84 FCC 2d 968 (1981), *recon. denied*, 87 FCC 2d 797 (1981), *rev'd on other grounds sub nom. UCC* v. *FCC*, *supra n.193 [hereinafter cited as "Radio Deregulation"*).

[216] *Broadcasting/Cablecasting Yearbook*, (1985) at F1–61.

[217] *See Report and Order* in Docket No. 80–90, 53 FCC 2d 1550 (1983); *First Report and Order* in MM Docket No. 84–231, 50 Fed. Reg. 3514 (January 25, 1985); *Second Report and Order* in MM Docket No. 84–231, FCC 85–124 (released April 12, 1985).

[218] *See Universal Filing Period, Public Notice*, FCC No. 4699 (May 22, 1985). *See also, Report and Order* in MM Docket No. 84–750, FCC–125, 50 Fed. Reg. 19936 (May 13, 1985).

[219] *See Clear Channel Broadcasting in the AM Broadcast Band*, 78 FCC 1345 (1980), *recon. denied*, 83 FCC 2d 216 (1980), *aff'd sub nom. Loyola University* v. *FCC*, 670 F.2d 1222 (D.C. Cir. 1982).

[220] *See, e.g., Report and Order* in MM Docket No. 84–281, FCC 85–224 (released May 7, 1985) (foreign nightime AM clear channels); *Report and Order* in MM Docket No. 84–752, FCC 85–150 (released April 24, 1985) (AM rules and international agreements); *Notice of Proposed Rule Making* in MM Docket No. 85–39, FCC 85–75 (released March 12, 1985) (AM application criteria); *Second Notice of Inquiry* in Gen. Docket No. 84–647, FCC 84–644 (released January 11, 1985) (preparation for ITV conference); *Report and Order* in BC Docket 82–538, FCC 83–412, 48 Fed. Reg. 42944 (September 30, 1983), *recon. denied in part*, FCC 84–591 (released December 4, 1984) (AM daytime operations).

As of 1984, 96 percent of the television households received five or more television signals. This figure represents a significant increase in actual signal availability since 1972, where only 83 percent of the television households received five or more signals. The increase is even more dramatic compared to 1964 when only 59 percent of television households were capable of receiving 5 or more stations. Today, only 4 percent of the television households receive fewer than five signals. These statistics demonstrate a significant growth in signal availability throughtout the country. Of particular significance is the fact that these figures are based on over-the-air reception and do not include the enhanced signal availability achievable with cable television. The significance of cable televison as a factor in increasing the number of available signals will be discussed, *infra*. These data generally confirm statistics supplied by several commenters which demonstrate an increase in signal availability in both large and small markets.[221]

100. Increases in the number of outlets and signal availability does not necessarily provide a complete picture of the fundamental structural changes occurring in the television marketplace. For example, UHF television, once thought to have occupied second class status, is now a significant voice in the marketplace.[222] Indeed, the growth of this service—113 percent since *Red Lion*—is evidence of its economic viability. Concomitant with the growth in UHF stations has been the increased importance of independent television.

As the Commission observed in its television deregulation decision, the growth of UHF independent television stations has added an important new voice in the information marketplace.[223] Since 1970, the number of independent television stations has grown from 90 to 214 stations, an increase of 107.7 percent.[224] Moreover, the growth in independent television stations has not been confined to a few large markets. As of 1984, independent stations were located in 98 different markets and reaching 82 percent of all television households.[225]

101. The impact of the rise of independent television stations can be seen in the steady decline of the network's audience share. As the Commission previously observed, the overall network audience share declined from 90 percent to 80 percent in 1983.[226] This trend continues as the overall network share dropped from 80 percent in 1983 to 76 percent in 1984.[227] In television households without cable television, the network share of the audience declined from 89 percent in 1983 to 85 percent in 1984. During this time period, non-network television usage in these households increased from 17 percent in 1983 to 21 percent in 1984. Moreover, non-network television stations were able to maintain their share of the television audience even in households subscribing to either pay cable or basic cable service.[228]

102. Further structural changes can be seen in the development of new program distribution systems among group owners.[229] We believe these alternative systems will not only provide new programming sources, but also enhance the economic viability of local independent television stations. Moreover, our recent modification to the national multiple ownership rules is expected to foster the development of these new systems, thereby enhancing diversity at the local level.[230] In this regard, the development of these stronger voices may facilitate the ability of these stations to address controversial issues of public importance.[231]

103. We also note that additional growth can be achieved by utilizing vacant allocations and improved spectrum efficient technologies. Currently, there are a total of 54 vacant VHF channels and 462 vacant UHF channels.[232] of these vacant allocations, 34 are commercial VHF channels and 109 commercial UHF channels. These vacancies appear in both large and small markets. For example, in the top 50 markets there are 32 commercial UHF vacancies. Moreover, 19 of these UHF vacancies are located within fifty-five miles of their respective titled ADI cities. There are also 20 noncommercial VHF vacancies and 353 noncommercial UHF vacancies available nationwide. In addition, the Commission and others have conducted several studies demonstrating the technology feasibility of various UHF improvements, including enhanced reception, thereby reducing the impact of the traditional UHF "taboos".[233] Such improvements have the potential of increasing the number of UHF stations available in each market. These technological improvements combined with the number of vacant channels suggest that there is sufficiently available spectrum to anticipate continued growth in the number of television broadcast facilities.

104. Given the significant development of both radio and television, we believe it is no longer necessary to utilize a mechanism of government imposed "fairness" in order to insure appropriate coverage of controversial issues of public importance. As the above data amply demonstrate, there are a sufficient number of over-the-air television and

[221] A study of signal availability submitted by NAB generally confirms this conclusion. NAB examined the growth of television signals in large markets (AID 1–50), medium markets (AID 50–100) and small markets (AID 101+). Of particular interest is the increase in signal availability in small markets. Of the thirty-one small markets surveyed, seventeen had both an increase in signal avialability since 1974 and a projected increase by 1990. Four markets showed an increase in signal availability since 1974 but had no projected increases. Ten markets exhibited no growth in signal availability between 1974 and 1984. However, seven of these markets anticipated increases in signal availability by 1990. Only three markets exhibited both on growth between 1974–1984 and on projected growth. However, one of there markets had four available signals and the remaining two markets had achieved significant cable penetration. *See* NAB Comments, *supra* n.79 App. Vol., App. A at 40–63.

[222] We note that while there will always be physical differences between UHF and VHF services, these differences do not necessarily mean that UHF stations will not be a viable force in the television marketplace. *See Report and Order* in Gen. Docket No. 78-391, 90 FCC 2d 1121, 1124 (1982). Moreover, cable television has enhanced the ability to receive UHF stations thereby making it comparable to VHF television in markets that have been wired.

[223] *See Television Deregulation*, 98 FCC 2d at 1083 (1984).

[224] The growth in independent television stations has occurred primarily in the UHF television services. In 1970 there were 59 UHF independents compared to 155 in 1984. *Id.* at 1139 [1970 data]; Data for 1984 taken from *Broadcasting*, Jan. 7, 1985, at 82.

[225] *See Broadcasting*, Jan. 7, 1985, at 82.

[226] *Television Deregulation*, 98 FCC 2d at 1139.

[227] *Nielson Report on Television*, (1985) at 12.

[228] In households subscribing to pay cable services, the audience share of non-network stations increased from 16 percent in 1983 to 18 percent in 1984. During this same period the audience share of these stations remained stable—20 percent—for homes subscribing only to basic cable services. *Id.*

[229] For example, as of January 1985, Gannett Broadcasting Croup, Hearst Broadcasting, Metromedia Inc. Storer Communications and Taft Broadcasting (prior to its merger with Gulf Broadcasting), representing 32 stations reaching 45 percent of television households had established a consortium to produce programmings. *See Broadcasting*, Jan. 7, 1985, at 86.

[230] *See Memorandum Opinion and Order*, 50 Fed. Reg. at 4570.

[231] We also note that the changes in the national multiple ownership rules will assist in the acquisition of those stations which were formerly devoted to subscription television. *Broadcasting*, Jan. 7, 1985, at 88 and 90.

[232] *Television Channel Utilization*, FCC No. 3723, Apr. 9, 1985.

[233] *See, e.g., Program to Improve Television Reception*, Georgia Institute of Technology, September 1980; J. B. O'Neil, *Television Receiver Noise Figure Study*, North Carolina State University, February 1980; A. Stillwell, and R. Wilmotte, *Spectrum Requirements of UHF Television with Current and Improved Tuning*, FCC Office of Plans and Policy, 1978.

radio voices to insure the presentation of diverse opinions on issues of public importance.[234] Our decision in this proceeding is guided to some extent by the underlying policies expressed in the radio and television deregulation proceedings.[235] In both decisions, the Commission found that the growth of the broadcast medium created sufficient economic incentives to attenuate the need for each licensee to provide "well balanced something for everyone programming." Similarly, we believe that the growth in both radio and television broadcasting provide reasonable assurance that a sufficient diversity of opinion on controversial issues of public importance will be provided in each broadcast market. In this regard, we note that even if there had been no increase in alternate electronic information sources, the growth and development of both the radio and television markets by themselves make the fairness doctrine an unnecessary regulatory mechanism.

(b) Substitute Electronic Technologies

105. In addition to traditional over-the-air television and radio broadcasting, we find that there exist numerous alternative electronic technologies making a significant contribution to the marketplace of ideas. The importance of these technologies, especially cable television, in the policy making context was recently recognized by the United States Circuit Court of Appeals.[236] We believe that in the context of this proceeding consideration should be given to the contributions of cable television, low power television (LPTV), multichannel multipoint distribution service (MMDS), video cassette recorder (VCR), satellite master antenna systems (SMATV) and other electronic media including recent advancements in satellite technology.

106. Universally recognized as a significant non-over-the-air electronic medium, cable television has developed from a means of improving reception into a major industry providing video programming. Early data show that in 1952, three years after the *1949 Fairness Report*, there were 70 operating cable systems with an estimated 14,000 subscribers.[237] At the time of the Supreme Court's decision in *Red Lion* there were 2,260 systems in operation with an estimated 3.6 million subscribers.[238] By the time of our *1974 Fairness Report*, there were 3,158 operating cable systems with a reported 8.7 million subscribers.[239] As of 1985 there are 6,600 operating cable systems in 18,500 communities with approximately 1,600 franchises that have been approved but not built.[240] According to recent A.C. Neilson estimates, U.S. cable households now number 38,673,270 placing national cable penetration at 43.3% of all television households.[241] In comparative terms, the number of cable systems in operation has increased 195 percent since *Red Lion* and 111 percent since the Commission's *1974 Fairness Report*. Growth in subscribership amounts to an astronomical 975 percent since the *Red Lion* decision and 345 percent increase since the *1974 Fairness Report*. Moreover, cable television will continue to expand in the future. According to a recent study by Arthur D. Little Inc., the number of cable subscribers will increase to 48 million by 1990.[242] In addition, industry revenue is expected to double from 8.4 billion in 1984 to 16.5 billion in 1990. During this period after tax revenues are expected to triple from $600 million in 1984 to 1.7 billion in 1990.[243]

107. The importance of cable's development, however, is not limited to increases in the number of systems. Indeed, there has been a significant change in the nature of cable service. For example, at the time of the *Red Lion* decision only 1 percent of all cable systems had the capacity to carry more than 12 channels.[244] As of April 1, 1984, 58 percent of the cable systems exceed 12 channels. Most importantly, however, systems limited to 12 channels or less comprise only 18.63 percent of total cable subscribers.[245] The significance of cable television is also demonstrated by its ability to increase the number of viewing options available to the public. The following table illustrates the importance of cable by comparing the number of stations receivable per television household to the number of channels receivable with cable television.

	Stations and channels receivable per TV household in 1984						
	1 to 4	5 to 6	7 to 8	9 to 10	11 to 14	15 to 19	20+
	In percentage						
Number of channels receivable (includes cable)	3	5	9	8	29	16	29
Number of stations receivable (absent cable)	4	11	21	22	24	15	3

SOURCE: *Nielson Report on Television* (1985) at 2.

With the inclusion of cable television, the number of households capable of receiving more than six television signals increases from 85 percent of all television households to 92 percent of all television households. Similarly, the percentage of television households capable of receiving more than ten television signals increases from 42 percent to 74 percent. The most dramatic increase in signal availability appears in households receiving 20 or more signals. Absent cable, these households comprise only 3 percent of all television households as compared with 29 percent of all television households when cable is considered. The importance of increased channel capacity is enhanced by the ready availability of a wide variety of cable networks which provide a significant array of diverse programming. As one commenter has noted, there are approximately twenty-eight basic cable networks not including four super stations.[246] Many of these networks

[234] This diversity is illustrated further by the combined coverage of both television and radio signals. For example, in a separate proceeding CBS claims that its television station in New York City encompasses 190 radio stations within its Grade B Contour. Moreover, CBS asserts that its New York television station must compete with 278 radio stations which provide service to some portion of the area covered by its Grade B contour. *See* "CBS Reply Comments" filed with *In re Application of Turner Broadcasting System, Inc.*, File No. BTCCT-850418 *et al*, June 1985 at 60.

[235] *See Radio Deregulation, supra* n.215; *Television Deregulation, supra* n.177.

[236] *ACT v. FCC*, 756 F.2d at 901.

[237] *Television and cable Factbook*, Cable & Services Volume No. 52 (1984) at 1735.

[238] *Id.*

[239] *Id.*

[240] *Broadcasting/Cablecasting Yearbook*, (1985) at D-3.

[241] *Broadcasting*, June 17, 1985 at 10.

[242] *Prosperity for Cable TV: Outlook 1985-1990*, Arthur D. Little Inc., *cited* in *Broadcasting*, June 10, 1985 at 32. This may be a conservative estimate. As we have noted elsewhere, some analysts expect cable penetration to be 60 percent by 1990, reaching 58 million subscribers. *See Television Deregulation*, 98 FCC 2d at 1138. Another source has estimated that cable penetration will reach 54 percent by 1990. *Cablefile*, (1985) at III-26.

[243] *Id.*

[244] *Notice, supra* n.1 at ¶ 37 n.47 *citing* B.M. Compaine, C.H. Sterling, T. Guback and J.K. Noble, Jr., *Who Owns the Media* (2nd ed. 1982) at 418.

[245] *Television and Cable Factbook*, Cable & Services Volume No. 52, 1984 at 1726.

[246] *See* NAB Comments, *supra* n.79 App. Vol., App. A. at 4.

have highly specialized program formats including news channels such as the Cable News Network, the Financial News Network, and public affairs programming such as C-Span.[247] In addition, there are approximately 10 pay cable networks in operation.

108. Apart from the growth in the number of cable systems, we find that the pattern of development in small markets to be particularly relevant to the objectives of this proceeding. The record in this proceeding clearly demonstrates that cable services are an important media voice in small markets. Cable penetration rates in these markets are far in excess of the national average and significantly higher when compared with larger broadcast markets.[248] The high penetration levels in these small markets suggest that there is a significant degree of substitutability between cable and over-the-air television broadcasting.

109. We also note that the Cable Communications Policy Act of 1984 will play an important role in expediting further development of cable technology.[249] Congress intended to establish a national policy that encourages the growth and development of cable television as well as insuring that cable systems are responsive to the needs and interest of the local communities they serve.[250] Under the Act, a franchising authority is able to establish and designate channels for public, educational or government (PEG) use as well as commercial access channels for systems with 36 or more activated channels.[251]

110. Another developing voice in the information services market is Low Power Television (LPTV). These stations are over-the-air television broadcast facilities, generally limited to 10 watts for VHF and 1,000 watts for UHF stations. These facilities were nonexistent at the time of the *Red Lion* decision and our *1974 Fairness Report.* Stations of this power were translators, limited to the rebroadcast of signals from full service stations. In 1982, the Commission authorized these stations to originate programming.[252] There are currently 126 licensed low power UHF stations and 215 low power VHF stations.[253] It is predicted that this source will eventually add an additional 4000 television stations to the marketplace. Moreover, the most significant administrative problems inhibiting initial development of this new service have been rectified with the establishment of new processing procedures designed to expedite the development of this new medium.[254]

111. LPTV significantly expands the information marketplace. Allocation policies have emphasized placing these facilities in smaller markets where there are fewer over-the-air full service television facilities. With lower entry and operating costs, LPTV can be an important source of local programming in rural areas. In larger markets, LPTV will be able to target its audience to specific communities or ethnic groups.[255] A recent economic study provides some evidence that this service appears to be commercially viable in certain areas of the country.[256]

112. At the time of the *1974 Fairness Report,* multipoint distribution service (MDS) was just beginning to develop as a communications service. Used primarily to provide subscription programming via microwave transmissions, there were approximately 438,578 MDS subscribers out of a potential audience of 13.1 million at the end of 1984.[257] Confined to offering a single pay channel, MDS subscription declined slightly from 1983 levels.

113. Expectation of growth in MDS will likely involve the development of multichannel MDS systems. With the reallocation of 8 channels from Instructional Fixed Television Service, multichannel MDS will be able to offer multiple channels as opposed to a single viewing option.[258] Added to this are leases available from ITFS operators leading to MMDS systems of up to twenty two channels. As of February 1985, there were 16,499 applications on file with the Commission.[259] The advantage of this service is that construction costs and time delays are greatly reduced, relative to cable, since wiring to a headend is not necessary. Estimates of subscribership growth by 1990 range between 6 to 12 million subscribers.[260]

114. Satellite Master Antenna Systems (SMATV) are similar to cable systems except that they are built in individual apartment complexes, condominiums, hotels and trailer parks. These "private" cable systems did not exist at the time of the *Red Lion* decision or our *1974 Fairness Report.* The Commission's decision not to regulate these systems, coupled with preemption of state and local regulation, has facilitated the development of this service.[261] According to the National Satellite Cable Association about 600,000 to 800,000 homes have been wired with this service.[262] Because of lower capital and construction costs, SMATV systems have become increasingly popular in both rural and urban areas that are currently unserved by cable television.[263]

115. Sales of video cassette recorders continue to have a major impact on the information marketplace. As with many other new technologies, VCR's were not readily available at the time of the *1974 Fairness Report.* The impact of this technology on other electronic video technologies has been significant. By the end of 1985 it is estimated that there will be 23.3 million VCR homes representing 27.4 percent of all TV households.[264] A more recent study of VCR penetration reported that sales are running about one million a month and will reach critical mass penetration of one third of all homes by early 1986. According to the report the term "critical mass" is

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[247] Additional growth in cable networks can be expected. For example, the Discovery Channel recently commenced operation offering a basic cable service of educational, non-fiction, science and nature programming free to cable operators. *Multichannel News,* June 24, 1985 at 1.

[248] For example, an analysis of NAB's data concerning 31 of the smallest television markets (100+) reveals a combined average subscription rate of approximately 57 percent, almost fourteen percentage points higher than the national average. *See* NAB Comments, *supra* n.79 App. Vol., App. A.

[249] Cable Communications Policy Act of 1984, Pub. L. 98-549, 98 Stat. 2779 (1984).

[250] *See* House Committee on Energy and Commerce, H.R. Rep. No. 931, 98th Cong. 2d Sess. at 19 (1984); *See also Report and Order* in MM Docket No. 84-1296, FCC 85-179 (released Apr. 19, 1985) at ¶¶ 28-37.

[251] *Id.* at 30.

[252] *See Report and Order,* in BC Docket No. 78-253, FCC 82-107, 47 Fed. Reg. 21468 (1982).

[253] FCC release No. 5080, June 11, 1985.

[254] *See Report and Order* in MM Docket No. 83-1350, FCC 84-492 (adopted October 18, 1984).

[255] *Legal Times,* Dec. 8, 1984, at 1; *Wall Street Journal,* Oct. 23, 1984, at 1.

[256] The study, conducted by Kompas Beil Associates, indicates that LPTV may already be a viable service in some areas. Of the stations initially responding to its survey, 16 stations were non-profit religious stations, 8 were operating as subscription television, 10 were operating as non-profit educational stations. Sixteen stations were operating on a commercial basis with fourteen of these stations reporting a profit. Two of the stations were temporarily off the air with copyright problems. *Videography,* Apr. 1985 at 72.

[257] Paul Kagen Associates, Inc., *Multicast Newsletter,* Apr. 17, 1985.

[258] *See Report and Order* in Gen. Docket 80-112, 94 FCC 2d 1203 (1983).

[259] *Broadcasting,* Feb. 11, 1985, at 56.

[260] *Television Deregulation,* 98 FCC 2d at 1140.

[261] *See Memorandum, Opinion Declaratory Ruling and Order* in CSR-2347, 95 FCC 2d 1223 (1983), *recon. denied,* FCC 84-206 (May 14, 1984), *affd. sub nom. New York State Commission on Cable Television* v *FCC,* 749 F.2d 805 (D.C. Cir. 1984).

[262] *New York Times,* Dec. 5, 1984, at 30. A more conservative estimate was provided by Paul Kagen Associates who estimated subscribership at 290,000. Paul Kagen Associates, *SMATV News,* Apr. 25, 1984.

[263] *New York Times,* Nov. 13, 1983, at 47; *See also New York Times,* Dec. 19, 1982, at 1.

[264] *Television/Radio Age,* May 27, 1985, at c7 (*citing* Paul Kagen Associates).

used to describe the penetration level that establishes the technology as a mass medium.[265] Further estimates place VCR usage at 67.9 million homes representing 68 percent of all television households by 1990.[266]

116. We take particular note of the development of video recordings as a means of disseminating issue related video programming.[267] We find this to be a significant development in the information marketplace. To the extent VCR's do not utilize spectrum, anyone who desires to communicate by television may do so by means of a VCR. In this regard, we agree with NBC that VCR's have the potential to become the "electronic handbills" or indeed even the electronic newspaper of the future.[268] Moreover, our own empirical analysis of the relationship between VCR's and television reveals that a VCR is both a substitute and a complement to over-the-air and cable television.[269] In other words, VCR's act not only as a means of time shifting programming, but also as an independent source of programming. Moreover, the ability to reschedule video programming gives viewers the opportunity to acquire additional information from other sources. By time shifting, viewers are able to reallocate their time so as to increase the number of potential viewing options.[270] We believe that the flexibility afforded the public by VCR's, represents an important qualitative development in the information services marketplace.

117. The above mentioned electronic technologies are the most prominent alternatives to over-the-air broadcasting in today's marketplace. There are other electronic services, however, that have the potential of becoming substitute information sources in the marketplace of ideas. We do not, however, find them to be significant contributors to the marketplace at this time.

118. The direct to home satellite services (DBS) is still in the beginning stages of development. Using the Ku satellite band, this service generally provides programming directly to households. Households using this service either rent or purchase a small one meter-earth station. The first direct broadcast satellite services was authorized by the Commission in 1982.[271] Of the eight original applicants, three have been granted orbital and channel assignments and launch authority. In 1984, the Commission granted six additional applications for DBS service.[272] One of these grantees has been given launch authority as well as its orbital and channel assignment. Currently, the Commission has pending before it six DBS applications seeking either to modify existing grants or apply for new allocations.[273] It appears, therefore that despite the recent setbacks, there is a continued interest in the development of DBS service.[274]

119. Another important element prompting the development of satellite direct service is the continued growth in the home earth station market. Latest reported data indicate that there are approximately one million existing earth stations and estimates of growth range between 40,000 to 80,000 per month.[275] Moreover, the Cable Communications Policy Act of 1984, which clarified the legality of receiving satellite signals, may provide an additional spur to this already expanding market.[276] Because of the potentially enormous market, some traditional cable programmers have suggested scrambling their signals to provide a direct to home satellite service from their C band satellites.[277] Facilitating the development of this system is the oversupply of transponders which will lower the costs of transmission making this form of program particularly attractive.[278] While the development of a C-band direct system is still in the planning stage, there appears to be significant movement towards developing this service.[279]

120. Satellite technology has also played a significant role in enhancing existing information services. For example, satellites have allowed local television stations to increase their capability to gather news. Satellite news gathering (SNG) has become an important element in providing regional coverage.[280] In addition, satellite technology has become an important part of the syndication market.[281] The nationwide access afforded by this technology increases the opportunities for another source of programming through ad-hoc networking, thereby increasing viewpoint diversity in local markets.

121. An additional alternative technology is subscription television (STV). STV is a pay service that sends over-the-air television signals, in a scrambled mode, to its subscribers. The number of STV outlets has declined in recent years due primarily to increased cable penetration. As of June 30, 1984 there were approximately 701,042 STV subscribers and 19 STV channels operating in 17 markets.

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[265] *Broadcasting*, July 8, 1985, at 14 (*citing* a study conducted by Young & Rubicam USA).

[266] *Id.*

[267] *UCC* notes in its Comments that there are currently 72 titles considered public affair by the publishers. Similar categories such as "Civil Rights" (54 titles) and "Documentaries" are also included. *See* UCC Comments, *supra* n.170 at 3.

[268] *See* NBC Comments, *supra* n.80 at 86.

[269] J. Levy and P. Pitsch, *Statistical Evidence of Substitutability Among Video Delivery Systems*, FCC Office of Plans and Policy, April 1984. *See also* J. Levy and F. Setzer, *Measurement of Concentration in Home Video Markets*, FCC Office of Plans and Policy, December 23, 1982.

[270] According to Neilson data, 59 percent of all recordings are made with the television set turned off, 17 percent occurs while viewers are watching a different channel and 24 percent of viewers record from the channel they are watching. *Neilson Report on Television*, (1985) at 13.

[271] *See Direct Broadcast Satellite Services*, 90 FCC 2d 676 (1982) *recon. denied*, FCC 83-241, (released May 19, 1983), *rev'd, United States Satellite Broadcasting Company, Inc. v FCC*, 740 F.2d 1177 (D.C. Cir. 1984); *Satellite Television Corporation*, 91 FCC 2d 953 (1982); *CBS, Inc.*, 92 FCC 2d 64 (1982). *See also GTE Satellite Corporation*, 90 FCC 2d 1009 (1982) *recon. denied*, FCC 83-271 (released June 23, 1983). Of the eight original grantees, four were able to demonstrate due diligence in proceeding with the development of their respective DBS systems. *See CBS, Inc.*, FCC 84-477 (released October 10, 1984). Two of the parties failing to meet the due diligence requirements have re-applied to the Commission for DBS authorization.

[272] *See Satellite Syndicated Systems Inc.*, FCC 84-608 (released December 18, 1984).

[273] *See Public Notice* "DBS Applications Accepted for Filing" Rep. No. DBS 2-B (released April 4, 1985). Three of these applicants are existing grantees seeking additional channels. Two of the three applicants seeking new DBS authorization were previously granted such authority but failed previously to meet the Commission's due diligence requirements.

[274] Earlier this year, U.S.C.I. terminated service to its approximately 10,000 subscribers. *DBS Newsletter*, April 1985 at 1. This DBS service was not a Commission licensee but rather utilized Canada's Telesat Anik C-11 satellite. While this system did not prove to be a commercial success, it did demonstrate the technical feasibility of Ku band direct satellite service. *See Broadcasting*, July 8, 1985 at 52.

[275] *See Broadcasting*, July 8, 1985, at 52.

[276] Cable Communications Policy Act of 1984, Pub. L. 98-549, § 5(b), 98 Stat. 2779 (1984). This section amended section 705 of the Communications Act by allowing the reception of any satellite cable programming for private viewing if: (1) The programming involved is not encrypted and, (2) a marketing system has not been established.

[277] Descramblers for the reception of HBO, which scrambles part of its programming, are already being manufactured. Approximately 25,000 headend descramblers have been produced and parts have been ordered for 100,000 consumer units which will be distributed to wholesalers next fall. *See Broadcasting*, July 8, 1985, at 53.

[278] *Id.* at 46.

[279] *See Broadcasting*, July 1, 1985, at 87; *Broadcasting* July 8, 1985, at 52.

[280] *See Broadcasting*, July 8, 1985, at 60.

[281] *Id.* at 58. In this regard, we note that continued development of satellite technologies will facilitate the development of new program distribution systems. *See* ¶ 102, *supra*.

122. Additional information technologies are continuing to be developed. The Commission has recently authorized the use of FM Radio subcarriers.[282] Subcarriers may be utilized for a variety of different functions such as "radio talking books", commodities information, stock quotes and news. The Commission has also authorized the use of teletext by television licensees.[283] This system uses the vertical blanking interval for transmitting pages of text which are formatted on the users screen with the use of a decoder. Videotext is also a potential source of information. At the present time, this service has approximately 500,000 subscribers.[284] As a final matter home computer systems have played a significant role in adding to the information services marketplace. However, we do not find these services to be significant contributors to media diversity at this time.

(c) Print Media

123. As we observed in the *Notice* the overall number of broadcast facilities exceeds the total number of daily newspapers in the United States. This does not mean, however, that the print media is not a significant contributor to the information marketplace. As of 1984, there were 1,701 daily newspapers in the country.[285] During this period, average circulation increased to 62,544,503, an increase of 157,426 from 1983 levels.

124. In analyzing the information marketplace, however, we agree with those commenters who felt that the *Notice* gave insufficient consideration to the importance of other print sources such as weekly and even monthly newspapers and magazines. According to the *Notice*, the total number of periodicals has increased from 6,960 in 1950 to 10,688 in 1982. As commenters such as MAP and UCC point out, these newspapers are significant source of information, especially local information, which is available to consumers in each market.[286] The viability of newspapers as an important information source is further illustrated by the volume of advertising appearing in each medium. According to this criterion, advertising expenditures for newspapers exceeded both television and radio.[287] Moreover, the combined advertising revenues for newspapers and magazines were greater than the combined total for television and radio. We believe that these data provide important evidence relative to the strength of newspapers and magazines as significant contributors to the marketplace of ideas.

3. Availability in the Information Market

125. Several parties have argued that the increases in the number of information outlets do not necessarily attenuate the need for the fairness doctrine.[288] Specifically, these parties state that overall increases in information service outlets are not necessarily sufficient to provide each market with diverse and antagonistic sources of information. The argument is predicated on two assumptions. First it assumes that the growth of information sources nationwide has had no impact on local markets. Second it assumes that these sources will not provide coverage to controversial issues of public importance. As noted below, we find the data upon which these assertions are based, flawed, and we are not persuaded by the logic of the arguments.

126. On the record before us, we find that the nationwide development of these diverse information sources has had a direct impact on the availability of information in each media market. For example, even in small markets such as El Paso, Texas (ADI market No. 104), there are a significant number of media voices. According to data submitted by NAB, this market has seven television stations, twenty seven radio stations, two MDS channels, thirty thousand VCR's and cable penetration at 47 percent.[289] The most detailed refutation of this position appeared in a study conducted by Prof. Ralph Jennings.[290] The study sampled ten percent of the 3,926 communities in the United States which have at least one commercial or public radio station. It then inventoried each community's broadcast, newspaper, cable and multipoint distribution system and "examined the extent to which the communities share in the national communications wealth." We have carefully reviewed the data contained in the study and disagree with the methodology employed therein. At the outset, the study does not appear to provide a representative sampling of media markets throughout the United States. Rather, the study focuses primarily on small markets. Recognizing this problem, the study attempts to enlarge its sample by including 72 larger communities. However, the study itself recognizes that even with these communities the sample does not reflect the characteristics of the population as a whole.[291]

127. A second concern involves use of the "community" as the basic unit of analysis. The study assumes that a community is not being served unless a broadcast facility (or other information source) is located within the geographic boundaries of the community. As CBS correctly points out, the relevant inquiry is not what stations are licensed to a community, but rather what broadcast signals the community can actually receive.[292] In this regard, we note that the Commission has recognized that a broadcast licensee may serve communities which lie outside the strict geographic boundaries of its community of license.[293] Moreover, such methodology may underestimate the availability of broadcast facilities and other information services such as cable and local newspapers.[294]

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[282] *Report and Order* in BC Docket No. 82-536, FCC No. 83-1154, 48 Fed. Reg. 28445 (June 22, 1983); *Second Report and Order* in BC Docket No. 82-536, 97 FCC 2d 23 (1984), *recon. denied*, FCC 84-313, 98 FC 2d 433 (1984).

[283] *Report and Order* in MM Docket No. 81-741, 48 Fed. Reg. 27054 (June 13, 1983).

[284] *Broadcasting*, July 1, 1985, at 64.

[285] *Editor and Publisher Yearbook*, (1984) at VIII. The figures are based on 1983 data and represent a decline of 10 newspapers when compared with 1982 figures. However, this decline was due to the merger of 10 daily papers and therefore, does not evidence a net decrease in the number of daily newspapers. During this period, 8 daily newspapers were discontinued but this was offset by new entries into the market. *Id.* at V.

[286] *See* MAP/TRAC Comments, *supra* n.50 at 86-90; UCC Comments, *supra* n.170 at 13.

[287] In 1983, the total advertising volume for the various media was approximately $20.1 million for newspapers, $16 million for television, $5.2 million for radio and $4.1 million for magazines. *Television and Cable Factbook*, Services Volume No. 52 (1984) at 14.

[288] *See, e.g.*, "Comments of Black Citizens for a Fair Media, Citizens Communication Center, League of United Latin American Citizens, National Association of Better Broadcasting [hereinafter cited as "BCFM Comments"]; UCC Comments, *supra* n.170.

[289] NAB Comments, *supra* n.79 App. Vol., App. A. at 49.

[290] R. Jennings, *Diversity of Communications Facilities in American Communities*, *cited* in UCC Comments, *supra* n.10 at App. B, and USCC Reply Comments, *supra* n.152 [hereinafter cited as "Jennings Study"].

[291] *Id.* at 10.

[292] "Reply Comments of CBS, Inc." at 22 [hereinafter cited as "CBS Reply Comments"].

[293] *See, e.g., Report and Order* in B.C. Docket No. 82-374, FCC 83-487, 54 RR 2d 1343 (1983), *recon. denied*, 56 RR 2d 797 (1984); *Report and Order* in B.C. Docket No. 82-320, 93 FCC 2d 436 (1983), *recon. denied*, FCC 84-335 (released July 31, 1984).

[294] The following example illustrates the potential problems inherent in the study's analysis. The study reports the following cities as not having cable television service in their community: Birch Tree, Missouri and Marshall, North Carolina. However, each of these towns is served by a cable system in which the corporate headquaters of the cable system is located outside of the community. *See Television and Cable Factbook*, Services Volume No. 52 (1984) at 997 and 1151. Similar concerns exist with respect to local newspapers. For example, the study reports that the town of Weston, Massachusetts did not have a local newspaper. However, the town is served by a weekly newspaper that covers local issues, but it is

Continued

128. On the record before us, we cannot find that there are a insufficient number of voices in local markets to warrant continuation of the fairness doctrine. As we observed previously, increases in signal availability from traditional broadcasting facilities—television and radio—by themselves attenuate the need for a government imposed obligation to provide coverage to controversial issues. The existence of a plethora of alternate electronic voices, as well as numerous locally oriented print voices, augments this argument. Further support for this conclusion can be found from the homogeneity of the various media systems. Thus, in communities with few television stations one can expect to find higher cable subscribership. For example, the Jennings study found that cable was available in 82 percent of the communities surveyed. Similarily, in large urban areas with no cable systems, there are generally numerous television outlets. Moreover, data submitted by NAB confirms fungibility of the various information service technologies.[295]

129. Several commenters have argued that absent the fairness doctrine there will be no incentive for broadcasters to provide coverage to controversial issues of public importance. These parties also assert that the new electronic technologies are unable to address these types of issues, particularly at the local level. We are not persuaded by these arguments.

130. We note that other information systems, such as the print media, devote a significant amount of time to controversial issues in the absence of a government imposed obligation to do so. For these media, the incentive to cover such issues is not the fear of government sanction, but rather economic necessity. Similar incentives exist for over-the-air broadcasting. Our experience with industry performance persuades us that radio and television broadcasters would be sufficiently motivated to provide coverage to controversial issues of public importance in the absense of fairness doctrine obligations. Indeed, assuming *arguendo* that television is the most relied upon information source, then there is a strong market incentive to cover such issues in response to the demand.[296] As we have observed in other proceedings, marketplace forces are the primary determinants of information oriented programming.[297] Moreover, given our previous analysis regarding the chilling effect of the fairness doctrine, we believe it reasonable to expect an increase in the coverage of these types of issues. In any event, there is no reason to believe that there will be a decline in the coverage of controversial issues of public importance.

131. Apart from the incentives of traditional broadcast facilities, we believe that other media systems will provide sufficient amounts of programming covering controversial issues of public importance. Cable television, for example, is already providing various informational programming such as CNN and the Financial News Network. Movever, many cable systems are originating their own programming and have local community access channels. Increased availablity of VCR's will also provide an important outlet for discussion of issues in each market. Most importantly, local newspapers will remain as an important source of locally oriented information.[298] All of these sources will make significant contributions to the marketplace of ideas.

H. The Fairness Doctrine Can Not Be Justified on the Basis That It Protects Either Broadcasters or the Public from Undue Influence

132. As noted above,[299] the Commission historically justified the retention of the fairness doctrine on the sole basis that affirmative regulatory intervention was necessary to vindicate the interest of the public in obtaining access to diverse viewpoints on controversial issues of public importance. Our evaluation of the fairness doctrine both in terms of its efficacy and its continued need in the communications marketplace today is based upon this expressed regulatory objective. Several participants in this proceeding, however, have argued that the retention of the doctrine furthers other regulatory goals. Specifically, these parties argue that there are legitimate "protective" functions which are promoted by the continued existence of the doctrine. In this section we will assess the merits of these arguments.

133. Several commenters contend that retention of the fairness doctrine is useful as a "protection against outside pressures" [300] by groups within the community which would otherwise exert undue influence on the editorial decisionmaking of broadcasters. Absent the fairness doctrine, these parties contend that broadcasters will simply "cave-in" to the pressures of advertisers,[301] political action committees,[302] or other powerful groups in the community [303] who do not wish

published in a neighboring town. *See Wayland/Weston Town Crier* (Weston Edition), July 3, 1985 at 1.

[294] *See* NAB Comments, *supra* n.79 App. Vol., App. A at 48–63.

[295] Evidence of a marketplace demand for programming covering controversial issues of public importance can be seen in the employment patterns of news staffs after our television and radio deregulation decisions. A recent study of the effects of deregulation conducted by RTNDA found that: "[M]ost radio stations have not changed their news or public affairs staffing or programming as a result of deregulation. Most TV stations also plan to continue business as usual. News cutbacks have come mainly at radio stations in major markets where changes have drawn attention and accusations against deregulation. But while some news directors may have lost staff members because the FCC lifted its minimum requirements, other [sic] say they are doing a better job because of the greater freedom." *RTNDA Communicator*, May 1985 at 1.

[296] *See generally, Deregulation of Television, supra* n.177; *Deregulation of Radio, supra* n.215.

[297] In light of our conclusion that sufficient incentives exist to provide coverage to controversial issues among the traditional broadcast media, reliance on alternative electronic technology systems to provide coverage to such issues is not a necessary element in our decision. We note, however, that these information sources are significant contributors of issue oriented information. In this regard, their performance makes the elimination of the fairness doctrine even more compelling.

[298] *See* ¶¶ 4, 23, *supra*.

[299] "Comments of the United States Catholic Conference" at 19 [hereinafter cited as "USCC Comments"].

[300] *See, e.g., id;* DNC Comments, *supra* n.203 at 17; *See also* USCC Reply Comments, *supra* n.152 at 9.

Indeed, without providing any support for its assertions, the Democratic National Committee ("DNC") argues that "the potential fear [of broadcasters] of offending a power group in the community that buys advertisements was the reason the Fairness Doctrine was adopted in the first place." *Id.* at 17. As described above, the articulated reason for the establishment of the fairness doctrine was to further access by the public to diverse viewpoints on controversial issues of public importance. Our historic justification of this doctrine was not based upon an expressed concern that regulatory intervention was necessary to counterbalance the alleged influence exerted by advertisers—or any other group—on licensees with respect to their decisions concerning the broadcast of controversial issue programming.

[301] DNC Comments, *supra* n.203 at 15–16.

[302] The most expansive articulation of this argument was expressed by Ecumedia. In its Reply Comments, it stated that the fairness doctrine provided broadcast journalists with the means to deflect pressure exerted by "external sources including politicians, public officials, corporations, advertisers, organized community groups and outspoken individuals [as well as] [i]nternal pressure from station management or parent companies. "Reply Comments of Ecumedia," at 19. [hereinafter cited as "Ecumedia Reply Comments"].

to have particular contoversial viewpoints expressed.[304]

134. We take issue with the assumption that intrusive governmental regulation is necessary to "protect" broadcasters from groups which allegedly attempt to influence their programming decisions. The First Amendment forbids governmental intervention in order to "protect" print journalists and we believe that broadcast journalists are in no greater need of "protection" than their counterparts in the print media. We think it telling, in this regard, that broadcasters themselves are not seeking this protection. Moreover, the framework of broadcast regulation is predicated in large part upon reliance on the editorial discretion of broadcast journalists. As the Supreme Court has stated, the Communications Act "manifest[s] the intention of Congress to maintain a substantial measure of journalistic independence for the broadcast licensee."[305] Consequently, consistent with their public interest responsibilities, broadcasters are accorded wide discretion under the Communications Act with respect to their programming decisions.[306] We are not convinced that broadcasters have been unduly pressured by groups within the community in the past. Moreover, in our view, the speculative notion that, absent the fairness doctrine, they will be unable to resist undue pressure in the future is a wholly inadequate basis upon which to justify the continued existence of rules which intervene in the editorial decisionmaking process of broadcast journalists. Rather, we deem it appropriate to rely, as we have in the past, upon the good faith judgment of the licensee regarding the selection of programming material.[307]

135. In addition, several commenters, in support of the fairness doctrine, argue that the doctrine serves to safeguard the public against unwarranted influence by what they perceive as biased broadcast reporting.[308] Although the commenting parties differ among themselves in their perception of the bias to which they object,[309] they believe that retention of the fairness doctrine is appropriate to prevent broadcasters from presenting biased or one-sided programming. The argument apparently is predicated upon the presumption that the requirement to provide "balanced" controversial issue programming is not merely a means to assure access to the marketplace of ideas but is itself a valid regulatory objective.

136. Balance may be a laudable editorial goal, but there are grave dangers when the government tries to strike that balance. First, as we have just noted above, determining what constitutes balanced programming is a very subjective endeavor. Second, as we have described, having the government attempt to achieve balance by means of enforcing the fairness doctrine results in a chilling effect to the ultimate detriment of the listening public. Third, there are the inherent dangers of an arm of the federal government influencing the content of programming in an attempt to guarantee balance. Further, the First Amendment does not require and may well not permit a neat apportionment, dictated by the government, in the marketplace of ideas, with equal space assigned to every viewpoint. As the Supreme Court noted in *First National Bank* v. *Bellotti:*

> [T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment.[310]

The fact that a particular viewpoint may have the capability to be extremely influential or offensive does not mean that it is accorded a lesser degree of First Amendment protection than the expression of less influential or more reasonable opinions.[311] Therefore, we do not believe that the "protection" of the viewing and listening public against even allegedly one-sided presentations affords a justifiable basis for the retention of the fairness doctrine.[312]

I. Summary

137. We believe the fairness doctrine is an unnecessary and detrimental regulatory mechanism. While we recognize that the fairness doctrine has been a central tenet of broadcast regulation for more than fifty years, we believe that we have a statutorily mandated duty to reassess the propriety of even long standing policies in light of changes in the broadcast marketplace and evidence that the policy may not further the public interest. After careful evaluation of the evidence of record, our experience in enforcing the fairness doctrine, and fundamental constitutional principles, we find that the fairness doctrine disserves the public interest.

138. Three factors form the basis for this determination. First, in recent years there has been a significant increase in the number and types of information sources. As a consequence, we believe that the public has access to a multitude

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[304] For example, asserting that the fairness doctrine operates as an effective "insulating" mechanism, DNC argues that:

> The Fairness Doctrine actually protects a broadcaster who does not want to take this safe course of cozy relations with its community's financial elite . . .
>
> Many broadcasters go to great lengths to present issues of public importance and offer their audiences balanced coverage. For them, the Fairness Doctrine has been a valuable shield. When pressured by demands from established powers in its community to suppress coverage of an unpopular issue or to support their political points of view, a broadcaster today can simply point to his or her responsibilities under the Doctrine.

DNC Comments, *supra* n.203 at 16.

[305] *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. at 116. Indeed, the Supreme Court, in addressing the editorial discretion of broadcast journalists under the Communications Act, has recognized that "[f]or better or worse, editing is what editors are for; and editing is selection and choice of material." *Id.* at 124.

[306] The Court has asserted that: "In the delicate balancing historically followed in the regulation of broadcasting Congress and the Commission could appropriately conclude that the allocation of journalistic priorities should be concentrated in the licensee rather than diffused among many. This policy gives the public some assurance that the broadcaster will be answerable if he fails to meet its legitimate needs." *Id.* at 125.

[307] Reliance upon the editorial discretion of broadcast licensees also furthers First Amendment principles. As the United States Supreme Court has stated: "indeed, if the public's interest in receiving a balanced presentation of views is to be fully served, we must *necessarily* rely in large part upon the editorial initiative and judgment of the broadcasters who bear the public trust." *FCC* v. *League of Women Voters of California*, 104 S.Ct. at 3117 (emphasis added).

[308] *See, e.g.*, "Comments of the American Legal Foundation" at 10–14 [hereinafter cited as "ALF Comments"].

[309] There appears to be a sharp divergence of opinion among the commenters making this argument as to the precise nature of the alleged "bias." For example, one party asserts that the bias of the broadcast media is liberal (*Id.* at 11); another participant argues that the media is biased "toward the business and commercial community." "Comments of the Maine Nuclear Referendum Committee" at 1. Still another commenter contends that the broadcast media unduly favors the views of the alleged "Zionist/Israeli lobby." Letter to the Chairman, Federal Communications Commission from Richard Hill and Donald W. Harris (Oct. 20, 1984).

[310] *First National Bank of Boston* v. *Bellotti*, 435 U.S. at 791–92.

[311] As the Supreme Court has asserted, "[t]he Constitution 'protects expression which is eloquent no less than that which is unconvincing.'" *Id., quoting Kingsley International Pictures Corp.* v. *Regents*, 360 U.S. at 689.

[312] Justice Douglas has stated that: "The implication that the people of the country—except the proponents of the theory—are mere unthinking automatons manipulated by the media, without interests, conflicts, or prejudices is an assumption which I find quite maddening. The development of constitutional doctrine should not be based on such hysterical overestimation of media power and underestimation of the good sense of the American public." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. at 152 n.3.

of viewpoints without the need or danger of regulatory intervention.

139. Second, the evidence in this proceeding demonstrates that the fairness doctrine in operation thwarts the laudatory purpose it is designed to promote. Instead of furthering the discussion of public issues, the fairness doctrine inhibits broadcasters from presenting controversial issues of public importance. As a consequence, broadcasters are burdened with counterproductive regulatory restraints and the public is deprived of a marketplace of ideas unencumbered by the hand of government.

140. Third, the restrictions on the journalistic freedoms of broadcasters resulting from enforcement of the fairness doctrine contravene fundamental constitutional principles, accord a dangerous opportunity for governmental abuse and impose unnecessary economic costs on both the broadcasters and the Commission. Finally, we believe the record in this proceeding raises significant issues regarding the constitutionality of the fairness doctrine in light of First Amendment concerns.

IV. Modifications Short of Repeal and Alternatives to Current Enforcement of the Fairness Doctrine

141. In addition to those comments which favored complete repeal or retention of the fairness doctrine, a number of proposals were offered to modify the doctrine's scope or otherwise limit its application.[313] For example, several commenters urged elimination of or limitation on the scope of the *Cullman* doctrine corollary to the fairness doctrine.[314] Specifically, ABC proposed that ballot proposition advertising and advertising by independent political committees should be exempted from the *Cullman* doctrine. In lieu of *Cullman*, ABC recommended an approach modeled on the Commission's *Zapple* doctrine,[315] under which reasonable amounts, but not free, response time would be required as a means of achieving the Commission's fairness objectives. It was also urged by some commenters that all advertising be exempted from application of the fairness doctrine. Additionally, a two year moratorium on enforcement of the fairness doctrine was proposed as a means of empirically evaluating the impact of the doctrine on broadcast speech.

142. Beyond the above suggestions, the record reflects a number of proposals which have been previously considered by the Commission in connection with its fairness doctrine requirements. In this regard, Henry Geller again recommended that the current contemporaneous, case-by-case review of fairness doctrine complaints should be abandoned in favor of examining fairness compliance solely at renewal. It was also proposed that broadcast licensees be permitted to satisfy their fairness doctrine obligations by providing on-air "access" time to the public.

143. While these various proposals may present possibilities in terms of reducing the intrusive impact of the fairness doctrine, we do not believe it is appropriate to consider them at this time, given our intention to defer action on the fairness doctrine generally, pending review of the record in this proceeding by Congress.

V. Agency Authority To Modify or Repeal the Fairness Doctrine

144. Given our policy conclusions as to the continued undesirability of the fairness doctrine, the question arises whether we have the authority to eliminate or substantially modify the fairness doctrine. In this regard, issues pertaining to our statutory authority were clearly raised in the *Notice*[316] and addressed by numerous commenting parties in this proceeding. As we observed in the *Notice*, we do not believe that Congress explicitly codified the fairness doctrine prior to the 1959 Amendments to the Communications Act. Nor do we find that the fairness doctrine necessarily inheres in the public interest standard of the Communications Act. The 1959 amendments to the Communications Act pose a more difficult question. For the reasons we have earlier stated, however, we need not reach this question.[317] Rather, we will afford Congress an opportunity to review the record adduced in this proceeding. In order to provide a full and complete record in connection with such review, we have set forth below the arguments in this proceeding with respect to codification of the fairness doctrine.

A. Pre-1959 Period

145. We begin our examination of the legal authority of the Commission to eliminate or modify the fairness doctrine in the period prior to the 1959 amendments to ascertain whether or not the doctrine was codified either explicitly within the Communications Act or implicitly as part of the general obligation of broadcasters to serve the public interest.[318] In this regard, we note at the outset that neither the Radio Act of 1927 nor the Communications Act of 1934 contained any explicit provisions indicating that Congress intended to mandate that broadcasters provide fairness in their coverage of controversial issues of public importance.

146. Indeed, in 1927 Congress specifically addressed the question of whether or not there was a need to statutorily require fairness in the discussion of controversial issues of public importance. When enacting Section 18 of the Radio Act of 1927,[319] the forerunner of Section 315 of the present Communications Act, Congress had before it in the House of Representatives language in the bill, H.R. 9971 of the 69th Congress, that would have required broadcasters to provide equal access to "both the proponents and opponents of all political questions or issues."[320] At the same time, the Senate was considering a provision recommended to it by its Commerce Committee which would have prohibited broadcasters from discriminating in the use of their facilities "for the discussion of any question affecting the public."[321] Neither of these provisions survived the House-Senate Conference. The Conferees rewrote the radio bill without the proposed fairness-type language.[322]

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[313] Several parties addressed elimination or retention of the Personal Attack Rule. However, as we stated in the *Notice* in this proceeding, our review here is limited to the fairness doctrine and does not include the Personal Attack Rule, which is the subject of a separate, pending proceeding. *Notice, supra* n.1 at ¶ 9 n.10 and *Repeal or Modification of the Personal Attack and Political Editorial Rules*, 48 Fed. Reg. 28295 (June 21, 1983).

[314] For a discussion of the *Cullman* doctrine and its evolution, see n.119 *supra*.

[315] *Nicholas Zapple*, 23 FCC 2d 707 (1970). The Zapple doctrine requires that if supporters, or spokesmen, for one political candidate appear on a broadcast station, supporters for opposing candidates must be afforded similar treatment. However, the doctrine only applies to major political parties during formal campaign periods and does not require the provision of free time.

[316] *See Notice, supra* n.1 at ¶ ¶ 96–120.

[317] *See* ¶ 7, *supra*.

[318] For a detailed examination of the pre-1959 period *See Staff Study of the House Committee on Interstate and Foreign Commerce, Legislative History of the Fairness Doctrine*, 90th Cong. 2d Sess. (Comm. Print. 1968) [hereinafter cited as "Manelli Report"].

[319] Section 18 of the Radio Act of 1927 read, in pertinent part: "If any licensee shall permit any person is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station. . . ." (44 Stat. 1170).

[320] 67 Cong. Rec. 5,560–61 (1926).

[321] S. Rep. No. 772, 69th Cong., 1st Sess. (1926).

[322] H.R. Rep. No. 1886, 69th Cong., 2d Sess. (1927).

Since there was no explanation in the Conference Report as to why the fairness-type language was excluded, we must conclude that Congress did not desire to explicitly mandate a fairness type obligation on broadcasters at that time.

147. Section 18 of the Radio Act of 1927 became Section 315 of the Communications Act of 1934. Yet, before it was enacted into law, attempts were made in the Senate to enlarge the scope of this section to impose a fairness standard on any discussion of public questions to be voted upon at an election. Specifically, the language proposed in the Senate would have required that:

> if any licensee shall permit any person to use a broadcasting station in support of or in opposition to any candidate for public office, or in the presentation of views on a public question to be voted upon at an election, he shall afford equal opportunity to an equal number of other persons to use such station in support of an opposing candidate for such public office, or to reply to a person who has used such broadcasting station in support of or in opposition to a candidate, or for the presentation of opposite views on such public questions. Furthermore, it shall be considered in the public interest for a licensee, so far as possible, to permit equal opportunity for the presentation of both sides of public questions.[323]

In the House, the Committee on Interstate and Foreign Commerce reported a substitute bill that did not contain the provision providing for "equal opportunity" in the discussion of public questions.[324] Minus the proposed fairness-type language, the Conference Committee incorporated Section 18 verbatim as Section 315 of the Communications Act of 1934.[325] Once again attempts to include fairness type language explicitly into the Communications Act had failed.

148. The 1952 amendments were the last revisions to Section 315 of the Communications Act prior to 1959. The 1952 Amendments to the Communications Act added another provision to section 315 which provided for uniformity of charges for political time vis-a-vis other uses. While in the House of Representatives, an amendment was offered to alter Section 315 to extend the "equal opportunity" provision to include statements made by authorized spokesmen of candidates,[326] this language was omitted from the bill be the Conferees.[327] Given these various attempts to legislatively mandate some form of fairness standard, it is apparent that, prior to 1959 at least, Congress had steadfastly refused to statutorily require broadcasters to provide fairness in the coverage of controversial questions and issues of public concern.

149. Despite the lack of legislative support for a mandatory fairness obligation, as evidenced in these early expressions of legislative intent by Congress in not explicitly codifying the fairness doctrine,[328] the Federal Radio Commission and later the Federal Communications Commission imposed fairness obligations upon broadcasters. As early as 1929, the Federal Radio Commission in *Great Lakes Broadcasting Co.*,[329] declared that "[i]n so far as a program consists of discussions of public questions, public interest requires ample play for the free and fair competition of opposing views, and the Commission believes that the principle applies . . . to all discussions of issues of importance to the public."[330] The Federal Communications Commission followed its predecessor by requiring that licensees cover both sides of controversial issues.[331] These decisions culminated in the issuance of the definitive statement of the fairness doctrine obligations for broadcasters. It was in the 1949 *Report of Editorializing by Broadcast Licensees*,[332] that the Commission fully set forth the two prong requirements of the fairness doctrine.

150. The fairness doctrine, as enunciated by the Commission in the *1949 Fairness Report*, was not developed pursuant to any specific command in the Act requiring that a broadcaster "devote a reasonable percentage of time to the coverage of controversial public issues" or that the broadcaster provide fairness in the coverage of such issues. Rather, it was promulgated pursuant to the "expansive" powers delegated by Congress under the Act in order that the Commission might regulate the "field of enterprise the dominant characteristic of which was the rapid pace of its unfolding."[333] In particular, the fairness doctrine developed under the general authority of the Commission to devise regulations to insure licensees broadcast in the "public interest, convenience, and necessity."[334] Based upon its perceptions of the communications field in 1949, the Commission determined that "the public interest requires that the licensee must operate on a basis of overall fairness, making his facilities available for the expression of contrasting views of all responsible elements in the community on the various issues which arise."[335] Thus, the Commission from the inception of the fairness doctrine has recognized that the sole statutory basis for the doctrine was the general duty of licensees to serve the public interest.[336]

151. Proponents of the fairness doctrine contend that the Commission can not eliminate the doctrine because it is an inherent and necessary element of the general pubic interest standard.[337]

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[323] *See* S. Rep. No. 781, 73d Cong., 2d. Sess. (1934). This same "fairness" type provision in H.R. 7716, had been introduced during the 72d Congress, H. Rep. No. 2106, 72d Cong., 2d Sess. 6 (1933). This bill was passed by Congress, but subjected to a pocket veto by President Hoover. *See Manelli Report, supra* n.318.

[324] H.R. Rep. No. 1850, 73d Cong., 2d Sess. (1934).

[325] *See* H.R. rep. No. 1918, 73d. Cong., 2d Sess. 49 (1934).

[326] 93 Cong. Rec. 7415 (1952).

[327] H.R. Rep. No. 2420, 82d Cong., 2d Sess. (1952). This omission was particularly relevant since by this time the Commission had developed the fairness doctrine pursuant to the public interest standard of the Communications Act.

[328] Indeed, as pointed out in the *Manelli Report, supra* n.318, some of the failures to enact fairness type legislation "cast serious doubts on the proposition that the Fairness Doctrine, at least in substance, is a necessary corollary of the 'public interest' standard contained in the Radio Act, and carried forward into the 1934 Communications Act." *Id.* The United States Supreme Court, however, has admonished that "unsuccessful attempts at legislation are not the best guides to legislative intent." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. at 381 n.11.

[329] 3 FRC 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930).

[330] *Id.* at 33.

[331] *See Young People's Association for the Propagation of the Gospel*, 6 FCC 178 (1938). Moreover, the Commission in *Mayflower Broadcasting Corp.*, 8 FCC 333 (1941), gave an even more expansive meaning to the public interest standard while at the same time giving a more restrictive view of broadcasters' latitude under that standard. Specifically, the Commission determined that "as one licensed to operate in the public domain the licensee has assumed the obligation of presenting all sides of important public questions, fairly, objectively and without bias. . . . These requirements are inherent in the conception of public interest set up the Communications Act as the criterion of regulation." *Id.* at 340. While this decision was overturned because of its specific edict against editorializing by broadcasters, its interpretation of the public interest standard was carried forward in subsequent Commission cases.

[332] *See 1949 Fairness Report, supra* n.6.

[333] *National Broadcasting Company* v. *United States*, 319 U.S. at 219.

[334] *See* 47 U.S.C. 303, 307(a), 309(a), 310(d). According to the United States Supreme Court the public interest criterion "serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

[335] 1949 Fairness Report, at 1250.

[336] *Id.* at 1254.

[337] *See, e.g.*, BCFM Comments, *supra* n.288 at 6–12; Geller/Lampert Comments, *supra* n.83 at 7–10; GM Comments, *supra* n.203 at 36–40; MAP/TRAC Comments, *supra* n.50 at 13–19; and Mobil Comments, *supra* n.128 at 12–17.

We believe, however, that the obligations of licensees under the public interest standard, including the fairness doctrine, were never meant to be unsusceptible to change. Nor do we conclude that the sole power to make such alterations in Commission policies promulgated pursuant to the general public interest standard rests with Congress. This conclusion is aptly supported by the United States Supreme Court which has long recognized that the public interest standard is not inflexible, but is subject to the "rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."[338] Over the years the Commission has often exercised its expert judgment and administrative experience to change policies once viewed by the Commission to be in the public interest. Given that the Commission is the expert agency in the field, courts have upheld the Commission's elimination of policies which were based solely on the public interest standard.[339] In so doing, the courts have generally relied heavily on the Commission's judgment regarding the best means to implement the broad public interest standard.[340] Indeed, the United States Supreme Court has posited that the Commission should not hesitate to abandon existing policies "[i]f time and changing circumstances reveal that the 'public interest' is not served by application of the regulations."[341]

152. As we have already determined, as detailed above, the fairness doctrine no longer serves the public interest. Accordingly, if the only statutory basis for the fairness doctrine was the general public interest standard, the Commission upon a rationally based and clearly articulated finding would possess sufficient authority to abolish the doctrine.

B. The 1959 Amendments to the Communications Act

153. In 1959 Congress once again amended section 315 of the Communications Act.[342] Primarily, the purpose of these amendments was to create an exemption from Section 315(a)'s equal opportunity requirement for certain types of news programs. After accomplishing its primary purpose in enacting the amendments, Congress set forth at the end of section 315(a) a new proviso which apparently references the general fairness doctrine. In the *Notice*,[343] we offered three possible scenarios as to the possible statutory implications of the language espoused in the 1959 Amendments to the Communications Act. One construction of the amendments is that they were an explicit codification of the fairness doctrine in its entirety. The second possible interpretation is that the 1959 amendments only codified the fairness doctrine with respect to the political broadcasting realm to ensure that the purposes of the equal opportunities requirements would not be defeated by abuse of the newly created exemptions. A final construction is that Congress at that time did not codify the fairness doctrine at all, but merely acknowledged and preserved the Commission's policy in this area without statutorily mandating its continuance.[344] According to the arguments of the different commenting parties, evidence supporting all three propositions can be found in the statutory language of Section 315, as amended in the 1959 amendment to the Communications Act, its legislative history, subsequent court and legislative interpretations, as well as our own past interpretations.

1. *The Statutory Language*

154. We begin with the language in the statute itself. In this regard, we note that the United States Supreme Court has specifically concluded that "in determining the scope of a statute, one is to look first at its language" and "[a]bsent a clearly expressed legislative intention to the contrary, that langauge must ordinarily be regarded as conclusive."[345] Of particular relevance to our inquiry is the last sentence of Section 315(a) which provides that:

> Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and *to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.*[346] (emphasis added)

Although this language appears clearly to reference the fairness doctrine obligation, its precise statutory implications are unclear. In this connection, several parties argued that this language could be read as a Congressional enactment of the fairness doctrine since its wording is quite similar to the language found in the second prong of the fairness doctrine as enunciated in the *1949 Fairness Report*. Contrarily, other comments took the position that Congress in amending Section 315 desired to make clear that it had not disturbed the Commission's fairness doctrine policy, but did not mandate its continuance. Major commenting parties have advanced strong arguments on both sides of this controversy as to the precise meaning to be accorded this language.[347] Commenters, such as the National Telecommunications and Information Administration (NTIA), assert that "[o]n its face section 315(a), as amended in 1959, indicates that Congress understood the Fairness Doctrine to be embodied in the Federal Communications Act."[348] Likewise, other proponents have found the language in the last sentence of section 315(a) to "plainly" mean that Congress intended to codify the fairness doctrine.[349]

155. On the other hand the RTNDA contends that "[o]n its face this language provides only that the amendments should not be construed to *relieve* broadcasters of fairness obligations; it neither states nor implies that Congress intended to change in any

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[338] *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. at 138.

[339] *See, e.g., FCC* v. *WNCN Listeners Guild, supra* n.193.

[340] *See, FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. at 810 and *FCC* v. *WNCN Listeners Guild, supra* n.193; *see also UCC* v. *FCC, supra* n.193 and *Chisholm* v. *FCC*, 538 F.2d 349, 357 (D.C. Cir. 1976).

[341] *National Broadcasting Co.* v. *United States*, 319 U.S. at 225.

[342] *See Act of September 14, 1959*, §1, P.L. 66–274, 73 Stat. 556, amending 47 U.S.C. § 315(a).

[343] *See Notice, supra* n.1 at ¶ 99.

[344] While different permutations of these constructions of the statutory implications of the 1959 amendments exist, we believe these three to be the most plausible.

[345] *North Dakota* v. *United States*, 460 U.S. 300, 312 (1983), *quoting Consumers Products Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). *See also United States* v. *Yermian*, 104 S. Ct. 2936 (1984) and *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982).

[346] 47 U.S.C. § 315(a) (1964).

[347] Some Commenters contend that the language in the last sentence of section 315(a) specifically addresses itself to fairness regarding "controversial issues" in general. *See, e.g.*, MAP/TRAC Comments, *supra* n.50 at 48. Other parties point out the Congress spoke in terms of the obligation as being "under this Act" this they contend provides support for the argument that the fairness doctrine is merely a Commission policy developed pursuant to delegated authority under the general public interest standard of the act and not to anything directly in the Act. *See, e.g.*, CBS Comments, *supra* n.83 at 110–111.

[348] "Comments of the National Telecommunications and Information Administration" at 5 [hereinafter cited as "NTIA Comments"].

[349] *See, e.g.*, MAP/TRAC Comments, *supra* n.50 at 31–34; Geller/Lampert Comments, *supra* n.83 at 4; and Ecumedia Reply Comments, *supra* n.39 at 7–9.

way the nature of the statutory authorization for the doctrine."[350] Moreover, opponents of the fairness doctrine argue that if Congress had intended this language to codify the fairness doctrine, it would have made its intent clear, as it has done in many other enactments.[351] Beause the "plain" language of the statute has been interpreted to stand for more than one proposition, we examined the legislative history of the 1959 amendments to ascertain congressional intent.[352]

2. Legislative History

156. Congress in the 1959 amendments to section 315 was responding in an expedited fashion to overturn the Commission's *Lar Daly* decision and avoid its possible ramifications.[353] In *Lar Daly*, the Commission had ruled that section 315's "equal opportunities" requirements applied to appearances of political candidates on newscasts.[354] Subsequently, broadcasters warned that if Congress did not act to correct this novel Commission interpretation of Section 315 the result might be a blackout of radio and televisison news coverage of political campaigns, including the upcoming national political conventions.[355] To prevent such an occurrence, Congress moved swiftly to enact legislation providing exemptions for news-type programming. Congress was mainly concerned with overturning the Commission's decision. Consequently, both the original bills drafted in the House of Represenatives and Senate dealt primarily with correcting through legislation the *Lar Daly* decision.[356] Accordingly, the legislative history lacks clear record evidence demonstrating a reasoned consideration of the fairness doctrine which would indicate an intent by Congress to codify the doctrine. While there does exist scattered references to the obligations of broadcasters under the public interest standard to present both sides of controversial public issues by some members of Congress, there was no significant discussion of the Commission's fairness doctrine.

157. However, the Senate Committee Report—probably in response to concerns voiced by the Commission and the Department of Justice—provided that:

> In recommending this legislation, the committee *does not diminish or affect in any way* Federal Communications Commission policy or existing law which holds that a licensee's statutory obligation to serve the public interest is to include the broad encompassing duty of providing a fair cross-section of opinion in the station's coverage of public affairs and matters of public controversy.[357] (emphasis added).

This language appears to suggest that the Senate Committee did not wish to abrogate the Commission's policy developed pursuant to the Commission's delegated authority under the general public interest standard of the Act. It is argued that this language implies that the Senate did not intend to change the broadcasters existing statutory obligation to provide fairness in the coverage of controversial issues of public importance. This does demonstrate that the Senate was ambivalent, at least initially, as to whether the fairness doctrine was a Commission policy that was grounded in the statutory obligation of broadcasters to serve the public interest. It may also suggest that Senate concerns focused primarily upon the doctrine's role in ensuring fair coverage of candidates should the "news" exemption to section 315 be enacted.

158. When the bill came up for debate in the Senate, a floor amendment was offered by Senator Proxmire. This amendment would have added to section 315 a new provision providing that:

> but nothing in this sentence shall be constructed as changing the basic intent of Congress with respect to the provisions of this Act, which recognizes that television and radio frequencies are in the public domain, that the license to operate in such frequencies requires operation in the public interest, and that in newscasts, news interviews, news documentaries, on-the-spot coverage of news events, . . . all sides of public controversies shall be given as equal an opportunity to be heard as is practically possible.[358]

Upon a recommendation by Senator Pastore the phrase "as equal an opportunity" found in the last part of the Proxmire amendment was revised to read "as fair an opportunity."[359] Senator Pastore in offering this alteration explained that this new language "merely expresses the philosophy that the media of radio and television are in the public domain, and that they must render, under the law, public service, and that wherever it is practical and possible the situation must bring to light all sides of a controversy in the public interest. . . ."[360] While Senator Pastore had referred to the Proxmire amendment as "surplusage,"[361] he nonetheless stated that he understood "the amendment to be a statement or codification of the standards of fairness . . ." and that the Commission was "obliged by existing law and policy to abide by the standards of fairness."[362] Thus, it appears that at least some of the Senators viewed the Proxmire amendment as an attempt to codify the fairness doctrine.[363]

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[350] RTNDA Comments, *supra* n.141 at 13. Similarly, NBC argues that this language was merely a "savings clause" in that Congress "left pre-existing law—the Commission's authority to interpret the 'public interest' standard of the Federal Communications Act—undisturbed." NBC Comments, *supra* n.86 at 102. *See, also* CBS Comments, *supra* n.83.

[351] *See* NBC Comments, *supra* n.86 at 105 (NBC points out that Congress made explicit the codification of a Commission policy when it enacted § 317 requiring the public announcement of any sponsorship of a political or other controversial broadcast.) *See, also* CBS Comments, *supra* n.83 at 111.

[352] As the United States Circuit Court of Appeals for the District of Columbia Circuit has stated, "[c]onstruing a statutory term, however, requires more than a superficial and isolated examination of the statute's plain words. Ascertaining congressional intent requires us to examine the 'context in which the words are set—the statute's purpose, structure, and history' . . ." *Multi-State Communications, Inc.* v. *FCC*, 728 F.2d 1519, 1522 (D.C.Cir. 1984) *quoting Natural Resources Defense Council, Inc.* v. *EPA*, 725 F.2d 761, 769 (D.C. Cir. 1984). *See also Viacom International, Inc.* v. *FCC*, 672 F.2d 1034, 1040 (2d Cir. 1982).

[353] *Lar Daly*, 26 FCC 715 (1959)

[354] *Id.*

[355] *See, e.g.*, 105 Cong. Rec. 14.447 (1959) (Remarks of Senator Hartke.)

[356] *See S. Rep. No. 562, 86th Cong., 1st Sess. (1959) and H.R. Rept. No. 802, 86th Cong., 1st Sess. (1959).*

[357] S. Rep. No. 562 at 13. The Senate Committee specifically included a letter from the Department of Justice suggesting that Congress in amending section 315 should not abolish fairness obligations. Specifically, the Department of Justice stated that "care should be taken lest present requirements of fair treatment of public issues be weakened." The Department added that "under existing law, the Commission has held that a licensee's statutory obligation to serve the public interest includes the broad all encompassing duty of providing a fair cross-section of opinion in the station's coverage of public affairs and other matters of controversy. This general fairness standard is presently applicable to political broadcasting not coming within the coverage of section 315." *Id.* at 19 (citations omitted).

[358] 105 Cong. Rec. 14.457 (1959). Senator Proxmire in offering his amendment stated that the purpose of the amendment was to put into the Act the declaration made on page 13 of the Committee Report and thus as a part of the statute make it binding. *Id.* While we believe the language found on page 13 of this Senate Committee Report, *supra* n.356, only sought to preserve the Commission's existing policy, the language proposed by Senator Proxmire appears to be more of an explicit codification of the fairness doctrine.

[359] *Id.*

[360] *Id.*

[361] Senator Pastore stated that he believed "we have already accomplished the purpose of the Senator's amendment. We have expressed it in the report." *Id.* at 14.457.

[362] 105 Cong. Rec. at 14.462.

[363] There is still some doubt as to whether the Proxmire amendment if enacted would have codified the fairness doctrine in its entirety, especially in light of the fact that the majority of what little debate there was on the amendment centered on questions relating to fairness in the political broadcasting realm. *See Notice, supra* n.1 at ¶ 110.

159. Unlike the Senate bill, the bill reported out of the House of Representatives dealt almost exclusively with correcting the situation brought about by the Commission's *Lar Daly* decision.[364] No specific amendment with respect to the general fairness doctrine was passed by the House of Representatives. The House members did, however, reject in a floor vote an amendment which would have required broadcasters to provide "equal opportunities" to opposing "representatives of any political or legislative philosoph[ies]."[365]

160. Because of differences in the bills reported out of the House of Representatives and Senate, the respective bills were sent to a House-Senate Conference.[366] Within this Conference, the language of the Proxmire Amendment was altered by the Conferees to its present form.[367] In the Conference Report [368] the Conferees, in referring to their inclusion of language which referenced the fairness doctrine, explained in a short statement that "there is nothing in this language which is inconsistent with the House substitute. It is a restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934." [369] Thus, there was no discussion in the Conference Report explaining why the Proxmire language was altered. Moreover, the Conference Report failed to explain whether the original intent of the Proxmire amendment had been retained in this new proviso. In this connection, we also note that the Conference Report explains that there was nothing in the language inconsistent with the House substitute. In light of the fact that the House bill did not contain any fairness language, the lack of a major discussion of the inclusion of fairness doctrine language suggests that this provision was not viewed as being controversial. However, we are not certain as to the reason this was not a controversial issue. In this regard, it appears that there are several plausible rationales for the lack of discussion on this provision in the Conference Report. First, it could be that Congress was merely making explicit what it already considered to be a statutory obligation under the public interest standard. Second, there is a possibility that because Congress was only preserving a Commission policy and not mandating its continuance there was no need for a discussion.[370] Further, if the provision was largely understood as intended only to ensure fair treatment of candidates in programming exempted from Section 315's equal opportunities provisions, there may have been general agreement that the proviso was desirable. Finally, it should be noted that, at the time, the fairness doctrine was enforced only at renewal, and some legislators believed it had little practical effect on licensees.[371]

161. In the post-Conference debates in both Houses, the Conferees in introducing the revised version of the bill made an effort to explain that the Proxmire amendment had been retained, at least in spirit. In particular, Representative Harris stated that:

> Now, just in case anybody in the broadcasting industry or in the Federal Communications Commission, or even a candidate himself, should get the idea that the reins are off; you can do what you want to, we have accepted in the Conference substitute a provision similar to what was referred to as the Proxmire amendment in the other body.[372]

Likewise, in the Senate debates, Senator Pastore pointed out that "while the House conferees found some fault with the so-called Proxmire amendment, we insisted it be retained in the bill, if with some slight modifications, because it was the one condition we could write into the law to make sure the Federal Communications Commission would give the matter the right interpretation." [373]

162. These statements may lend some support for the proposition that a byproduct of the 1959 Amendments was a codification of the fairness doctrine. In the House of Representatives, however, the dialogue between Representatives Avery and Harris lends support to the contrary position that Congress intended solely to preserve the fairness doctrine. Specifically, Representative Avery questioned whether or not the "standard of fairness still prevails in the basic Act irrespective of any changes that were made in section 315" and that "it applies not only to political candidates, but issues and editorializing by licensees as well."[374] In response, Representative Harris agreed that the standard remained and added that the conferees "discussed this particular item" and "agreed that the standard of fairness must prevail, and applies to the programs which will be exempted from the equal-time requirements of section 315." [375] As demonstrated by these discussions, the majority of the debate on the fairness doctrine in both Houses centered around assuring that despite the new amendment the doctrine remained in the context of political broadcasting. This is understandable since the reason for Congress' action was overturning the *Lar Daly* decision.

163. While this appears to have been the focus of most of the debates, in the Senate at least one Senator believed that the fairness doctrine was being codified in its entirety. Specifically, Senator Scott pointed out that:

> [w]e have maintained very carefully the spirit of the Proxmire amendment, and I ought to point out . . . that the phrase "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance" does not refer merely to political discussions as such or to opposing views of political parties or of candidates. It is intended to encompass all legitimate areas of public importance which are controversial . . . and it is intended that no one point of view shall gain control over the airwaves to the exclusion of another point of view.[376]

Senator Case, however, did immediately afterwards endorse everything that Senator Scott stated and everything stated in the Conference Report.[377] None of the other Senators offered any remarks on the correctness of Senator Scott's statement.

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[364] However, it should be noted that in the House Committee debates there is evidence that members believed that broadcasters were already subject to a statutorily required fairness obligation. For example, Representative Cellar stated that: "broadcast licensees would continue to remain subject to their present statutory duty to operate in the public interest. Under this general, overall standard of licensee responsiblity, the Commission requires a licensee to be fair in the presentation of opposing views on controversial public issues." 105 Cong. Rec. 16,227 (1959).

[365] *Id.* at 16,245.

[366] H.R. Rep. No. 1069, 86th Cong., 1st Sess. (1959). The non-inclusion of any fairness doctrine language in the House of Representatives was not the sole difference between the two bills.

[367] The United States Supreme Court in *Red Lion Broadcasting Co.* v. *FCC*, *supra* n.10 in dictum stated that the original Proxmire language "constituted a positive statement of doctrine and was altered to the present merely approving language in the conference committee." *Id.* at 383–84 (footnote omitted) *See* ¶ 166, *infra*.

[368] H.R. Rep. No. 1069, 86th Cong., 1st Sess. (1959).

[369] *Id.* at 5.

[370] Parties, such as MAP/TRAC, have argued that this language proves that Congress intended to codify the fairness doctrine. *See* MAP/TRAC Comments, *supra* n.50 at 29–34. Other parties point out it is mere recognition of the Commission's policy pursuant to the public interest standard in the Act. *See* CBS Comments, *supra* n.63 at 111.

[371] *See Notice*, *supra* n.1 at ¶ 112.

[372] 105 Cong. Rec. 17,778 (1959). In addition, Representative Harris, stated that the Conferees "went further than that to be sure that there was no advantage taken by the broadcasting industry or anyone else and reaffirmed the 'standard of fairness' established under the Communications Act." *Id.*

[373] *Id.* at 17,830.

[374] *Id.* at 17,779.

[375] *Id.*

[376] *Id.* at 17,831.

[377] *Id.* at 17,832.

164. We also found other statements in the legislative history which suggested that some members did believe that the fairness doctrine should not be a mandatory obligation. In particular, we note the statement of Representative Brown who expressed regret that the final bill "does not go quite as far as I would like toward giving freedom of information over the radio and television such as is enjoyed by the press of the Nation." [378] While there are a few statements throughout the legislative history discussing the fairness obligation, there is no evidence that clearly demonstrates an intent by Congress to codify the doctrine. Although as NBC observes "[t]he legislative discussion of the fairness doctrine cannot achieve what the statutory language fails to do," [379] neither the statutory language nor the legislative history of section 315 provides a satisfactory answer to the question of congressional intent.

3. Judicial Interpretations of the 1959 Amendments

165. As CBS points out the question of whether or not Congress has enacted the fairness doctrine as a statutory mandate has never been directly considered by any court.[380] In *Red Lion Broadcasting Co.* v. *FCC*,[381] the United States Supreme Court in upholding the personal attack and political editorializing rules did however provide dictum pertaining to the statutory implications of the 1959 Amendments to the Communications Act. Proponents and opponents alike have cited the *Red Lion* decision as supporting their respective positions concerning the statutory nature of the fairness doctrine. While the Court did examine the legislative history of section 315, it failed to reach a clear conclusion as to whether the doctrine was codified. In this regard, we note that after citing the language at the end of section 315(a) the Court stated:

[t]his language makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues.[382]

As proponents of the fairness doctrine contend this language suggests that the Court "viewed Congress' action as a codification of the FCC's interpretation that the fairness doctrine was an inextricable element of the 'public interest' section of the Act."[383] In addition, the *Red Lion* Court stated that "[h]ere, the Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation."[384]

166. Although this language implies that the *Red Lion* Court believed the 1959 amendments to be an explicit codification of the fairness doctrine, other language found in the decision just as equally suggests that it was only codified with respect to the political broadcasting realm or not at all. In particular, the Court stated that Congress "knowingly preserved the FCC's complementary efforts." [385] In this connection, we note that preservation of a Commission policy indicates that it is not a mandatory obligation of broadcasters and does not foreclose our discretion to later reevaluate that policy. Moreover, the Court in referring to the Proxmire amendment states that:

[t]his amendment, which Senator Pastore, a manager of the bill and a ranking member of the Senate Committee, considered "rather surplusage," constituted a *positive statement of doctrine* and was altered to the present *merely approving language* in the Conference Committee. [386] (emphasis added).

Commenters who argue that the fairness doctrine is not statutory, contend that this language proves that the Court viewed the proviso as not mandating, but merely endorsing the Commission's then existing policy. [387] For example, CBS contends that the Court's analysis in *Red Lion* "made clear that the doctrine was not being displaced by the exemptions to the equal time provisions, it did not deprive the Commission of the power later to determine that the public interest would be better served by the doctrine's rescission."[388]

167. Four years later the United States Supreme Court in *Columbia Broadcasting System* v. *Democratic National Committee* [389] also in dictum addressed the statutory implications of the 1959 Amendments to the Communications Act. However, the Court once again used ambiguous terminology in referring to the fairness doctrine. Therein, the Court stated that "[i]n 1959, Congress amended § 315 of the Act to give *statutory approval* to the Fairness Doctrine." [390] Standing alone this language could suggest that the Court understood the 1959 amendments to codify the fairness doctrine. Contrarily, this same statement could stand for the proposition that Congress was recognizing and approving the doctrine, but not mandating its retention. Moreover, in the same footnote the Court while discussing Congress' enactment of section 312(a) states that "[t]his amendment essentially codified the Commission's prior interpretation of section 315(a) as requiring broadcasters to make time available to political candidates." [391] If the Court had meant to suggest that the fairness doctrine was codified, it could have stated that the fairness doctrine had been codified as it did in reference to section 312(a). We are not certain if the Court's choice of the term "statutory approval" was meant to suggest that the fairness doctrine is not statutory. Moreover, Justice William Brennan joined by Justice Thurgood Marshall in a dissenting statement determined that:

The statutory authority of the Commission to promulgate this doctrine and related regulations derives from the mandate to the "Commission from time to time, as public convenience, interest, or necessity requires," to promulgate "such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of [the Act] . . . " [392] (citations omitted)

That these Justices concluded that the "Fairness Doctrine was recognized and implicitly approved by Congress in the 1959 amendments to § 315 of the Act," [393] suggests, as evidenced by the above statement, that they did not necessarily view it as having been mandated by section 315 of the Act. We have no evidence as to whether the other Justices agreed with this interpretation.

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[378] *Id.* at 17,781.

[379] "Reply Comments of National Broadcasting Company, Inc." at 21. [hereinafter cited as "NBC Reply Comments"].

[380] *See* CBS Comments, *supra* n.66 at 124.

[381] 395 U.S. 367 (1969).

[382] *Id.* at 380.

[383] MAP/TRAC Comments, *supra* n.50 at 35–36. This proposition is supported by the Court's subsequent statement that the congressional action in 1959 was a vindication of the "FCC's general view that the fairness doctrine inhered in the public interest standard." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 380.

[384] *Id.* at 381–82 (footnote omitted). The NTIA cites *Black's Law Dictionary* for the proposition that "[r]atification means the adoption of the act of another as one's own act, with the resulting responsibility for the consequences of that act." Reply Comments of the National Telecommunications and Information Administration" at 14 [hereinafter cited as "NTIA Reply Comments"]. In light of the subsequent statements made in the *Red Lion* decision, we are not certain what the Court reference to the doctrine having been ratified meant.

[385] Red Lion Broadcasting Co. v. FCC, 395 U.S. at 385.

[386] Id. at 383–84 [citations omitted].

[387] See RTNDA Comments, *supra* n.141 at 21.

[388] See CBS Comments, *supra* n.83 at 125 (footnote omitted).

[389] 412 U.S. 94 (1973). (The Court upheld the Commission's determination that the public interest would not be served by requiring broadcasters to accept editorial advertisements).

[390] *Id.* at 113 n.12 (emphasis added).

[391] *Id.*

[392] *Id.* at 185 n.16. (Brennan, J., dissenting).

[393] *Id.* at 185 n.15. (citations omitted).

168. Because the United States Supreme Court so far has not given a definitive answer on whether or not the fairness doctrine has been explicitly codified into the Communications Act, we examined the cases in the United States Circuit Courts of Appeal. While some of these courts have, in passing, discussed the statutory nature of the fairness doctrine, none has specifically addressed in a reasoned decision the question of whether or not the fairness doctrine is codified. The Courts, which in dictum state that the fairness doctrine was codified in 1959, generally do not discuss the rationale behind their conclusions. Indeed, many of these Courts have adoped—without any discussion as to its correctness—the Commission's interpretation on whether or not the fairness doctrine was codified as part of the Communications Act.[394] Other Courts have relegated their discussion of the statutory nature of the fairness doctrine to a sentence or two in a footnote.[395]

169. At least one Court has specifically determined that the fairness doctrine has not been codified. The United States Circuit Court of Appeals for the First Circuit in *Public Interest Research Group* v. *FCC*[396] in upholding the Commission's determination that the fairness doctrine would only apply to commercial advertisement that spoke in an obvious and meaningful way to public issues stated, in dictum, that the "fairness doctrine is *not a creature of statute* but was evolved over the years by the Commission under the 'public interest' standard of the Communications Act."[397] Moreover, the Court declared that Congress only "acknowledged and generally endorsed the Commission's adoption of fairness standards."[398]

170. In *Strauss Communications, Inc.* v. *FCC*,[399] the court found that find that the fairness doctrine "received explicit statutory recognition in the 1959 amendments."[400] The precise ramifications of Congress giving "statutory recognition" are unclear. Moreover, the Court made this statement without any substantive discussion indicating its meaning.

4. Commission Interpretations of the 1959 Amendments

171. Although some Courts have relied upon Commission interpretation of the fairness doctrine's statutory nature, the Commission itself has not steadfastly found the doctrine to have been codified. Over the years, the Commission has reassessed the implications of the 1959 amendments to the Communications Act. While some Commission decisions have without much discussion assumed that Congress codified the doctrine in 1959,[401] other Commission determinations have found that Congress only "ratif[ied] the Commission's then-existing policy concerning application of the Fairness Doctrine to news broadcasts."[402] And still other Commission decisions have been ambivalent on whether the doctrine was codified.[403] Thus, the Commission has never definitively concluded that the fairness doctrine was codified in 1959.

5. Subsequent Congressional Interpretations of the 1959 Amendments

172. Finally, we examined subsequent statements by Congress, including the statements of key figures in the 1959 amendment to section 315, to ascertain Congressional views on the statutory nature of the fairness doctrine. Once again we discovered there was evidence both supporting the codification proposition and opposing it. We begin with those statements suggesting that Congress in 1959 codified the fairness doctrine. In particular, Senator Pastore during congressional hearings in 1963 on further amending the equal time provision, implied that section 315 codified the fairness doctrine and that if there were any changes made to section 315, "there ought to be a restatement on the fairness doctrine."[404] Moreover, Senators Pastore and Proxmire in a 1975 hearing on bills to eliminate the fairness doctrine, gave their beliefs that the doctrine had been codified in 1959. Specifically, in his opening statement, Senator Proxmire explained that:

> Although the fairness doctrine dates back to 1949 in a sophisticated form, it was not until 1959 that it was recognized in the United States Code. I had a hand in putting it there.[405]

This conclusion was expanded upon by Senator Pastore who simply stated "we codified [the fairness doctrine] in 1959."[406]

173. There also exists subsequent legislative statements suggesting that even Congress itself was not certain whether the fairness doctrine has been codified.[407] In this connection, we note that in 1968, less than ten years after the amendments to section 315, a study of the legislative history of the fairness doctrine was prepared for the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce,[408] (Manelli Report). The Manelli Report, after an exhaustive study of the legislative history, concluded that "the legislative history of the Communications Act with respect to the Fairness Doctrine does not establish whether the doctrine should properly be considered a part of the statute."[409] In addition, the Manelli Report contended that Congress "intended neither approval nor disapproval of it (fairness doctrine), but merely intended to ensure that Section 315 would not interfere with

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[394] *See, e.g., Green* v. *FCC*, 447 F.2d 323, 327 n. 6 (D.C. Cir. 1971) (the Court cited the FCC's ruling *In re Obligations of Broadcast Licensees Under the Fairness Doctrine*, 23 FCC 2d 27, 28 (1970) and *Brandywine-Mainline Radio, Inc.*, v. *FCC*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied* 412 U.S. 922 (1973) (The Court quoted the FCC's opinion in *Committee for the Fair Broadcasting of Controversial Issues*, 25 FCC 2d 283, 291 (1970). In this regard, we note that both of these Commission decisions cited by the courts found the fairness doctrine to have been codified in the 1959 Amendments.

[395] *See, e.g., Maier* v. *FCC*, 735 F.2d at 225 n. 5 and *Banzhaf* v. *FCC*, 405 F.2d at 1095 n. 49.

[396] 522 F.2d 1060 (1st Cir. 1975).

[397] *Id.* at 1066 (emphasis added). Complainants in this case had specifically argued that the fairness doctrine was codified. However, the court concluded that Congress had delegated under the general public interest standard the enforcement of the fairness doctrine.

[398] *Id.* (citations omitted).

[399] 530 F.2d 1001 (D.C. Cir. 1976).

[400] *Id.* at 1007 n.11. *See also American Security Council Education Foundation* v. *FCC*, 607 F.2d 438 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980). The District of Columbia Circuit Court of Appeals therein stated that "[i]n 1959, Congress confirmed the Commission's view that the fairness doctrine was part of the public interest standard" *Id.* at 443 n.12.

[401] *See Study of Fairness Doctrine*, 30 FCC 2d 26, 26–27 (1971) and *1974 Fairness Report*, *supra* n.3. It should be once again pointed out that the *1949 Fairness Report*, *supra* at n.6., found the doctrine to be statutory solely under the general public interest standard.

[402] *Report and Order* in BC Docket No. 81–741, FCC 83–120, 53 RR 2d 1306 (1983). *See also Notice of Proposed Rule Making* in MM Docket No. 83–331, FCC 83–130 (released May 25, 1983). (Commission stated that Fairness Doctrine was "statutorily approved" by Congress). We also note that then Chairman Richard E. Wiley in a separate statement to the reconsideration of the *1974 Fairness Report* concluded that "The literal wording of the statute indicates only that the Commission's fairness policies were left undisturbed . . . ." *Memorandum Opinion and Order on Reconsideration of the Fairness Report*, 58 FCC 2d at 700 (separate statement of Chairman Wiley).

[403] *See Notice of Proposed Rule Making* in MM Docket No. 83–670, 94 FCC 2d 678, 706 n.50 (1983).

[404] *Equal Time: Hearings on S. 251, S. 252, S. 1696 and H.J. Res. 247 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 88th Cong., 1st Sess. 59 (1963). *See also* NTIA Comments, *supra* n.348 at 9.

[405] *Fairness Doctrine: Hearings on S. 2, S. 608 and S. 1178 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 94th Cong., 1st. Sess. 13 (1975).

[406] *Id.*

[407] *See, e.g., Notice supra* n.1 at § 111 n.157.

[408] *Manelli Report*, *supra* n.318.

[409] *Id.* at 28.

it."[410] The Senate also issued a staff study in 1968 which determined that "Section 315 is a congressional enactment and the 'fairness doctrine,' although a qualifying reference to it appears in section 315, is not."[411] However, it did find that the "public interest, convenience, and necessity, requires each broadcast licensee to devote a reasonable percentage of his broadcast time to the presentation of programs dealing with issues of interest in the community served by the particular station."[412]

174. As demonstrated by the conflicting evidence found in the record, reaching a conclusion as to whether or not Congress has mandated our retention of the fairness doctrine is a difficult determination. We believe it unnecessary, however, to reach a definitive conclusion on this matter given our determination to defer action concerning the fairness doctrine pending review by Congress of the record compiled in this proceeding.

VI. Conclusion

175. Based on the voluminous record compiled in this proceeding, our experience in administering the doctrine and our general expertise in broadcast regulation policy determinations, we believe that as a policy matter the fairness doctrine no longer serves the public interest. Moreover, the development of the information services marketplace makes unnecessary any governmentally imposed obligation to provide balanced coverage of controversial issues of public importance. Furthermore, we have found that far from serving its intended purpose, the doctrine has a chilling effect on broadcaster's speech. Accordingly, we have questioned the permissibility of the doctrine as a matter of both policy and constitutional law.

176. Notwithstanding these conclusions, we have decided not to eliminate the fairness doctrine at this time. The doctrine has been a longstanding administrative policy and a central tenet of broadcast regulation in which Congress has shown a strong although often ambivalent interest. Indeed, while Congress has not yet chosen to eliminate the doctrine legislatively, several members of Congress have recently sponsored bills seeking to abolish the fairness doctrine and its related policies.[413] Congress also has held hearings to determine whether or not it should enact legislation to eliminate the doctrine.[414] In addition, we recognize that the United States Supreme Court in *FCC* v. *League of Women Voters of >California*[415] has similarly demonstrated an interest in our examination of the constitutional and policy implications underlying the fairness doctrine. Because of the intense Congressional interest in the fairness doctrine and the pendency of legislative proposals, we have determined that it would be inappropriate at this time to eliminate the fairness doctrine. Given our decision to defer to Congress on this matter, we also believe that it would be inappropriate for us to act on the various proposals to modify or restrict the scope of the fairness doctrine. It is also important to emphasize that we will continue to administer and enforce the fairness doctrine obligations of broadcasters and to underscore our expectation that broadcast licensees will continue to satisfy these requirements.

177. Accordingly, it is ordered, that this proceeding is terminated.

178. It is further ordered, that the motions requesting acceptance of late-filed pleadings are granted.

179. It is further ordered, that the "Application for Review" filed by the Media Access Project is denied.

180. It is further ordered, that the Secretary shall cause this *Report* to be printed in the Federal Communications Commission Reports.

181. It is further ordered, that the Secretary shall forward copies of this *Report* to the appropriate Committees and Subcommittees of the House of Representatives and the Senate.

Federal Communications Commission.*

William J. Tricarico,

Secretary.

Appendix

Parties Submitting Formal Comments in Gen. Docket No. 84-282 [1]

Accuracy in Media
American Advertising Foundation
American Association of Advertising Agencies
American Broadcasting Co. ("ABC")
American Cancer Society
American Civil Liberties Union ("ACLU")
American Heart Association
American Jewish Committee
American Jewish Congress
American Legal Foundation ("ALF")
American Newspaper Publishers Association
Antidefamation League of the B'nai B'rith
Arizona Television Co.
Ashville Musicians and Artists for a Sane Environment
Association of National Advertisers
Black Citizens for a Fair Media/Citizens Communications Center/League of United Latin American Citizens/National Association of Better Broadcasting ("BCFM et al.")
CBS, Inc. ("CBS")
Committee for Community Access
Common Cause
Democratic National Committee
Eagle Forum
Elba Development Corp/Multimedia, Inc. and Providence Journal Co.
Forward Communications Co., et al.
Foundation for the Arts of Peace
Freedom of Expression Foundation ("FEF")
General Motors/International Paper Co./Campbell Ewald Co. ("General Motors et al.")
Henry Geller/Donna Lampert
Glass Packaging Institute
Robert C. Greene
KGRL 940 (Gary Capps)
KIPR 95.FM
KMAN (B. Thornton)
Pamela Magasich
Maine Nuclear Referendum Committee
Luther Martin
Media Action Project Telecommunications Research and Action Center ("MAP/TRAC")
Meredith Corp.
Midwest Family Group
Mobil Corp.
National Association of Broadcasters ("NAB")
National Broadcasting Co. ("NBC")
National Cable Television Association
National League of Cities
National Radio Broadcasters Association
National Rifle Association of America
National Telecommunications and Information Administration ("NTIA")

[410] *Id.* at 29.

[411] *Staff Report of the Senate Committee on Commerce*, 90th. Cong., 2d Sess. 4 (Comm. Print. 1968).

[412] *Id.*

[413] *See, e.g.*, S. 1038, 99th Cong., 1st Sess. (1985); S. 22, 99th Cong., 1st Sess. (1985); H.R. 5585, 97th Cong., 2d Sess. (1982); and S. 22, 98th Cong., 1st Sess. (1983).

[414] *See, e.g., Freedom of Expression Act of 1983: Hearings on S. 1917 Before the Committee on Commerce, Science, and Transportation*, 98th Cong., 2d Sess. (1984). Senator Bob Packwood also requested that a staff report prepared by the National Telecommunications and Information Administration be printed for use by the Senate Committee on Commerce, Science, and Transportation. *Print and Electronic Media: The Case for First Amendment Parity Printed at the Direction of Senator Bob Packwood for the Committee on Commerce, Science, and Transportation*, 98th Cong., 1st. Sess. (1983). This study examined in detail whether there should be first amendment parity between the print and electronic media.

[415] 104 S.Ct. 3106 (1984). *See* ¶ 15, *supra*.

* See attached statement of Commissioner Mark S. Fowler, Chairman and concurring statement of Commissioner James H. Quello.

[1] For purposes of compiling this list of parties filing comments and reply comments, a filing was considered "formal" if it included the correct docket number and the proper number of copies were submitted.

People for the American Way
Post-Newsweek
Public Broadcasting Service and National Association of Public Television Stations
Public Media Center
Radio Television News Director Association
Society of Professional Journalists
Tribune Broadcasting Co.
United States Catholic Conference
Office of Communications of the United Church of Christ
Westinghouse Broadcasting and Cable ("Group W")
Yes to Stop Calloway Committee

Parties Submitting Formal Reply Comments

Actors Equity Guild et al.
American Arab Anti-Discrimination Committee
ABC
ACLU
American Federation of Labor and Congress of Industrial Organizations
ALF Authors League of America
Byron Bailer
Toni Bean
BCFM, et al.
Eric Buchanan
Deborah Bynum
Laura Byrd
CBS
Center for Science in the Public Interest
Sharon Chambers
Choosing Our Future
Committee for Responsible Investment, Medical Mission Sisters
Department for Professional Employees, AFL-CIO
Ecumedia
Donise Edwards
Janis Ernst
Cheryl N. Freeman
FEF
Alyce F. Gaither
Henry Geller/Donna Lampert
General Motors et al.
Sidney Hall
John Harvey
Kentucky Fair Tax Coalition
Catherine LaMarr
Andrew Lee
Mark Loud
Shari Mauney
MAP/TRAC
NAB
National Bar Association/National Association for the Advancement of Colored People
NBC
National Coalition to Ban Handguns
NTIA
Kay Pierson
Robert Rivers
Rhonda Rhea
Rosemary Ryan, M.D. et al.
Safe Energy Alliance of Alabama
Jennifer Small
United States Catholic Conference
United States Public Interest and Research Group
Telecommunications Research and Action Center
Cheryl Thompson
Laurie Washington
Group W
Yvette Williams

August 7, 1985.

Statement of Mark S. Fowler, Chairman

Re: Fairness Doctrine Report

250 years ago this week, a publisher named John Peter Zenger was on trial. Zenger ran the Weekly Journal, a New York paper that had reprinted the letters of two Whig journalists who had argued in their essays for freedom of the press, that "freedom of speech is ever the symptom as well as the effect of good government." For this, and for being a critic of the British authorities, Zenger had been charged with seditious libel by the Governor General of New York. He spent almost a year in jail awaiting trial. Although he was surely guilty under the prevailing laws at the time, the jury acquitted Zenger.

The lessons of the Zenger trial have never been lost on the United States, nor on this Commission. Today's report is linked to this country's tradition of people to criticize their government without recrimination or licensing.

Justice William O. Douglas foreshadowed this viewpoint in his own repudiation of the Fairness Doctrine 12 years ago. He said: "The Court . . . by endorsing the Fairness Doctrine sanctions a federal saddle on broadcast licensees that is agreeable to the traditions of nations that never have known freedom of press and that is tolerable in countries that do not have a written constitution containing prohibitions as absolute as those in the First Amendment." [1]

This very week the British Broadcasting Corporation experienced a walk-out of its journalists. They did not strike over wages or seniority, but over the matter that concerns us today: their freedom of the broadcast press to cover a controversial issue of public importance in the manner they saw fit. Justice Douglas was right: There is a difference amongst the nations of this world that have a constitutional protection against restraints on press and those that, unhappily, do not.

So it is freedom, then, that is at the heart of this exemplary example of draftsmanship from the Mass Media Bureau. I have made the advancement of First Amendment rights an uppermost objective of my Chairmanship. I feel pride and satisfaction that we have a report that comprehensively reviews the operation and context of the Fairness Doctrine and considers the comments of all those who participated in our proceeding. It responds to the arguments of proponents and opponents of the Fairness Doctrine in a scholarly and responsible manner.

Today's report is an indictment of a misguided government policy. It is a recital of its shortcomings, both legal and practical. The First Amendment dictates: Choose between the right of the press to criticize freely and the authority of the government to channel that criticism. Today's order is a statement by this Commission that we should reverse course, and head ballistically toward liberty of the press for radio and television. Free speech and free government thrive together or they fail together. John Peter Zenger said that. William O. Douglas said that. And today, so do we.

August 7, 1985.

Concurring Statement of FCC Commissioner James H. Quello

In re: Inquiry into the General Fairness Doctrine Obligations of Broadcast Licensees.

This *Report* contains a very well reasoned and persuasive indictment of the fairness doctrine. It presents conclusive evidence that the doctrine is unnecessary and that it does not further its purpose of encouraging the presentation of controversial issues of public importance. The *Report* strongly documents its ultimate conclusion that the fairness doctrine does not serve the public interest, and I fully support that conclusion.

I wish to emphasize, however, my determination that this record compels the conclusion that Congress intended to codify the fairness doctrine as part of the 1959 amendments to the

[1] Columbia Broadcast System v. Democratic Nat'l Comm., 412 U.S. 94, 817–18 (1973) (concurring opinion).

Communications Act.[1] The Commission has long acquiesced in the view that the fairness doctrine was codified by these amendments,[2] and, thus, the burden of proof must rest with those who would urge that the agency itself has authority to eliminate the doctrine. In my view, nothing in the record contradicts the clear language of section 315(a) which states that licensees have an "obligation imposed upon them under [the Communications Act] to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." [3]

Since I believe that the doctrine has been codified, I concur in the decision to defer to Congress on this matter.

[FR Doc. 85-20563 Filed 8-29-85; 8:45 am]
BILLING CODE 6712-01-M

[1] See Act of September 14, 1959, Pub. L. 86-274, section 1, 73 Stat. 557 (amending 47 U.S.C. 315(a) (1982)).

[2] See, e.g., *Fairness Report*, 48 FCC 2d 1, 1 (1974).

[3] 47 U.S.C. 315(a) (1984).

federal register

Friday
August 30, 1985

Part VI

Department of Health and Human Services

Food and Drug Administration

21 CFR Parts 606 and 640

Current Good Manufacturing Practice for Blood and Blood Components; Uniform Blood Labeling; Final Rule

Guideline for the Uniform Labeling of Blood and Blood Components; Availability of Guideline; Notice

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 606 and 640

[Docket No. 80N-0120]

Current Good Manufacturing Practice for Blood and Blood Components; Uniform Blood Labeling

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is revising the labeling requirements for any blood and blood component product that is collected or manufactured in a blood bank establishment to combine, simplify, and update the biologics regulations. Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of a final guideline "Guideline for the Uniform Labeling of Blood and Blood Components" that is consistent with this final rule. The guideline provides criteria for the printing and use of a standardized container label for each blood and blood component product.

EFFECTIVE DATE: September 2, 1986 for all affected products initially introduced or initially delivered for introduction into interstate commerce. The labeling for all blood components collected on or after this effective date shall comply with the requirements set forth in these regulations. FDA advises that licensed establishments may begin using labeling printed in accordance with these regulations and the guideline "Guideline for the Uniform Labeling of Blood and Blood Components" without its prior approval by FDA. Concurrent with its use, licensed establishments are required to submit to the Director, Offices of Biologics Research and Review (HFN-800), Food and Drug Administration, 8800 Rockville Pike, Bethesda, MD 20205, the revised labeling and instruction circular as an amendment to their product license(s). For additional information concerning the effective date, see the discussion under the heading "Paperwork Reduction Act of 1980" located at the end of the preamble.

FOR FURTHER INFORMATION CONTACT: Steven F. Falter, Center for Drugs and Biologics (HFN-364), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-3650.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of October 31, 1980 (45 FR 72416), FDA issued a proposed rule to amend the biologics regulations to revise and simplify the labeling requirements for any transfusible blood and blood component product that is collected or manufactured in a blood bank establishment and unifying these requirements under one set of regulations in §§ 606.120, 606.121, and 606.122 (21 CFR 606.120, 606.121, and 606.122). FDA believed that these proposed labeling requirements would: (1) Improve the eye-readability of the container label by limiting the amount of information required on the label; (2) provide for the use of a machine-readable code on the label; (3) unify all labeling requirements in one place in the current good manufacturing practices for blood and blood components regulations (21 CFR Part 606); and (4) encourage the use of uniform labels by all establishments engaged in the collection, processing, or labeling of blood and blood components.

I. Background

In the preamble to the October 31, 1980 proposed rule, FDA also announced the availability of a draft guideline entitled "Guidelines for the Uniform Labeling of Blood and Blood Components." The guideline provided specifications for a uniform blood label, consistent with the proposed rules, that was suitable for any blood establishment to use in labeling blood and blood components intended for transfusion. The uniform label was developed with the cooperation of the Committee for Commonality in Blood Banking Automation (CCBBA) of the American Blood Commission (ABC). Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of the final guideline based on the October 1980 draft guideline. The final guideline provides instructions for the printing and proper use of a uniform blood label consistent with the final regulations. Any changes in the final guideline are described in the notice announcing its availability.

FDA also published two other proposals in the **Federal Register** of October 31, 1980 (45 FR 72404) that are related to this final rule. The first of these proposals was intended to revise the proper names for many biological products, including the proper names for blood and blood components. In the **Federal Register** of January 28, 1985 (50 FR 4128), FDA published a final rule based on that proposal. The proper names for blood products used herein reflect the changes in names promulgated in that final rule.

In the second related proposal published in the **Federal Register** of October 31, 1980 (45 FR 72422), FDA proposed to revise certain requirements for the additional standards for human blood and blood products. FDA has withdrawn that proposed rule for reconsideration. See the **Federal Register** of July 22, 1983 (48 FR 33494). Because of that withdrawal, FDA is changing several labeling provisions of this final rule and is explaining these changes later in the preamble.

II. FDA's Response To Comments

FDA provided interested persons 60 days to submit written comments on the proposed rule concerning uniform blood labeling. In response to a request by a licensed manufacturer of blood components and blood derivatives, FDA extended the comment period another 60 days by a notice published in the **Federal Register** of December 9, 1980 (45 FR 81065). FDA received 54 letters of comment in response to the proposal, and most letters contained more than one comment. Most of the comments supported FDA's proposed actions. A summary of the comments and FDA's responses follow.

1. A comment noted that in proposed § 606.121(a), Source Plasma is exempt from the labeling requirements in § 606.121, but products such as Source Plasma Liquid or Source Plasma Salvaged are not mentioned. The comment asked whether these products also were exempt from the labeling requirements.

FDA advises that when a name of a biologic product is used in a regulation (excluding any modifiers or the identification of the anticoagulant), the requirement applies to all products using that name alone or together with any required modifiers in the product's proper name. See definition of "proper name" in 21 CFR 600.3(k). Thus, the exemption for Source Plasma in § 606.121 applies to all forms of Source Plasma—Source Plasma, Source Plasma Liquid, Source Plasma Salvaged, etc. If a requirement in the regulations for biologics does not apply to all products using a name, the requirement identifies the particular products to which it applies. FDA believes that it is unnecessary and cumbersome to list in the regulations the proper name of each product with each approved modifier.

2. One comment on proposed § 606.121(b) stated that the language used incorrectly implies that the only instance in which labels are permitted to be altered is where blood components are removed from the product. The comment suggested that the provision permit the revision of a label to indicate the proper name and other information to describe the "* * * contents

remaining in a container after processing."

FDA partially agrees with the comment. In certain cases, such as the deglycerolizing of red flood cells, no blood components are removed, but the unit may require relabeling. Accordingly, in the final rule FDA is revising § 606.121(b) to provide that the labeling shall not be removed, altered, or obscured except to indicate information required to identify accurately the contents of a container after blood components have been prepared from the unit. FDA believes that use of the word "processing" would not be appropriate, because the word is interpreted in the laboratory to include test performed on the blood , such as the test for hepatitis, that do not require changes in the container label.

3. A comment stated that the phrase "the label provided by the collection facility" in proposed § 606.121(b) implies that the collecting facility and initial processing facility always add a label to the collected unit. The comment noted that the manufacturer of the blood collection unit (blood bag) often provides preprinted labeling, and the collecting facility merely adds additional required information to that labeling during collection and processing.

FDA disagrees with the comment. Whether or not the blood container is prelabeled or partially or wholly labeled by the collecting facility, under this final rule the collecting (and processing) facility is responsible for the labeling used on the blood product, including the product label. Thus, for enforcement purposes, FDA considers that the collection facility provides the labeling used. Accordingly, the agency concludes that the reqirement is clear and correct, and FDA is issuing § 606.121(b) without change.

4. Four comments on proposed § 606.121 (b) and (c)(13)(iv) asked whether an additional unit number could be added to the label of a unit of blood by a receiving facility when the unit is received from another location. Two of these comments stated that renumbering of a unit of blood should be permitted. One comment asked for instructions on how to renumber a unit of blood if it is received from another facility.

FDA agrees that a second unit number may be added to the label of a unit of blood, although the agency discourages this practice. When two unit numbers are present on a container of blood, someone may not identify the product correctly, resulting in a transfusion error. Where adequate labeling controls are present, the receiving facility may add to a unit of blood a second unit number that is consistent with the receiving facility's numbering system. FDA recommends that the receiving facility place the added unit number on the label in a uniform location and suggests that the added unit number (or label) be placed in the space reserved for the optional collection date or directly above the original unit number. Under § 606.121(b), the added unit number shall not conceal the original unit number on the container.

5. One comment noted that there is no space on the uniform label for including the identification of more than one establishment when the blood is collected and processed by separate facilities.

FDA disagrees with the comment. The uniform label provides space to record the name and address of the facility that receives blood. The space is located on the uniform label directly below the space for recording the name and address of the collecting facility.

6. One comment on proposed § 606.121(c)(2) recommended that the facility's registration number be included on the label if the registration number is to serve as the encoded collection center identifier required by § 606.121(c)(13)(iii).

FDA agrees with the comment. The registration number, assigned to each location involved in the collection or processing of blood, should be included on the container label for the proper identification of the collecting establishment. Accordingly, in the final rule, FDA is amending § 606.121(c)(2) to require the inclusion on the label of the registration number of the collecting establishment. Many establishments have multiple locations for the collection of blood, each with a different registration number. FDA advises that such an establishment may select one registration number, preferably that of the primary locaton, for inclusion on the container label in eye-readable form and in encoded form as the collection center identifier. However, an establishment with multiple locations that uses one registration number on the container label for all locations is required to have adequate internal methods for determining the specific collection site of a unit of blood.

7. One comment on proposed § 606.121(c)(2) requested that FDA clarify the provision by stating that the license number should appear only on a licensed product.

FDA agrees with the comment. Section 351 of the Public Health Service Act (42 U.S.C. 262) requires that the license number of the manufacturer be marked on the label of a container of a licensed biological product. Conversely, the label of an unlicensed biological product must not be marked with a license number. Accordingly, in the final rule FDA is clarifying § 606.121(c)(2) to require that the license number of each manufacturer be included on the container label only for licensed products.

8. A comment asked that FDA clarify the discrepancy between proposed § 606.121(c)(3), which requires that the container label include the "donor, pool, or lot number" and current § 640.24(a) (21 CFR 640.24(a)), which states that platelets shall not be pooled during processing.

FDA disagrees with the comment. FDA believes that §§ 606.121(c)(3) and 640.24(a) are consistent. Section 606.121(c)(3) lists several possible alternatives for identifying a unit and relating it to the donor. Because platelets may not be pooled during processing, a pool number would not exist for such units and therefore could not be included on the container label. However, after preparation of individual platelet units is completed, units of platelets intended for a specific patient often are pooled by the transfusing facility. A pool number, relating the pooled platelets to the individual donor numbers comprising the pool, may then be assigned the pooled platelet product and included on its label.

9. Two comments on proposed § 606.121(c)(4) recommended that the expiration date indicate the month of expiration as well as the day and year.

FDA agrees with the comment. The word "month" was inadvertently omitted in the proposed rule. The final rule is amended accordingly.

10. Two comments on proposed § 606.121(c)(5) argued that because the majority of blood banks use only volunteer donors, the identification on the blood label of volunteer donors should not be required. The comments suggested that only paid donors be identified on the label, relieving the majority of blood banks from this labeling requirement.

FDA disagrees with the comments. In the Federal Register of January 13, 1978 (43 FR 2142), FDA promulgated the requirement that a donor classification statement be included on the label to protect the public health. FDA based its regulation on data showing that blood from paid donors generally presents a higher risk of transmitting hepatitis than blood from volunteer donors. At a June 1982 meeting, FDA's Blood Products Advisory Committee was asked to consider, among other things, FDA's donor classification requirements. The

Blood Products Advisory Committee recommended that the current donor classification requirements be retained without change. A number of States have enacted legislation that requires donor classification on blood labels, with specific labeling requirements varying from State to State. FDA is providing a uniform label for blood products shipped in interstate commerce and is protecting the public health by continuing to require a statement of donor classification on the label of each unit of blood.

11. One comment recommended that the definition of "paid donor" under proposed § 606.121(c)(5)(i) be revised to include a donor who receives nonmonetary payment.

FDA disagrees with the comment. FDA believes that the higher risk of posttransfusion hepatitis associated with blood from paid donors results primarily because direct monetary payment for blood attracts donations from persons from socioeconomic groups with prevalent transmissible hepatitis. When persons donating blood obtain nonmonetary long-term benefits that are not readily convertible to cash, such benefits provide incentives for persons from groups at low risk of hepatitis to donate blood, while such incentives are not as likely to attract persons from groups with a high risk of hepatitis. FDA continues to believe that a donor who receives nonmonetary long-term benefits is properly classified as a "volunteer donor." Accordingly, in the final rule FDA did not change the definitions of "paid donor" and "volunteer donor."

12. One comment on proposed § 606.121(c)(6), which concerns the accuracy of the label declaration of the volume of certain blood products, recommended that this proposed requirement be revised to permit use of a preprinted volume range on the label of Platelets.

FDA agrees with the comment. In a final rule promulgated on October 29, 1982 (47 FR 49017), FDA eliminated the volume limits formerly required on labels for Platelets and permitted the product to be resuspended in an appropriate volume of plasma. Because FDA now permits use on labels of an unspecified range of volumes for Platelets, it may not be possible to always achieve a Platelet volume accurate to within ±10 percent, as required in proposed § 606.121(c)(6). Therefore, in the final rule FDA is permitting a reasonable range of Platelet volumes on the label for the product. To date, on the uniform blood labels submitted to the agency for review and approval, industry has used a range of up to 20 milliliters (mL) for the preprinted volume range for Platelets, e.g., 45 mL to 65 mL. FDA will consider and approve other volume ranges for Platelets, provided that the labeled volume range is informative and consistent with current good manufacturing practices.

13. Two comments on § 606.121 (c)(8)(iii) and (d)(2) recommended that the statement "PROPERLY IDENTIFY INTENDED RECIPIENT" be of the most prominence on the label and the only label element printed in red. As a basis for this recommendation, the comment noted that a transfusion given to the wrong patient is the most common cause of an avoidable fatal reaction.

FDA disagrees with the recommendation. FDA recognizes that this labeling statement is important for the reason stated in the comment. On the uniform label presented in the final guideline, the statement "PROPERLY IDENTIFY INTENDED RECIPIENT" is printed all in capitals in 6-point size type and is one of three statements in red. The prototype label, modified to meet FDA requirements, was field tested by 16 blood banking establishments. The uniform label was found to be functional through field testing and through its voluntary use since the time of the proposed rule. As practical experience is gained through the label's use, FDA may revise the format of the uniform label to improve its utility. Until such experience clearly demonstrates the need for improvements, FDA intends to support, through regulations and the guideline, the use of the uniform label.

14. One comment on proposed § 606.121(c)(9) (redesignated as § 606.121(c)(9)(i) in the final rule) recommended that the required statement "This product may transmit the agent of hepatitis" be revised editorially to read: "This product may transmit one or more agents of hepatitis."

FDA agrees in part and disagrees in part with the comment. FDA agrees that the wording of the proposed statement was not precise. However, FDA disagrees that the exact suggested language be used. FDA believes that the suggested language is not broad enough in scope to meet current circumstances. Since the proposed rule was published, scientists have determined that human T-lymphotropic virus type III (HTLV-III), the suspected causative agent of acquired immunodeficiency syndrome (AIDS), may be transmitted by blood transfusion. Although blood establishments are now voluntarily testing blood for antibody to HTLV-III, FDA believes that the possibility of transmitting the causative agent of AIDS by blood transfusion will be reduced but not eliminated. Additionally, on rare occasions other infectious agents, such as cytomegalovirus or malaria, may be carried in blood. Accordingly, because infectious agents other than hepatitis may be carried in blood, FDA is amending the final rule in § 606.121(c)(9) to require that the container label include the cautionary statement "This product may transmit infectious agents."

15. One comment on proposed § 606.121(c)(9) (redesignated as § 606.121(c)(9)(i) in the final rule) recommended that the provision not apply to the labeling of products intended for autologous infusion.

FDA agrees with the comment. The labeling provisions necessary for blood intended for autologous infusion (return of blood by infusion to the original donor) are those that ensure that such blood is infused into the donor and not mistakenly used homologously. Many of the general labeling requirements, such as the volunteer donor statement, unexpected antibody information, and blood grouping information, are not necessary and may be omitted for blood intended solely for autologous use. However, as provided in § 606.121(i)(5), blood originally intended for autologous purposes is sometimes diverted for homologous use, in which case all labeling requirements for homologous transfusion must be met.

16. One comment on § 606.121(c)(10) asked whether the volume of source material should include the volume of anticoagulant. If the anticoagulant volume was not included, the comment contended that the provision would be inconsistent with § 606.121(c)(6). The comment also asked why a volume range (±10 percent) is permitted in paragraph (c)(6) and not in (c)(10).

FDA believes that § 606.121(c) (6) and (10) are consistent. Under § 606121(c)(6), FDA requires that the product label provide the user with a reasonably accurate statement of the total volume of the product, including the volume of anticoagulant. Under § 606.121(c)(10), FDA requires that the label for blood components include a statement of the name and volume of the source material. The statement of the source material volume will aid the user in estimating the final product's biological activity. Because the anticoagulant does not contribute directly to the final product's activity, FDA does not require that the anticoagulant volume be included as part of the source material volume. Often a blood facility will obtain source material from another facility for the manufacture of blood components. The receiving facility is not responsible for

confirming the accuracy of the volume statement on the label of the source material. Accordingly, FDA does not require the facility to assure that the statement of source material volume is within specific limits of accuracy.

17. One comment objected to the requirements of § 606.121(c)(12). The comment contended that there is one definitive report that clearly establishes the D^u antigen to be far less immunogenic than the D(Rh_o) antigen and that the remaining examples of claimed Rh immunization by the D^u antigen are most questionable. In addition, the comment noted that there are several grades of D^u antigen which vary greatly in ease of detection and potential for acting as an immunogen. The comment recommended that blood found nonreactive by automated testing procedures or by manual methods using the indirect antiglobulin procedure be labeled as Rh negative.

FDA agrees with the comment, but finds revision of the regulations to be unnecessary. The regulation requires that a test for D^u antigen be performed if the test using Anti-D Blood Grouping Serum is negative; the method of testing for the D^u antigen is not specified. Both the indirect antiglobulin procedure and some automated testing procedures in current use have been found acceptable by the agency for detecting the D^u antigen, even though some of the weakest variants may not be detected by these methods. Licensed blood banks may incorporate any of the approved test methods by requesting an amendment to their product license. Labeling accompanying the various reagents and automated equipment indicates whether the product is suitable for detecting the D^u antigen.

18. Six comments on § 606.121(c)(12) argued that a label identifying the Rh group should not be required on Cryoprecipitated AHF or Plasma. The comments stated that the rare occasions in which transfusion with Rh-positive Plasma or Cryoprecipitated AHF causes Rh antibody production in Rh-negative recipients does not justify the additional expense of retaining additional labeling. Two comments noted that labeling these products with the Rh group could confuse an uninformed individual who may not know when matching of the Rh groups of the blood product and recipient is necessary.

FDA partially agrees with the comments. As stated in the preamble to the October 1980 proposal, some clinicians believe that only Rh negative units of Plasma should be used for transfusing certain patients, such as potentially child-bearing Rh negative females for whom the consequences of immunization are most serious. To omit the Rh group from the label would deprive the clinician of the information necessary to implement this option. Furthermore, the agency believes that only thoroughly trained personnel, acting in accordance with written standard operating procedures, should be given the responsibility of determining the appropriate handling and testing of blood products. Accordingly, the agency does not believe that the labeling of blood components with the Rh group will create confusion on the part of the individuals using the blood components.

FDA also proposed to require that the donor's Rh group be on the container label of Cryoprecipitated AHF. However, unlike Plasma, Cryoprecipitated AHF undergoes a second centrifugation during processing through which red blood cell fragments, containing the Rh antigen, are removed. FDA is not aware of a documented case of Cryoprecipitated AHF causing Rh antibody production in an Rh-negative recipient. Accordingly, FDA is amending § 606.121(c)(12) in the final rule to permit the omission of the Rh group on Cryoprecipitated AHF. FDA expects that many blood banks will continue to identify the Rh group on Cryoprecipitated AHF labels. On the uniform label, the ABO and Rh groups are printed on one labeling unit. To omit the Rh group, an establishment would have to purchase additional labels containing only the ABO group, thereby increasing its label inventory and labeling costs. Accordingly, FDA advises that establishments may continue to include the Rh group on Cryoprecipitated AHF labels to limit labeling costs and to provide maximum information to the using clinician.

19. Eleven comments on proposed § 606.121(c)(13) objected to the required inclusion of encoded information on the labels of transfusible blood and blood components. A variety of reasons were given for this objection, but the majority of comments said that the additional expense of encoded labels cannot be justified by any potential benefits, especially for those establishments that are not computerized to allow use of the machine-readable codes. Some of the comments expressed the belief that machine-readable encodement was useful only for those establishments extensively engaged in the interregional exchange of blood and blood components. Accordingly, many of the comments suggested that encoded information be prescribed only on an optional basis. One comment stated specifically that the encoded unit number should not be required on container labels. One comment from registered but unlicensed blood bank asked whether unlicensed establishments would be required to adopt the bar code system for blood labeling.

FDA agrees that it is unnecessary to require encoding. From the time the October 1980 proposed rule was published, FDA has encouraged the voluntary adoption of the uniform label, including bar coding. Currently, approximately two-thirds of the blood distributed in the United States is labeled with the bar-coded uniform label. Because of the benefits that may be derived from the use of computer technology, FDA believes that use of machine-readable symbols on blood labels will continue to expand whether or not FDA required their use.

The use of computer technology in blood banking will be of substantial benefit in reducing labeling and recording errors, providing a more efficient means of recording and storing information, controlling inventory and assisting in the interchange of blood among establishments. In addition, the use of a uniform label will reduce overall labeling costs in contrast to the expense of each establishment developing and printing its own customs labels. It is expected that blood establishments will be able to purchase the uniform label as a standard catalogue item from its hospital supply service. Large regional blood centers often supplement their blood inventories with blood collected and labeled at local blood banks within their region. Because of recordkeeping difficulties, computerized regional blood centers have found it impractical to include blood with unencoded labels in their inventories. If a significant percentage of blood in a center's region is unencoded and, therefore, unavailable to the center, the center's ability to efficiently supply a region's blood needs may be hindered, especially in an emergency situation. However, for those establishments that are not yet computerized and do not frequently exchange blood and blood components with computerized establishments, the direct benefit of including encoded information on the container label would be minimal. Upon reconsideration, FDA has determined that the voluntary adoption of encoded labeling is adequate to support the efficient use of blood resources by computerized facilities and it is unnecessary to require use of bar-coded blood labels at this time.

Accordingly, FDA is amending § 606.121(c)(13) in the final rule by removing the requirement that certain

information be encoded on the container label of blood and blood components. Instead, in § 606.121(c)(13), FDA is requiring that any machine-readable coding system used voluntarily for labeling blood and blood components be one approved for such use by the Director, Office of Biologics Research and Review.

20. Two comments on § 606.121(c)(13) argued that FDA has not adequately investigated the economic impact of the proposed regulations and that the information placed on file with Dockets Management Branch is inadequate to substantiate the economic effects of requiring encodement of information on the labels of blood and blood components.

FDA disagrees with the comment. FDA primarily based its economic assessment upon a cost comparison of the then current labeling and the uniform label, including bar codes, provided by a major blood banking organization. The costs were verified by data supplied by a printer of blood container labels. No specific data were received contradicting the estimates provided in FDA's economic assessment. FDA believes that the cost estimates provided in its economic assessment that accompanied the proposed rule were valid at that time. For its final rule, FDA has reassessed the economic impact, with the encoded uniform label serving as the basis for cost estimates, and an updated revised economic assessment is on file with the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

21. Five comments on § 606.121(c)(13) agreed with the principle of encoding information on container labels; however, the comments recommended that a means of encodement be used that is readable both by the eye and machine. Four of the comments specifically recommended the use of the Optical Character Recognition (OCR) method of encoding information. One manufacturer of equipment compatible with the OCR system submitted extensive technical information on the OCR system. Another comment related the perceived merits of the OCR system in comparison with the bar-code method.

FDA cannot accept the OCR system as an alternative method for encoding information at this time. CCBBA considered a number of candidate symbol systems, including the OCR system, when selecting the CODABAR™ symbol as most appropriate for blood-banking automation. CCBBA's findings and recommendations on the symbol systems it reviewed are included as Volume III of its Final Report which is on file under Docket No. 80N-0120. In light of the comments and information received in response to the proposed rule, members of FDA and ABC again considered the merits of the OCR system compared with the CODABAR™ system. The review reaffirmed CCBBA's original finding that, based upon available data, the OCR system has several disadvantages and no significant advantage when compared with the use of its CODABAR™ system in a blood-bank setting. Of primary concern to FDA, the available data indicate that OCR symbols have a higher rate of substitution errors (errors related to unidentified misreads) than CODABAR™ symbols. Because such errors may not be identified, a labeling or transfusion error may result. FDA recognizes that the technology surrounding automated data processing is rapidly advancing and will continue to monitor alternative methods of encodement. FDA will consider data to support a change to the OCR system or other methodology at any time. If another system is found equal or superior to the current system, the Director, Office of Biologics Research and Review, may approve the candidate symbol as an alternative method of encoding information on the blood container label.

22. One comment on § 606.121(c)(13) stated that if labels containing the encoded Julian date were misprinted or misplaced, it would take 30 to 45 days to replace labeling containing bar-codes, during which time no products could be labeled.

FDA disagrees with the comment. The expiration date is not an encoded element of the uniform label and is written in the form of the day, month, and year of expiration. Julian dating, the system in which the days of the year are numbered sequentially from 1 to 365, may be used to identify the collection date of the blood unit. Use of the collection date is optional and, when used, may be presented in encoded and printed forms. It is expected that those establishments identifying the collection date on the label will use on-site bar-code printing equipment to print the bar-coded label upon demand. Accordingly, only blank collection date labels need be kept in stock by those establishments choosing to use this labeling element, and no problems in maintaining an adequate labeling inventory should result.

23. Two comments on § 606.121(c)(13)(ii) stated that identification of the type of anticoagulant should not be required on the label for frozen red blood cell products because the final product will be washed and the anticoagulant effectively removed.

FDA agrees with the comments. FDA is revising the provision in the final rule to indicate that it applies only to unfrozen red blood cell products. Similarly, FDA is revising the applicability of § 606.121(e)(2)(i) in the final rule.

24. One comment on § 606.121(c)(13)(ii) opposed the required inclusion of the type of anticoagulant on labels for Whole Blood and Red Blood Cells. The comment stated that this provision could cause problems for blood banks using more than one type of anticoagulant. The comment expressed the opinion that because the type of anticoagulant used does not affect the safety or effectiveness of the final products, this information may readily be omitted. As an alternative, the comment suggested that the information circular describe the anticoagulant solution used for each collected product.

FDA disagrees with the comment. The type of anticoagulant used is known to affect a product's physical properties, such as stability, and may influence decisions as to what blood components should be prepared. In a computerized system, expiration dates are set according to the anticoagulant and product bar code; to avoid mislabeling, the same information must appear below the bar code in eye-readable form. Although it is true that establishments using more than one type of anticoagulant will need to retain product labels for each anticoagulant, FDA does not find this an undue burden when necessary to assure the accurate identification and effective use of the product. Furthermore, FDA considers the anticoagulant to be an active ingredient of a blood product. In accordance with section 502(e)(1)(A) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 352(e)(1)(A)), information concerning each active ingredient must be provided on the container label of a drug product. Because biological products are also drugs and therefore subject to the act, section 502(e)(1)(A) requires that the labeling for Whole Blood and Red Blood Cells include the type of anticoagulant.

25. One comment on § 606.121(c)(13)(iii) argued that requiring the inclusion of the collection center identifier on the label will cause a serious labeling problem for establishments that have several collection sites and one centralized processing facility, all under a single

establishment license. The comment noted that a properly run establishment will have internal methods to determine the collection site of a unit of blood and only the identifier for the licensed establishment is necessary on the blood label.

FDA agrees with the comment. As stated above in paragraph 6 of this preamble, an establishment with multiple collection sites need select only one registration number, preferably that of the primary location, for inclusion on the container label in eye-readable form and, optionally, in encoded form as the collection center identifier. Establishments with multiple locations but using only one registration number on the label must have appropriate internal methods for determining the specific collection site of a unit of blood.

26. About 40 comments on § 606.121(d)(3) recommended that the color coding for differentiating ABO blood groups not be changed. Many of the comments argued that the current color codes have been in use for a number of years and to change them would cause confusion and possibly misidentification of the blood group. Further, the comments said that changing the color codes to be consistent with the colors used for blood grouping sera is unnecessary because different personnel are usually involved in handling each type of product and the discrepancy in color codes has not caused confusion in the past. Two comments requested clarification of the effective date for the change in color codes. Many of the comments stated that a 1-year transition period, during which color coding would not be permitted, was not long enough to prevent confusion and to dispose of the more stable blood components labeled with the old color codes.

FDA agrees with the comments. FDA is amending § 606.121(d)(3) in the final rule to prescribe the colors for designating the ABO blood group that are in current use and were formerly codified under § 640.7(d)(2). FDA proposed to change the prescribed colors designating ABO Blood groups in response to a suggestion by CCBBA that the colors be changed for consistency with those prescribed for Blood Grouping Sera in § 660.28(a)(1) (21 CFR 660.28(a)(1)). Considering the number of comments opposing the proposed change and the lack of supporting comments, FDA agrees that the color scheme should not be changed when the current scheme has functioned successfully for a number of years. Because the existing color scheme is being retained, FDA is deleting in the final rule the provision in proposed § 606.121(d)(5) for the effective date and transition period.

27. Two comments on § 606.121(d)(3) recommended that there be no color scheme for identifying ABO groups on the label.

FDA disagrees with the comments. The agency is aware that some persons involved in blood banking and blood transfusion do not support the use of color coding in designating the ABO group. However, many establishments use color coding so that persons at the transfusion site may conveniently reaffirm, even from a distance, that blood of the correct ABO group is being used. FDA is not aware of any data supporting either the required use or prohibition of ABO group color coding. Accordingly, FDA will continue to permit the optional use of color coding for identifying the ABO group of blood units.

28. One comment stated that it was unclear throughout the regulations whether the name of the anticoagulant should be considered as part of the proper name of the product. The comment suggested that, because additional new anticoagulants are continually being developed, it is unnecessary to list the anticoagulant names under § 606.121(e)(1)(ii). Accordingly, the comment suggested that § 606.121(e)(1)(ii) be revised to read: "The name of the anticoagulant shall be part of the proper name of the product, immediately preceding the term 'Whole Blood', and shall be expressed as set forth in the order approving the new anticoagulant."

FDA disagrees with the comment. The name of the anticoagulant is considered a modifier of the proper name. FDA is not aware of any regulation that implies that the anticoagulant name is part of the proper name of the blood product. FDA believes that the revision to § 606.121(e)(1)(ii) suggested in the comment is not as informative as the current wording, nor would it have the same effect. The nomenclature provided in the regulation is considerably revised from that formerly codified in labeling regulations for Whole Blood (Human) (21 CFR 640.7(b)(1)). Therefore, the suggested wording would be incorrect as it would suggest that the outdated names for anticoagulant should continue to be used. FDA does recognize that, as proposed, § 606.121(e)(1)(ii) would require amendment each time a new anticoagulant is approved. Accordingly, FDA is revising the final rule to permit the use of other anticoagulant names upon the approval of the Director, Office of Biologics Research and Review.

29. Two comments on § 606.121(e)(1)(iii) argued that there is no practical value for placing the name of an antibody on a Whole Blood container label. Rather, it is preferable to convert such units to Red Blood Cells. One of the comments asked whether the intent of this provision is to label the names of all unexpected antibodies or only the significant ones.

FDA disagrees with these comments. Although the agency agrees that often it is preferable to convert units of whole blood containing unexpected antibodies to red blood cells, there are occasions when units of whole blood containing unexpected antibodies must be transfused, such as when there are shortages of compatible blood. FDA believes such blood may safely be transfused, provided the blood is found compatible with that of the recipient. Accordingly, the blood should be labeled with any antibodies found to be present. FDA advises that the provision requires the listing of all unexpected antibodies found. However, FDA has consistently permitted the use of test methodology that can greatly minimize the number of insignificant antibodies detected. All unexpected antibodies identified should be listed so that those administering the blood may make the determination of which antibodies should be ignored for the individual recipient. In the October 31, 1980 proposal to revise the additional standards for Whole Blood, FDA proposed to require that Whole Blood from previously pregnant or transfused donors be tested for unexpected antibodies by a method that demonstrates significant alloantibodies. That proposed rule has been withdrawn (48 FR 33494; July 22, 1983). But FDA intends to repropose this requirement by separate rulemaking procedures. At present, the testing of blood from previously pregnant or transfused donors for unexpected antibodies is not explicitly required, but strongly recommended by FDA. Any unexpected antibodies found shall be listed on the container label, as prescribed in § 606.121 (e)(1)(ii), (2)(ii), and (4).

30. One comment on § 606.121 (e)(1)(iii) and (2)(ii) asked that the use of a special label or tie-tag be permitted for identifying unexpected antibodies. The comment noted that the number of units of blood that will have significant antibodies will be very small and tie-tags are less expensive, easier to apply, and easier to write on.

FDA accepts the comment. FDA supports the concept, developed by CCBBA and endorsed by the major blood banking organizations, that

standardized (uniform) container labeling should be used by blood banks for identifying all information. But the agency recognizes that for some establishments, especially those collecting and labeling a small number of units of blood each year, the use of tie-tags for specialized information may be more economical. Accordingly, FDA is amending the final rule by adding § 606.121(j) to permit the optional use of tie-tags for identifying unexpected antibodies. Provisions in proposed § 606.121 (h)(1) and (i)(2) that permit the use of tie-tags for conveying required information for blood shipped in an emergency and blood intended for autologous infusion are also combined under new § 606.121(j).

31. One comment on § 606.121(e)(3) stated that the provision implies that Platelets may be prepared in an open system; the comment asked that this provision be clarified.

FDA disagrees with the comment. Section 606.121(e)(3) does not permit the preparation of Platelets in an open system. The proposed rule listed the products, including Platelets and products prepared in an open system, that must have the hour, day, month, and year of expiration on the container label. The provision only pertains to expiration dating and does not imply that Platelets may be prepared in an open system.

32. One comment on § 606.121(e)(5) noted that the term "recovered plasma" is not defined in the regulations. The comment recommended that an official definition be included. Another comment contended that "recovered plasma" is not a proper name and it should be changed to "Salvaged Source Plasma."

FDA disagrees with the comments. Recovered plasma is plasma obtained as a byproduct of component preparation or recovered from outdated units of blood. Recovered plasma is used as a source material for a variety of injectable and noninjectable biological products. FDA routinely assigns a proper name to each licensed biological product. (See the definition of "proper name" under § 600.3(k) (21 CFR 600.3(k)).) (Because recovered plasma is not a licensed biologic, FDA sees no need to formally define the product or assign a proper name. "Recovered plasma" is the name adopted by the majority of the industry for identifying this material, and the regulations are worded consistently. Source Plasma Salvaged is a specific licensed product prepared only by pheresis; therefore, assigning the name "Salvaged Source Plasma" to an unlicensed product would be confusing.

33. One comment addressed § 606.121(e)(5), which prescribes three labeling requirements for the labels of recovered plasma. The comment stated that further definition is required to determine the circumstances under which each of the three labeling provisions would apply.

FDA believes the regulation is adequately clear to those facilities affected by its provisions; however, for the information of the reader, the circumstances for use of each labeling statement are explained below.

a. *Section 605.121(e)(5)(i).* This provision requires that all recovered plasma container labels include the date of collection of the oldest material in the container. The oldest material in the container is that prepared from whole blood collected on the earliest date.

b. *Section 606.121(e)(5)(ii).* Although recovered plasma may not be used for transfusion, it may serve as a source material for a variety of licensed and unlicensed biological products. Section 606.121(e)(5)(ii) prescribes labeling for such usage. Recovered plasma intended for use in manufacturing injectable products must be labeled with the statement "Caution: For Manufacturing Use Only." Recovered plasma intended for use in manufacturing noninjectable products must be labeled "Caution: For Use in Manufacturing Noninjectable Products Only."

c. *Section 606.121(e)(5)(iii).* This provision governs the use of recovered plasma that does not meet the requirements for use in licensable products. Recovered plasma can only be used in manufacturing a licensable product if plasma is in "short supply" and the recovered plasma is shipped under a "short supply agreement" as required by § 601.22. Section 606.121(e)(5)(iii) requires that plasma not shipped under a "short supply agreement" and therefore not usable in a licensed biological product be labeled "Not For Use in Products Subject to Licensure Under Section 351 of the Public Health Service Act."

34. One comment recommended that the requirements of § 606.121(f), which requires that blood and blood components unsuitable for transfusion be labeled "NOT FOR TRANSFUSION", apply only if the product is not labeled according to §606.121(e)(5)(ii) for noninjectable use only.

FDA agrees with the comment. Recovered plasma labeled in accordance with § 606.121(e)(5) would contain the statement "Caution: For Manufacturing Use Only" or "Caution: For Use in Manufacturing Noninjectable Products Only," and thus would not need to be labeled "Not For Transfusion." FDA has therefore modified § 606.121(f) to provide that it does not apply to recovered plasma labeled in accordance with § 606.121(e)(5).

35. One comment noted that no mention is made in the regulations of the use of a biohazard label for units of blood which are not intended for further manufacturing. The comment asked whether this omission meant that a biohazard label should not be used.

The use of a biohazard label is optional. A biohazard label is commonly used to identify contaminated units or units of blood known to be positive for an infectious agent, such as HBsAg. A recommended biohazard label is included in the guideline. The labeling regulations do not require the use of a biohazard label, although FDA encourages its use. FDA does require that contaminated units and HBsAg positive units not intended for further manufacture be segregated from transfusable units of blood and properly disposed of by autoclaving or incineration.

36. One comment on § 606.121(g) recommended that the labeling provisions for blood and blood components positive for HBsAg and intended for further manufacturing use be clarified beyond simply referencing § 610.40 (21 CFR 610.40).

FDA accepts the comment. Section 610.40 includes not only provisions for the proper labeling of HBsAg positive units but also requirements for testing the blood, conditions for the use of HBsAg positive units, and procedures for notifying the agency of the shipment of HBsAg positive blood. These requirements are necessary because HBsAg positive blood is a highly infectious agent and any person who comes into contact with the blood, due to mishandling or misuse of the blood, may contract hepatitis. Because of the importance of these requirements, the agency cautions that they should be viewed and understood as a unit. However, FDA agrees that an important objective of this rulemaking is to incorporate all requirements for the labeling of blood and blood components into one set of regulations. Accordingly, FDA is amending § 606.121(g) in the final rule to reiterate the labeling requirements specified in § 610.40 applicable to HBsAg reactive blood and blood components.

37. One comment on proposed § 606.121(h)(1) (combined into § 606.121(j) in the final rule) objected to the use of the term "tie-tag." The comment contended that this term implies that the only acceptable means

of attaching a tag to the container is by use of a string and that other better means of making the attachment are available.

FDA disagrees with the comment. The term "tie-tag" in these regulations is generically descriptive and does not imply any requirements relative to the means of attachment of the tag. Various plastic ties, similar to those used to attach price-tags to clothing articles, are used routinely. The agency cautions that the means of attachment should not pierce the blood container and should ensure continuous attachment under normal conditions of use.

38. One comment on proposed § 606.121 (h)(1) and (i)(1) (combined into § 606.121(j) in the final rule) asked why use of a tie-tag is allowed considering that special labels are available that can be securely attached to the container. The comment contended that the use of a tie-tag appears to compromise the special label concept.

While the agency agrees that the use of special labels is preferable, FDA does not intend to prohibit the use of tie-tags for conveying specialized information. Many establishments have been using tie-tags successfully for a considerable time to convey information that is needed infrequently or for information that may later be removed. Because of the anticipated infrequent use of tie-tags, FDA believes that the concept of providing all information on a uniform label to encourage the free exchange of blood is not compromised. The agency will continue to encourage the use of special labels by providing instructions for the content and format of special labels in the guideline.

39. One comment on proposed § 606.121(h)(2) contended that it would be advantageous to label blood intended for emergency release with the name of the intended recipient.

FDA agrees with the comment. Although the agency recommends that the name of the intended recipient should be omitted on the special label or tie-tag for emergency blood in most situations, FDA is deleting from the final regulations the requirement that the intended recipient's name be omitted from the label. Blood is labeled for emergency use when, because of the immediate need for the blood, one or more of the required tests on the blood cannot be completed before transfusion. When the crisis has passed, a unit of incompletely tested blood is less likely to be transfused if the intended recipient's name is not on the label. In addition, the attending clinician administering the blood is more likely to examine thoroughly the emergency blood label and identify what tests have not yet been completed and what extra precautions should be taken. However, FDA agrees there are some circumstances, such as when several patients are to receive emergency-released blood simultaneously, for which the inclusion of the recipient's name on the label may be appropriate.

40. One comment on § 606.121(i) stated that to ensure safe transfusions to patients receiving autologous units of blood (blood intended to be returned to the original donor by infusion), designation of the ABO and $Rh_o(D)$ blood group may provide an additional precaution.

FDA believes that the regulations adequately respond to the comment. Section 606.121(i)(1) requires the identification of the patient on the special label for autologous blood, and the blood group of the patient may be used as part of that identification. FDA does not require the identification of the blood group on the label of autologous blood because blood returned to the original donor is assuredly blood group compatible. On the uniform label, the usual blood grouping label is not attached to blood intended for autologous purposes, thereby assuring that the autologous blood is not mistaken for blood intended for routine homologous transfusion purposes.

41. One comment on proposed § 606.121(i)(1)(ii) (redesignated as § 606.121(i)(2) in the final rule) argued that the date of donation is not valuable information on the label of a product for autologous transfusion and only the expiration date should be required on the label.

FDA disagrees with the comment. Usually blood is collected for autologous purposes when it is difficult or impossible to obtain suitable blood from homologous sources for transfusing a certain patient, for example, when the patient has a rare blood type. Because of limitations both on the amount of blood that can be collected from a patient and the collection frequency restrict the amount of fresh autologous blood available, it is occasionally necessary to transfuse autologous blood that may have marginally exceeded its expiration date. Also, to assure an adequate supply of fresh blood at the time it is needed, it is a recognized practice for the attending physician to reinfuse the oldest unit of autologously collected blood into the patient at the same time that two fresh units are collected. In either of the situations cited above, it is the age of the blood that is of the utmost importance, and this information is best conveyed by showing the date of collection on the label. Accordingly, the agency concludes that the date of collection is required on the label of autologous blood and the final rule so provides.

42. Two comments asked that proposed § 606.121(i)(2) (§ 606.121(i)(5) in the final rule) be revised to provide for the overlabeling or obliteration of special labels because it is often difficult to remove a well-adhered tape label.

FDA agrees with the comment. The agency considers overlabeling or obliteration (inking over a label statement) to be equivalent to removal of the label. For clarity, FDA is revising the regulation in the final rule to provide that the special label for blood intended for autologous purposes shall be removed or otherwise obscured if the unit is issued for homologous transfusion.

43. One comment recommended that the following statements be required on the label of all transfusable blood products: "Do Not Add Medication To This Blood"; "Infuse Through A Filter"; "Do Not Warm Except By Specifically Authorized Procedures"; and "Infuse Immediately; Do Not Store Outside Of The Blood Bank. Return Any Unused Portion To The Blood Bank Immediately". The comment contended that these labeling statements would help inform relatively untrained and unsupervised personnel who occasionally administer blood products, thereby avoiding some potential transfusion errors. Another comment stated that while cautions on a label may be disregarded or unread, statements on the label do have greater immediacy and are more likely to be read than those in a circular. This comment suggested no specific information for inclusion on the label.

FDA disagrees with the comments. One of the purposes of CCBBA's review of blood labeling and the proposed rules was to delete from the blood container label information that is not essential for the proper processing and administration of the product. FDA considers the suggested label statements in the comment to be educational and therefore unnecessary for adequately trained personnel. The agency believes that brief statements on the container label are inadequate for educating untrained personnel. Furthermore, untrained and unsupervised personnel should not be given the responsibility for administering blood and blood products. Persons administering blood should be properly trained and supervised and should be working under written standard operating procedures. FDA believes that the information given in the comment is better understood when given in the blood establishment's

training program by the trainee's supervisor. The written standard operating procedures and instruction circular can then serve to remind personnel of these procedures. FDA also disagrees with the comment that the instruction circular is unread. While it is often unnecessary to consult the instruction circular during the routine operation of a transfusion service, the circular is useful in providing necessary information when a question arises concerning characteristics of a blood product or its proper administration.

44. One comment suggested that the agency issue the labeling requirements as tentative final regulations and simultaneously issue a new draft guideline (presumably for further comment). At that time the agency could encourage voluntary compliance with either the tentative final regulations or the guideline. Subsequently, when final regulations and a final guideline are issued, establishments could continue to use labeling in compliance with the tentative final regulations or draft guideline until depleted. The comment contended that this means of implementation would allow for inconsistencies and questions to be resolved while holding down health care costs.

FDA believes that the procedures being used by the agency to promulgate its labeling regulations and make available its guidelines are consistent with the intent of the comment. By permitting the voluntary use of the uniform label since October 1980 when these labeling regulations were proposed and the draft guideline was made available, FDA effectively instituted a trial period. Only minor discrepancies between the proposed rule and the guideline were found during the trial period, and any discrepancies have been corrected.

45. One comment on § 606.122(c) objected to the required labeling statement "Do not add medications" because the addition of 0.9 percent Sodium Chloride Injection U.S.P. may be considered addition of a medication and yet may be appropriate.

FDA disagrees with the comment. While 0.9 percent Sodium Chloride Injection U.S.P. may be construed to be a medication in the broadest sense of the term, FDA believes that the statement "Do not add medications" will not cause misunderstanding. The addition of 0.9 percent Sodium Chloride Injection U.S.P. would be appropriate only for certain blood components and when its addition is appropriate its use is noted only in the sections of the instruction circular discussing the applicable blood components.

46. Two comments on § 606.122(d) requested that the term "known sensitizing substances" be further defined. One of the comments asked whether such substances include protein and cellular antigens, allergens, and drugs, or some other substances.

The provision was intended to apply to substances that may be used in the processing of certain blood components, such as hydroxyethyl starch, that are known to be potentially sensitizing. FDA has reconsidered this provision and finds that it is unclear, applies to only a few substances, and it overlaps proposed § 606.122(h), which would require the naming of any additives that still may be present in the product. Accordingly, in the final rule FDA is removing § 606.122(d) and redesignating paragraphs (e) through (o) as (d) through (n), respectively. Despite the deletion of this paragraph, FDA advises that the instruction circular must continue to note, when applicable, that a particular additive may be potentially sensitizing.

47. Two comments noted that § 606.122(f) (redesignated as § 606.122(e) in the final rule) requires a statement in the labeling instruction circular concerning the serologic test for syphilis while this statement is not in the example labeling included in the guideline.

A statement concerning the serologic test for syphilis is required in the instruction circular. The current American Association of Blood Banks/ American Red Cross instruction circular states "serologic test for syphilis may also have been performed, as required, and found to be negative." FDA finds that this wording complies with § 606.122(e).

48. One comment objected to the labeling statement required under proposed § 606.122(k). Proposed § 606.122(k) would have required that the instruction circular contain a statement that Whole Blood Platelets and/or Cryoprecipitate Removed should not be used for patients requiring, as applicable, platelets or antihemophilic factor. The comment stated that administration of Whole Blood Platelets and/or Cryoprecipitate Removed to patients requiring platelets or antihemophilic factor would be permitted if the product is not intended as a source of platelets or antihemophilic factor. The comment noted that the labeling requirement does not apply to older units of Whole Blood which would also be deficient in functional platelets and AHF.

FDA agrees with the comment. Accordingly, FDA is deleting proposed § 606.122(k) in the final rule. FDA also advises that, as announced in the "Changes in Proper Names" final rule, the proper name of a product where the cryoprecipitate has been removed shall be "Whole Blood Cryoprecipitate Removed" and the removal of platelets need not be noted on the label.

49. Four comments on § 606.122(l)(1) (redesignated as § 606.122(k)(1) in the final rule) recommended that the labeling suggest, but not require, the use of a suitable plasma volume expander if red blood cells are substituted for whole blood. The comments also noted that the use of a volume expander is proper only if additional volume is immediately necessary and that this is a decision that should be made by the attending physician. The comments noted that the provision incorrectly implies that the plasma volume expander should be added directly to the Red Blood Cells, a procedure that is contrary to currently accepted practice and to the labeling caution not to add medications. Three of the comments suggested that the labeling statements in proposed § 606.122(c), (l)(1), and (l)(2) be combined to read: "Instructions not to add medication to a unit of red blood cells except 0.9 percent Sodium Chloride Injection USP when indicated. Additional plasma volume expanders may be administered separately if necessary."

FDA agrees in part and disagrees in part with the comments. In the case of a massive transfusion, where the blood's oxygen carrying capacity must be restored and the patient must be treated for extreme hypovolemia, Whole Blood is the indicated product. In such cases, Red Blood Cells may be substituted, but suitable plasma volume expanders should be administered concurrently. Although it is ultimately the attending physician's decision as to what blood products should be administered, the product's labeling instruction circular must provide adequate instructions for the use of the product. The instructions should include information about other forms of therapy, such as the administration of suitable plasma volume expanders, that may be necessary concurrent with the administration of the product. However, FDA agrees that the proposed labeling statement incorrectly implies that the plasma volume expander should be added directly to the Red Blood Cells. Accordingly, FDA is amending § 606.122(k)(1) in the final rule to clarify that the instructions apply only when Whole Blood is the indicated product and that plasma volume expanders should be administered concurrently. FDA sees no benefit in combining the labeling provisions cited in the

comment. For clarity, each labeling provision is listed in the regulations separately. However, such required information may be associated together in the instruction circular.

50. One comment on § 606.122(l)(2) (redesignated as § 606.122(k)(2) in the final rule) recommended that a statement warning that only saline should be added to red blood cell products should replace the warning not to add Lactated Ringer's Injection (U.S.P.) solution. The comment stated that it is obvious that a strong sucrose solution should not be added to blood components, and therefore the labeling provision is unnecessary.

FDA disagrees with the comment. FDA concludes that the warning against the addition of Lactated Ringer's Injection (U.S.P.) solution remains appropriate. FDA acknowledges that most persons administering blood are aware that such a solution should not be added to a blood product. This is especially true for Lactated Ringer's Injection, which contains calcium and interferes with the function of the anticoagulant. Unfortunately, FDA is aware of several instances in which transfusion of a blood product with Lactated Ringer's Injection added was attempted. To lessen the chance of a recurrence of this error, FDA is requiring a specific warning in the instruction circular.

51. One comment on § 606.122(m)(1) (redesignated as § 605.122(l)(1) in the final rule) recommended that the provision be corrected editorially to read: "The approximate volume of plasma from which the platelets were prepared."

FDA agrees and § 601.122(l)(1) is amended in the final rule as recommended by the comment.

52. One comment on § 606.122(m)(1) (redesignated as § 606.122(l)(1) in the final rule) asked whether the volume of plasma should be stated in the labeling for platelets obtained from single units and for pooled platelets.

FDA advises that the volume of plasma from which the product was prepared is required only in the labeling for single units of platelets. The provision is clarified in the final rule accordingly.

53. One comment on § 606.122(m)(2) (redesignated as § 606.122(l)(2) in the final rule) noted that the American Association of Blood Banks (AABB) Standards Committee currently permits the use of platelets 6 hours after entering the container or pooling. The comment recommended that, because of the absence of data contradicting the recommendation, the regulations should be revised consistently. A comment on § 606.122(n)(3) (redesignated as § 606.122(m)(3) in the final rule) recommended that the provision be revised consistent with the current AABB standard that permits the storage of thawed plasma at 1 to 6 °C for a maximum of 24 hours before transfusion. Two comments on § 606.122(o)(5) (redesignated as § 606.122(n)(5) in the final rule) noted that the AABB Standards Committee currently permits the use of Cryoprecipitated AHF 6 hours after entering the container or pooling. The comments recommended that because of the absence of data contradicting the AABB recommendation, the regulation should be revised consistently.

FDA cannot accept these recommendations at this time. Proposed §§ 606.122 (m)(2), (n)(3), and (o)(5) (redesignated as §§ 606.122 (l)(2), (m)(3), and (n)(5) in the final rule) are labeling requirements formerly codified in §§ 640.26(k), 640.35(l), and 640.57(l), respectively. FDA is unaware of convincing data supporting the changes recommended by the comments. The agency believes that these changes could affect the safety and effectiveness of the products and that the changes recommended should not be implemented without notice and comment rulemaking procedures. Further, as part of FDA's retrospective review of regulations that is required by E.O. 12291 and the Regulatory Flexibility Act (Pub. L. 96-354), FDA now is reviewing its regulations for blood and blood products. During its review of these regulations, FDA will consider the differences between its regulations and the standards issued by AABB. If FDA believes that the changes recommended by the comments have merit, FDA will include the changes in its proposed rule to be issued as part of FDA's retrospective review of the blood regulations. Interested persons will be offered an opportunity to submit comments, data, and other information at that time.

54. One comment suggested that a new labeling requirement for platelets be included under § 606.122(m) (redesignated as § 606.122(l) in the final rule) to read: "Good patient management requires monitoring treatment responses to Platelets by periodic posttransfusion platelet counts." This statement parallels a similar statement for Cryoprecipitated AHF required under § 606.122(n)(8).

FDA disagrees with the comment. It is always a sound medical practice to monitor a patient's response when undergoing an intensive form of therapy, such as a blood or blood component transfusion. When the monitoring of a patient by specific methodology has been found by scientific consensus to be necessary for assuring the effective use of a product, FDA believes such information should be included in the product labeling. FDA is not aware of a consensus as to the most appropriate means of monitoring a patient's response to Platelet transfusion. For example, monitoring may be accomplished by platelet count, testing the clotting function of the blood, or by observing the patient for reduced bleeding. Because a variety of means of monitoring the patient are acceptable, FDA will not require that the labeling recommend any specific means for monitoring a patient's progress after Platelet transfusion.

55. One comment on § 606.122(o)(1) (redesignated as § 606.122(n)(1) in the final rule) stated the potency of Cryoprecipitated AHF should be expressed as International Units of antihemophilic factor.

FDA agrees with the comment. The only potency unit currently established for measuring antihemophilic factor is obtained by measurement against the international standard (or against a standard that has been compared with the international standard). FDA is amending § 606.122(n)(1) in the final rule accordingly.

56. One comment on § 606.122(o)(2) (redesignated as § 606.122(n)(2) in the final rule) asked whether the provision is an indirect requirement to assay Cryoprecipitated AHF for fibrinogen.

The provision does not require, either directly or indirectly, the testing of Cryoprecipitated AHF for its fibrinogen content. Cryoprecipitated AHF is occasionally used to treat the hypofibrinogenemic patient; therefore, an approximation of the product's fibrinogen content should be included in the instruction circular. As an option, the instruction circular may include the statement, "Usually contains at least 150 mg of fibrinogen." The agency has found through a review of assays of a representative number of units that Cryoprecipitated AHF usually contains at least 150 milligrams of fibrinogen. No additional testing is required by manufacturers to verify this value. Recognizing that a manufacturer may want to present a more precise value in the labeling, the regulations offer the option to the manufacturer of determining the average fibrinogen content of its Cryoprecipitated AHF through the assay of a representative number of units and including the determined value in the instruction circular. In the final rule, FDA is revising § 606.122(n)(2) for clarity.

57. One comment on § 606.122(o)(4) (redesignated as § 606.122(n)(4) in the final rule) stated that 15 minutes should be the maximum time for thawing Cryoprecipitated AHF at 37 °C. Two comments stated that there is no evidence that Cryoprecipitated AHF must be thawed for no more or less than 15 minutes, and the regulation should be revised accordingly.

FDA agrees that 15 minutes should be the maximum time for thawing Cryoprecipitated AHF. The primary component of Cryoprecipitated AHF, antihemophilic factor (Factor VIII), is heat labile. Therefore, extended exposure of the product to elevated temperatures will significantly lower product yield. Accordingly, Cryoprecipitated AHF should be thawed at 37 °C for the minimum time necessary to ensure complete resuspension of the precipitate. Through practical experience, 15 minutes has been found to be ample time for the complete thawing of Cryoprecipitated AHF. FDA agrees that Cryoprecipitated AHF may be thawed in less time, although care should be taken to ensure that the precipitate is completely resuspended. Accordingly, FDA is amending the final rule to require a statement in the instruction circular that Cryoprecipitated AHF should be thawed for no more than 15 minutes at a temperature of 37 °C.

58. Two comments recommended that § 606.122(o)(6) (redesignated as § 606.122(n)(6) in the final rule) be revised by substituting the term "0.9 percent Sodium Chloride Injection U.S.P." for "saline."

FDA agrees with the comment and is amending § 606.122(n)(6) accordingly.

59. One comment on § 606.122(o)(8) (redesignated as § 606.122(n)(8) in the final rule), which requires that the instruction circular for Cryoprecipitated AHF note the importance of careful patient monitoring, argued that the required labeling statement infringes on the practice of medicine and is not authorized by section 351 of the Public Health Service Act.

FDA disagrees with the comment. FDA does not believe that the provision infringes on the practice of medicine. It is not FDA's intent to require a physician to perform certain tests to monitor the patient's response to Cryoprecipitated AHF. However, in accordance with section 502(f) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 352(f)), FDA does require that labeling provided to the physician for all prescription drugs, including biologics, contain adequate instructions for the product's use. FDA and most members of the scientific community agree that careful patient monitoring is necessary to ensure the effective use of Cryoprecipitated AHF. Accordingly, FDA is requiring that the instruction circular for Cryoprecipitated AHF note the importance of careful patient monitoring when administering Cryoprecipitated AHF.

60. FDA is amending § 606.121(e)(1)(ii) in the final rule to include the approved nomenclature for a new anticoagulant, Anticoagulant Citrate Phosphate Double Dextrose (CP2D), which FDA recently approved for the collection of Whole Blood and the preparation of various blood components.

61. FDA is amending § 606.121(e)(3) in the final rule to state that products with a dating period of 72 hours or less shall be labeled with the hour of expiration. The revised wording will provide greater flexibility if a dating period for a product should change. Indeed, Platelets collected in certain container systems are being granted dating periods of up to 5 days, in which case the hour of expiration is not required on the container label.

62. Proposed § 606.122 (m)(2), (n)(3), and (o)(5) (redesignated as § 606.122 (l)(2), (m)(3), and (n)(5) in the final rule) contains labeling requirements formerly codified in §§ 640.26(k), 640.35(l), and 640.57(l), respectively. In the final rule, FDA is adopting these provisions with a minor clarifying change. The agency advises that instruction circulars that conform to the proposed requirements and the former codified language continue to be acceptable until the effective date of this final rule. To assure uniform wording among instruction circulars in use, FDA recommends that manufacturers revise their instruction circulars to be in agreement with § 606.122 (l)(2), (m)(3), and (n)(5) when labeling is reordered.

63. In the Federal Register of October 31, 1980, FDA published a proposal to revise the additional standards for Whole Blood (21 CFR Part 640, Subpart A) in which FDA proposed to revise the requirements concerning the emergency issue of blood in § 640.2(f). In view of the withdrawal of the proposal (48 FR 33494; July 22, 1983), FDA, in this final rule, is amending § 640.2 in paragraph (f) (4) and (5) to delete the labeling provisions and in paragraph (f)(3) to reference the labeling requirements in § 606.121(h).

Environmental Impact

The agency has determined pursuant to 21 CFR 25.24(a)(11) (April 26, 1985; 50 FR 16636) that this action is of a type that does not individually or cumulatively have a significant impact on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

Paperwork Reduction Act of 1980

In accordance with the Paperwork Reduction Act of 1980 and 5 CFR 1320.13(g) of OMB's regulations implementing the provisions of that act, FDA has submitted the final rule to OMB for approval of the collection of information requirements contained in §§ 606.121 and 606.122 of the rule. These requirements will not be effective until FDA obtains OMB approval. In accordance with 5 CFR 1320.13(j), prior to November 29, 1985, FDA will publish in the Federal Register a notice of OMB's decision to approve, modify, or disapprove these requirements. Other organizations and individuals desiring to submit comments on the collection of information requirements should direct them to FDA's Dockets Management Branch (address above) and to the Office of Information and Regulatory Affairs, OMB, Rm. 3208, New Executive Office Bldg., Washington, DC 20503, Attn: Bruce Artim.

Various current sections of Part 606 contain collection of information requirements that were submitted to OMB for review and approval as required by section 3507 of the Paperwork Reduction Act. The requirements were approved and assigned OMB control number 0910-0116.

The requirement for a regulatory flexibility analysis under the Regulatory Flexibility Act does not apply to this final rule because the proposed rule was issued prior to January 1, 1981, and is therefore exempt. The economic impact of this rule has been assessed in accordance with Executive Order 12291. FDA concludes that approximately 178 licensed establishments and 1,300 registered but unlicensed establishments are affected by this final rule. The assessment assumes that all establishments will adopt the uniform label described in the guideline "Guideline for the Uniform Labeling of Blood and Blood Components," although some establishments may not use an encoded unit number label. FDA estimates that the rule could result in savings of $2,400 per year for each establishment; if each establishment elected to use the least expensive uniform label. However, because many establishments are expected to use voluntarily more expensive, fully bar-coded labels, label cost may be up to $312,000 more per year ($2,000 per establishment). The anticipated costs are insufficient to warrant designation

of the rule as a major rule under any of the criteria specified under section 1(b) of Executive Order 12291. The assessment done to make this determination is on file with the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

List of Subjects

21 CFR Part 606

Blood, Laboratories, Reporting and recordkeeping requirements.

21 CFR Part 640

Blood, Reporting and recordkeeping requirements.

Therefore, under the Food, Drug, and Cosmetic Act, the Public Health Service Act, and the Administrative Procedure Act and under authority delegated to the Commissioner of Food and Drugs, Parts 606 and 640 are amended as follows:

PART 606—CURRENT GOOD MANUFACTURING PRACTICE FOR BLOOD AND BLOOD COMPONENTS

1. The authority citation for 21 CFR Part 606 continues to read as follows:

Authority: Secs. 201, 502, 505, 701, 52 Stat. 1040-1042 as amended, 1050-1053 as amended, 1055-1056 as amended by 70 Stat. 919 and 72 Stat. 948 (21 U.S.C. 321, 352, 355, 371) and the Public Health Service Act (sec. 351, 58 Stat. 702 as amended (42 U.S.C. 262)) and the Administrative Procedure Act (secs. 4, 10, 60 Stat. 238 and 243 as amended (5 U.S.C. 553, 701-706)); 21 CFR 5.10.

2. By revising § 606.120 to read as follows:

§ 606.120 Labeling, general requirements.

(a) Labeling operations shall be separated physically or spatially from other operations in a manner adequate to prevent mixups.

(b) The labeling operation shall include the following labeling controls:

(1) Labels shall be held upon receipt, pending review and proofing against an approved final copy, to ensure accuracy regarding identity, content, and conformity with the approved copy.

(2) Each type of label representing different products shall be stored and maintained in a manner to prevent mixups, and stocks of obsolete labels shall be destroyed.

(3) All necessary checks in labeling procedures shall be utilized to prevent errors in translating test results to container labels.

(c) All labeling shall be clear and legible.

3. By adding new §§ 606.121 and 606.122 to read as follows:

§ 606.121 Container label.

(a) The container label requirements are designed to facilitate the use of a uniform container label for blood and blood components (except Source Plasma) by all blood establishments. Single copies of an FDA guideline entitled "Guideline for the Uniform Labeling of Blood and Blood Components" are available upon request (under Docket No. 80N-0120) from the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857 (copies of the guideline are available also from the American Blood Commission, 1901 North Ft. Myer Drive, Suite 300, Arlington, VA 22209).

(b) The label provided by the collecting facility and the initial processing facility shall not be removed, altered, or obscured, except that the label may be altered to indicate the proper name and other information required to identify accurately the contents of a container after blood components have been prepared.

(c) The container label shall include the following information, as well as other specialized information as required in this section for specific products:

(1) The proper name of the product in a prominent position, and modifier(s), if appropriate.

(2) The name, address, registration number, and, if a licensed product, the license number of each manufacturer.

(3) The donor, pool, or lot number relating the unit to the donor.

(4) The expiration date, including the day, month, and year, and, if the dating period for the product is 72 hours or less, the hour of expiration.

(5) If the product is intended for transfusion, the appropriate donor classification statement, i.e., "paid donor" or "volunteer donor", in no less prominence than the proper name of the product.

(i) A paid donor is a person who receives monetary payment for a blood donation.

(ii) A volunteer donor is a person who does not receive monetary payment for a blood donation.

(iii) Benefits, such as time off from work, membership in blood assurance programs, and cancellation of nonreplacement fees that are not readily convertible to cash, do not constitute monetary payment within the meaning of this paragraph.

(6) For Whole Blood, Plasma, Platelets, and partial units of Red Blood Cells, the volume of the product, accurate to within ±10 percent; or optionally for Platelets, the volume range within reasonable limits.

(7) The recommended storage temperature (in degrees Celsius).

(8) If the product is intended for transfusion, the statements:

(i) "Caution: Federal law prohibits dispensing without prescription."

(ii) "See circular of information for indications, contraindications, cautions, and methods of infusion."

(iii) "Properly identify intended recipient."

(9) The statement: "This product may transmit infectious agents."

(10) Where applicable, the name and volume of source material.

(11) The statement: "Caution: For Manufacturing Use Only", when applicable.

(12) If the product is intended for transfusion, the ABO and Rh groups of the donor shall be designated conspicuously. For Cryoprecipitated AHF, the Rh group may be omitted. The Rh group shall be designated as follows:

(i) If the test using Anti-D Blood Grouping Serum is positive, the product shall be labeled: "Rh positive."

(ii) If the test using Anti-D Blood Grouping Serum is negative but the test for D^u is positive, the product shall be labeled: "Rh positive."

(iii) If the test using Anti-D Blood Grouping Serum is negative and the test for D^u is negative, the product shall be labeled: "Rh negative."

(13) The container label may bear encoded information in the form of machine-readable symbols approved for use by the Director, Office of Biologics Research and Review (HFN-800), Center for Drugs and Biologics.

(d) Except for recovered plasma intended for manufacturing use or as otherwise approved by the Director, Office of Biologics Research and Review (HFN-800), Center for Drugs and Biologics, the paper of the container label shall be white and print shall be solid black, with the following additional exceptions:

(1) The Rh blood group shall be printed as follows:

(i) Rh positive: Use black print on white background.

(ii) Rh negative: Use white print on black background.

(2) The proper name of the product, any appropriate modifier(s), the donor classification statement, and the statement "properly identify intended recipient" shall be printed in solid red.

(3) The following color scheme may be used optionally for differentiating ABO Blood groups:

Blood group	Color of label paper
O	Blue.
A	Yellow.
B	Pink.
AB	White.

(4) Ink colors used for the optional color coding system described in paragraph (d)(3) of this section shall be a visual match to specific color samples designated by the Director, Office of Biologics Research and Review (HFN–800), Center for Drugs and Biologics.

(5) Special labels, such as those described in paragraphs (h) and (i) of this section, may be color coded using the colors recommended in the guideline (see paragraph (a) of this section), or colors otherwise approved for use by the Director, Office of Biologics Research and Review (HFN–800), Center for Drugs and Biologics.

(e) Container label requirements for particular products or groups of products.

(1) Whole Blood labels shall include:

(i) The volume of anticoagulant.

(ii) The name of the applicable anticoagulant immediately preceding and of no less prominence than the proper name and expressd as follows: (*a*) ACD, (*b*) CPD, (*c*) Heparin, (*d*) CPDA–1, (*e*) CP2D, or by other nomenclature approved for use by the Director, Office of Biologics Research and Review (HFN–800), Center for Drugs and Biologics.

(iii) If tests for unexpected antibodies are positive, blood intended for transfusion shall be labeled: "Contains (*name of antibody*)."

(2) Except for frozen, deglycerolized, or washed Red Blood Cell products, red blood cell labels shall include:

(i) The volume and kind of Whole Blood, including the type of anticoagulant, from which the product was prepared.

(ii) If tests for unexpected antibodies are positive and the product is intended for transfusion, the statement: "Contains (*name of antibody*)."

(3) Labels for products with a dating period of 72 hours or less, including any product prepared in a system that may compromise sterility, shall bear the hour of expiration.

(4) If tests for unexpected antibodies are positive, Plasma intended for transfusion shall be labeled: "Contains (*name of antibody*)."

(5) Recovered plasma labels shall include:

(i) In lieu of an expiration date, the date of collection of the oldest material in the container.

(ii) The statement: "Caution: For Manufacturing Use Only"; or "Caution: For Use in Manufacturing Noninjectable Products Only", as applicable.

(iii) For recovered plasma not meeting the requirements for manufacture into licensable products, the statement: "Not for Use in Products Subject to License Under Section 351 of the Public Health Service Act."

(f) Blood and blood components determined to be unsuitable for transfusion shall be prominently labeled: "NOT FOR TRANSFUSION", and the label shall state the reason the unit is considered unsuitable. The provision does not apply to recovered plasma labeled according to paragraph (e)(5) of this section.

(g) As required under § 610.40 of this chapter, labels for blood and blood components that are reactive for Hepatitis B Surface Antigen, but that are intended for further manufacturing, shall state conspicuously that the material is reactive when tested for hepatitis B surface antigen and may transmit viral hepatitis or, as applicable, that blood was collected from a donor known to be reactive for hepatitis B surface antigen and is presumed to be infectious, although confirmatory hepatitis testing has not been done.

(h) The following additional information shall appear on the label for blood or blood components shipped in an emergency, prior to completion of required tests, in accordance with § 640.2(f) of this chapter:

(1) The statement: "FOR EMERGENCY USE ONLY BY ———."

(2) Results of any tests prescribed under §§ 610.40 and 640.5 (a), (b), or (c) of this chapter completed before shipment.

(3) Indication of any tests prescribed under §§ 610.40 and 640.5 (a), (b), or (c) of this chapter and not completed before shipment.

(i) The following additional information shall appear on the label for Whole Blood or Red Blood Cells intended for autologous infusion:

(1) Information adequately identifying the patient, e.g., name, blood group, hospital, and identification number.

(2) Date of donation.

(3) The statement: "FOR AUTOLOGOUS USE ONLY."

(4) In place of the blood group label, each container of blood intended for autologous use and obtained from a donor who fails to meet any of the donor suitability requirements under § 640.3 of this chapter or who is reactive in the hepatitis tests prescribed under § 610.40 of this chapter shall be prominently and permanently labeled: "FOR AUTOLOGOUS USE ONLY."

(5) Units of blood originally intended for autologous use, except those labeled as prescribed under paragraph (i)(4) of this section, may be issued for homologous transfusion provided the container label complies with all applicable provisions of paragraphs (b) through (e) of this section. In such case, the special label required under paragraph (i) (1), (2), and (3) of this section shall be removed or otherwise obscured.

(j) A tie-tag attached to the container may be used for providing the information required by paragraph (e) (1)(iii), (2)(ii), and (4), (h), or (i)(1), (2), and (3) of this section.

§ 606.122 Instruction circular.

An instruction circular shall be available for distribution if the product is intended for transfusion. The instruction circular shall provide adequate directions for use, including the following information:

(a) Instructions to mix the product before use.

(b) Instructions to use a filter in the administration equipment.

(c) The statement "Do Not Add Medications" or an explanation concerning allowable additives.

(d) A description of the product, its source, and preparation, including the name and proportion of the anticoagulant used in collecting the Whole Blood from each product is prepared.

(e) Statements that the product was prepared from blood that was nonreactive when tested for hepatitis B surface antigen by an FDA required test and nonreactive when tested for syphilis by a serologic test for syphilis (STS).

(f) The statements: "Warning. The risk of transmitting hepatitis is present. Careful donor selection and available laboratory tests do not eliminate the hazard."

(g) The names of cryoprotective agents and other additives that may still be present in the product.

(h) The names and results of all tests performed when necessary for safe and effective use.

(i) The use of the product, indications, contradications, side effects and hazards, dosage and administration recommendations.

(j) [Reserved]

(k) For Red Blood Cells, the instruction circular shall contain:

(1) Instructions to administer a suitable plasma volume expander if Red Blood Cells are substituted when Whole Blood is the indicated product.

(2) A warning not to add Lactated Ringer's Injection U.S.P. solution to Red Blood Cell products.

(l) For Platelets, the instruction circular shall contain:

(1) The approximate volume of plasma from which a sample unit of Platelets is prepared.

(2) Instructions to begin administration as soon as possible, but not more than 4 hours after entering the container.

(m) For Plasma, the instruction circular shall contain:

(1) A warning against further processing of the frozen product if there is evidence of breakage or thawing.

(2) Instructions to thaw the frozen product at a temperature between 30 and 37 °C.

(3) When applicable, instructions to begin administration of the product within 6 hours after thawing.

(4) Instructions to administer to ABO-group-compatible recipients.

(5) A statement that this product has the same hepatitis risk as Whole Blood; other plasma volume expanders without this risk are available for treating hypovolemia.

(n) For Cryoprecipitated AHF, the instruction circular shall contain:

(1) A statement that the average potency is 80 or more International Units of antihemophilic factor.

(2) The statement: "Usually contains at least 150 milligrams of fibrinogen"; or, alternatively, the average fibrinogen level determined by assay of representative units.

(3) A warning against further processing of the product if there is evidence of breakage or thawing.

(4) Instructions to thaw the product for no more than 15 minutes at a temperature of 37 °C.

(5) Instructions to store at room temperature after thawing and to begin administration as soon as possible but no more than 4 hours after entering the container or after pooling and within 6 hours after thawing.

(6) A statement that 0.9 percent Sodium Chloride Injection U.S.P. is the preferred diluent.

(7) Adequate instructions for pooling to ensure complete removal of all concentrated material from each container.

(8) The statement: "Good patient management requires monitoring treatment responses to Cryoprecipitated AHF transfusions with periodic plasma factor VIII or fibrinogen assays in hemophilia A and hypofibrinogenemic recipients, respectively."

4. By adding a new clause regarding the OMB control number at the end of § 606.170 to read as follows:

§ 606.170 Adverse reaction file.

* * * * *

(Information collection requirements approved by the Office of Management and Budget under OMB control number 0910-0116)

PART 640—ADDITIONAL STANDARDS FOR BLOOD AND BLOOD PRODUCTS

5. The authority citation for 21 CFR Part 640 continues to read as follows:

Authority: Secs. 215, 351, 58 Stat. 690 as amended; 702 as amended (42 U.S.C. 216, 262); 21 CFR 5.10.

6. In § 640.2 by revising paragraph (f) to read as follows:

§ 640.2 General requirements.

* * * * *

(f) *Issue prior to determination of test results.* Notwithstanding the provisions of § 610.1 of this chapter, blood may be issued by the manufacturer on the request of a physician, hospital, or other medical facility before results of all tests prescribed in § 640.5 and the test for hepatitis B surface antigen prescribed in § 610.40(a) of this chapter have been completed, where such issue is essential to allow time for transportation to ensure arrival of the blood by the time it is needed for transfusion: *Provided,* That (1) the blood is shipped directly to such physician or medical facility, (2) the records of the manufacturer contain a full explanation of the need for such issue, and (3) the label on each container of such blood bears the information required by § 606.121(h) of this chapter.

§§ 640.7, 640.18, 640.26, 640.35, and 640.57 [Removed]

7. By removing § 640.7 *Labeling,* § 640.18 *Labeling,* § 640.26 *Labeling,* § 640.35 *Labeling,* and § 640.57 *Labeling.*

8. In § 640.70 by revising the introductory text of paragraph (a) to read as follows:

§ 640.70 Labeling.

(a) In addition to the labeling requirements of § 610.62 of this chapter, and in lieu of the requirements in §§ 606.121, 610.60, and 610.61 of this chapter, the following information shall appear on the label affixed to each container of Source Plasma:

* * * * *

Dated: August 1, 1985.

Frank E. Young,

Commissioner of Food and Drugs.

[FR Doc. 85-20739 Filed 8-29-85; 8:45 am]

BILLING CODE 4160-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICE

Food and Drug Administration

[Docket No. 80N-0120]

Guideline for the Uniform Labeling of Blood and Blood Components; Availability of Guideline

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a revised guideline for the uniform labeling of blood and blood components. The guideline describes in detail the specifications for a uniform container label for blood-banking use which conform with a final rule published elsewhere in this issue of the Federal Register.

ADDRESS: Written comments and requests for a copy of the guideline (identified with the docket number found in brackets in the heading of this document) to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Mary Ann Tourault, Center for Drugs and Biologics (HFN-830), Food and Drug Administration, 8800 Rockville Pike, Bethesda, Md 20205, 301-496-4396.

SUPPLEMENTARY INFORMATION: FDA is making available a final guideline prepared by the Office of Biologics Research and Review in the Center for Drugs and Biologics to describe the uniform container label for blood and blood components. In the Federal Register of October 31, 1980 (45 FR 72416), FDA published a proposed rule to revise the labeling requirements for blood and blood components. In the same document, FDA announced the availability of a proposed guideline entitled "Guidelines for the Uniform Labeling of Blood and Blood Components." Preparation of the guideline is part of a program supported by FDA, the American Blood Commission (ABC), and other organizations representing the blood banking industry, to encourage the use of blood container labels of a standard content and format, with certain label elements present in both eye-readable and machine-readable form. Since the time of the announcement of the proposed guideline's availability, FDA has permitted the voluntary use of uniform labeling consistent with the proposed rule and guideline.

Elsewhere in this issue of the Federal Register, FDA is publishing a final rule revising the labeling requirements for blood and blood components. In the Federal Register of January 29, 1985 (50 FR 4128), FDA published a final rule revising the proper names for certain biological products, including blood and blood component products. FDA is announcing the availability of a revised guideline which reflects the labeling requirements and new proper names established in the respective final rules. In cooperation with ABC, FDA has revised the final guideline to correct several errors found in the guideline made available in October 1980. The final guideline provides labeling information for several additional products, including additional blood components, anticoagulants, preservatives, and blood container systems. Although many of these products are not currently licensed or approved by FDA for general use in the United States, FDA expects that these additional products will gain wide acceptance and use in the next few years.

Included with the guideline as Appendix A is "Suggested Evaluation Protocol for Bar-Coded Pressure Sensitive labels" intended for use by printers of labels to determine the acceptability of their products for use in blood banks.

ABC also has made the proposed guideline of October 1980 available to its constituents, along with other instructions for the uniform labeling of blood and blood components. Base upon the practical experience gained through the use of the proposed guideline, ABC has recommended revisions to clarfiy the guideline, to provide additional information concerning the printing and use of the uniform label, and to delete certain unnecessary information. The revised final guideline incorporates ABC's recommendations.

This notice is issued under § 10.90(b) (21 CFR 10.90(b)), which provides for the use of guidelines to outline procedures or standards of general applicability that are acceptable to FDA for a subject matter than falls within the laws administered by FDA. Although these guidelines are not a legal requirement, a person may be assured that in following an agency guideline the procedures followed and standards used will be acceptable to FDA. A person may also choose to use alternative procedures or standards for which there is scientific rationale even though they are not provided for in a guideline. A person who chooses to use procedures or standards not in a guideline may discuss the matter further with the agency to prevent an expenditure of resources for work that FDA may later determine to be unacceptable.

FDA is permitting the immediate voluntary use of container labels printed in accordance with the revised final guideline that are consistent with the final regulations published elsewhere in this issue of the Federal Register. Licensed establishments may begin using the new container label and instruction circular without their prior review and approval by FDA, provided that the label is printed in accordance with the specifications described in the guideline. As an amendment to the product license(s), a licensed establishment is required to submit the revised label and instruction circular to the Director, Office of Biologics Research and Review (HFN-800), Center for Drugs and Biologics, 8800 Rockville Pike, Bethesda, MD 20205.

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 35), the reporting and recordkeeping requirements in §§ 606.121 and 606.122 of the final rule on uniform blood labeling (Docket No. 80N-0120) have been submitted for approval to the Office of Management and Budget (OMB). The guideline being made available by the agency has been developed in accordance with the provisions of these sections. The requirements under §§ 606.121 and 606.122 for uniform blood labeling, as described in the final rule published elsewhere in this issue of the Federal Register, will not be effective until FDA obtains OMB approval of the recordkeeping and reporting requirements in §§ 606.121 and 606.122. Prior to November 29, 1985, FDA will publish a notice concerning OMB review of these requirements.

Single copies of the final guideline are available from the Dockets Management Branch (address above). Copies of the final guideline are available also from the American Blood Commission, 1901 N. Ft. Meyer Drive, Suite 300, Arlington, VA 22209 for $5.00 per copy. (The price of the guideline is subject to change.)

Interested persons may submit written comments on the guideline to the Dockets Management Branch. These comments will be considered in determining whether further amendments to, or revisions of, this guideline are warranted. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

Dated: August 1, 1985.

Frank E. Young,

Commissioner of Food and Drugs.

[FR Doc. 85-20734 Filed 8-29-85; 8:45 am]

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federal register

Friday
August 30, 1985

Part VII

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Parts 3, 7, 9, 14, 15, and 52
Federal Acquisition Regulation; Interim Rule With Request for Comments

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 3, 7, 9, 14, 15 and 52

[Federal Acquisition Circular 84-11]

Federal Acquisition Regulation

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: Federal Acquisition Circular (FAC) 84-11 amends the Federal Acquisition Regulation (FAR) with respect to the following: Unreasonable Restriction on Subcontractor Sales, Planning for Purchase of Supplies in Economic Quantities, and Qualification Requirements.

DATES:

Effective Date: August 30, 1985.

Comment Date: Comments must be received on or before September 30, 1985. Please cite FAC 84-11 in all correspondence on this subject.

ADDRESS: Interested parties should submit written comments to: General Services Administration, ATTN: FAR Secretariat (VRS), Room 4041, GS Building, 18th & F Streets, NW., Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Ms. Margaret A. Willis, FAR Secretariat, Telephone (202) 523-4755.

SUPPLEMENTARY INFORMATION:

A. Background

The FAR revisions in FAC 84-11 are required by the Defense Procurement Reform Act of 1984 (Title XII of the Department of Defense Authorization Act, 1985, Pub. L. 98-525), and the Small Business and Federal Procurement Competition Enhancement Act of 1984 (Pub. L. 98-577).

B. Determination to Issue an Interim Regulation

A determination has been made under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator of the National Aeronautics and Space Administration that the regulations in FAC 84-11 must be issued as an interim regulation in compliance with section 22 of the Office of Federal Procurement Policy Act, as amended.

C. Regulatory Flexibility Act

(1) The Regulatory Flexibility Act of 1980, Pub. L. 96-354, specifies circumstances under which a regulatory flexibility analysis is required in connection with the issuance of a general notice of proposed rulemaking or the promulgation of a final rule, and provides that such requirements do not apply to any proposed or final rule if the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Therefore, it is hereby certified that Items I and II of FAC 84-11 will not have a significant economic impact on a substantial number of small entities as follows:

FAC 84-11, Item I, Unreasonable Restriction on Subcontractor Sales, amends the FAR to implement section 1234 of Pub. L. 98-525 and section 206 of Pub. L. 98-577. Under the new coverage contractors are prohibited from restricting the sales of any item or process, of any actual or prospective subcontractor, directly to the Government under the instant contract or any follow-on production contract. This new coverage will not have significant economic impact on a substantial number of small entities because the interim coverage does not impose additional reporting requirements or add new contractual requirements to small businesses.

FAC 84-11, Item II, Planning for the Purchase of Supplies in Economic Quantities, amends the FAR to implement section 1233 of Pub. L. 98-525 and section 205 of Pub. L. 98-577. Under the new coverage, offerors are invited to state an opinion on whether the quantity of supplies to be acquired is economically advantageous to the Government, and if applicable to recommend a more advantageous quantity, including a quoted unit and total price. Since response to the invitation is entirely voluntary, and the type of information requested is of a nature that should normally be readily available in small businesses, there will be no significant economic impact on small entities as a result of the interim regulation.

(2) An initial regulatory flexibility analysis has been prepared for Item III as follows:

FAC 84-11, Item III, Qualification Requirements, may have a significant beneficial economic impact on a substantial number of small entities. Current guidance requires that an initial regulatory flexibility analysis be prepared if the interim rule will have a significant economic impact on a substantial number of small entities even if the economic impact will benefit small entities. Accordingly, an initial regulatory flexibility analysis has been prepared for Item III of this interim rule in accordance with the Regulatory Flexibility Act, Pub. L. 96-354. This initial regulatory flexibility analysis has been prepared in accordance with section 603, Title 5 of the United States Code.

Reasons for Agency Action

Congress amended Title 10 and Title 41 of the United States Code to require agencies to prescribe policies and procedures regarding qualification requirements for acquisitions that are subject to such requirements.

Objectives and Legal Basis

The interim rule implements Pub. L. 98-525 (10 U.S.C. 2319) and Pub. L. 98-577 (41 U.S.C. 253(e)) with the objective of encouraging new competitors for Government contracts. The interim rule seeks to accomplish this by requiring agencies to justify the necessity for establishing qualification requirements, assuring that the requirements are available to all offerors, and permitting offerors to demonstrate their ability to meet these requirements up to the time of award.

Description of and Estimate of Number of Small Entities to which Interim Rule Applies

The interim rule applies to all small businesses that want to contract with the Government and which will either offer a product which is listed on a qualified products list, or which will participate in an acquisition which is limited to certain manufacturers or qualified bidders that can meet established requirements prior to award. It is not feasible to estimate the number of small entities to which the interim rule applies because the number of small businesses who would participate in these types of acquisitions is unknown. Also, the number of qualification requirements which will be modified or eliminated as the result of this interim rule is unknown.

Projected Reporting, Recordkeeping, and Other Compliance Requirements

There are no additional projected reporting, recordkeeping or other compliance requirements likely to result from the interim rule. Small businesses who qualify for reimbursement of testing and evaluation costs by the United States are required by the law to certify to their status as a small business under section 3 of the Small Business Act. This

should not impose an additional burden on small businesses because they are already required to determine their status under Government contracts.

Relevant Federal Rules Which May Duplicate, Overlap, or Conflict With the Interim Rule

There do not appear to be any relevant Federal rules which duplicate, overlap, or conflict with the interim rule.

Significant Alternatives

The Regulatory Flexibility Act requires consideration of significant alternatives to the interim rule that would accomplish the objectives of the statute and minimize any significant economic impact on small entities. These alternatives include:

(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 interim rule for such small entities;

(3) The use of performance rather than design standards; and

(4) An exemption from coverage of the interim rule, or any part thereof, for such small entities.

The interim rule does not establish reporting or recordkeeping requirements. The use of performance rather than design standards if feasible is already mandated by Part 10 of the Federal Acquisition Regulation (FAR). Qualification requirements, which must be met by manufacturers or bidders (or their products) before being awarded a contract, are necessary to assure that the Government obtains a product which meets its minimum needs. Although these requirements cannot be waived or relaxed for small entities, the interim rule extends the period offerors have to demonstrate their ability to meet the Government's requirements compared to the prior rule. This should benefit small entities. Also small entities may be reimbursed for costs of testing and evaluation in some cases which should help them to become more competitive on these types of acquisitions.

List of Subjects in 48 CFR Parts 3, 7, 9, 14, 15, and 52

Government procurement.

Dated: August 27, 1985

Lawrence J. Rizzi,

Director, Office of Federal Acquisition and Regulatory Policy.

Federal Acquisition Circular

[Number 84-11]

The material contained in FAC 84-11 is effective immediately (August 30, 1985).

Eleanor R. Spector,

Deputy Assistant Secretary of Defense for Procurement.

Paul K. Trause,

Acting Administrator.

August 26, 1985.

S.J. Evans,

Assistant Administrator for Procurement, NASA.

Federal Acquisition Circular (FAC) 84-11 amends the Federal Acquisition Regulation (FAR) as specified below.

Item I—Unreasonable Restrictions on Subcontractor Sales

FAR Part 3 is amended to add a new section 3.503 and a new clause at 52.203-6. Under the new coverage contractors and subcontractors are prohibited from asserting or agreeing to unreasonable restrictions on direct sales by subcontractors to the Government.

Item II—Planning for the Purchase of Supplies in Economic Quantities

FAR Subpart 7.2 and Sec. 14.212, 15.415, and 52.207-4 are added to prescribe policies, procedures, and a contract provision for gathering and using information from offerors to assist the Government in planning the most advantageous quantities in which supplies should be purchased. Under the new coverage, offerors are invited to state an opinion on whether the quantity of supplies proposed to be acquired is economically advantageous to the Government and, if applicable, to recommend a more advantageous quantity, including a quoted unit and total price.

Item III—Qualification Requirements

FAR Subpart 9.2 is amended to prescribe policies and procedures regarding qualification requirements. The solicitation provision at 52.209-1 and the contract clause at 52.209-2 are similarly revised for these purposes. The new coverage addresses how agencies will establish and enforce qualification requirements, encourage the qualification of additional sources and products, bear the costs under certain circumstances for products of small businesses to become qualified, and periodically examine the need to continue the use of each qualification requirement.

Therefore, 48 CFR Parts 3, 7, 9, 14, 15, and 52 are amended as set forth below.

1. The authority citation for 48 CFR Parts 3, 7, 9, 14, 15, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137, and 42 U.S.C. 2453(c).

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

2. Sections 3.503, 3.503-1, and 3.503-2 are added to read as follows:

3.503 Unreasonable restrictions on subcontractor sales.

3.503-1 Policy.

10 U.S.C. 2402 and 41 U.S.C. 253(g) require that subcontractors not be unreasonably precluded from making direct sales to the Government of any supplies or services made or furnished under a contract. However, this does not preclude contractors from asserting rights that are otherwise authorized by law or regulation.

3.503-2 Contract clause.

The clause at 52.203-6, Restrictions on Subcontractor Sales to the Government, shall be inserted in solicitations and contracts for supplies or services.

PART 7—ACQUISITION PLANNING

3. Subpart 7.2 is added to read as follows:

Subpart 7.2—Planning for the Purchase of Supplies in Economic Quantities

Sec.

7.200 Scope of subpart.
7.201 [Reserved]
7.202 Policy.
7.203 Solicitation provision.
7.204 Responsibilities of contracting officers.

Subpart 7.2—Planning for the Purchase of Supplies in Economical Quantities

7.200 Scope of subpart.

This subpart prescribes policies and procedures for gathering information from offerors to assist the Government in planning the most advantageous quantities in which supplies should be purchased.

7.201 [Reserved]

7.202 Policy.

(a) Agencies are required by 10 U.S.C. 2384(a) and 41 U.S.C. 253(f) to procure supplies in such quantity as (1) will

result in the total cost and unit cost most advantageous to the Government, where practicable, and (2) does not exceed the quantity reasonably expected to be required by the agency.

(b) Each solicitation for a contract for supplies is required, if practicable, to include a provision inviting each offeror responding to the solicitation (1) to state an opinion on whether the quantity of the supplies proposed to be acquired is economically advantageous to the Government, and (2) if applicable, to recommend a quantity or quantities which would be more economically advantageous to the Government. Each such recommendation is required to include a quotation of the total price and the unit price for supplies procured in each recommended quantity.

7.203 Solicitation provision.

Contracting officers shall insert the solicitation provision at 52.207–4, Economic Purchase Quantity—Supplies, in solicitation for supplies; except that, for civilian agencies other than NASA, this solicitation provision is optional in connection with the acquisition of supplies unless the items of supply being acquired are individual parts, components, subassemblies, assemblies or subsystems integral to a major system, and other property which may be replaced during the service life of the system, including spare parts and replenishment spare parts, but not including packaging or labeling associated with shipment or identification of an item.

7.204 Responsibilities of contracting officers.

(a) Contracting officers are responsible for transmitting offeror responses to the solicitation provision at 52.207–4 to appropriate inventory management/requirements development activities in accordance with agency procedures. The economic purchase quantity data so obtained are intended to assist inventory managers in establishing and evaluating economic order quantities for supplies under their cognizance.

(b) In recognition of the fact that economic purchase quantity data furnished by offerors are only one of many data inputs required for determining the most economical order quantities, contracting officers should generally take no action to revise quantities to be acquired in connection with the instant procurement. However, if a significant price variation is evident from offeror responses, and the potential for significant savings is apparent, the contracting officer shall consult with the cognizant inventory manager or requirements development activity before proceeding with an award or negotiations. If this consultation discloses that the Government should be ordering an item of supply in different quantities and the inventory manager/requirements development activity concurs, the solicitation for the item should be amended or canceled and a new requisition should be obtained.

PART 9—CONTRACTOR QUALIFICATIONS

4. Subpart 9.2 is revised to read as follows:

Subpart 9.2—Qualification Requirements

Sec.

9.200 Scope of subpart.
9.201 Definitions.
9.202 Policy.
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Subpart 9.2—Qualifications Requirements

9.200 Scope of subpart.

This subpart implements 10 U.S.C. 2319 and 41 U.S.C. 253(e) and prescribes policies and procedures regarding qualification requirements and the acquisitions that are subject to such requirements.

9.201 Definitions.

"Procuring activity," as used in this part or subpart, means a component of an executive agency having a significant acquisition function and designated as such by the head of the agency. Unless agency regulations specify otherwise, the term "procuring activity" shall be synonymous with "contracting activity" as defined in Subpart 2.1.

"Qualification requirement" means a requirement for testing or other quality assurance demonstration that must be completed by an offeror before the offeror is awarded a contract.

"Qualified bidders list (QBL)" means a list of bidders who have had their products examined and tested and who have satisfied all applicable qualification requirements for that product or have otherwise satisfied all applicable qualification requirements.

"Qualified manufacturers list (QML)" means a list of manufacturers who have had their products examined and tested and who have satisfied all applicable qualification requirements for that product.

"Qualified products list (QPL)" means a list of products which have been examined, tested, and have satisfied all applicable qualification requirements.

9.202 Policy.

(a)(1) The head of the agency or designee shall, before establishing a qualification requirement, prepare a written justification—

(i) Stating the necessity for establishing the qualification requirement and specifying why the qualification requirement must be demonstrated before contract award;

(ii) Estimating the likely costs for a potential offeror of testing and evaluation which a potential offeror will incur to become qualified.

(iii) Specifying all requirements that a potential offeror (or its product) must satisfy in order to become qualified. Only those requirements which are the least restrictive to meet the purposes necessitating the establishment of the qualification requirements shall be specified.

(2) Upon request to the contracting activity, potential offerors shall be provided—

(i) All requirements that they or their products must satisfy to become qualified;

(ii) At their expense (but see 9.204(a)(2) with regard to small businesses), a prompt opportunity to demonstrate their abilities to meet the standards specified for qualification using qualified personnel and facilities of the agency concerned, or of another agency obtained through interagency agreements, or under contract, or other methods approved by the agency (including use of approved testing and evaluation services not provided under contract to the agency).

(3) If the services in (a)(2)(ii) above are provided by contract, the contractors selected to provide testing and evaluation services shall be—

(i) Those that are not expected to benefit from an absence of additional qualified sources; and

(ii) Required by their contracts to adhere to any restriction on technical data asserted by the potential offeror seeking qualification.

(4) A potential offeror seeking qualification shall be promptly informed as to whether qualification is attained and, in the event it is not, promptly furnished specific reasons why qualification was not attained.

(b) When justified under the circumstances, the agency activity

responsible for establishing a qualification requirement shall submit to the competition advocate for the procuring activity responsible for purchasing the item subject to the qualification requirement, a determination that it is unreasonable to specify the standards for qualification which a prospective offeror (or its product) must satisfy. After considering any comments of the competition advocate reviewing the determination, the head of the procuring activity may waive the requirements of 9.202(a)(1)(ii) through (4) above for up to 2 years with respect to the item subject to the qualification requirement. A copy of the waiver shall be furnished to the head of the agency or other official responsible for actions under 9.202(a)(1). The waiver authority provided in this paragraph does not apply with respect to qualification requirements contained in a QPL, QML, or QBL.

(c) If a potential offeror can demonstrate to the satisfaction of the contracting officer that the potential offeror (or its product) meets the standards established for qualification or can meet them before the date specified for award of the contract, a potential offeror may not be denied the opportunity to submit and have considered an offer for a contract solely because the potential offeror—

(1) Is not on a QPL, QML, or QBL maintained by the Department of Defense (DOD) or the National Aeronautics and Space Administration (NASA); or

(2) Has not been identified as meeting a qualification requirement established after October 19, 1984, by DOD or NASA; or

(3) Has not been identified as meeting a qualification requirement established by a civilian agency (not including NASA).

(d) The procedures in Subpart 19.6 for referring matters to the Small Business Administration are not mandatory on the contracting officer when the basis for a referral would involve a challenge by the offeror to either the validity of the qualification requirement or the offeror's compliance with such requirement.

(e) The contracting officer need not delay a proposed award in order to provide a potential offeror with an opportunity to demonstrate its ability to meet the standards specified for qualification. In addition, when approved by the head of an agency or designee, a procurement need not be delayed in order to comply with 9.202(a).

(f) Within 7 years following enforcement of a QPL, QML, or QBL by DOD or NASA, or within 7 years after any qualification requirement was originally established by a civilian agency other than NASA, the qualification requirement shall be examined and revalidated in accordance with the requirements of 9.202(a). For DOD and NASA, qualification requirements, other than QPL's, QML's, and QBL's, shall be examined and revalidated within 7 years after establishment of the requirement under 9.202(a). Any periods for which a waiver under 9.202(b) is in effect shall be excluded in computing the 7 years within which review and revalidation must occur.

9.203 QPL's, QML's and QBL's.

(a) Qualification and listing in a QPL, QML, or QBL is the process by which products are obtained from manufacturers or distributors, examined and tested for compliance with specification requirements, or manufacturers or potential offerors, are provided an opportunity to demonstrate their abilities to meet the standards specified for qualification. The names of successful products, manufacturers, or potential offerors are included on lists evidencing their status. Generally, qualification is performed in advance and independently of any specific acquisition action. After qualification, the products, manufacturers, or potential offerors are included in a Federal or Military QPL, QML, or QBL. (See 9.202(a)(2) with regard to any product, manufacturer, or potential offeror not yet included on an applicable list.)

(b) Specifications requiring a qualified product are included in the following publications:

(1) Index of Federal Specifications and Standards, FPMR 101–29.1.

(2) Department of Defense Index of Specifications and Standards.

(c) Instructions concerning qualification procedures are included in the following publications:

(1) Federal Standardization Handbook, FPMR 101–29, Chapter IV.

(2) Defense Standardization Manual 4120.3–M, Chapter IV, as amended by Military Standards 961 and 962.

(d) The publications listed in paragraphs (b) and (c) above are sold to the public by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402. Civil agencies may obtain the publications from the General Services Administration, Specifications Section (WFSIS), Washington, DC 20407. Defense agencies may obtain the publications from the Naval Publications and Forms Center, 5801 Tabor Avenue, Philadelphia, PA 19120.

9.204 Responsibilities for establishment of a qualification requirement.

The responsibilities of agency activities that establish qualification requirements include the following:

(a) Arranging publicity for the qualification requirements. If active competition on anticipated future qualification requirements is likely to be fewer than two manufacturers or the products of two manufacturers, the activity responsible for establishment of the qualification requirements shall—

(1) Periodically publish notice in the Commerce Business Daily soliciting additional sources or products to seek qualification unless the contracting officer determines that such publication would compromise the national security.

(2) Bear the cost of conducting the specified testing and evaluation (excluding the costs associated with producing the item or establishing the production, quality control, or other system to be tested and evaluated) for a small business concern or a product manufactured by a small business concern which has met the standards specified for qualification and which could reasonably be expected to compete for a contract for that requirement. However, such costs may be borne only if it is determined in accordance with agency procedures that such additional qualified sources or products are likely to result in cost savings from increased competition for future requirements sufficient to amortize the costs incurred by the agency within a reasonable period of time, considering the duration and dollar value of anticipated future requirements. A prospective contractor requesting the United States to bear testing and evaluation costs must certify as to its status as a small business concern under section 3 of the Small Business Act in order to receive further consideration.

(b) Qualifying products that meet specification requirements.

(c) Listing manufacturers and suppliers whose products are qualified in accordance with agency procedures.

(d) Furnishing QPL's, QML's, or QBL's or the qualification requirements themselves to prospective offerors and the public upon request (see 9.202(a)(2)(i) above).

(e) Clarifying, as necessary, qualification requirements.

(f) In appropriate cases, when requested by the contracting officer, providing concurrence in a decision not to enforce a qualification requirement for a solicitation.

(g) Withdrawing or omitting qualification of a listed product, manufacturer or offeror, as necessary.

(h) Advising persons furnished any list of products, manufacturers or offerors meeting a qualification requirement and suppliers whose products are on any such list that—

(1) The list does not constitute endorsement of the product, manufacturer, or other source by the Government;

(2) The products or sources listed have been qualified under the latest applicable specification;

(3) The list may be amended without notice;

(4) The listing of a product or source does not release the supplier from compliance with the specification; and

(5) Use of the list for advertising or publicity is permitted. However, it must not be stated or implied that a particular product or source is the only product or source of that type qualified, or that the Government in any way recommends or endorses the products or the source listed.

(i) Reexamining a qualified product or manufacturer when—

(1) The manufacturer has modified its product, or changed the material or the processing sufficiently so that the validity of previous qualifications is questionable;

(2) The requirements in the specification have been amended or revised sufficiently to affect the character of the product; or

(3) It is otherwise necessary to determine that the quality of the product is maintained in conformance with the specification.

9.205 Opportunity for qualification before award.

(a) If an agency determines that a qualification requirement is necessary, the agency activity responsible for establishing the requirement shall urge manufacturers and other potential sources to demonstrate their ability to meet the standards specified for qualification and, when possible, give sufficient time to arrange for qualification before award. The responsible agency activity shall, before establishing any qualification requirement, furnish notice to the U.S. Department of Commerce, Office of Field Operations, P.O. Box 5999, Chicago, Illinois 60680, for synopsis in the Commerce Business Daily. The notice shall include—

(1) Intent to establish a qualification requirement;

(2) The specification number and name of the product;

(3) The name and address of the activity to which a request for the information and opportunity described in 9.202(a)(2) should be submitted;

(4) The anticipated date that the agency will begin awarding contracts subject to the qualification requirement;

(5) A precautionary notice that when a product is submitted for qualification testing, the applicant must furnish any specific information that may be requested of the manufacturer before testing will begin; and

(6) The approximate time period following submission of a product for qualification testing within which the applicant will be notified whether the product passed or failed the qualification testing (see 9.202(a)(4)).

(b) The activity responsible for establishing a qualification requirement shall keep any list maintained of those already qualified open for inclusion of additional products, manufacturers, or other potential sources, including eligible products from designated countries under terms of the International Agreement on Government Procurement (see Subpart 25.4).

9.206 Acquisitions subject to qualification requirements.

9.206-1 General.

(a) Agencies may not enforce any QPL, QML, or QBL without first complying with the requirements of 9.202(a). However, qualification requirements themselves, whether or not previously embodied in a QPL, QML, or QBL, may be enforced without regard to 9.202(a) if they are in either of the following categories:

(1) Any qualification requirement established by statute prior to October 30, 1984, for civilian agencies (not including NASA); or

(2) Any qualification requirement established by statute or administrative action prior to October 19, 1984, for DOD or NASA. Qualification requirements established after the above dates must comply with 9.202(a) to be enforceable.

(b) Except when the agency head or designee determines that an emergency exists, whenever an agency elects not to enforce a qualification requirement which it established, the requirement may not thereafter be enforced unless the agency complies with 9.202(a).

(c) If a qualification requirement applies, the contracting officer need consider only those offers identified as meeting the requirement or included on the applicable QPL, QML, or QBL, unless an offeror can satisfactorily demonstrate to the contracting officer that it or its product can meet the standards established for qualification before the date specified for award.

(d) If a product subject to a qualification requirement is to be acquired by the prime contractor as a component of an end item, the contracting officer shall require the prime contractor to furnish a component that has met the qualification requirement before award of a subcontract for the component. Any delay resulting from the prime contractor's awaiting qualification approval of a component by the Government shall not constitute excusable delay if a previously qualified component could have been acquired by the prime contractor in time to meet the end item delivery schedule (see the clause at 52.209-2, Qualification Requirements—Components of End Items).

(e) In acquisitions subject to qualification requirements, the contracting officer shall take the following steps:

(1) Use presolicitation notices in appropriate cases to advise potential suppliers before issuing solicitations involving qualification requirements. The notices shall identify the specification containing the qualification requirement and establish an allowable time period, consistent with delivery requirements, for prospective offerors to demonstrate their abilities to meet the standards specified for qualification. The notice shall be publicized in accordance with 5.204. Whether or not a presolicitation notice is used, the general synopsizing requirements of Subpart 5.2 apply.

(2) Distribute solicitations to prospective contractors whether or not they have been identified as meeting applicable qualification requirements.

(3) When appropriate, request in accordance with agency procedures that a qualification requirement not be enforced in a particular acquisition and, it granted, so specify in the solicitation (see 9.206-1(b)).

(4) Forward requests from potential suppliers for information on a qualification requirement to the agency activity responsible for establishing the requirement.

(5) Allow the maximum time, consistent with delivery requirements, between issuing the solicitation and the contract award. As a minimum, contracting officers shall comply with the time frames specified in 5.203 when applicable.

9.206-2 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 52.209-1, Qualification Requirements, in solicitations when the acquisition is subject to a qualification requirement.

(b) The contracting officer shall insert the clause at 52.209-2, Qualification Requirements—Components of End Items, in solicitations and contracts, when components of end items are subject to a qualification requirement.

9.206-3 Competition.

(a) *Presolicitation.* If a qualification requirement applies to an acquisition, the contracting officer shall review the applicable QPL, QML, or QBL or other identification of those sources which have met the requirement before issuing a solicitation to ascertain whether the number of sources is adequate for competition. (See 9.204(a) for duties of the agency activity responsible for establishment of the qualification requirement.) If the number of sources is inadequate, the contracting officer shall request the agency activity which established the requirement to—

(1) Indicate the anticipated date on which any sources presently undergoing evaluation will have demonstrated their abilities to meet the qualification requirement so that the solicitation could be rescheduled to allow as many additional sources as possible to qualify; or

(2) Indicate whether a means other than the qualification requirement is feasible for testing or demonstrating quality assurance.

(b) *Postsolicitation.* The contracting officer shall submit to the agency activity which established the qualification requirement the names and addresses of concerns which requested copies of the solicitation but are not included on the applicable QPL, QML, or QBL or identified as meeting the qualification requirement. The activity will then assist interested concerns in meeting the standards specified for qualification (see 9.202(a) (2) and (4)).

9.207 Changes in status regarding qualification requirements.

(a) The contracting officer shall promptly report to the agency activity which established the qualification requirement any conditions which may merit removal or omission from a QPL, QML, or QBL or affect whether a source should continue to be otherwise identified as meeting the requirement. These conditions exist when—

(1) Products or services are submitted for inspection or acceptance that do not meet the qualification requirement;

(2) Products or services were previously rejected and the defects were not corrected when resubmitted for inspection or acceptance;

(3) A supplier fails to request reevaluation following change of location or ownership of the plant where the product which met the qualification requirement was manufactured (see the provision at 52.209-1, Qualification Requirements, and the clause at 52.209-2, Qualification Requirements—Components of End Items);

(4) A manufacturer of a product which met the qualification requirement has discontinued manufacture of the product;

(5) A source requests removal from a QPL, QML, or QBL;

(6) A condition of meeting the qualification requirement was violated; e.g., advertising or publicity contrary to 9.204(h)(5);

(7) A revised specification imposes a new qualification requirement;

(8) Manufacturing or design changes have been incorporated in the qualification requirement;

(9) The source is on the Consolidated List of Debarred, Suspended, and Ineligible Contractors (see Subpart 9.4); or

(10) Performance of a contract subject to a qualification requirement is otherwise unsatisfactory.

(b) After considering any of the above or other conditions reasonably related to whether a product or source continues to meet the standards specified for qualification, an agency may take appropriate action without advance notification. The agency shall, however, promptly notify the affected parties if a product or source is removed from a QPL, QML, or QBL, or will no longer be identified as meeting the standards specified for qualification. This notice shall contain specific information why the product or source no longer meets the qualification requirement.

PART 14—SEALED BIDDING

5. Section 14.212 is added to read as follows:

14.212 Economic purchase quantities (supplies).

Contracting officers shall comply with the economic purchase quantity planning requirements for supplies in Subpart 7.2. See 7.203 for instructions regarding use of the provision at 52.207-4, Economic Purchase Quantity—Supplies, and 7.204 for guidance on handling responses to that provision.

PART 15—CONTRACTING BY NEGOTIATION

6. Section 15.415 is added to read as follows:

15.415 Economic purchase quantities (supplies).

Contracting officers shall comply with the economic purchase quantity planning requirements for supplies in Subpart 7.2. See 7.203 for instructions regarding use of the provision at 52.207-4, Economic Purchase Quantity—Supplies, and 7.204 for guidance on handling responses to that provision.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

7. Section 52.203-6 is added to read as follows:

52.203-6 Restrictions on Subcontractor Sales to the Government.

As prescribed in 3.503-2, insert the following clause:

Restrictions on Contractor Sales to the Government (Jul 1985)

(a) Except as provided in (b) below, the Contractor shall not enter into any agreement with an actual or prospective subcontractor, nor otherwise act in any manner, which has or may have the effect of restricting sales by such subcontractors directly to the Government of any item or process (including computer software) made or furnished by the subcontractor under this contract or under any follow-on production contract.

(b) The prohibition in (a) above does not preclude the Contractor from asserting rights that are otherwise authorized by law or regulation.

(c) The Contractor agrees to incorporate the substance of this clause, including this paragraph (c), in all subcontracts under this contract.

(End of clause)

8. Section 52.207-4 is added to read as follows:

52.207-4 Economic Purchase Quantity—Supplies.

As prescribed in 7.203, insert the following provision:

Economic Purchase Quantity—Supplies (Jul 1985)

(a) Offerors are invited to state an opinion on whether the quantity(ies) of supplies on which bids, proposals or quotes are requested in this solicitation is (are) economically advantageous to the Government.

_____

_____

_____

(b) Each offeror who believes that acquisitions in different quantities would be more advantageous is invited to recommend an economic purchase quantity. If different quantities are recommended, a total and a

unit price must be quoted for applicable items. An economic purchase quantity is that quantity at which a significant price break occurs and beyond which no substantial decrease would result. If there are significant price breaks at different quantity points, this information is desired as well.

OFFEROR RECOMMENDATIONS

Item	Quantity	Price quotation	Total

(c) The information requested in this provision is being solicited to avoid acquisitions in disadvantageous quantities and to assist the Government in developing a data base for future acquisitions of these items. However, the Government reserves the right to amend or cancel the solicitation and resolicit with respect to any individual item in the event quotations received and the Government's requirements indicate that different quantities should be acquired.

(End of provision)

9. Section 52.209–1 is revised to read as follows:

52.209–1 Qualification Requirements.

As prescribed in 9.206–2(a), insert the following provision:

Qualification Requirements (Jul 1985)

(a) Definition: "Qualification requirement," as used in this provision, means a requirement for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract.

(b) This solicitation identifies those supplies or services to which a qualification requirement applies. The Contracting Officer will make awards for those supplies or services requiring qualification only if the offered product, manufacturer, or offeror has demonstrated that it meets the standards prescribed for qualification. The product, manufacturer, or offeror must be qualified by the time of award whether or not the name of the product, manufacturer, or offeror is actually included on a qualified products list, qualified manufacturers list, or qualified bidders list. Offerors should contact the agency activity designated below to obtain all requirements that they or their products must satisfy to become qualified and to arrange for an opportunity to demonstrate their abilities to meet the standards specified for qualification.

(Name) _____

(Address) _____

(c) If an offeror or its product has already met the qualification requirement, the applicable information noted below should be provided.

Offeror's Name _____

Manufacturer's Name _____

Item Name _____

Test Number _____

(to the extent known)

(d) If an offeror or its product has met the qualification requirement but is not yet on a qualified products list, qualified manufacturers list, or qualified bidders list, the offeror shall submit evidence of qualification with its offer in order to receive consideration. If this is a sealed bid acquisition and the product, manufacturer or offeror that is already qualified or is to be qualified before award is not identified, either above or elsewhere in the bid, the Contracting Officer will reject the bid. Unless determined to be in the Government's interests, this acquisition will not be delayed in order to provide an offeror with an opportunity to meet the standards specified for qualification.

(e) Any change in location or ownership of the plant where a previously qualified product was manufactured requires reevaluation of the qualification. Similarly, any change in location or ownership of a previously qualified manufacturer or offeror requires reevaluation of the qualification. The reevaluation must be accomplished before the date of award.

(End of provision)

10. Section 52.209–2 is revised to read as follows:

52.209–2 Qualification Requirements—Components of End Items.

As prescribed in 9.206–2(b), insert the following clause:

Qualification Requirements—Components of End Items (Jul 1985)

(a) Definition: "Qualification requirement," as used in this clause, means a requirement for testing or other quality assurance demonstration that must be completed before award of subcontracts or before beginning manufacture of certain components of end items covered by this contract.

(b) If any of the end items to be acquired by the Government will contain one or more components that are subject to a qualification requirement, the components or their manufacturers must demonstrate their abilities to meet the standards specified for qualification before the Contractor awards any subcontract for the components. If the Contractor plans to manufacture components, the Contractor shall have demonstrated its ability to meet the standards specified for qualification before beginning to manufacture the components. The components need not be qualified before the manufacture of the prototype, preproduction model, or first article, for qualification testing.

(c) Unless required for interchangeability or compatibility, the Contractor shall not cite brand names from any qualified products list or qualified manufacturers list in any subcontractor solicitation, but shall refer to the pertinent specification in order to obtain optimum competition.

(d) Delay resulting from the Contractor's awaiting qualification approval by the Government of a component or its manufacturer shall not constitute excuseable delay when a previously qualified component could have been acquired in time to meet the end item delivery schedule.

(e) Any change in location or ownership of the plant where a previously qualified product was manufactured requires reevaluation of whether the standards specified for qualification are still met. The reevaluation must be completed before the award of any subcontract for the components or before beginning the manufacture of the components.

(End of clause)

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Friday
August 30, 1985

Part VIII

Department of Education

Office of Special Education and Rehabilitative Services

34 CFR Part 327

Handicapped Special Studies Program; Final Regulations

DEPARTMENT OF EDUCATION

Office of Special Education and Rehabilitative Services

34 CFR Part 327

Handicapped Special Studies Program

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary issues regulations under Section 618 of Part B of the Education of the Handicapped Act, as amended by the Education of the Handicapped Act Amendments of 1983, Pub. L. 98-199. This program provides support for data collection activities and studies, investigations, and evaluations to assess the impact and effectiveness of programs assisted under the Education of the Handicapped Act, and for the development, publication and dissemination of the annual report to the Congress required under Section 618 of the Act.

These final regulations include, among other things, information about the kinds of projects supported under this program, the application requirements, and the selection criteria for judging applications.

EFFECTIVE DATE: These regulations will take effect either 45 days after publication in the **Federal Register** or later if Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write to the Department of Education contact person.

FOR FURTHER INFORMATION CONTACT: Ms. Susan Sanchez, Special Education Programs, Department of Education, 400 Maryland Avenue, SW. (Switzer Building, Room 3511-M/S 2313), Washington, D.C. 20202; Telephone: (202) 732-1117.

SUPPLEMENTARY INFORMATION: The Handicapped Special Studies program is authorized by Section 618 of Part B of the Education of the Handicapped Act, as amended by the Education of the Handicapped Act Amendments of 1983, Pub. L. 98-199 (20 U.S.C. 1418). Under this program, support is provided for the collection of data, as well as studies to evaluate State and local efforts to provide a free appropriate public education to handicapped children and youth. Section 618 of the Act requires that this information be included in the annual report submitted to the Congress by the Department. The activities conducted under this program are designed to provide Congress with information relevant to policymaking and to provide Federal, State and local educational agencies with information relevant to program management, administration, and the effectiveness of their special education programs. Under Section 618(c) of the Act, the Secretary is required, not later than July 1 of each year, to submit to the appropriate committees of each House of the Congress and to publish in the **Federal Register** proposed evaluation priorities for special studies to determine the impact of the Act for review and comment.

A notice of proposed rulemaking for this program was published on February 6, 1985 (50 FR 5080). Certain technical revisions have been made to the selection criteria in § 327.31. No substantive changes are intended, and no amendments to the applications are necessary. The comments received in response to this notice and the Secretary's responses are summarized below.

Comment. One commenter recommended that the regulations specify that the evaluation requirements under Section 618 of the Act also apply to the program operated by the Bureau of Indian Affairs (BIA) in the Department of Interior and its special education State plan. The commenter also recommended that the evaluations of special education programs under the jurisdiction of the States and BIA be conducted by third party evaluates who are not involved in the administration of these programs. The commenter suggested that Indian tribes be included as appropriate bodies to oversee the evaluations, or that the evaluations of the special education needs and services for those distinct minority populations be contracted for separately.

Response. No change has been made. The Bureau of Indian Affairs is treated as a State educational agency and, as such, is eligible to apply for awards under section 618 of the Act. Section 618(d)(2) of the Act requires that cooperative agreements entered into under section 618(d) be developed in consultation with the State Advisory Panel established under section 613(a)(12) of the Act, the local educational agencies, and others involved in or concerned with the education of handicapped children and youth. Indian tribes would appropriately be included among the groups consulted in developing an application by BIA for one of those awards. Under section 618(d)(1) of the Act, only State educational agencies are eligible to apply for an award for a cooperative agreement, but the recipient of an award is not precluded from contracting with third parties to conduct activities to carry out the project.

Comment. Several commenters asked that the regulations require the Secretary to notify unsuccessful applicants that they are not receiving awards, the reasons for the rejection, and the number of points earned.

Response. No change has been made. Section 75.218 of EDGAR now provides that the Secretary inform an applicant why the application was not selected in a competition. Applications received under competitions held under section 618 of the Act are covered by this requirement.

Comment. Several commenters recommended that the training and qualifications of the panel members that review and recommend the selection of the award recipients be specified, if it is not the Secretary alone who makes the selection.

Response. No change has been made. EDGAR (34 CFR 75.217) already specifies the procedures for using a group of experts to evaluate applications. These procedures apply to this program. Because of the wide variety of competitions held by the Department and the diverse areas which may be addressed within a single competition, the training and qualifications of the individuals assigned to evaluate applications are determined as priorities are established for funding.

Comment. Several commenters felt that § 327.40 is discriminatory because it identifies the State educational agency as the only potential grantee required to contribute an amount not less than 40 percent of the cost of the study, while § 327.2 indicates that eligible recipients of grants under this program include public or private agencies, institutions, organizations and other appropriate parties.

Response. A change has been made. The proposed regulations do not clearly identify the State Educational Agency/Federal Evaluation Studies projects as the activities funded under section 618(d) of the Act. Language has been added to § 327.40 to make this clear. State educational agencies are the only eligible applicants for awards under section 618(d) and by statute are required to contribute an amount not less than 40 percent of the cost of the study.

If a State educational agency were to apply for an award in competitions other than those under section 618(d) of the Act, the 40 percent contribution would not be a requirement.

Comment. Several commenters felt that the regulations should allow a State educational agency to contract with research and/or evaluation consultants

as necessary to conduct evaluation studies.

Response. No change has been made. The regulations do not prohibit a State educational agency from contracting with research and/or evaluation consultants for the purpose of assisting in conducting evaluation studies. When a State educational agency contracts with consultants for such a purpose, the EDGAR provisions at 34 CFR 75.708(b) and Part 74, Subpart P apply to the use and compensation of consultants.

Comment. Several commenters asked that there be a specific procedure for requesting additions or deletions to the grant or cooperative agreement, or a reference to other regulations. Several commenters also recommended that there be specific procedures for recipients to follow in the event of a potential or actual cost overrun.

Response. No change has been made. The EDGAR provisions at §§ 74.102 (*Prior approval procedures*), 74.103 (*Programmatic changes*), and 74.105 (*Budget revisions—nonconstruction projects*) establish the procedures to be followed for requesting changes to a grant or cooperative agreement. Section 327.3 of these regulations already specifies that the EDGAR regulations apply.

Comment. One commenter recommended that a change be made in § 327.40(a) to consider not only administrative funds under Part B of the Act as an allowable portion of the 40 percent State contribution for projects funded under Section 618(d), but also a State's allocation of the remainder of the Part B funds for direct and support services.

Response. No change has been made. The Secretary believes that evaluation of programs is an appropriate administrative activity that can be supported by that portion of a State's Part B funds that can be set aside for administrative uses. Section 300.621(a)(2) of the regulations for the Part B program specifically states that Federal funds for State administration may be used for "approval, supervision, monitoring, and evaluation of the effectiveness of local programs and projects for the education of handicapped children."

A summary of these final regulations follows:

(a) Subpart A—General

Section 327.1 contains the purpose for the Handicapped Special Studies program.

Section 327.2 provides that public or private agencies, institutions, organizations, or other appropriate parties are eligible for an award under this program. The Act identifies State educational agencies as the only applicants eligible to apply to enter into a cooperative agreement with the Secretary to conduct an evaluation study under Section 618(d) of the Act.

Section 327.3 lists the regulations that apply to the Handicapped Special Studies program, including Parts 74, 75, 77, 78, and 79 of the Education Department General Administrative Regulations (EDGAR).

The Department has available the full range of funding options (grants, contracts, or cooperative agreements) for use under Section 618 in conducting projects. These final regulations apply to both grants and cooperative agreements. Contract awards are governed by 48 CFR (Federal Acquisition Regulations) and, therefore, are not addressed in these final regulations.

Section 327.4 provides definitions that apply to the program. It incorporates certain EDGAR definitions as well as the definition of "handicapped children" used in the Assistance to States for Education of Handicapped Children program (34 CFR Part 300). This definition is adopted to ensure consistency among programs under the Act.

(b) Subpart B—What Kinds of Projects Does the Secretary Assist under This Program?

Section 327.10 identifies the types of projects that the Secretary supports. This section identifies the activities authorized under Section 618 of the Act.

(c) Subpart C—[Reserved]

(d) Subpart D—How Does the Secretary Make an Award?

Section 327.30 describes the procedures used by the Secretary to select priorities for funding from among the types of projects authorized under Section 618 of the Act.

Section 327.31 contains the selection criteria the Secretary uses to evaluate applications for new awards. The Secretary uses weighted criteria that reflect the relative importance of the elements of an application in order to ensure that the most promising projects are selected.

(e) Subpart E—What Conditions Must Be Met by a Grantee?

Section 327.40(b) contains requirements that State educational agencies must meet if they enter into a cooperative agreement with the Secretary to conduct an evaluation study under Section 618(d) of the Act. These requirements include—(1) payment of not less than 40 per cent of the total cost of the study; and (2) consulting with the State advisory panel established under Part B of the Act, and others, including the local educational agencies, involved in the education of handicapped children and youth, in developing the study. *See* Section 618(d)(2) of the Act.

Executive Order 12291

These final regulations have been reviewed in accordance with Executive Order 12291. They are classified as non-major because they do not meet the criteria for major regulations established in the Order.

Regulatory Flexibility Act Certification

The Secretary certifies that these final regulations will not have a significant economic impact on a substantial number of small entities. The application procedures in the final regulations will not place undue burdens on small entities submitting applications under this program. The regulations do not impose other burdens that would have a significant economic impact on small entities participating in the program.

To the extent that the regulations affect States and State agencies, they will not have an impact on small entities. States and State agencies are not small entities under the Act.

Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR Part 79 (48 FR 29158; June 24, 1983). The objective of the Executive Order is to foster an intergovernmental partnership and a strengthened federalism by relying on State and local processes for State and local government coordination and review of proposed Federal financial assistance.

In accordance with the Order, this document is intended to provide early notification of the Department's specific plans and action for this program.

Assessment of Educational Impact

In the notice of proposed rulemaking, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority of the United States. Based on the comments on the proposed rules and the Department's own review, it has been determined that the regulations in this document do not require information that is already being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 327

Education, Education of handicapped, Education—research, Grants program—education, Reporting and recordkeeping requirements, State educational agencies.

Citation of Legal Authority

A citation of statutory or other legal authority is placed in parentheses on the line following each substantive provision of these regulations.

(20 U.S.C. 1418)

(Catalog of Federal Domestic Assistance No. 84.159; Handicapped Special Studies)

Dated: August 27, 1985.

William J. Bennett,

Secretary of Education.

The Secretary adds a new Part 327 to Title 34 of the Code of Federal Regulations to read as follows:

PART 327—HANDICAPPED SPECIAL STUDIES PROGRAM

Subpart A—General

Sec.

327.1 What is the Handicapped Special Studies Program?
327.2 Who is eligible to apply for an award under this program?
327.3 What regulations apply to this program?
327.4 What definitions apply to this program?
327.5–327.9 [Reserved]

Subpart B—What Kinds of Projects Does the Secretary Assist Under This Program?

327.10 What kinds of projects are authorized under this part?
327.11–327.19 [Reserved]

Subpart C—[Reserved]

Subpart D—How Does the Secretary Make an Award?

327.30 How does the Secretary establish priorities for an award?
327.31 What are the selection criteria for evaluating applications for awards?
327.32–327.39 [Reserved]

Subpart E—What Conditions Must Be Met by a Grantee?

327.40 What are the requirements for conducting projects?
327.41–327.49 [Reserved]

Authority: Sec. 618 of the Education of the Handicapped Act as amended by Pub. L. 98–199, 97 Stat. 1360–1363 (1983), (20 U.S.C. 1418), unless otherwise noted.

Subpart A—General

§ 327.1 What is the Handicapped Special Studies Program?

The purpose of this program is to support the collection of data, studies, investigations, and evaluations to assess the impact and effectiveness of programs and projects assisted under the Education of the Handicapped Act, and related activities to provide the Congress and others with this information.

(20 U.S.C. 1418)

§ 327.2 Who is eligible to apply for an award under this program?

(a) The Secretary may make awards under this program to public or private agencies, institutions, organizations, and other appropriate parties for support of the kinds of projects described in § 327.10(a)–(b), and (d)–(h).

(b) The Secretary may enter into cooperative agreements with State educational agencies to carry out the projects described in § 327.10(c).

(20 U.S.C. 1418)

§ 327.3 What regulations apply to this program?

The following regulations apply to grants and cooperative agreements under this program:

(a) The regulations in this Part 327.

(b) The Education Department General Administrative Regulations (EDGAR) in Title 34 of the Code of Federal Regulations in—

(1) Part 74 (Administration of Grants);

(2) Part 75 (Direct Grant Programs);

(3) Part 77 (Definitions that Apply to Department Regulations);

(4) Part 78 (Education Appeal Board); and

(5) Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(20 U.S.C. 1418)

§ 327.4 What definitions apply to this program?

(a) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Applicant
Application
Award
EDGAR
Fiscal year
Grant
Grantee
Local educational agency
Project
Secretary
State educational agency.

(20 U.S.C. 1418)

(b) *Definition in 34 CFR Part 300.* The following term used in this part is defined in 34 CFR 300.5: Handicapped children.

(20 U.S.C. 1401(a)(1))

§§ 327.5–327.9 [Reserved]

Subpart B—What Kinds of Projects Does the Secretary Assist under This Program?

§ 327.10 What kinds of projects are authorized under this part?

This program provides support for activities that include projects to—

(a) Collect data, and conduct studies, investigations, and evaluations, to assess progress in the implementation of the Act, the impact of the Act, and the effectiveness of State and local efforts to provide free appropriate public education to all handicapped children and youth;

(b) Obtain data, on at least an annual basis, about programs and projects assisted under the Act and under other Federal laws relating to the education of handicapped children and youth, as required under Section 618(b) of the Act;

(c) Assess the impact and effectiveness of programs assisted under the Act, in accordance with Sections 618(d) (1) and (2) of the Act, through cooperative agreements with State educational agencies;

(d) Provide technical assistance to participating State educational agencies in the implementation of the evaluation studies described under paragraph (c) of this section;

(e) Disseminate information from the studies assisted under paragraph (c) of this section to State educational agencies, and, as appropriate, others involved in or concerned with the education of handicapped children and youth;

(f) Conduct evaluation studies to determine the impact of the Act;

(g) Conduct evaluation studies, including—

(1) A longitudinal study of a sample of handicapped studies, encompassing the full range of handicapping conditions, to examine their educational progress while in special education and their status (including their occupational, educational, and independent living status) after leaving secondary school; or

(2) Obtaining and compiling current information from State and local educational agencies and other service providers regarding State and local expenditures for educational services for handicapped children in order to calculate per pupil expenditures by handicapping condition; or

(h) Assist in the development, publication, and dissemination of the annual report to the Congress required under section 618(f) of the Act.

(20 U.S.C. 1418)

§§ 327.11-327.19 [Reserved]

Subpart C—[Reserved]

Subpart D—How Does the Secretary Make an Award?

§ 327.30 How does the Secretary establish priorities for an award?

Section 618(c) of the Education of the Handicapped Act requires that not later than July 1 of each year, the Secretary submit to the appropriate committee of each House of the Congress and publish in the Federal Register proposed evaluation priorities for the program under this part for review and comment.

(20 U.S.C. 1418)

§ 327.31 What are the selection criteria for evaluating applications for awards?

The Secretary uses the criteria in this section to evaluate applications for awards. The maximum score for all of the criteria is 100 points.

(a) *Plan of operation* (10 points).

(1) The Secretary reviews each application to determine the quality of the plan of operation for the project.

(2) The Secretary looks for—

(i) High quality in the design of the project;

(iii) An effective plan of management that insures proper and efficient administration of the project;

(iii) A clear description of how the objectives of the project relate to the purpose of the program;

(iv) The way the applicant plans to use its resources and personnel to achieve each objective; and

(v) A clear description of how the applicant will provide equal access and treatment for eligible project participants who are members of groups that have been traditionally underrepresented, such as—

(A) Members of racial or ethnic minority groups;

(B) Women;

(C) Handicapped persons, and

(D) The elderly.

(b) *Quality of key personnel.* (10 points)

(1) The Secretary reviews each application to determine the qualifications of the key personnel the applicant plans to use on the project.

(2) The Secretary considers—

(i) The qualifications of the project director (if one is to be used);

(ii) The qualifications of each of the other key personnel to be used in the project;

(iii) The time that each person referred to in paragraph (b)(2)(i) and (ii) of this section will commit to the project; and

(iv) The extent to which the applicant, as part of its nondiscriminatory employment practices, encourages applications for employment from persons who are members of groups that have been traditionally underrepresented, Such as—

(A) Members of racial or ethnic minority groups;

(B) Women;

(C) Handicapped persons, and

(D) The elderly.

(3) To determine personnel qualifications, the Secretary considers experience and training, in fields related to the objectives of the project, as well as other evidence that the applicant provides.

(c) *Budget and cost effectiveness.* (10 points)

(1) The Secretary reviews each application to determine if the project has an adequate budget and is cost effective.

(2) The Secretary considers the extent to which—

(i) The budget for the project is adequate to support the project activities; and

(ii) Costs are reasonable in relation to the objectives of the project.

(d) *Evaluation plan.* (5 points).

(1) The Secretary reviews each application to determine the quality of the evaluation plan for the project.

Cross Reference: 34 CFR 75.590, *Evaluation by the grantee.*

(2) The Secretary considers the extent to which the methods of evaluation are appropriate for the project and, to the extent possible, are objective and produce data that are quantifiable.

(e) *Adequacy of resources.* (5 points).

(1) The Secretary reviews each application to determine if the applicant plans to devote adequate resources to the project.

(2) The Secretary considers the extent to which—

(i) The facilities that the applicant plans to use are adequate; and

(ii) The equipment and supplies that the applicant plans to use are adequate.

(f) *Importance.* (10 points).

(1) The Secretary reviews each application to determine if the proposed project addresses State and national concerns in light of the purposes of this part.

(2) The Secretary considers—

(i) The significance of the issues to be addressed for both State and national audiences;

(ii) The importance of the proposed project in determining the impact and effectiveness of programs assisted under the Act;

(iii) The experiences of service providers related to the problem or issue; and

(iv) Previous research and evaluation findings related to the issues.

(g) *Usefulness.* (10 points).

The Secretary reviews each application to determine the usefulness of the proposed project findings in improving services to handicapped children and youth including—

(1) The contribution that the project findings or products will make to current knowledge or practice;

(2) The extent to which findings and reports will be useful in improving services for handicapped children and youth; and

(3) The extent to which findings and reports will be useful to both State and national audiences in understanding the impact and effectiveness of programs assisted under the Education of the Handicapped Act.

(h) *Technical soundness.* (40 points).

The Secretary reviews each application to determine the technical soundness of the research or evaluation plan, including, where appropriate—

(1) The design;

(2) The proposed sample;

(3) Instrumentation;

(4) Data analysis procedures; and

(5) Procedures for the development of the project report.

(20 U.S.C. 1418)

§§ 327.32-327.39 [Reserved]

Subpart E—What Conditions Must Be Met by a Grantee?

§ 327.40 What are the requirements for conducting projects?

Each State educational agency receiving an award for a State Educational Agency/Federal Evaluation Studies project under § 327.10(c) shall—

(a) Contribute an amount not less than 40 percent of the total cost of the study, which amount may be paid from a State's allocation of funds for State administration of Part B of the Act; and

(b) Develop the study in consultation with the State advisory panel established under the Act, the local educational agencies, and others involved in or concerned with the education of handicapped children and youth.

(20 U.S.C. 1418 (c), (d)(2))

§§ 327.41-327.49 [Reserved]

[FR Doc. 85-20789 Filed 8-29-85; 8:45 am]

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Friday
August 30, 1985

Part IX

Office of Personnel Management

5 CFR Part 293 et al.

Reduction in Force; Performance Management and Recognition System; Pay Administration Under the Fair Labor Standards Act, and Personnel Folder; Final Rules and Proposed Rules

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 300, 335, 351, 430, 431, 451, 531, 532, 540, 551, and 771

Reduction in Force; Performance Management System; Pay Administration Under the Fair Labor Standards Act

Cross Reference and Confirmation of Effective Date

Regulations originally published as final rules on October 25, 1983 (48 FR 49462–49498), concerning reduction-in-force (RIF), performance management, and the application of the Fair Labor Standards Act (FLSA) to the Federal workforce became effective on July 3, 1985, when the Chief Justice of the United States Supreme Court, acting as Circuit Justice, vacated an order of the United States Court of Appeals for the District of Columbia Circuit staying the effectiveness of the rules. This document confirms the effective date of these rules and refers the reader to proposed rules published also in this issue by the Office of Personnel Management.

Three of the four proposed rule documents are the final rules published on October 25, 1983, here republished, with some modifications, in notices of proposed rulemaking that afford interested parties the opportunity to consider and comment on the final rules, including on the substantive revisions to those rules that are contained in this issue. The three proposed rules contain more detailed background information concerning the publication history of these regulations.

The specific units of the Code of Federal Regulations amended by the October 25, 1983, documents which became effective July 3, 1985, and which remain effective, except where superseded by interim or final rules published subsequent to October 25, 1983, are:

Section 300.602
Section 335.104
Part 351
Part 430
Part 431
Part 451
Part 531
Part 532, Subpart H
Part 540
Section 551.102(h)
Sections 551.201–551.209
Section 771.206(c)(3)

Constance Horner,

Director.

August 27, 1985

[FR Doc. 85–20828 Filed 8–27–85; 4:35 pm]

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5 CFR Parts 293, 430, 530, 531, 536, 540, and 771

Performance Management and Recognition System

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is revising its regulations implementing the Performance Management and Recognition System (PMRS) to reflect comments on interim regulations published March 25, 1985. The PMRS, mandated by Title II of the Civil Service Retirement Spouse Equity Act of 1984, replaced the Merit Pay System for Federal supervisors and managers. The new System bases supervisors' and managers' pay and awards on their performance, and provides for a more extensive performance award system than in the past.

EFFECTIVE DATE: October 1, 1985.

FOR FURTHER INFORMATION CONTACT: Jack Pokoyk, (202) 632–5653.

SUPPLEMENTARY INFORMATION: On March 25, 1985, at 50 FR 11788, OPM published interim regulations to implement title II of the Civil Service Retirement Spouse Equity Act of 1984, Pub.L. 98–615, with a 60-day comment period. Title II established the Performance Management and Recognition System, replacing the Merit Pay System for Federal Government supervisors and management officials in grades GS–13 through GS–15.

During the comment period, which ended May 24, 1985, OPM received comments from 32 Federal agency headquarters, one member of Congress, two associations, and eight individuals. The revised regulations reflect these comments, as well as technical changes that arose in considering the comments.

Following is an outline of the changes to the regulations, including a summary of comments, and discussion of OPM rationale for the changes being made.

1. Issue: Filing and Transfer of Performance Records

Summary of Comments: Of 32 agencies commenting on the PMRS regulations, 19 agencies commented on the performance records provisions. Most commenters object to maintaining performance records in both the Official Personnel Folder (OPF) and the Employee Performance File (EPF). Seven agencies prefer maintaining performance records in the EPF until the employee transfers, and then placing performance records in the OPF to be transferred to the gaining agency. Two agencies prefer to maintain records in the OPF only, and five agencies recommend abolishing the EPF system if records must be filed in the OPF. Three agencies recommend that OPM allow agencies the option to file either in the OPF or the EPF.

Five agencies object to filing more than one rating, and two agencies object to filing performance plans on which ratings are based.

Seven agencies recommend that procedures for filing and transferring performance records be the same for all employees, rather than have a separate procedure for PMRS employees.

Discussion. Most of the difficulties with this provision can be resolved by allowing agencies the option of filing performance records in either the OPF or the EPF, as long as, at the time the employee transfers, the performance ratings are placed in the OPF and forwarded to the gaining agency. Performance records filing regulations currently require that 3 years' ratings and performance plans be maintained in the EPF, but some losing agencies' workloads can be lessened by transferring only the most recent performance plan to the gaining agency.

Finally, with regard to requests that OPM require the same filing procedures for all employees' performance records, OPM did, in fact, publish proposed regulations on October 25, 1983, which would require similar procedures for non-PMRS employees. However, the Congressional prohibition on expenditure of funds on work related to those proposed regulations prevented us from finalizing them to coincide with the final regulations for the PMRS. OPM plans to issue regulations covering non-PMRS employees in this area in the near future.

Change: Agencies are allowed the option to file performance records for PMRS employees in either the OPF or the EPF, as long as they forward the records in the OPF when the employee transfers. Losing agencies are required to forward three ratings of record and the most current performance plan when the employee transfers to another agency.

2. Issue: Definition of "Rating" (§ 430.404)

Summary of co.nments: Eight agencies and one individual commented on the definition of "rating" in Part 430. Five of the agencies recommend deleting the second definition. One agency recommends that the second definition

refer to formal notice of unacceptable performance. Two agencies asked questions about the status of and procedures for the second rating.

Discussion: 5 U.S.C. 4302a (b)(6) requires that an employee be provided a written notice at any time his/her performance is unacceptable on one or more critical elements.

Change: Based on the comments, the second definition of rating has been revised and added to the definition of "rating of record." In response to these comments, as well as to comments on the definition of "rating" found in Part 540, a nomenclature change has been made: "rating" is now titled "summary rating."

3. Issue: Definition of "Performance Standard" (§ 430.404)

Summary of Comments: One agency suggests expanding the definition of "performance standards" to include the requirement that organizational goals be reflected in performance standards.

Another agency recommends clarifying the term "manner of performance" in the definition of "performance standards," to avoid the appearance of appraisal of personal traits.

Discussion: Since the provision in § 430.405 is being changed to encourage, rather than require, including accomplishment of organizational goals in individual performance plans (see discussion below in Issue 7), it is unnecessary to reflect that provision in the definition.

Assessing the manner of PMRS employees' performance is essential and is included in the Management Activities Standard that has been provided to all agencies. Also, further guidance on how to account for manner of performance will be forthcoming.

Change: No change.

4. Issue: Definition of "Appraisal" (§ 430.404)

Summary of Comments: Two agencies suggest revising the definition of "appraisal" to eliminate reference to progress reviews because appraisal is defined as a process.

Discussion: Since performance appraisal is a process done throughout the year, progress reviews should not be included in the definition.

Changes: The second sentence in the definition of "Appraisal" is deleted. Further, a new definition of "progress review" is added, providing that it is a review of the employee's progress toward achieving performance standards and not a rating in itself.

5. Issue: Definition of "Non-critical Elements" (§ 430.404)

Summary of Comments: Two agencies request further clarification that non-critical elements are optional.

Discussion: Because it is important that the use of non-critical elements is not required, adding that information to the definition would clarify the issue.

Change: The definition is revised to reflect that non-critical elements are optional and may be used at agency discretion.

6. Issue: Request for Additional Definition (§ 430.404)

Summary of Comments: One agency recommends adding a definition for "Fully Successful."

Discussion: Since the determination of "Fully Successful" performance must be at the agency's discretion, OPM does not think it would be appropriate for OPM to place a definition of "Fully Successful" in regulation.

Change: No change.

7. Issue: Inclusion of the Accomplishment of Organizational Goals in Performance Plans (§ 430.405(d)(2))

Summary of Comments: Seven agencies objected to including accomplishment of organizational goals in individual performance plans. Four agencies prefer the flexibility in the statute to include accomplishment of organizational accomplishment or not. Two agencies feel that these are inappropriate performance elements. Three agencies think this provision appears to conflict with the legal prohibition on OPM prescription of a specific performance element.

Discussion: 5 U.S.C. 4302a does allow the agency the option of including accomplishment of organizational objectives in individual performance plans. It is important to consider these accomplishments whenever possible in evaluating PMRS employees, because that makes performance a functioning part of existing basic management and supervisory responsibilities and is the key to successful management. It is important to note that requiring the inclusion of this type of element is not a violation of the statutory prohibition on OPM prescription of a specific performance element.

Change: The regulatory provision now strongly encourages, rather than requires, including accomplishment of organizational goals in individual performance plans.

8. Issue: Performance-Based Actions if Employee Doesn't Reach "Fully Successful" After an Opportunity To Improve Performance (§ 430.405(j)(3))

Summary of Comments: Eighteen agencies objected to the provisions requiring performance-based actions if an unacceptable employee does not reach "Fully Successful" after an opportunity to improve. Nine agencies believe that the law won't allow "432" actions against employees who have raised their performance to level 2 (minimally successful). Three other agencies believe agencies should have the discretion to take performance-based actions on those employees. Five agencies object to having no provisions to take actions on employees rated at level 2 for long periods of time. Three agencies comment that this provision is inconsistent with, or makes unnecessary, the Performance Improvement Plan (PIP) provisions.

Discussion: After careful consideration, OPM believes that the language and the intent of the statute mandate performance-based actions if employees do not improve their performance to the "Fully Successful" level after an opportunity to improve. (See also the discussion of the PIP provisions below in Issue 12). Further guidance will be forthcoming via the FPM System.

Provision is modified to provide that employees whose performance have not improved to "Fully Successful", if not reassigned, undergo a second opportunity period to demonstrate "Fully Successful" performance.

9. Issue: Rating When the Employee Changes Positions (§ 430.406(a))

Summary of Comments: Eight agencies commented on the requirement to rate an employee when he/she changes positions, and to take that rating into consideration in the employee's next rating of record. Three agencies question the requirement to incorporate this rating into the next rating of record. Two of them think the rating official should have the discretion for weighing this rating. Two agencies think this rating should become the rating of record. Two agencies question whether this rating can be included in the next rating of record if the employee transfers to a new agency. One agency recommends requiring such a rating when either the employee or the rating official changes positions within 90 days of the appraisal date.

Discussion: OPM continues to believe that, when an employee changes positions and has been in the position

for the minimum appraisal period, a summary rating must be prepared. Agency performance management plans must indicate procedures for including this rating in the employee's next rating of record, including the ratings for employees recently transferred from other agencies. At agency option, ratings can be prepared when rating officials transfer, but OPM would not require this for all agencies.

Change: The provision is slightly modified to indicate that performance management plans will describe how ratings will be derived when employees change positions during the appraisal period.

10. Issue: Minimum Appraisal Period (§ 430.406(b))

Summary of Comments: Six agencies commented on the requirement that the minimum appraisal period consist of 90 days. Four agencies believe agencies should have the option of a longer (120-day) minimum appraisal period. One agency requests clarification if it may be longer than 90 days. One agency thinks the minimum should be shorter.

Discussion: Some agencies currently have a minimum appraisal period of 120 days and would prefer to keep their current appraisal system intact. It would lessen the administrative workload on these agencies to retain their current minimum appraisal period.

Change: The minimum appraisal period, set by the agency, must be at least 90 days but not more than 120 days.

11. Issue: Appraisal on Details (§ 430.406(d))

Summary of Comments: Twelve agencies commented on the requirement for appraising employee performance on details. Three agencies object to the provisions as impractical and of no benefit. One agency thinks the provision should be left as an agency option. The remaining nine commenters offer the following technical suggestions:

—Make the 120-day requirement the same whether the detail is inside or outside the agency;
—Make the requirement "more than 120 days";
—Clarify whether the ratings are subject to reconsideration;
—Require this only if elements are similar/identical, if using employing agency's system;
—Make the borrowing agency responsible for the rating;
—Clarify coverage on IPA assignments and if non-Federal supervisor can rate a Federal employee; and
—Clarify that employees can't be removed for poor performance of "critical" elements on a detail.

Discussion: A detail within or out of an agency often involves an important project or assignment undertaken by the employee or the agency. For that reason it is required that a performance plan and summary rating be prepared to be used by the employing agency in deriving the rating of record. The amount of time spent by an employee on detail should not be lost as input into the rating of record; particularly on longer details.

Change: No change.

12. Issue: Performance Improvement Plan (PIP) (§ 430.406(f))

Summary of comments: Seventeen agencies commented on the PIP provisions. Six agencies think the PIP is burdensome and confusing, and feel supervisors will avoid dealing with poor performers rather than use the PIP. Two agencies think the PIP is not in the spirit of the Civil Service Reform Act of 1978, which provided for easing removal procedures. Four agencies feel that the PIP is duplicative of the opportunity period under Part 432; and three agencies think the PIP should be deleted, while another agency thinks it should be optional. Six other agencies requested clarification of the applicability of the PIP requirements.

Discussion: The objective of the PIP is met by the addition, at § 430.405(j)(2), of the requirement that employees be informed of the performance standard necessary for retention when an "Unacceptable" rating is communicated.

Change: The PIP is removed from the regulations.

13. Issue: Higher Level Review of Performance Plans and Ratings, and Higher Level Reconsideration (§§ 430.405(g), and 430.407 (c) and (e))

Summary of Comments: Seven agencies object to the prohibition on communicating an employee's rating before it is reviewed and approved at higher level(s). Reasons include: poor employee relations, adversarial situations, and increased requests for reconsideration. Six agencies expressed concern with the escalation of levels of review and approval. Some concerns were that the highest level agency officials currently rate or review ratings, and geographic separation of reviewing/approving/reconsideration officials. Three agencies think that these provisions erode the authority of the supervisor.

Discussion: It is a good management practice to review and approve (and change, if necessary) performance ratings, before communicating them to employees. Higher level involvement, from the initial review of elements and standards through all stages of the appraisal process, will strengthen the effectiveness of performance appraisal as a management tool by improving consistency and objectivity.

In some agencies there is some confusion that the reconsideration procedure was intended to replace or exclude communication between employees and individuals involved in the review and approval process. This is not the case.

Changes: The provision on higher level review of ratings is clarified so that it does not preclude communication about performance between a supervisor and an employee prior to the determination of the rating of record. Approval of performance plans and ratings of record remain the responsibility of higher level management.

The provision on reconsideration is clarified so that the reconsideration process does not preclude the involvement of officials at intermediate levels in the process.

14. Issue: Inability To Rate (§430.407(f))

Summary of Comments: Eight agencies commented on the provisions in Part 430 for employees who cannot be rated. Four agencies oppose giving these employees a rating just before a reduction in force (RIF), because they feel the ratings may be inflated. Two other agencies question what procedure should be followed if the employee hasn't served a minimum appraisal period before the RIF. Two agencies find the provisions confusing or inconsistent with the provisions in Part 540. Also, three agencies object to the term "unrateables", because they think it has a negative connotation.

Discussion: There are very few instances in which an employee cannot be rated. These include: (1) An employee was not in the position for the minimum appraisal period, and (2) the employees was in an opportunity period under Part 432. In other instances in which the appraisal period ends and the employee has not been in the position for the minimum appraisal period, the agency can extend the appraisal period for the amount of time necessary to achieve the minimum appraisal period at which time a rating of record shall be prepared.

Change: The provision is revised to provide that the appraisal period be extended for the amount of time necessary to meet the minimum

appraisal period when an agency cannot prepare a rating of record at the time specified in the agency performance management plan. The use of performance ratings (or their absence) is now covered in Part 351.

15. Issue: Transfer of Rating To Be Used in the Employee's Next Rating of Record (§ 430.407(g))

Summary of Comments: Nine agencies objected to the requirement for using a transferred rating to derive the employee's next rating of record. Three agencies believe that the rating prepared at the time the employee changes positions should be incorporated into the new rating of record. Two agencies object to using a previous year's rating of record to derive the current rating of record. Three agencies object to using a different agency's ratings, and another agency suggests using only ratings with elements identical/similar to those of the current position. One agency prefers the option to presume level 3.

Discussion: OPM agrees that an employee's most recent performance should be rewarded whenever possible. The summary rating prepared when the employee changes positions can be transferred to the gaining agency to be incorporated into the new rating of record.

Change: The provision for transferring a rating, to be used in the employee's next rating of record, is clarified to allow the current year's summary rating (prepared when the employee changes positions) to be transferred and used in deriving the new rating of record.

16. Issue: Size of the Performance Standards Review Board (PSRB) (§ 430.408)

Summary of Comments: Five agencies recommend that the PSRB consist of six or more members, as allowed by law.

Discussion: The law (5 U.S.C. 4302a(d)(1)) allows flexibility in determining the maximum number of members of a PSRB. Some agencies would prefer this flexibility to have board(s) with more than six members.

Change: The regulation now allows for six or more members on an agency's PSRB(s).

17. Issue: Discontinuing Special Rates (§ 530.306)

No comments.

Discussion: The interim regulations provided that when a special rate is discontinued for a PMRS employee, that employee retains his/her existing rate or, if the rate is less than the minimum of the regular rate range, the salary is raised to the minimum of the regular rate range. OPM has determined that, because there is no statutory authority to raise the rate to the minimum of the regular rate range, the salary of an employee whose rate is below the minimum of the regular rate range must retain his/her existing rate, in accordance with 5 U.S.C. 5405(a)(2).

Change: Paragraph 530.306(d)(4) is changed to reflect that the salary of an employee whose rate is below the minimum of the regular rate range must retain his/her existing rate, in accordance with 5 U.S.C. 5405(a)(2).

18. Issue: Exception to Rules of Setting Pay When Acquiring or Losing PMRS Status (§ 531.204(e))

Comments: No comments.

Discussion: Paragraphs 531.204 (c) and (b) provide, in effect, that an employee who acquires or loses PMRS status retains his or her existing rate of basic pay plus other possible adjustments. However, an employee against whom disciplinary action is taken should not be guaranteed his/her existing rate, but rather, the agency should be able to reduce the salary to no less than the minimum rate of the grade of the employee's new position. Similarly, an employee who is returned to a lower grade after a temporary promotion should not be entitled to keep the higher salary earned in the temporary position, but rather, should have his/her salary set based on what he/she would have earned had the temporary promotion not occurred.

Change: To correct these inequities, paragraph (e) has been added to § 531.204 to exclude such employees from the provisions of § 531.204 (c) and (d).

19. Issue: Equivalent Increase (§ 531.407(d))

Summary of Comments: Four agencies commented on the "equivalent increase" provisions for employees moved from PMRS to the General Schedule (GS). Three agencies think that a determination to give no merit increase should be considered an "equivalent increase."

Discussion: This requirement (based on statute) was intended to include no merit increase as an equivalent increase, because it would be inequitable to give a poor performer a pay increase advantage over higher level performers upon movement from the PMRS to the GS. Without this provision, upon movement to the GS, an employee rated at level 2 (Minimally Successful) or less would be eligible for a *full* within-grade increase; whereas an employee rated at level 3 (Fully Successful) or level 4 (Exceeds Fully Successful) in the upper two-thirds of the pay range who receives one-third or one-half of a merit increase respectiviely would not be eligible for any within-grade increase upon movement to the GS. Therefore, the less-than-Fully Successful employee would not only get back what he/she did not earn because of poor performance, but would get more than those employees performing at a Fully Successful level or even higher.

Change: Section 531.407(d) is clarified to provide that all or a portion of, or a zero merit increase made under PMRS is an equivalent increase.

20. Issue: Definition of "Rating" (§ 540.102)

Summary of Comments: Two agencies commented on the definition of "rating." One thinks that "rating" should be defined the same in both Parts 430 and 540. The other agency asked for clarification of "summary rating."

Discussion: See discussion of the definition of "rating" under Part 430.

Change: The term "rating" is changed to "summary rating" to make a clear distinction between an offical rating of record and summary ratings given at other times or for other purposes. This new term is defined in Part 430 and the same definition is incorporated in Part 540.

21. Issue: Definition of "Reference Amount" (§ 540.102)

Summary of Comments: One agency commented that the definition was differently worded than the statute.

Discussion: The definition of "reference amount" in the interim regulations did not technically and accurately reflect the statutory language, particularly in reference to certain special rates that may be established under 5 U.S.C. 5303.

Change: This definition is revised to include the statutory language, which will encompass all possible situations, but the definition retains the more easily understood explanation that the reference amount equals the fourth step of the General Schedule.

22. Issue: Definition of "Performance Pay Decisions" and Higher Level Review of Performance Pay Decisions (§ § 540.102 and 540.105(b))

Summary of Comments: Ten agencies commented on the definition of "performance pay decisions" and higher level review of performance pay decisions. Five agencies find the term "performance pay decisions" inconsistent, because they view the general and merit increases as automatic, based on the rating. They think, therefore, that only award

decisions need to be reviewed at a higher level. One agency says that performance ratings need to be managed, rather than base pay increases. Six agencies prefer that performance pay decisions be made at a lower level. One feels this erodes supervisors' authority, and another anticipates difficulties because of the agency size and geographic sparation of reviewers from employees. One agency requests clarification of the role of the approving official. The agency also suggests rewording the reason for higher level review to indicate that it is to insure fair, accurate appraisal.

Discussion: The definition of "performance pay decisions" articulates the philosophy that pay for performance can only be achieved through an integrated approach of managing both the appraisal process and the pay process. The results of the appraisal process clearly have an impact on all components of the performance pay decision (i.e., general increases, merit increases, and performance awards). Similarly, amounts spent for general and, most particularly, merit increases have an incremental impact on determining performance awards budgets based on aggregate salaries (i.e., the greater the general and merit increase amounts, the greater the aggregate salaries and, therefore, the performance award fund).

A critical aspect to achieving a viable performance management system is to require that the same managers at various levels in the organization provide review and approval of both the performance rating and all pay decisions. In this regard, if pay for performance is to be managed, the individual(s) responsible for the awards budget must be directly involved in all performance management decisions if the distribution of rewards is to be equitable across the organization. Review and approval only at lower levels could result in inaccurate appraisals and disproportionate pay and award amounts in some units within the organization, and an inability of the agency to maintain expenditures within statutory limitations. The requirement that agencies manage the appraisal process for difficulty and strictness of application to obtain equitable and appropriately sized pay amounts for each employee emphasizes the linkage of all aspects of performance management.

Clarification of the role of the approving official in the higher level review process will be handled in Federal Personnel Manual or other guidance rather than regulation.

Changes: No change.

23. Issue: Calculation of General Increase for Employees Whose Rate of Basic Pay is Below the Minimum of the Rate Range and Receives a Level 3 Rating (§ 540.106)

Comments: No comments.

Discussion: Section 540.106(c)(4)(i) specifies to calculate the general increase for an employee who receives a level 2 performance rating, including employees who have already fallen below the minimum of the rate range because of poor performance. However, the interim regulations do not specify how to calculate the general increase for an employee who has fallen below the minimum of the rate range because of poor performance, and subsequently receives a level 3 or above performance rating.

Changes: A new paragraph in § 540.106(c)(4)(ii) is added, which provides that an employee in this situation will have his/her base pay multiplied by the full amount of the general increase.

24. Issue: Eligibility Dates for Determining Merit Increases and Performance Awards (§§ 540.107 and 540.109)

Comments: No comments.

Discussion: Based on additional review of the interim regulations and informal comments received from agency personnel, OPM determined a need to clarify in the regulations when an employee is eligible for a merit increase or performance award. A great number of employees change positions throughout the year, moving within the PMRS and into and out of the PMRS, creating agency questions about what date an employee must be in a PMRS position to be eligible to receive a merit increase or performance award.

Changes: In §§ 540.107 and 540.109 of these regulations, we have specified eligibility dates. An employee is eligible for a merit increase if he/she is in the PMRS position on the effective date of the merit increase. An employee is eligible for a performance award if he/she is in the PMRS position on the last day of the agency's performance appraisal period for which awards are being paid.

25. Issue: Three-Step Process for Determining Merit Increases for Unrateable Employees (§ 540.109)

Summary of Comments: Thirteen agencies disagreed with the three-step process for determining merit increases for employees who cannot be rated. Ten agencies prefer treating these employees as if their performance rating were level 3 ("Fully Successful"), rather than attempting to determine current performance.

One agency suggests allowing agencies to use the first step (extend the rating period not to exceed September 30) for all pay purposes to assure that current performance is rated whenever possible and that all parts of the performance pay decision are based on the same current rating.

When required to use step 2 of the process, two agencies object to paying GM increases based on an extended rating of record for GS performance. Two agencies prefer, in this situation, to use the rating prepared when the employee changed positions during the performance appraisal year, to link pay decisions to current year's performance rather than a previous rating of record. One agency prefers to eliminate the second step.

Two agencies recommend extending the applicability of the three-step process to make pay determinations for employees under Intergovernmental Personnel Act (IPA) assignments. One agency recommends applying the three-step process to make pay determinations for employees after temporary promotions, and after return to the General Schedule following an unsuccessful probationary period as a supervisor or manager.

Discussion: The basic premise of the law is that *current* performance is to be accurately and fairly appraised, and that pay will be given annually in relation to current performance. The regulations are designed to assure that, whenever possible, performance during the current appraisal period is rated and that this current rating drives performance pay decisions for that year. When a current rating of performance legitimately cannot be provided, a performance pay decision is still required by statute, and the regulations attempt to ensure that the employee is not harmed by management's inability to carry out its responsibility.

If a current rating cannot be provided, OPM believes the most recent rating of record is the next best indication of the employee's performance. In this way, a high level performer who cannot be rated because he/she was assigned to a variety of important, but short-term, projects would not be penalized by management's decision to place him/her in such assignments. Only as a last resort, when a recent rating is not available, should the employee be treated as if he/she was "Fully Successful."

Additionally, OPM feels it is necessary to clarify the provision that allows agencies to extend the rating

period by indicating that agencies may, but are not required to extend the rating period to no later than September 30; and that the rating given at the end of the extended rating period will be considered a rating for the current appraisal period.

OPM agrees with those agencies that expressed concern over using an extended rating of record from a General Schedule position to make a PMRS pay determination. They believe that the PMRS was intended to reward supervisory and managerial responsibilities, which are not reflected in non-PMRS jobs. In line with the premise that, whenever possible, *current* performance should be appraised and paid for, OPM agrees with the suggestion that when an employee transfers and cannot be rated in the new position, the summary rating prepared when an employee changes position during the appraisal year (§ 430.406(a)) should be used to determine performance pay decisions.

In view of the above issues and the complexity of the performance pay decision rules, OPM has added a statement of the clear intention of the law that all parts of the performance pay decision are being paid for performance achieved in the current appraisal period and, therefore, the same current rating of record must be the basis for all parts of the performance pay decision.

OPM agrees with the suggestion to extend the applicability of the three-step process to employees under IPA assignments. However, the three-step process cannot be applied, as suggested by one agency, to employees returning to the General Schedule after temporary promotions or following an unsuccessful probationary period as a supervisor or manager, because the determination of these employees' pay is based on other statute and regulations.

Changes:

(1) The three-step process for determining merit increases for employees who cannot be rated is retained in 540.108(a)(2), with the modification that only PMRS ratings can be used as extended ratings of record in the second step.

(2) The provision is added in § 540.104(b)(2) clarifying agencies' flexibility to extend the rating period no later than September 30, to provide for current ratings of record for purposes of making performance pay decisions.

(3) A provision is added in § 540.105(a)(4) requiring that a transferred summary rating be used as a rating of record for pay purposes when the gaining agency or organization cannot give the employee a new rating of record.

(4) A provision is added to § 540.104(a)(2) clarifying that all parts of the performance pay decision must be based on the same rating of record.

(5) Application of the three-step process is extended to cover pay determinations for employees on IPA assignments, as provided in §§ 540.108(a)(1)(iii) and 540.108(c)(1)(ii).

26. Issue: Determining Eligibility for Merit Increases and Performance Awards for Employees on Leave Without Pay (LWOP) (§§ 540.108 and 540.109)

Comments: No comments.

Discussion: The interim regulations contained no provision for determining eligibility for merit increases or performance awards for employees on extended LWOP who return to their agencies between less than the minimum appraisal period or after the end of the agency's appraisal period and the effective date of the merit increase. It would be inequitable to grant rewards to employees in this situation when they have not performed during the current appraisal period.

Change: Sections 540.108(d)(1) and 540.109(i) provide that these employees are not eligible for merit increases and performance awards.

27. Issue: Determining Eligibility for Performance Awards for Newly Appointed Employees (§ 540.109)

Comments: No comments.

Discussion: The interim regulations provided for determining the eligibility for *merit increases* for employees newly appointed to the Government. However, the interim regulations did not provide for determining eligibility for *performance awards* for newly appointed employees.

Change: A requirement is established in the performance awards section of the final regulations (§ 540.109) identical to the requirement specified for merit increases.

28. Issue: Date Used To Calculate Performance Award (§ 540.109)

Comments: No comments.

Discussion: The interim regulations provide a specific date for calculating the general increases and merit increases, but do not provide a date on which to calculate the individuals' performance awards for agencies determining the amount of awards using a percentage of base pay. Many agencies have inquired informally whether OPM would establish a specific date or leave it up to agency discretion.

OPM has decided to establish a specific date. Otherwise, agencies could pay performance awards on various dates based on different amounts of base pay. This could result in, for example, two employees in the same organization with identical ratings and initial salaries, receiving different award amounts only because one of the employees received a pay increase such as a promotion or because one employee received an award before the general increase and the other employee after. This would create an inequity in the system and is inconsistent with PMRS pay-for-performance philosophy.

Change: Section 540.109(e) requires that, for agencies using a percentage of base pay to determine awards, the rate of basic pay on the last day of the agency's performance appraisal period must be used to calculate the amount of the award. This date directly links the employee's award to the period of time in which the work was performed.

29. Issue: Awards for Employees Rated at Level 4 and Level 3 (§ 540.109(d))

Summary of Comments: Nine agencies commented on the provisions for paying performance awards to employees rated at level 4 and level 3. Three agencies disagree with the requirement to pay higher awards to employees with higher ratings. One Member of Congress disagrees with this provision as well. Two agencies request the flexibility to determine these differences in terms of percentages of pay, rather than dollar amounts. One agency suggests that no level 3 performers should receive performance awards unless all level 4 performers have received them.

Discussion: A basic tenet of the pay-for-performance system is that an employee who performs at a higher level than another employee in a similar position should receive a greater reward for his/her accomplishments. Based on this principle, OPM believes it is appropriate to require that higher awards be paid to employees with higher ratings.

The regulations are designed to provide management flexibility in awards determinations, while at the same time supporting the pay-for-performance principle. For this reason, it would not be appropriate to require that no level 3 performers should receive a performance award until all level 4 performers have received them. The regulations, as currently written, already permit agencies to determine whether they want to base their performance awards on a percentage of an employee's base salary or on a specific dollar amount.

Change: No change.

30. Issue: Performance Award Funding (§§ 540.109 and 540.112)

Summary of Comments: Nine agencies commented on the performance awards funding provisions. Five agencies commented on the requirement to estimate the performance awards budget at the beginning of the fiscal year. Several requested a specific date to determine the amount available. Two agencies questioned why performance rating distributions should be considered in estimating the awards budget. An agency requested clarification on whether the awards budget estimate to be sent to OPM is a report or a request for OPM approval.

One agency suggests allowing performance awards lower than 2 percent for "Outstanding" employees if paying 2 percent to all "Outstanding" employees would exceed the 1.5 percent-of-payroll limit on the awards fund. One small agency objected to the requirement that small agencies annually request OPM approval to establish a higher level of funding for performance awards.

Discussion: The law is very clear in its requirement that agencies determine the award funds at the beginning of the fiscal year, based on an estimate of PMRS salaries for the *entire* fiscal year. The regulations restate the requirement of the law. FPM guidance will be provided as needed to clarify the procedure. No specific date for determining the amount available for awards is necessary as the statute specifically requires that salaries for the *entire* fiscal year be used to determine funds available.

OPM thinks it would be helpful to clarify that the submission of the above data is a report rather than a request for approval.

To make a prospective estimation of the award budget as required under the law, agencies should *consider* performance rating distributions for salary increase implications, which impact on aggregate salary amounts and, therefore, the awards budget amount.

The minimum 2 percent award for "Outstanding" employees is statutorily based and cannot be changed by OPM in regulation. The spending limitations specified in the law underscore and support the need for an integrated approach of managing both the appraisal process and the pay process.

The law provides that agencies with 20 or fewer employees may establish a higher level of funding, up to 10 percent, for performance awards to allow for adequate funding. The law intended that OPM approve only that level of funding that is necessary for an agency to pay adequate awards to its employees. Since requirements can change, OPM needs to review each agency's situation each year to avoid overfunding and to allow OPM to meet its regulatory oversight and reporting responsibilities.

Changes:

(1) No change in the performance award funding section of the regulations (§ 540.109(b)).

(2) In § 540.112(b) the word "submit" is changed to "report" to clarify that the estimated budget is a report, not a submission for approval.

31. Issue: Matters Excluded From the Agency Administrative Grievance System (§ 771.206(c)(1)(xii))

Summary of Comments: One agency questioned whether OPM intentionally omitted the granting of PMRS performance awards from the matters excluded from agency administrative grievance systems.

Discussion: The interim regulations provided for excluding general increases and merit increases, or the lack thereof, from the administrative grievance system, but unintentionally omitted an exclusion for the granting of, or the failure to grant, performance awards.

Change: This omission has been corrected by including performance awards, or the lack thereof, under matters excluded from the agency administrative grievance system.

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because the regulations will only affect Government employees.

List of Subjects

5 CFR Part 293

Archives and records, Government employees, Privacy.

5 CFR Part 430

Government employees, Administrative practice and procedure, Reporting and recordkeeping requirements.

5 CFR Part 530

Government employees, Wages.

5 CFR Part 531

Government employees, Wages, Administrative practice and procedure.

5 CFR Part 536

Administrative practice and procedure, Government employees, Wages.

5 CFR Part 540

Government employees, Wages.

5 CFR Part 771

Government employees, Administrative practice and procedure.

U.S. Office of Personnel Management.

Constance Horner,

Director.

The interim rule as published March 25, 1985, is confirmed as final with amendments. The final text of the interim rule, except for certain nomenclature changes, with amendments, is set forth for the convenience of the reader:

Part 293—PERSONNEL RECORDS

1. The authority citation for Part 293 is revised to read as follows:

Authority: 5 U.S.C. 552a, 4302a, and 4315; E.O. 12107 (December 28, 1978), 3 CFR 1954-1958 Comp; 5 CFR 7.2; E.O. 9830, 3 CFR 1943-1948 Comp.

2. Section 293.304 is revised to read as follows:

Subpart C—Official Personnel Folder

* * * * *

§ 293.304 Maintenance and content of folder.

The head of each agency shall maintain in the Official Personnel Folder the reports of selection and other personnel actions named in section 2951 of title 5, United States Code. Performance ratings of record, including the performance plan on which the most recent rating was based, may also be maintained in the Official Personnel Folder for each employee covered under the Performance Management and Recognition System under Part 540 of this chapter. The folder shall also contain long-term records affecting the employee's status and service as required by OPM's instructions and as designated in FPM Supplement 293-31.

3. Section 293.306(b) is revised to read as follows:

§ 293.306 Use of existing folders upon transfer or reemployment.

* * * * *

(b) Before transferring the Official Personnel Folder, the losing agency shall:

(1) Remove those records of a temporary nature filed on the left side of the folder, except for PMRS employees'

performance ratings of record including the performance plan on which the most recent rating was based;

(2) Transfer performance ratings of record and the performance plan on which the most recent rating was based from the Employee Performance File of PMRS employees to their Official Personnel Folder, if the ratings and plans are not maintained by the agency in the Official Personnel Folder; and

(3) Ensure that all permanent documents of the folder are complete, correct, and present in the folder in accordance with FPM Supplement 293–31.

4. Section 293.402 (a) and (b) are revised to read as follows:

Subpart D—Employee Performance File System Records

* * * * *

§ 293.402 Establishment of separate employee performance record system.

(a) Copies of PMRS employees' performance ratings of record, including the performance plan on which the most recent rating was based, must be placed in either the employee's Official Personnel Folder (OPF) or in the Employee Performance File (EPF). However, ratings for all other employees, and all other performance-related documents, may be retained in the OPF only when the agency prescribes the use of a separate envelope, temporarily located in the OPF, and removed whenever the OPF (except as required in § 293.404(b)) is transferred to another agency. PMRS performance ratings of record, including the performance plan on which the most recent rating was based, shall be retained on the left (temporary) side of the OPF. No other performance-related record shall be retained on the left (temporary) or right (long term) side of the OPF or shall be transferred to the National Personnel Records Center (except as required by § 293.404(b)).

(b) Except for performance records maintained in the OPF consistent with paragraph (a) of this section, each agency having employees occupying a position described in § 293.401 shall provide for maintenance of performance-related records for such employees in this EPF system. The agency may elect to retain records in a separate file that is located in the same office with the OPF, or in an envelope kept in the OPF itself. If the agency determines that a separate EPF is cost-effective, such a file may be located in another designated agency office (as specified in the agency's written performance appraisal plan documentation) including with supervisors or managers (hereinafter referred to as rating officials) or with Performance Review Boards. Any supporting documents of their duties shall be kept in these files.

* * * * *

5. Sections 293.404 (a)(1) and (a)(2) are revised to read as follows:

§ 293.404 Retention schedule.

(a)(1) Except as provided in § 293.405(a), performance appraisals or documents supporting them are generally not permanent records and shall, except for appointees to the SES and including incumbents of executive positions not covered by the SES, be retained as prescribed below:

(i) Performance ratings of record, including the performance plans on which they are based, shall be retained for 3 years;

(ii) Supporting documents shall be retained for as long as the agency deems appropriate (up to 3 years);

(iii) Performance records superseded (e.g., through an administrative or judicial procedure) and performance-related records pertaining to a former employee (except as prescribed in § 293.405(a)) need not be retained for a minimum of 3 years. Rather, in the former case they are to be destroyed and in the latter case agencies shall determine the retention schedule; and

(iv) Except where prohibited by law, retention of automated records longer than the maximum prescribed here is permitted for purposes of statistical analysis so long as the data are not used in any action affecting the employee when the manual record has been or should have been destroyed.

(2) When an employee is reassigned within the employing agency, disposition of records in this system, including transfer with PMRS employees, shall be as agencies prescribe, consistent with § 293.405(a).

* * * * *

6. Section 293.405(a) is revised to read as follows:

§ 293.405 Disposition of records.

(a) When the OPF of a PMRS employee is sent to another servicing office in the employing agency, to another agency, or to the National Personnel Records Center, the "losing" servicing office shall include in the OPF all performance ratings of record that are 3 years old or less, including the performance plan on which the most recent rating was based. Also, the "losing" office will purge from the OPF all performance ratings more than 3 years old, and other performance-related records, according to agency policy established under § 293.404(a)(2) and in accordance with FPM Supplement 293–31.

* * * * *

7. In Part 430, Subparts A and C are reserved; the headings for Part 430 and Subpart A through C are revised; and Subpart D is revised to read as follows:

PART 430—PERFORMANCE MANAGEMENT

Subpart A—Performance Management System [Reserved]

Subpart B—Performance Appraisal for General Schedule and Wage Grade Employees

* * * * *

Subpart C—Performance Awards [Reserved]

Subpart D—Performance Appraisal for the Performance Management and Recognition System

Sec.

430.401 Statutory authority.
430.402 Purpose.
430.403 Coverage.
430.404 Definitions.
430.405 Agency performance appraisal systems.
430.406 Appraisal of performance.
430.407 Ratings.
430.408 Performance standards review boards.
430.409 Training and evaluation.
430.410 OPM review of performance appraisal systems.
430.411 Performance appraisal plans.
430.412 Reports.

Authority: 5 U.S.C. 4302a and 4305.

Subpart D—Performance Appraisal for the Performance Management and Recognition System

§ 430.401 Statutory authority.

Title 5, U.S. Code, section 4302a provides for the establishment of performance appraisal systems for Performance Management and Recognition System (PMRS) employees. This subpart contains regulations which the Office of Personnel Management has prescribed for performance appraisal under the Performance Management and Recognition System, and implements and supplements the provisions of 5 U.S.C. 4302a.

§ 430.402 Purpose.

It is the purpose of this subpart to ensure that performance appraisal systems for Performance Management and Recognition System employees are used as a tool for executing basic management and supervisory responsibilities by:

(a) Communicating and clarifying agency goals and objectives;

(b) Identifying individual accountability for the accomplishment of organizational goals and objectives;

(c) Evaluating and improving individual and organizational accomplishments; and

(d) Using the results of performance appraisal as a basis for adjusting base pay and determining performance awards, training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees.

§ 430.403 Coverage.

(a) *Employees and agencies covered by statute.* This subpart applies to any supervisor or management official, as defined in 5 U.S.C. 7103 (a)(10) and (a)(11), who is in a position within grades GS–13, GS–14, or GS–15 of the General Schedule and covered by Part 540 of this chapter.

(b) *Administrative exclusions.* OPM may exclude any position or group of positions in the excepted service under the authority of 5 U.S.C. 4301(2)(G). The following are excluded:

(1) Positions for which employment is not reasonably expected to exceed 120 calendar days in a consecutive 12-month period.

(2) Positions filled by Noncareer Executive Assignments under Part 305 of this chapter.

(c) *Agency requests for exclusions.* Heads of agencies or their designees may request the Director of the Office of Personnel Management to exclude positions in the excepted service. The request must be in writing, explaining why the exclusion would be in the interest of good administration.

§ 430.404 Definitions.

In this subpart, terms are defined as follows—

"Appraisal" means the act or process of reviewing and evaluating the performance of an employee against the described performance standard(s).

"Appraisal period" means the period of time established by an appraisal system for which an employee's performance will be reviewed.

"Appraisal system" means a performance appraisal system established by an agency or component of an agency under subchapter I of chapter 43 of title 5, U.S.C. and this subpart which provides for identification of critical and noncritical elements, establishment of performance standards, communication of elements and standards to employees, establishment of methods and procedures to appraise performance against established standards, and appropriate use of appraisal information in making personnel decisions.

"Critical element" means a component of a position consisting of one or more duties and responsibilities which contributes toward accomplishing organizational goals and objectives and which is of such importance that unacceptable performance on the element would result in unacceptable performance in the position.

"Non-critical element" means a component of an employee's position which does not meet the definition of a critical element, but is of sufficient importance to warrant written appraisal. Non-critical elements are optional and may be used at agency discretion.

"Performance" means an employee's accomplishment of assigned work as specified in the critical and non-critical elements of the employee's position.

"Performance Appraisal System". (See Appraisal System).

"Performance Management Plan" means the description of the agency's methods which integrate performance, pay, and awards systems with its basic management functions for the purpose of improving individual and organizational effectiveness in the accomplishment of agency mission and goals. The performance management plan, which includes the performance appraisal plan, must be submitted to OPM for review and approval as required by § 430.411 of this subpart and § 540.111 of this chapter.

"Performance plan" means the aggregation of all of an employee's written critical and non-critical elements and performance standard(s).

"Performance standard" means a statement of the expectations or requirements established by management for a critical or non-critical element at a particular rating level. A performance standard may include, but is not limited to, factors such as quality, quantity, timeliness, and manner of performance.

"Progress review" means a review of the employee's progress toward achieving the performance standards and is not in itself a rating.

"Rating" (See Summary Rating).

"Rating of record" means the summary rating, under 5 U.S.C. 4302a, required at the time specified in the performance management plan or at such other times as the plan specifies for special circumstances, including written notice at any time that an employee's performance is unacceptable on one or more critical elements.

"Summary Rating" means the written record of the appraisal of each critical and non-critical element and the assignment of summary rating level (as specified in § 430.405(h) of this subpart).

§ 430.405 Agency performance appraisal systems.

(a) Each agency shall develop one or more performance appraisal systems for employees covered by the Performance Management and Recognition System.

(b) Under each appraisal system, critical elements must be included and non-critical elements may be included in individual performance plans. An employee must be appraised on each critical and non-critical element in the employee's performance plan, unless the employee has had insufficient opportunity to demonstrate performance on the element. A summary rating level, as specified in § 430.405(h), must be assigned.

(c) Each appraisal system must provide for the joint participation of the supervising official and the employee in developing performance plans. This may be accomplished by means including, but not limited to, the following:

(1) Employee and supervisor discuss and develop performance plan together;

(2) Employee provides to supervisor a draft performance plan;

(3) Employee comments on draft performance plan prepared by supervisor; and

(4) Performance plan is prepared by a group of employees occupying similar positions, with supervisor's approval.

Final authority for establishing such plans rests with the supervising officials.

(d)(1) Each appraisal system shall provide for establishing performance elements and standards based on the requirements of the employees' positions, providing written performance plans to employees at the beginning of each appraisal period (normally within 30 days), and appraising employees based on a comparison of performance with the standards established for the appraisal period.

(2) Accomplishment of organizational objectives should be included in performance plans by incorporating objectives, goals, program plans, workplans, or by other similar means that account for program results.

(e) Each appraisal system shall provide for a minimum of three rating levels for each critical element. Performance standards must be written at the "Fully Successful" level for all critical and non-critical elements and may be written at other levels. The absence of a written standard at a given rating level shall not preclude the assignment of a rating at that level.

(f) Each appraisal system shall provide that performance plans shall be in writing and shall be reviewed and approved at the beginning of the appraisal period by a person at a higher

level in the organization than the appraising official.

(g) Each appraisal system shall include a method for deriving a summary rating level from performance appraisals of critical elements and, at agency discretion, appraisals of non-critical elements. If appraisals of non-critical elements are considered in deriving summary rating levels, the derivation method must show that more weight will be given to critical elements than non-critical elements.

(h) Each appraisal system shall provide for five summary rating levels. The rating levels must include an "Unacceptable" level, a level between "Unacceptable" and "Fully Successful", a "Fully Successful" level, and two levels which are above "Fully Successful." For purposes of this part, "Unacceptable" is referred to as level 1, the level between "Unacceptable" and "Fully Successful" is level 2, "Fully Successful" is level 3, the level one level above "Fully Successful" is level 4, and the level two levels above "Fully Successful" is level 5.

(i) Each appraisal system shall provide for assisting employees in improving performance rated at a level below the "Fully Successful" level. Such assistance may include but is not limited to: formal training, on-the-job training, counseling, and closer supervision.

(j) Except with respect to employees occupying positions in Schedule C as authorized by § 213.3301 of this chapter,

(1) Each appraisal system shall provide for reassigning, reducing in grade, or removing any employee rated "Unacceptable," but only after affording the employee a reasonable opportunity to improve performance to the "Fully Successful" level or higher on the critical element(s) rated "Unacceptable", as required in 5 U.S.C. 4302a(b)(6).

(2) Once an "Unacceptable" rating has been communicated, the employee must be informed of the performance standards that must be reached in order to be retained.

(3) If, at the conclusion of the opportunity period referred to in paragraph (j)(1) of this section, the employee's performance is "Unacceptable", the agency must initiate reassignment, reduction in grade, or removal, subject to the provisions of 5 U.S.C. 4303. When an employee's performance improves to level 2, but not level 3, the employee, if not reassigned, shall be required to undergo an additional opportunity period in order to demonstrate performance at the "Fully Successful" level or higher, as required by 5 U.S.C. 4302a(b)(6).

(k) When an employee's position under the General Schedule is converted to PMRS with no change of duties and responsibilities in accordance with 540.103(b)(1), the employee's rating of record will be considered to have been derived from elements and standards established under 5 U.S.C. 4302a.

§ 430.406 Appraisal of performance.

(a) *Appraisal period.* Each agency appraisal system shall establish an official appraisal period for which a rating of record shall be prepared. The appraisal period will end no earlier than June 30 nor later than September 30 of the same year. Systems shall provide for preparing a summary rating when an employee changes positions during the appraisal period, if the employee has served for the minimum appraisal period in the position from which he/she has changed; agency performance management plans must describe how these ratings will be taken into consideration in deriving the next rating of record.

(b) *Minimum appraisal period.* Agency appraisal systems shall establish a minimum appraisal period of at least 90 days but not more than 120 days.

(c) *Appraisal of each element.* An employee must be appraised on each critical and non-critical element in the employee's performance plan, unless the employee has had insufficient opportunity to demonstrate performance on the element.

(d) *Appraisal of performance on details.* (1) When employees are detailed or temporarily promoted within the same agency, and the detail or temporary promotion is expected to last 120 days or longer, agencies shall provide written critical elements and performance standards to employees as soon as possible but no later than 30 calendar days after the beginning of a detail or temporary promotion. Ratings on critical elements must be prepared for these details and temporary promotions and must be considered in deriving an employee's next rating of record.

(2) When employees are detailed outside of the agency, the employing agency must make a reasonable effort to obtain appraisal information from the outside organization, which shall be considered in deriving the employee's next rating of record.

(i) If an employee has served in the employing agency for the minimum appraisal period, the employee must be rated. The rating shall take into consideration appraisal information obtained from the borrowing organization.

(ii) If an employee has not served in the agency for the established minimum appraisal period, but has served for the minimum appraisal period outside the employing agency, the employing agency must make a reasonable effort to prepare a rating based on a performance plan obtained from the borrowing organization.

(e) *Progress review.* A progress review shall be held for each employee at least once during the appraisal period. At a minimum, employees shall be informed of their level of performance by comparison with the performance elements and standards established for their positions.

(f) *Appraising disabled veterans.* The performance appraisal and resulting rating of a disabled veteran may not be lowered because the veteran has been absent from work to seek medical treatment as provided in Executive Order 5396.

§ 430.407 Ratings.

(a) *Written Rating.* A written rating of record must be given to each employee as soon as practicable after the end of the appraisal period.

(b) *Appraisal of each critical and non-critical element.* Employees must be appraised on each critical element and non-critical element of the performance plan(s) on which the employee has had a chance to perform.

(c) *Higher level review.* Ratings of record and performance-based personnel actions shall be reviewed and approved by a person(s) at a higher level in the organization than the appraising official. Ratings of record may not be communicated to employees prior to approval by the final reviewer. This does not preclude communication about appraisal of performance between a supervisor and an employee prior to the determination of the rating of record. Ratings of record must be approved by the official with the responsibility for managing the performance awards budget within the agency.

(d) *Forced distribution.* An agency may not prescribe a distribution of levels of ratings for employees covered by this subpart. However, in order to provide for the equitable distribution of merit increases and performance awards under the PMRS, agencies must establish procedures, such as reviews of standards and ratings for difficulty and strictness of application, to ensure that only those employees whose performance exceeds normal expectations are rated at levels above "Fully Successful." These procedures must be described in the agency's performance management plan.

(e) *Reconsideration process.* Upon request by the employee, his or her rating of record shall be reconsidered. The employee must be given the right to a reconsideration by a person at a higher level in the organization than the appraising, reviewing, or approving official, unless there is no one at a higher level. This does not preclude the involvement of such officials at intermediate levels in the process. The procedures for such reconsideration shall be in accordance with Part 771 of this chapter.

(f) *Inability to rate.* When an agency cannot prepare a rating of record at the time specified in the plan, the appraisal period shall be extended, for non-pay purposes, for the amount of time necessary to meet the minimum appraisal period at which time a rating of record shall be prepared. (For pay purposes refer to Part 540 of this chapter.)

(g) *Transfer of rating.* If an employee moves to a new agency or new organization in the employing agency at any time during the appraisal period, the current performance ratings of record must be transferred, as required by § 293.405(a) of this chapter. A summary rating must be prepared which must be taken into consideration by the gaining agency when deriving the next rating of record.

§ 430.408 Performance standards review boards.

(a)(1) Each agency shall establish one or more performance standards review boards. Each board will consist of at least six members chosen by the agency head or his or her designee. One-half of the board must be composed of employees covered by the PMRS and in the competitive service. The chair of the board will be chosen by the head of the agency or his or her designee.

(2) Agency performance management plans shall set forth the composition and operating procedures for the board(s). Boards shall become operational upon OPM's approval of the agency's performance management plan and shall report to their respective agency heads or designees at least annually.

(3) The board(s) shall review representative performance plans and report to the head of the agency or his or her designee at least annually on the quality of the plans including the difficulty of the performance standards. The board shall advise the head of the agency or his or her designee on ways to improve performance plans but shall have no authority to approve or modify performance plans.

(4) Boards shall review the ratings and make recommendations to the head of the agency or his or her designee regarding improving the equitable application of standards but shall not recommend any distribution of ratings. Such reviews shall be conducted after ratings of record have been prepared and communicated.

(5) Boards are also responsible for studying the feasibility of organizational awards and providing technical assistance on any demonstration projects on performance appraisal.

§ 430.409 Training and evaluation.

To assure that agency performance appraisal systems will be effectively implemented, agencies must provide appropriate training and information to supervisors and employees on the appraisal process, and must establish methods and procedures to evaluate periodically the effectiveness of the system(s) and to implement improvements as needed.

§ 430.410 OPM review of performance appraisal systems.

(a) OPM will review performance appraisal systems to determine conformance to requirements of law, OPM regulations, and OPM performance management policy.

(b) If OPM determines that an appraisal system does not meet the requirements and intent of subchapter I of 5 U.S.C. 43 or of this subpart, it shall direct the agency to implement an appropriate system or to correct operations under the system. The agency shall take any action so required.

§ 430.411 Performance appraisal plans.

(a) Agencies must submit proposed performance appraisal system to OPM for approval as part of the performance management plans required at § 540.111 of this chapter. If major subcomponents of an agency propose to modify any element of the agency's system that is included in the Performance Management Plan Checklist, as provided in § 540.111(b)(1), or to develop a separate system based on agency guidelines, each such subcomponent's proposed plan must be reviewed and approved by the agency and submitted to OPM for final approval.

(b) Agencies shall submit to OPM for approval any changes to their performance appraisal plans that modify any element of the agency's system that is included in the Performance Management Plan Checklist.

§ 430.412 Reports.

So that OPM can provide the Congress and others with information regarding the operation of the Performance Management and Recognition System and performance management plans including the performance appraisal systems, each agency shall maintain such records and submit to OPM such reports as OPM may require.

PART 530—PAY RATES AND SYSTEMS (GENERAL)

8. The authority citation for part 530 is revised to read as follows:

Authority: 5 U.S.C. 5303, and chapter 54; E.O. 11721, as amended.

9. In § 530.305, paragraph (a)(3) is revised to read as follows:

§ 530.305 Determining employee rates.

(a) * * *

(3) When a special rate range becomes initially applicable to, or increased for, a position occupied by an employee covered by the Performance Management and Recognition System, the employee's rate of basic pay shall be determined under § 540.106 of this chapter.

10. In § 530.306, paragraph (b)(4) is revised. Section 530.306(b)(4) reads as follows:

§ 530.306 Discontinuing special rates.

* * * * *

(b) * * *

(4) If the employee is receiving a rate of basic pay established under Part 540 of this chapter, the employee shall retain his or her existing rate. This rate may be lower than the minimum rate of the regular schedule as provided under § 540.106(c)(3).

* * * * *

PART 531—PAY UNDER THE GENERAL SCHEDULE

11. The authority citation for Part 531 is revised to read as follows:

Authority: 5 U.S.C. 5115, 5338, and Chapter 54, unless otherwise noted. Sections 531.501 to 531.516 also issued under 5 U.S.C. 5337.

12. Section 531.201 is revised to read as follows:

§ 531.201 Applicability.

This subpart and sections 5333 and 5334 of title 5, United States Code, apply to employees and positions, other than Senior Executive Service positions, to which chapter 51 of title 5 applies, including employees under the Performance Management and Recognition System (PMRS) established under chapter 54 of title 5, United States Code.

13. In § 531.203, the headings for paragraphs (c)(1) and (c)(2) are revised to read as follows:

§ 531.203 General provisions.

* * * * *

(c) * * *

(1) *For non-PMRS employees.*

* * * * *

(2) *For PMRS employees.*

* * * * *

14. In § 531.204, paragraphs (c) and (d) are revised, and paragraph (e) is added to read as follows:

§ 531.204 Special provisions.

* * * * *

(c) *Pay adjustment on acquiring PMRS status.* Except as provided in paragraph (e) of this section, when an employee acquires PMRS status, the employee shall receive his or her existing rate of basic pay plus any of the following adjustments that may be applicable, in the order specified:

(1) The amount of any statutory adjustment in the General Schedule made on that date, or in the case of an employee subject to special pay rates, the amount of any adjustment made on that date under section 5303 of title 5, United States Code, and Part 530 of this chapter;

(2) The amount of any within-grade or quality step increase to which the employee otherwise would be entitled on that date; and

(3) The amount resulting from a promotion effective on that date.

(d) *Pay adjustment on loss of PMRS status.* Except as provided in paragraph (e) of this section, when an employee loses PMRS status, the employee shall receive his or her existing rate of basic pay, plus any of the following adjustments that may be applicable, in the order specified:

(1) The amount of any general pay increases under section 5403 of title 5, United States Code, and § 540.106 of this chapter to which the employee otherwise would be entitled on that date, or in the case of an employee subject to special pay rates, the amount of any pay adjustment made on that date under section 5303 of title 5, United States Code, and Part 530 of this chapter;

(2) The amount of any merit increase under section 5404 of title 5, United States Code, and § 540.107 of this chapter to which the employee otherwise would be entitled on that date;

(3) The amount resulting from a promotion effective on that date;

(4) In the case of an employee whose resulting rate of basic pay falls between two steps of a General Schedule grade (or, in the case of an employee whose position is subject to special pay rates, between the two steps of the applicable special rate range), the amount of any increase that may be necessary to pay the employee the rate for the next higher step of that grade (or special rate range); and

(5) In the case of an employee whose resulting rate of basic pay falls below the minimum rate of a General Schedule grade (or, in the case of an employee whose position is subject to special pay rates, below the minimum of the applicable special rate range), the amount of any increase that may be necessary to pay the employee the minimum rate for that grade (or special rate range).

(e) *Special exceptions.* Paragraphs (c) and (d) of this section do not apply to an employee who acquires or loses PMRS status as the result of—

(1) An action taken for disciplinary or performance related reasons, or

(2) The expiration or termination of a temporary promotion.

15. In § 531.205, paragraphs (a)(2) and (b) are revised to read as follows:

§ 531.205 Pay schedule conversion rules at the time of a pay adjustment under 5 U.S.C. 5305 or 5 U.S.C. 5303.

(a) * * *

(2) If an employee is receiving basic pay immediately before the effective date of his or her pay adjustment at a rate determined under chapter 54 of title 5, United States Code, and part 540 of this chapter, the employee shall have his or her rate of basic pay adjusted under section 5403 of that title and § 540.106 of this chapter.

* * * * *

(b) Rates of basic pay authorized under section 5303 of title 5, United States Code, paid to an employee subject to the General Schedule shall not be adjusted by reason of a pay adjustment under 5 U.S.C. 5305.

§§ 531.305 and 531.402 [Amended]

16. Sections 531.305(a)(1) and 531.402(c)(1) are amended by removing the words "Merit Pay System" and inserting, in their place, the words "Performance Management and Recognition System."

17. In § 531.407, paragraphs (c)(1) and (d) are revised to read as follows:

§ 531.407 Equivalent increase determinations.

* * * * *

(c) * * *

(1) A statutory pay adjustment, including a general pay increase made under section 5403 of title 5, United States Code, but not including a merit increase made under section 5404 of that title;

* * * * *

(d) *Merit increases.* For the purpose of applying section 5335 of title 5, United States Code, and this subpart, all or a portion of, or a zero merit increase, made under section 5404 of title 5, United States Code, and § 540.107 of this chapter is an equivalent increase.

PART 536—GRADE AND PAY RETENTION

18. The authority citation for Part 536 continues to read as follows:

Authority: 5 U.S.C. 5361–5366, Pub. L. 95–454, 92 Stat. 1111.

19. Part 540 is revised to read as follows:

PART 540—PERFORMANCE MANAGEMENT AND RECOGNITION SYSTEM

Sec.

540.101 General.
540.102 Definitions.
540.103 Ranges of basic pay and employee coverage.
540.104 Performance Management and Recognition System performance ratings.
540.105 Performance recognition.
540.106 General pay increases.
540.107 Merit increases.
540.108 Special provisions for pay administration.
540.109 Performance awards.
540.110 Cash award program.
540.111 Agency Performance Management Plans.
540.112 Report.

Authority: 5 U.S.C. Chapters 43 and 54.

§ 540.101 General.

Chapter 54 of title 5, United States Code (5 U.S.C. 5401 through 5410), provides for a Performance Management and Recognition System (PMRS) to recognize and reward quality performance by supervisors and management officials (as defined in 5 U.S.C. 7103(a) (10) and (11)) in positions classified in GS–13, 14, or 15. This part contains the regulations which the Office of Personnel Management (OPM) has prescribed for the Performance Management and Recognition System, and supplements the provisions of 5 U.S.C. 4302a, and 5401 through 5410.

§ 540.102 Definitions.

In this part:

"Agency" has the meaning given it in 5 U.S.C. 5102, but does not include the Office of the Architect of the Capitol, the Library of Congress, the Botanic Garden, or the Administrative Office of the United States Courts.

"Employee" means a supervisor or management official as defined in 5 U.S.C. 7103(a) (10) and (11) in positions classified in grades GS–13, GS–14 and GS–15.

"General pay increase" means that portion of the pay adjustment under 5 U.S.C. 5305 (or for special salary rate employees, any adjustment under 5 U.S.C. 5303) granted to PMRS employees based on performance.

"Merit increase" means the increase in basic pay for a PMRS employee granted under 5 U.S.C. 5404 which is equivalent to one-ninth of the difference between the maximum rate of the grade or special rate range and the minimum rate of the grade or special rate range.

"Pay adjustment period" means the period beginning on the first day of the first day period applicable to the employee starting on or after the first day of the month in which an adjustment would take effect under 5 U.S.C. 5303 or 5 U.S.C. 5305 and ending at the close of the day preceding the beginning of the following pay adjustment period.

"Performance award" means a performance-based cash payment to a PMRS employee made under 5 U.S.C. 5406. A performance award does not increase base pay.

"Performance award budget" means the amount of money allocated by an agency for distribution as performance awards to covered employees.

"Performance Management Plan" means the description of the agency's methods which integrate performance, pay, and awards systems with its basic management functions for the purpose of improving individual and organizational effectiveness in the accomplishment of agency mission and goals.

"Performance pay decision" means the determination of the total amount of the general pay increase, merit increase, and performance award to be granted to an employee made by the officials also responsible for making the performance appraisal decisions, in accordance with OPM instructions.

"Rating" (See Summary Rating)

"Rating of record" means the summary rating, under 5 U.S.C. 4302a, required at the time specified in the performance management plan or at such other items as the plan specifies for special circumstances, including the written notice at any time that an employee's performance is unacceptable on one or more critical elements.

"Reference amount" means **the sum of the minimum rate of the grade and one-third of the difference between the maximum and the minimum rate for that grade. In the General Schedule, the reference amount equals the dollar amount of the fourth step of a General Schedule grade, in the case of a special rate range established under 5 U.S.C. 5303 and Part 530 of this chapter, the fourth step of such special rate range.

"Summary Rating" means the written record of the appraisal of each critical and non-critical element and the assignment of a summary rating level (as specified in § 430.405(h) of this chapter).

§ 540.103 Ranges of basic pay and employee coverage.

(a)(1) The range of annual rates of basic pay for each grade of the Performance Management and Recognition System shall be the same as the range of annual rates of basic pay for the corresponding grade of the General Schedule, or of a special salary rate range established under 5 U.S.C. 5303, except that an employee may be paid less than the minimum rate of basic pay of the grade or special rate range of the employee's position to the extent that payment of the lesser amount is the result of a performance evaluation of less than "Fully Successful."

(2) No PMRS employee's rate of basic pay may be increased by an amount that would cause that rate of basic pay to exceed the maximum rate for the range of basic pay applicable to the employee's position as specified in paragraph (a)(1) of this section, except in connection with retained pay, as provided in 5 U.S.C. 5363.

(b)(1) In accordance with the definitions in 5 U.S.C. 7103(a)(10) and (11), the head of each agency shall identify employees who are supervisors or management officials for purposes of coverage under the Performance Management and Recognition System.

(2) Employees who were appointed on the effective date of a pay adjustment under 5 U.S.C. 5303 or 5 U.S.C. 5305, and whose pay was set in accordance with the newly adjusted pay range for their grade, are not to be considered covered by the Performance Management and Recognition System on that day for the purposes of granting general pay increases, merit increases or performance awards under sections 5403, 5404, or 5406 of title 5, United States Code.

(c)(1) The head of an agency may request that the President exclude an agency, any unit of an agency, or any class of employees within any such unit from the PMRS. Such request must be filed with the Director, Office of Personnel Management, in writing, and must set forth the reasons why the agency, unit or class should be excluded.

(2) The head of an agency may request that OPM exclude an employee from the PMRS. Such request must be filed with the Office of Personnel Management in writing, and must set forth the reasons why the employee should be excluded.

§ 540.104 Performance Management and Recognition System performance ratings.

(a)(1) Except as provided in § 540.103(a)(2) of this part, each performance pay decision shall be based on the employee's rating of record for the current appraisal period for which performance pay decisions are being made under a performance appraisal system as defined in Part 430 of this chapter, approved by the Office of Personnel Management under 5 U.S.C. 4302a, or an equivalent performance appraisal system. If the agency determines it is appropriate to do so, performance pay decisions may also take into consideration the accomplishments of the employee's organization.

(2) All parts of a performance pay decision (i.e., general increase, merit increase, and performance award) must be based on the same rating of record.

(3) If an employee cannot be given a rating of record under 5 U.S.C. 4302a:

(i) The general increase will be determined in accordance with § 540.106(d); and

(ii) The merit increase and, as appropriate, the performance award will be determined in accordance with the procedure specified in § 540.108(a)(2).

(4) Notwithstanding the definition of rating of record in § 540.102 of this part, when a summary rating is transferred with an employee as required under § 430.407(g) of this part, and the new agency or organization cannot give the employee a rating of record as required in the Performance Management Plan, the transferred summary rating will be considered the employee's rating of record for the current appraisal period only for the purpose of making performance pay decisions.

(b)(1) The performance appraisal period on which the performance pay decision is based should be as close to the pay adjustment period as the agency deems practicable, but will not end earlier than June 30 not later than September 30 of the same year, or such other dates prescribed by OPM.

(2) In accordance with § 540.108(a) of this part, agencies are allowed to extend the performance appraisal period to no later than September 30. Such extension will be considered to be part of the current appraisal period for which performance pay decisions are being

made. Agencies determining to extend the appraisal period must specify the length of such extension in the Performance Management Plan required under § 540.111 of this part.

(c) Each agency shall establish procedures to manage the performance appraisal process for employees covered by the Performance Management and Recognition System, such as reviews of standards and ratings for difficulty and strictness of application, to obtain performance pay amounts that are equitable both in the value of the award to the employee and in the relationship of award between levels.

(d) Agencies and employees subject to the Performance Management and Recognition System, but not covered by chapter 43 of title 5, U.S.C., shall meet minimal performance appraisal requirements issued by OPM. Performance appraisal systems established under this paragraph shall, for purposes of this subpart, be equivalent to performance appraisal systems established under 5 U.S.C. 4302a.

§ 540.105 Performance recognition

(a) Each agency shall establish a procedure for determining the manner by which general increases, merit increases and performance award shall be granted to PMRS employees, in accordance with instructions provided by OPM.

(b) Agency procedures for making performance pay decisions must include a requirement for an approval of each decision by an official of the agency who is at a higher level than the official who made the initial decision, unless there is no official at a higher level in the agency, and also by the official(s) which responsibility for managing the performance award budget within the agency.

§ 540.106 General pay increases.

(a) General pay increases are to be made effective on the first day of the pay adjustment period.

(b) Except for paragraph (d) of this section, each general pay increase must be based on a rating of record for the current appraisal period for which performance pay decisions are being made. The following table prescribes the portion of the general pay increase employees must receive for each performance level, as defined in § 430.405(h) of this chapter.

GENERAL PAY INCREASES FOR EACH PERFORMANCE RATING LEVEL

If an employee's performance is rated at—	Then the employee receives—
Level 5, 4, or 3	The full general pay increase for the pay adjustment period.
Level 2	One-half the general pay increase for the pay adjustment period.
Level 1	No general pay increase for the pay adjustment period.

(c)(1) To determine the amount of the employee's general pay increase, the agency must use the employee's rate of basic pay on the day immediately preceding the pay adjustment period.

(2)(i) Except as provided in paragraph (c)(2)(ii) of this section, the agency will determine the general pay increase for employees at performance level 3 (Fully Successful) or above as follows:

(A) Subtract the minimum rate of the rate range of the employee's position in effect on the day immediately preceding the pay adjustment period from the employee's rate of basic pay as determined under paragraph (c)(1) of this section;

(B) Subtract the minimum rate of the range in effect immediately preceding the pay adjustment period from the maximum of that rate range;

(C) Divide the result of paragraph (c)(2)(i)(A) by the result of paragraph (c)(2)(i)(B);

(D) Subtract the minimum rate of the new rate range for the grade from the maximum rate of that range;

(E) Multiply the result of paragraph (c)(2)(i)(C) by the result of paragraph (c)(2)(i)(D); and

(F) Add the result of paragraph (c)(2)(i)(E) to the minimum of the new rate range and round to the next higher whole dollar amount.

(ii) The salary of an employee which is at the minimum or maximum of the rate range in effect on the day immediately preceding the pay adjustment period will be adjusted to the minimum or maximum of the new rate range respectively.

(3) An employee whose performance is rated at level 1 or 2 and, therefore, receives less than the full general increase may be paid less than the minimum rate of the rate range for the employee's position.

(4)(i) Except as provided in paragraph (c)(4)(iii) of this section, the salary of an employee whose performance is rated at level 2, including an employee whose rate of basic pay is less than the minimum rate of the rate range for the employee's position, will be adjusted by multiplying the employee's rate of basic pay on the day immediately preceding the pay adjustment period by one-half of the amount of the general increase applicable to the rate range for the grade of the employee's position for such pay adjustment period.

(ii) The salary of an employee whose rate of basic pay is less than the minimum rate of the rate range of the employee's position, and whose performance is rated at level 3 or above, will be adjusted by multiplying the employee's rate of basic pay on the day immediately preceding the pay adjustment period by the full amount of the general increase applicable to the rate range of the grade of the employee's position for such pay adjustment period.

(iii) An employee who is receiving retained pay will receive one-half of the general increase, as required under 5 U.S.C. 5363(a), regardless of his or her summary rating level.

(d) Agencies will increase the salary of employees who cannot be rated under a performance appraisal system established under 5 U.S.C. 4302a by the amount of the full general pay increase.

§ 540.107 Merit increases.

(a)(1) Merit increases under 5 U.S.C. 5404 are to be effective on the first day of the first applicable pay period commencing on or after October 1 of each year. Merit increases may be paid retroactively but must be received by the employee no later than December 31 of the applicable year.

(2) An employee is eligible to receive a merit increase if he/she is in a Performance Management and Recognition System position on the effective date of the merit increase.

(b) PMRS employees whose performance is rated at level 3 (Fully Successful), or levels 4 or 5 above the "Fully Successful" level, as defined in § 430.405(h) of this chapter, shall receive merit increases in accordance with the following table.

MERIT INCREASES FOR EACH PERFORMANCE RATING LEVEL

Performance rating	Amount received if rate of basic pay is less than the reference amount	Amount received if rate of basic pay is equal to or greater than the reference amount
Level 5	1 merit increase	1 merit increase.
Level 4	1 merit increase	⅔ merit increase.
Level 3 (Fully Successful)	1 merit increase	⅓ merit increase.

(c) PMRS employees whose performance is rated at level 1 or 2 will receive a zero merit increase.

(d) An employee newly appointed to the Government within 90 days of the effective date (including the effective date) of the merit increase shall not be

eligible for a merit increase. For the purposes of this paragraph:

(1) A reinstated employee is considered to be a newly appointed employee;

(2) An employee reemployed under Part 351, Subpart J, of this chapter, is not considered to be a newly appointed employee; and

(3) An employee receiving a new appointment without a break in service of one or more workdays is not considered to be a newly appointed employee.

(e) If an employee moving into the PMRS *on or before* the effective date of the merit increase has received an increase to base pay (promotion, within grade increase, Quality Step Increase) within 90 days of such effective date, the employee will not receive a merit increase for that fiscal year. An increase occurring on the effective date of the merit increase is considered to be within this 90 day period. Actions covered by this rule include:

(1) Conversion to the PMRS;

(2) Reassignment to the PMRS from another Federal pay system;

(3) Promotion to the PMRS;

(4) Temporary promotion to the PMRS.

(f) When an employee's performance cannot be appraised for the agency's minimum appraisal period, merit increases will be granted in accordance with the provisions of § 540.108(a), (b), (c) or (d) of this part.

§ 540.108 Special provisions for pay administration.

(a)(1) This paragraph applies when an employee cannot be rated for the current appraisal period under elements and standards established under 5 U.S.C. 4302a, under the following circumstances:

(i) An employee who is not under elements and standards, established under 5 U.S.C. 4302a, for the agency's minimum appraisal period, except as provided in § 540.107(d) and (e) of this part; or

(ii) An employee who is unable to be rated because the supervisor has left the agency, and higher level supervisors cannot reasonably appraise the performance of the employee; or

(iii) An employee who is on long-term training or IPA assignment under sections 3371 through 3376 of title 5, United States Code.

(2) Under these circumstances, a merit increase shall be granted using one of the following rules in the order specified:

(i) The employee's rating period may be extended as provided in § 540.104(b)(2), such extension not to exceed September 30 of the same year;

(ii) The employee's rating of record under 5 U.S.C. 4302a is extended and the appropriate increase is granted, if that rating was given no earlier than the previous agency rating period; or

(iii) The employee receives an increase equivalent to that granted for a level 3 ("Fully Successful") rating.

(b) Except as provided in paragraphs (c) and (d) of this section, when an employee who cannot be rated returns to a pay status after an approved absence that would be creditable service under 5 CFR 531.406, which included one or more pay adjustments provided under 5 U.S.C. 5403 and 5404, the employee's rate of basic pay shall be set at the sum of—

(1) The employee's rate of basic pay immediately before the interruption of his or her employment with the agency; and, as appropriate,

(2) The general pay increases that would have been required by 5 U.S.C. 5403 for a level 3 ("Fully Successful") rating, if the employee's service has not been interrupted; and

(3) The merit increases received by an employee rated at level 3 ("Fully Successful").

(c)(1) This paragraph applies when the employee's rate of basic pay is being set because of—

(i) Service in the armed forces or non-Government service referenced in 5 U.S.C. 5405(d);

(ii) Return to a pay status after an IPA assignment under sections 3371 through 3376 of title 5, United States Code;

(iii) Other service for which an employee's advancement through the pay range is preserved by statute; or

(iv) One or more merit increases that occurred during a period for which the employee has received credit under the back pay provisions of 5 U.S.C. 5596 and Subpart H of Part 550 of this chapter.

(2) Under these circumstances, the employee's pay shall be set at the sum of—

(i) The employee's rate of basic pay immediately before the interruption of his or her duty status, and, as appropriate;

(ii) The general increases that would be required by 5 U.S.C. 5403 for a level 3 ("Fully Successful") rating, if the employee's service had not been interrupted; and

(iii) Merit increases, which will be granted as follows:

(A)(1) For the first merit increase during the period of such service, the employee's rating of record under 5 U.S.C. 4302a is extended and the appropriate increase is granted, if that rating was given no earlier than the previous agency rating period; or

(2) If there is no rating of record that can be extended, the employee receives an increase equivalent to that granted for a level 3 ("Fully Successful") rating.

(B) For all subsequent merit increases, the employee will receive the increase equivalent to that received for a level 3 ("Fully Successful") rating for the period involved.

(d)(1) This paragraph applies when the employee's rate of basic pay is being set because of—

(i) Leave without pay (LWOP) for a period of time such that the employee is not in a pay status for at least the agency's minimum appraisal period; and

(ii) The employee returns to pay status between either (1) a period which is less than the agency's minimum appraisal period, or (2) after the end of the agency's appraisal period, and the effective date of the merit increase.

(2) Under these circumstances the employee's pay shall be set at the sum of—

(i) The employee's rate of basic pay immediately before the effective date of the LWOP; and, as appropriate,

(ii) The general increases that would be required by 5 U.S.C. 5403 for a level 3 ("Fully Successful") rating, if the employee had not been on LWOP.

(3) Under these circumstances, no merit increase will be granted for the current appraisal period for which merit increases are being granted.

(e) Notwithstanding § 531.203(f) of this chapter, when an employee is promoted within or out of the PMRS on the effective date of the general increase *and* the merit increase, the employee shall receive the following, in the order specified:

(1) Any general increase to which the employee otherwise would be entitled;

(2) Any merit increase to which the employee otherwise would be entitled; and

(3) The increase resulting from the promotion.

§ 540.109 Performance awards.

(a) Section 5406 of title 5, United States Code authorizes the payment of performance awards as part of the Performance Management and Recognition System.

(b)(1) Each agency covered by the Performance Management and Recognition System shall, at the beginning of each fiscal year, determine the amount of money available for performance awards for that fiscal year in accordance with the requirements of 5 U.S.C. 5406(c) and instructions provided by OPM. Except as provided in paragraph (b)(3) of this section, the following funding requirements apply:

(i) Each agency is required to pay a minimum of .75 percent of the estimated aggregate amount of PMRS employees' basic pay for fiscal year 1985 for performance awards;

(ii) In each of the four fiscal years thereafter, the minimum percentage to be spent for performance awards will be adjusted in accordance with OPM instructions so that for fiscal year 1989 a minimum of 1.15 percent is spent;

(iii) An agency may not spend more for performance awards than 1.5 percent of the estimated aggregate amount of PMRS employees' basic pay for any fiscal year.

(2) In determining the estimated aggregate amount of PMRS employees' basic pay for a fiscal year, consideration should be given to the following factors:

(i) The number of employees covered by the PMRS during the previous year (or the Merit Pay System in FY 84);

(ii) The aggregate rates of basic pay for such employees;

(iii) Significant changes in the number of PMRS employees expected in the current fiscal year, such as by attrition, reorganization, expansion, or reduction in force; and

(iv) The distribution of performance ratings in the agency;

(v) The amount of the general increases and merit increases that will be paid to PMRS employees in the current fiscal year.

(3) Agencies having 20 or fewer employees covered by the PMRS and that have determined that the funding allowed under 5 U.S.C. 5406(c)(2)(A) is insufficient to provide an effective performance awards distribution, may submit to OPM, at the beginning of each fiscal year, a request for approval of a higher level of funding for performance awards, but not to exceed 10 percent of the aggregate amount of basic pay for PMRS employees in that fiscal year as provided in 5 U.S.C. 5406(c)(2)(B). The request shall be in writing and shall include the level of funding desired, and the reasons for and sufficient data to support funding at the higher level. Sufficient data will include, at a minimum:

(i) Number of employees;

(ii) Distribution of ratings;

(iii) Awards distribution methodology;

(iv) Award amounts that would be payable under paragraph (b)(1) of this section; and

(v) Award amounts that will be payable under the proposed level of funding.

(c)(1) Performance awards shall be paid at least annually in accordance with 5 U.S.C. 5406(c)(2) and OPM instructions, on a date or within a time period established by the agency, except that agencies should pay these awards as close to the end of the performance appraisal period as the agency deems practicable. This does not preclude agencies from granting cash awards under 5 U.S.C. 5407 and § 540.110 of this part at any time during the appraisal period.

(2) An employee is eligible to receive a performance award if he/she is in a Performance Management and Recognition System position on the last day of the current performance appraisal period for which performance pay decisions are being made.

(d)(1) Performance awards must be based on an employee's rating of record for the current appraisal period for which performance pay decisions are being made. An employee with a rating at level 5 must receive a performance award of at least 2 percent of base pay (except that no minimum shall be applicable in FY 85), but not more than 10 percent of base pay in any given year. Based upon an agency head's determination that an employee has performed at an unusually outstanding level, the agency may grant a performance award not to exceed 20 percent of base pay.

(2) An employee with a summary rating at level 4 should receive a performance award, not to exceed 10 percent of base pay in any given year. Within each organizational element of an agency having responsibility for managing a performance award budget, any award granted to employees in the same grade rated at level 4 must be less than any award received by employees rated at level 5.

(3) An employee with a summary rating at level 3 may receive a performance award, not to exceed 10 percent of base pay in any given year. Within each organizational element of an agency having responsibility for managing a performance award budget, any award granted to employees in the same grade rated at level 3 must be less than any award received by employees rated at level 4.

(e) If an agency determines the amount of performance awards using a percentage of base pay, the rate of basic pay on the last day of the performance appraisal period for which awards are being paid must be used to calculate the amount of the awards.

(f)(1) In granting performance awards as provided in paragraph (d) of this section, if an employee has been promoted within the preceding year, the agency head may take this into account in determining the amount of the employee's performance award that otherwise would have been specified in the agency's Performance Management Plan. However, any employee receiving a rating of "Outstanding" must receive an award of no less than 2 percent of base pay (except that no minimum shall be applicable in FY 85).

(2) Performance awards that have been adjusted because of recent promotions will not be considered in meeting the requirements of paragraph (d) of this section.

(g) The agency head will determine whether an employee who cannot be given a rating of record under 5 U.S.C. 4302a will be granted a performance award. If a determination is made to grant a performance award, the amount of such award will be determined in accordance with the procedure specified in § 540.108(a)(2), and the agency's Performance Management Plan.

(h) An employee newly appointed to the Government, as specified in § 540.107(d), within 90 days of the effective date (including the effective date) of the merit increase shall not be eligible for a performance award.

(i)(1) When an employee is—

(i) On leave without pay (LWOP) for a period of time such that the employee is not in a pay status for at least the agency's minimum appraisal period; and

(ii) The employee returns to pay status between either (1) a period which is less than the agency's minimum appraisal period, or (2) after the end of the agency's appraisal period, and the effective date of the merit increase;

(2) The employee will not be granted a performance award.

(j) Failure of an agency to pay a performance award under this section as authorized by 5 U.S.C. 5406(b) may not be appealed.

§ 540.110 Cash award program.

(a) Title 5, U.S. Code, section 5407 authorizes a cash award program for:

(1) Suggestions, inventions, superior accomplishments, or other unique personal efforts which contribute to the efficiency, economy, or other improvement of Government operations, or achieve a significant reduction in paperwork; or

(2) The performance of a special act or service in the public interest in connection with or related to the employee's Federal employment.

(b) An award for any unique or special act or service under paragraph (a) of this section may be granted for any non-recurring employee or group contribution which is highly exceptional and unusually outstanding and which is beyond normal job responsibilities and performance standards.

(c) In granting cash awards under this section, the agency must prepare a

written justification separate from the employee's performance plan or rating.

(d) Cash awards will be granted in accordance with the incentive award program provisions in Part 451 of this chapter, OPM instructions under that chapter, and the agency's incentive award program established under Part 451 of this chapter.

§ 540.111 Agency Performance Management Plans.

(a) Each agency with employees who are subject to the Performance Management and Recognition System shall establish a Performance Management Plan for administering 5 U.S.C. 4302a, 5 U.S.C. 5401 through 5410, and this part. Performance Management Plans shall include each of the following which is applicable to the agency and any additional information requested by OPM:

(1) Appraisal systems required under 5 U.S.C. 4302a.

(2) Performance Management and Recognition System plan(s) required by this part, including the manner by which the distribution of the funds contained in the agency's performance award budget will be made.

(3) Requirements for communication to the agency's PMRS employees of the purpose of the Performance Management and Recognition System and how it works; and

(4) Requirements for training in the operation of the Performance Management and Recognition System for employees who are subject to that System and for Senior Executive Service members and other managers supervising PMRS employees.

(b)(1) Each agency covered by Part 540 of this chapter shall submit a Performance Management Plan to the Office of Personnel Management for review and approval. OPM will provide agencies with a Performance Management Plan Checklist, containing all the components necessary for approval of the PMRS Performance Management Plan.

(2) If major subcomponents of an agency propose to modify any element of the agency's plan that is included in the Performance Management Plan Checklist, or develop separate proposed plans based on agency guidelines, each such subcomponent's proposed plan must be reviewed and approved by the agency and submitted to OPM for final approval.

(3) Agencies will be required to implement the provisions of an approved Performance Management Plan pertaining to their Performance Management and Recognition System employees not less than 150 days prior to the end of the agency's performance appraisal period.

(c) Agencies shall submit to OPM for approval any changes to their Performance Management Plans that modify any element of the agency's Plan that is included in the Performance Management Plan Checklist.

§ 540.112 Reports.

(a) So that the Office of Personnel Management can provide the Congress and others with information regarding the operation of the Performance Management and Recognition System, including performance awards under 5 U.S.C. 5406 and cash awards under 5 U.S.C. 5407, each agency shall maintain such records and submit to OPM such reports as OPM may require.

(b) Each agency shall report to OPM at the beginning of each fiscal year the estimated performance awards budget, including the funding level used, and such other data required by OPM to administer the Performance Management and Recognition System.

PART 771—AGENCY ADMINISTRATIVE GRIEVANCE SYSTEM

20. The authority citation for Part 771 continues to read as follows:

Authority: 5 U.S.C. 1302, 3301, 3302, and 7301; E.O. 9830, 3 CFR 1943–1948 Comp., pp. 606–624; E.O. 11222, 3 CFR 1964–1969 Comp., p. 306.

21. In § 771.206, paragraph (c)(1)(xii) is revised to read as follows:

§ 771.206 Exclusions.

* * * * *

(c) *Matters excluded.*

(1) * * *

(xii) A decision to grant or not to grant a general increase, merit increase, or performance award under the Performance Management and Recognition System, or a decision on the granting of or failure to grant cash awards or honorary recognition under 5 U.S.C. chapter 54 and Part 540 of this chapter;

* * * * *

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BILLING CODE 6325–01–M

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 293

Personnel Records; Transfer of an Official Personnel Folder to Another Agency

AGENCY: Office of Personnel Management.

ACTION: Proposed rulemaking.

SUMMARY: In response to agency comments on proposed rulemaking on the performance management system, the Office of Personnel Management proposes to amend the regulations on Personnel Records. The proposed rule would require agencies to send a transferring employee's performance ratings, 3 years old or less, to his or her "gaining" agency, along with the employee's Official Personnel Folder (OPF).

DATE: To be considered, comments must be received by September 30, 1985.

ADDRESS: Send or deliver written comments to: John W. Fossum, Assistant Director for Performance Management, Workforce Effectiveness and Development, Office of Personnel Management, 1900 E Street NW., Room 7520, Washington, D.C. 20415.

FOR FURTHER INFORMATION CONTACT: Allen B. Levan (202) 632-5653.

SUPPLEMENTARY INFORMATION:

Background

Regulations published as final rules on October 25, 1983, at 48 FR 49462 through 49498, concerning reduction-in-force (RIF), performance management and the application of the Fair Labor Standards Act (FLSA) to the Federal workforce became effective on July 3, 1985. They are republished elsewhere in today's issue as a proposed rulemaking to afford interested parties the opportunity to comment on a proposed implementation schedule for the new performance management system and the FLSA regulations and to allow interested parties the opportunity to consider substantive changes to parts of the regulations. Comments on any and all aspects of the notice will be received and considered. Unlike the remainder of the PMS regulations, these regulations were proposed rules in October 1983, and are not currently in effect.

Note.—Subsequent to publication of the Performance Management System (PMS) regulations, title II of Pub. L. 98-615 established the Performance Management and Recognition System (PMRS), replacing the merit pay system. Under the authority of that statute, OPM published interim regulations on March 25, 1985, at 50 FR 11788, to implement the PMRS.

It was necessary in the March 1985 PMRS regulations to amend the same sections in Part 293 previously amended in the October 1983 Performance Management System (PMS) regulations. In all cases, wherever the March 1985 regulations differ from the October 1983 regulations, the more recently published PMRS (March 1985) regulations are in effect, and govern Federal agencies.

For the convenience of commenters, the proposed Personnel Records regulation is republished here.

On March 30 (48 FR 13342) and July 14, 1983 (48 FR 32288), OPM published proposed rules to implement a Performance Management System. Those rules are being published as proposed rulemaking elsewhere in today's issue of the **Federal Register**.

One of the key issues raised in agency comments on the proposed regulations was the transfer of employees' performance ratings to their new agency at the time employees transfer. Agencies pointed out that they need these performance ratings to make determinations about within-grade and step increases, reduction in force, and other personnel actions. Current OPM regulations prohibit agencies from transferring performance ratings on non-SES employees to another agency or to the National Personnel Records Center (NPRC) in an employee's Official Personnel Folder (OPF).

This proposed rule would require that agencies place performance ratings in an employee's OPF and forward the ratings to another "gaining" office within the employing agency, to another agency, or to NPRC. This change would only affect non-SES employees' performance ratings which are three years old or less. (Current regulations already require transferring SES ratings that are five years old or less.)

E.O. 12291 Federal Regulation

OPM has determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not have a significant impact on a substantial number of small entities because the regulation will only affect Government employees.

List of Subjects in 5 CFR Part 293

Archives and records, Government employees, Privacy.

U.S. Office of Personnel Management.

Constance Horner,

Director.

Accordingly, the Office of Personnel Management proposes to amend 5 CFR Part 293, as follows:

PART 293—PERSONNEL RECORDS

1. The authority citation for Part 293 is revised to read as follows:

Authority: 5 U.S.C. 522a, 4305 and 4315; E.O. 12107 (December 28, 1978); 5 U.S.C. 1103, 1104, and 1302; 3 CFR 1954–1958 Comp.; 5 CFR 7.2; E.O. 9830, 3 CFR 1943–1948 Comp.

2. Section 293.402(a) is revised to read as follows:

Subpart D—Employee Performance File System Records

* * * * *

§ 293.402 Establishment of separate employee performance record system.

(a) Copies of performance ratings must be placed in an employee's Official Personnel Folder (OPF). However, other performance-related documents may be retained in the OPF only when the agency prescribes the use of a separate envelope, temporarily located in the OPF. Performance ratings shall be retained on the left (temporary) side of the OPF. No other performance-related record shall be retained on the left (temporary) or right (long term) side of the OPF or shall be transferred to the National Personnel Records Center (except as required by § 293.404(b)).

* * * * *

3. Sections 293.404(a)(1) and (a)(2) are revised to read as follows:

§ 293.404 Retention schedule.

(a)(1) Except as provided in § 293.405(a), performance appraisals or documents supporting them are generally not permanent records and shall, except for appointees to the SES and including incumbents of executive positions not covered by the SES, be retained as prescribed below:

(i) Performance appraisal records (including identification of elements and standards) shall be retained for three years;

(ii) Supporting documents shall be retained for as long as the agency deems appropriate (up to 3 years);

(iii) Performance records superseded (e.g., through an administrative or judicial procedure) and performance-related records pertaining to a former employee (except as prescribed in § 293.405(a)) need not be retained for a minimum of 3 years. Rather, in the former case they are to be destroyed

and in the latter case agencies shall determine the retention schedule; and

(iv) Except when prohibited by law, retention of automated records longer than the maximum prescribed here is permitted for purposes of statistical analysis so long as the data are not used in any action affecting the employee when the manual record has been or should have been destroyed.

(2) When an employee is reassigned within the employing agency, disposition of records in this system, including transfer with the employee, shall be as agencies prescribe and consistent with § 293.405(a).

* * * * *

4. Section 293.405(a) is revised to read as follows:

§ 293.405 Disposition of records.

(a) When the OPF of a non-SES employee is sent to another servicing office in the employing agency, to another agency, or to the National Personnel Records Center, the "losing" servicing office shall include in the OPF all performance ratings which are 3 years old or less. Also, the "losing" office will purge from the OPF all performance ratings more than 3 years old, and other performance-related records, according to agency policy established under § 293.404(a)(2) and in accordance with FPM Supplement 293–31.

* * * * *

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BILLING CODE 6325–01–M

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5 CFR Part 351

Reduction in Force

AGENCY: Office of Personnel Management.

ACTION: Proposed rulemaking.

SUMMARY: The Office of Personnel Management is proposing new regulations to improve the current system for crediting performance ratings in determining retention standing during reduction in force.

COMMENT DATE: Written comments will be considered if received no later than September 30, 1985.

ADDRESS: Send or deliver written comments to Richard B. Post, Associate Director for Staffing, Office of Personnel Management, Room 6F08, 1900 E Street NW., Washington, D.C. 20415.

FOR FURTHER INFORMATION CONTACT: Donald L. Holum, (202) 632–6817.

SUPPLEMENTARY INFORMATION:

Background

Regulations published as final rules on October 25, 1983, at 48 Federal Register 49462, *et seq.*, concerning reduction-in-force (RIF), performance management, and the application of the Fair Labor Standards Act (FLSA) to the Federal workforce became effective on July 3, 1985. They are hereby republished as a proposed rulemaking to afford interested parties the opportunity to comment on a proposed implementation schedule for the new performance management system and the FLSA regulations and to allow interested parties the opportunity to consider substantive changes to parts of the regulations. Comments on any and all aspects of the notice will be received and considered. The current regulations in these areas remain in full force and effect, as they have been since July 3, 1985.

Effective Date

The supplementary information contained in the final reduction-in-force (RIF) rules published in the Federal Register on October 25, 1983 at 48 Federal Register 49462 *et seq.* provided for the delayed implementation of the regulations, as follows: "Agencies may delay implementation of these regulations if RIF plans are underway as of the date this regulation is issued *and* the RIF will take effect on or before January 16, 1984." Those final RIF rules went into effect on July 3, 1985, when the Chief Justice of the United States Supreme Court, acting as Circuit Justice, vacated an order of the United States Court of Appeals for the District of Columbia staying the effectiveness of the rules. *OPM* v. *AFGE*, No. A–5 (U.S. July 5, 1985), *aff'd*, *OPM* v. *AFGE*, ___ U.S. ___, (July 18, 1985). In a manner similar to the 120-day phase-in period utilized for the final rules published on October 25, 1983, implementation of the RIF rules which became effective on July 3, 1985, may be delayed by agencies if RIF plans were underway as of July 3, 1985, *and* the RIF will take effect on or before December 31, 1985.

Discussion of Proposed Changes

The 5 CFR Part 351 regulations which were published on October 25, 1983, and which went into effect on July 3, 1985, provide employees with additional service credit for determining retention standing on the basis of their last three annual performance ratings. Because of concerns expressed about the weight given performance in determining retention standing under these regulations, OPM is publishing a proposed change in the weighting system for public comment. Presently, an employee is entitled to receive ten additional years of service credit for each outstanding rating, seven years for each exceeds fully successful rating, and five additional years for each fully successful rating received in the last 3 years. Under the current regulation for example, an employee who had received annual performance ratings in the last three years of fully successful (5), exceeds fully successful (7) and outstanding (10), would receive 22 years of additional service credit (5+7+10=22) in determining retention standing.

Under the proposed new crediting system in this notice of proposed rulemaking, an employee would be entitled to receive additional service credit based on the *mathematical average* (rounded in the case of a fraction to the next higher whole number) of the employee's three previous annual performance ratings computed on the following basis:

—twenty (20) additional years of service for each performance rating of outstanding or equivalent;

—sixteen (16) additional years of service for each performance rating of exceeds fully successful or equivalent; or

—ten (10) additional years of service for each performance rating of fully successful or equivalent.

Under the proposed rule, for example, an employee who had received annual performance ratings in the last three years of fully successful (10), exceeds fully successful (16), and outstanding (20) would receive 16 years of additional service credit (10+16+20=46 divided by 3=15.3—rounded to 16) in determining retention standing.

With the exception of this proposed new performance weighing system in § 351.504, and minor clarifications in §§ 351.202, 351.403, and 351.701, the regulations published here, are the same as those published on October 25, 1983.

E.O. 12291, Federal Regulation

OPM has determined that this is not a major rule as defined under Section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation applies only to Federal agencies.

List of Subjects in 5 CFR Part 351

Government employees.

U.S. Office of Personnel Management.

Constance Horner,

Director.

Accordingly, OPM proposes to revise Subparts A through I of Part 351 of 5 CFR as follows:

PART 351—REDUCTION IN FORCE

Subpart A—[Reserved]

Subpart B—General Provisions

Sec.

351.201 Use of regulations.
351.202 Coverage.
351.203 Definitions.
351.204 Responsibility of agency.
351.205 Authority of OPM.

Subpart C—Transfer of Function

351.301 Applicability.
351.302 Transfer of employees.
351.303 Identification of positions with a transferring function.

Subpart D—Scope of Competition

351.401 Determining retention standing.
351.402 Competitive area.
351.403 Competitive level.
351.404 Retention register.
351.405 Employees demoted because of unacceptable performance.

Subpart E—Retention Standing

351.501 Order of retention—competitive service.
351.502 Order of retention—excepted service.
351.503 Length of service.
351.504 Credit for performance.
351.505 Records.
351.506 Effective date of retention standing.

Subpart F—Release From Competitive Level

351.601 Order of release from competitive level.
351.602 Prohibitions.
351.603 Actions subsequent to release from competitive level.
351.604 Use of furlough.
351.605 Liquidation provisions.
351.606 Mandatory exceptions.
351.607 Permissive continuing exceptions.
351.608 Permissive temporary exceptions.

Subpart G—Assignment Rights (Bump and Retreat)

351.701 Assignment involving displacement.
351.702 Qualifications for assignment.
351.703 Exception to qualifications.
351.704 Rights and prohibitions.
351.705 Administrative assignment.

Subpart H—Notice of Employee

351.801 Notice period.
351.802 General and specific notices.
351.803 Content of notice.
351.804 Notice concerning consideration for reemployment.
351.805 Expiration of notice.
351.806 New notice required.
351.807 Status during notice period.

Subpart I—Appeals and Corrective Action

351.910 Appeals.
351.902 Correction by agency.

Authority: 5 U.S.C. 1302, 3502, unless otherwise noted.

Subpart A—[Reserved]

Subpart B—General Provisions

§ 351.201 Use of regulations.

(a) (1) Each agency is responsible for determining the categories within which positions are required, where they are to be located, and when they are to be filled, abolished, or vacated. This includes determining when there is a surplus of employees at a particular location in a particular line of work.

(2) Each agency shall follow this part when it releases a competing employee from his or her competitive level by furlough for more than 30 days, separation, demotion, or reassignment requiring displacement, when the release is required because of lack of work, shortage of funds, insufficient personnel ceiling, reorganization, or the exercise of reemployment rights or restoration rights.

(b) This part does not require an agency to fill a vacant position. However, when an agency, at its discretion, chooses to fill a vacancy by an employee who has been reached for release from a competitive level for one of the reasons in paragraph (a)(2) of this section, this part shall be followed.

(c) Each agency is responsible for assuring that the provisions in this part are uniformly and consistently applied in any one reduction in force.

(d) An agency authorized to administer foreign national employee programs under section 408 of the Foreign Service Act of 1980 (22 U.S.C. 3968) may include special plans for reduction in force in its foreign national employee programs. In these special plans an agency may give effect to the labor laws and practices of the locality of employment by supplementing the selection factors in Subparts D and E of this part to the extent consistent with the public interest. Subpart I of this part does not apply to actions taken under the special plans authorized by this paragraph.

§ 351.202 Coverage.

(a) *Employees covered.* Except as provided in paragraph (b) of this section, this part applies to each civilian employee in:

(1) The executive branch of the Federal Government; and

(2) Those parts of the Federal Government outside the executive branch which are subject by statute to competitive service requirements or are determined by the appropriate legislative or judicial administrative body to be covered hereunder. Coverage includes administrative law judges except as modified by Part 930 of this chapter.

(b) *Employees excluded.* This part does not apply to an employee:

(1) In a position in the Senior Executive Service; or

(2) Whose appointment is required by Congress to be confirmed by, or made with the advice and consent of, the United States Senate, except a postmaster.

(c) *Actions excluded.* This part does not apply to:

(1) The termination of a temporary or term promotion or the return of an employee to the position held before the temporary or term promotion or to one of equivalent grade and pay.

(2) A change to lower grade based on the reclassification of an employee's position due to erosion of duties, the application of new classification standards, or the correction of a classification error.

(3) The change of an employee from regular to substitute in the same pay level in the U.S. Postal Service field service.

(4) The release from a competitive level of a National Guard technician under section 709 of title 32, United States Code.

(5) Placement of an employee serving on an intermittent, part-time, on-call, or seasonal basis in a nonpay and nonduty status in accordance with conditions established at time of appointment.

§ 351.203 Definitions.

In this part:

"Competing employee" means an employee in tenure group I, II, or III.

"Days" means calendar days.

"Function" means all or a clearly identification segment of an agency's mission (including all integral parts of that mission), regardless of how it is performed.

"Local commuting area" means the geographic area that usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities in which people live and can reasonably be expected to travel back and forth daily to their usual employment.

"Performance rating" means an official performance rating under a performance appraisal system approved by OPM in accordance with 5 U.S.C., chapter 43; or for an agency not subject to chapter 43, an official performance rating as provided for in the agency's appraisal system.

"Reorganization" means the planned elimination, addition, or redistribution of functions or duties in an organization.

"Representative rate" means the fourth step of the grade for a position subject to the General Schedule, the prevailing rate for a position under a wage-board or similar wage-determining procedure, and for other positions, the rate designated by the agency as representative of the position. Employees covered by the Merit Pay System are General Schedule employees for purposes of determining representative rate.

"Transfer of function" means the transfer of the performance of a continuing function from one competitive area and its addition to one or more other competitive areas; or the movement of the competitive area in which the function is performed to another communting area.

§ 351.204 Responsibility of agency.

Each agency covered by this part is responsible for following and applying the regulations in this part when the agency determines that a reduction in force is necessary.

§ 351.205 Authority of OPM.

The Office of Personnel Management may establish further guidance and instructions for the planning, preparation, conduct, and review of reductions in force through the Federal Personnel Manual system. OPM may examine an agency's preparations for reduction in force at any stage. When OPM finds that an agency's preparations are contrary to the express provisions or to the spirit and intent of these regulations or that they would result in violation of employee rights or equities, OPM may require appropriate corrective action.

Subpart C—Transfer of Function

§ 351.301 Applicability.

This subpart is applicable when the work of one or more employees is moved from one competitive area to another, regardless of whether or not the movement is made under authority of a statute, Executive order, reorganization plan, or other authority.

§ 351.302 Transfer of employees.

(a) Before a reduction in force is made in connection with the transfer of any or all of the functions of a competitive area to another continuing competitive area, each competing employee in a position identified with the transferring function or functions shall be transferred to the continuing competitive area without any change in the tenure of his or her employment.

(b) An employee whose position is transferred under this subpart solely for liquidation, and who is not identified with an operating function specifically authorized at the time of transfer to continue in operation more than 60 days, is not a competing employee for other positions in the competitive area gaining the function.

(c) Regardless of an employee's personal preference, an employee has no right to transfer with his or her function, unless the alternative in the competitive area losing the function is separation or demotion.

§ 351.303 Identification of positions with a transferring function.

(a) The competitive area losing the function is responsible for identifying the positions of competing employees with the transferring function. Two methods are provided to identify employees with the transferring function:

(1) Identification Method One; and

(2) Identification Method Two.

(b) Identification Method One must be used to identify each position to which it is applicable. Identification Method Two is used only to identify positions to which Identification Method One is not applicable.

(c) Under Identification Method One a competing employee is identified with a transferring function if:

(1) The employee performs the function during all or a major part of his or her work time; or

(2) Regardless of the amount of time the employee performs the function during his or her working time, the function performed by the employee incudes the duties controlling his or her grade or rate of pay.

(d) Under Identification Method Two, competing employees are identified with a transferring function in the inverse order of their retention standing.

(e) (1) The competitive area losing the function may permit other employees in the competitive area to volunteer for transfer with the function in place of employees identified under Identification Method One or Identification Method Two. However, the competitive area may permit these other employees to volunteer for transfer only if no competing employee who is identified for transfer under Identification Method One or Identification Method Two is separated or demoted solely because a volunteer transferred in place of him or her to the competitive area that is gaining the function.

(2) If the total number of employees who volunteer for transfer exceeds the total number of employees required to perform the function in the competitive area that is gaining the function, the losing competitive area should give preference to the volunteers with the highest retention standing.

Subpart D—Scope of Competition

§ 351.401 Determining retention standing.

Each agency shall determine the retention standing of each competing employee on the basis of the factors in this subpart and in Subpart E of this part.

§ 351.402 Competitive area.

(a) Each agency shall establish competitive areas in which employees compete for retention under this part.

(b) A competitive area may consist of all or part of an agency. The minimum competitive area in the departmental service is a bureau, major command, directorate or other equivalent major subdivision of an agency within the local commuting area. In the field, the minimum competitive area is an activity under separate administration within the local commuting area. A competitive area must be defined solely in terms of an agency's organizational unit(s) and geographical location, and it must include all employees within the competitive area so defined.

(c) When a competitive area will be in effect less than 90 days prior to the effective date of a reduction in force, a description of the competitive area shall be submitted to the OPM for approval in advance of the reduction in force. Descriptions of all competitive areas must be made readily available for review.

§ 351.403 Competitive level.

(a) Each agency shall establish competitive levels consisting of all positions in a competitive area which are in the same grade (or occupational level) and classification series and which are similar enough in duties, qualification requirements, pay schedules, and working conditions so that the incumbent of one position could successfully perform the critical elements of any other position upon entry into it, without any loss of productivity beyond that normally expected in the orientation of any new but fully qualified employee. Sex may not be the basis for assigning a position to a competitive level, except for a position which OPM has determined certification of eligibles by sex is justified.

(b) Each agency shall establish separate competitive levels according to the follow categories:

(1) *By service.* Separate levels shall be established for positions in the competitive service and in the excepted service.

(2) *By appointment authority.* Separate levels shall be established for excepted service positions filled under different appointment authorities.

(3) *By pay schedule.* Separate levels shall be established for positions under different pay schedules.

(4) *By work schedule.* Separate levels shall be established for positions filled on a full-time, part-time, intermittent, seasonal, or on-call basis. No distinction may be made among employees in the competitive level on the basis of the number of hours or weeks scheduled to be worked.

(5) *By supervisory or nonsupervisory status.* Separate levels shall be established for positions filled by a supervisor or management official as defined in 5 U.S.C. 7103(a) (10) and (11), except that a probationary period required by Subpart I of Part 315 of this chapter for initial appointment to a supervisory of managerial position is not a basis for establishing a separate competitive level.

(6) *By trainee status.* Separate levels shall be established for positions filled by an employee in a formally designated trainee or developmental program having all the characteristics covered in § 351.702(e)(1) through (e)(4) of this part.

(c) Competitive levels must be in effect at least 90 days prior to a reduction in force and descriptions of levels must be made readily available for review. Agencies are required to certify in advance to OPM that these requirements are met.

§ 351.404 Retention register.

(a) When a competing employee is to be released from a competitive level under this part, the agency shall establish a separate retention register for that competitive level. The retention register is prepared from the current retention records of employees. Except for an employee on military duty with a restoration right, the agency shall enter on the retention register, in the order of retention standing, the name of each competing employee who is:

(1) In the competitive level;

(2) Temporarily promoted from the competitive level by temporary or term promotion; or

(3) Detailed from the competitive level under 5 U.S.C. 3341 or other appropriate authority.

(b) (1) The name of each employee serving under a time limited appointment or promotion to a position in a competitive level shall be entered on a list apart from the retention register for that competitive level, along with the expiration date of the action.

(2) The agency shall list, at the bottom of the list prepared under paragraph (b)(1) of this section, the name of each employee in the competitive level with a written decision under Part 432 of this chapter to remove him or her because of unacceptable performance.

§ 351.405 Employees demoted because of unacceptable performance.

An employee who has received a written decision under Part 432 of this chapter to demote him or her because of unacceptable performance competes under this part from the position to which he or she will be or has been demoted.

Subpart E—Retention Standing

§ 351.501 Order of retention—competitive service.

(a) Competing employees shall be classified on a retention register on the basis of their tenure of employment, veteran preference, length of service, and performance in descending order follows:

(1) By tenure group I, group II, group III; and

(2) Within each group by veteran preference subgroup AD, subgroup A, subgroup B; and

(3) Within each subgroup by years of service as augmented by credit for performance under § 351.504, beginning with the earliest service date.

(b) Groups are defined as follows:

(1) Group I includes each career employee who is not serving a probationary period. (A supervisory or managerial employee serving a probationary period required by Subpart I of Part 315 of this title is in group I if the employee is otherwise eligible to be included in this group.)

(2) Group II includes each career-conditional employee and each employee serving a probationary period under Subpart H of Part 315 of this chapter. (A supervisory or managerial employee serving a probationary period required by Subpart I of Part 315 of this chapter is in group II if that employee has not completed a probationary period under Subpart H of Part 315 of this chapter).

(3) Group III includes all employees serving under indefinite appointment, temporary appointment pending establishment of register, status quo appointment, and any other nonstatus nontemporary appointment.

(c) Subgroups are defined as follows:

(1) Subgroup AD includes each preference eligible employee who has a compensable service-connected disability of 30 percent or more.

(2) Subgroup A includes each preference eligible employee not including in subgroup AD.

(3) Subgroup B includes each nonpreference eligible employee.

(d) A retired member of a uniformed service is considered a preference eligible under this part only if the member meets at least one of the conditions of the following paragraphs (d)(1), (2), or (3) of this section, except as limited by paragraph (d)(4) or (d)(5):

(1) The employee's military retirement is based on disability that either:

(i) Resulted from injury or disease received in the line of duty as a direct result of armed conflict; or

(ii) Was caused by an instrumentality of war incurred in the line of duty during a period of war as defined by sections 101 and 301 of title 38, United States Code.

(2) The employee's retired pay from a uniformed service is not based upon 20 or more years of full-time active service, regardless of when performed but not including periods of active duty for training.

(3) The employee has been continuously employed in a position covered by this part since November 30, 1964, without a break in service of more than 30 days.

(4) An employee who retired at the rank of major or above (or equivalent) is considered a preference eligible under this part if such employee is a disabled veteran as defined in section 2108(2) of title 5, United States Code, and meets one of the conditions covered in paragraphs (d)(1), (2), or (3) of this section.

(5) An employee who is eligible for retired pay under chapter 67 of title 10, United States Code, and who retired at the rank of major or above (or equivalent) is considered a preference eligible under this part at age 60, only if such employee is a disabled veteran as defined in section 2108(2) of title 5, United States Code.

§ 351.502 Order of retention—excepted service.

Competing employees in the excepted service shall be classified on retention registers in a way that corresponds to that under § 351.501 for employees in the competitive service having similar tenure of employment, veteran preference and performance ratings except that an employee who completes 1 year of current continuous service under a temporary appointment is in tenure group III.

§ 351.503 Length of Service.

(a) Each agency shall establish a service date for each competing employee.

(b) An employee's service date is whichever of the following dates reflects the employee's creditable service:

(1) The date the employee entered on duty, when he or she has no previous creditable service;

(2) The date obtained by subtracting the employee's total creditable previous service from the date he or she last entered on duty; or

(3) The date obtained by subtracting from the date in paragraph (b)(1) or (b)(2) of this section, the service equivalent allowed for performance ratings under § 351.504.

(c) An employee who is a retired member of a uniformed service is entitled to credit under this part for:

(1) The length of time in active service in the armed forces during a war, or in a campaign or expedition for which a campaign badge has been authorized; or

(2) The total length of time in active service in the armed forces if the employee is considered a preference eligible under § 351.501(d) of this part.

(d) Each agency shall adjust the service date for each employee to withhold credit for noncreditable time.

§ 351.504 Credit for performance.

(a) Performance ratings of outstanding, exceeds fully successful, fully successful, minimally successful and unacceptable are those ratings established under Part 430 of this chapter.

(b) An employee's entitlement to additional service credit for performance under this subpart shall be based on the employee's last three annual performance ratings received during the 3-year period prior to the date of issuance of specific reduction-in-force notices.

(c) The current annual performance rating shall be the last annual rating except that:

(1) An employee who has received an improved rating following an opportunity to demonstrate acceptable performance as provided in Part 432 of this chapter shall have the improved rating considered as the current annual rating; and

(2) An employee's current annual rating shall be presumed to be fully successful when the employee had been demoted under Part 432 of this chapter because of unacceptable performance and as of the date of issuance of specific reduction-in-force notices has not received a rating for performance in the position to which demoted.

(d) Service credit for employees who do not have three previous annual ratings shall be determined as follows:

(1) An employee who has not received a rating shall receive credit for performance for three assumed ratings of fully successful of equivalent.

(2) An employee who has received at least one but fewer than three previous annual ratings shall receive credit for performance based on the actual rating(s) received and on one, or two, assumed rating(s) of fully successful or equivalent, whicheverf is needed to credit the employee with three ratings.

(e) The additional service credit an employee receives for performance under this subpart shall be expressed in additional years of service and shall consist of the mathematical average (rounded in the case of a fraction to the next higher whole number) of the employee's three previous annual performance ratings computed on the following basis:

(1) Twenty additional years of service for each performance rating of outstanding or equivalent;

(2) Sixteen additional years of service for each performance rating of exceeds fully successful or equivalent; or

(3) Ten additional years of service for each performance rating of fully successful or equivalent.

(f) Each agency subject to Part 430 of this chapter is responsible for assuring that its application of these provisions is consistent with that part. Each agency not subject to Part 430 shall apply the provisions of its performance appraisal plan as appropriate.

§ 351.505 Records.

Each agency shall maintain the current correct records needed to determine the retention standing of its competing employees. The agency shall allow the inspection of its retention registers and related records by:

(a) A representative of OPM; and

(b) An employee of the agency to the extent that the registers and records have a bearing on a specific action taken, or to be taken, against the employee.

The agency shall preserve intact all registers and records relating to an employee for at least 1 year from the date the employee is issued a specific notice.

§ 351.506 Effective date of retention standing.

Except for applying the performance factor as provided in § 351.504:

(a) The retention standing of each employee released from a competitive level in the order prescribed in § 351.601 is determined as of the date the employee is so released.

(b) The retention standing of each employee temporarily retained in a competitive level under §351.608 is determined as of the date the employee would have been released from the competitive level had temporary retention action under § 351.608 not been taken. The retention standing of each employee so retained remains fixed until the completion of the reduction-in-force action which resulted in the temporary retention.

(c) When an agency discovers an error in the determination of an employee's retention standing, it shall correct the error and adjust any erroneous reduction-in-force action to accord with the employee's proper retention standing as of the effective date established by this section.

Subpart F—Release From Competitive Level

§ 351.601 Order of release from competitive level.

(a) Each agency shall select competing employees for release from a competitive level under this part in the inverse order of retention standing, beginning with the employee with the lowest retention standing on the retention register. An agency may not release a competing employee from a competitive level while retaining in that level an employee with lower retention standing except:

(1) As required under § 351.606 when an employee is retained under a mandatory or under § 351.806 when an employee is entitled to a new written notice of reduction in force; or

(2) As permitted under § 351.607 when an employee is retained under a permissive continuing exception or under § 351.608 when an employee is retained under a permissive temporary exception.

(b) When employees in the same retention subgroup have identical service dates and are tied for release from a competitive level, the agency may select any tied employee for release.

§ 351.602 Prohibitions.

An agency may not release a competing employee from a competitive level while retaining in that level an employee with:

(a) A specifically limited temporary appointment;

(b) A specifically limited temporary or term promotion;

(c) A written decision under Part 432 of this chapter of removal or demotion

from the competitive level because of unacceptable performance.

§ 351.603 Actions subsequent to release from competitive level.

An employee reached for release from a competitive level shall be offered assignment to another position in accordance with Subpart G of this part. If the employee accepts, the employee shall be assigned to the position offered. If the employee has no assignment right or does not accept an offer under Subpart G, the employee shall be furloughed or separated.

§ 351.604 Use of furlough.

(a) An agency may furlough a competing employee only when it intends within 1 year to recall the employee to duty in the position from which furloughed.

(b) An agency may not separate a competing employee under this part while an employee with lower retention standing in the same competitive level is on furlough.

(c) An agency may not furlough a competing employee for more than 1 year.

(d) When an agency recalls employees to duty in the competitive level from which furloughed, it shall recall them in the order of their retention standing, beginning with the highest standing employee.

§ 351.605 Liquidation provisions.

When an agency will abolish all positions in a competitive area within 3 months, it shall release employees in subgroup order but may release them regardless of retention standing within a subgroup, except as provided in § 351.606. When an agency releases an employee under this section, the notice to the employee shall so state and also shall give the date the liquidation will be completed. An agency may apply § 351.607 and § 351.608 in liquidation.

§ 351.606 Mandatory exceptions.

(a) When an agency applies § 351.601 or § 351.065, it shall give the following special retention priorities:

(1) Each group I or II preference eligible employee entitled under section 9 of the Military Selective Service Act of 1967, as amended (50 U.S.C. App. 459), to retention for 1 year after restoration shall be retained over other employees in the same subgroup for the retention period; and

(2) Each group I or II nonpreference eligible employee entitled under section 9 of the Military Selective Service Act of 1967, as amended (50 U.S.C. App. 459), to retention for either 6 months or 1 year after restoration shall be retained over other employees in the same subgroup for the retention period.

(b) Each agency shall record on the retention register, for inspection by each employee, the reasons for any deviation from the order of release required by § 351.601 or § 351.605.

§ 351.607 Permissive continuing exceptions.

An agency may make exception to the order of release in § 351.601 and to the action provisions of § 351.603 when needed to retain an employee on duties that cannot be taken over within 90 days and without undue interruption to the activity by an employee with higher retention standing. The agency shall notify in writing each higher standing employee reached for release from the same competitive level of the reasons for the exception.

§ 351.608 Permissive temporary exceptions.

(a) An agency may make exception for not more than 90 days to the order of release in § 351.601 and to the action provisions of § 351.603 when needed to retain an employee for 90 days or less after the effective date of release of a higher standing employee from the same competitive level:

(1) To continue an activity without undue interruption; or

(2) To satisfy a Government obligation to the retained employee; or

(3) When the temporary retention of the lower standing employee does not adversely affect the rights of any higher standing employee who is released ahead of the lower standing employee.

The temporary retention of a lower standing employee on sick leave as a permissive exception may exceed 90 days but may not exceed the date the employee's sick leave is exhausted.

(b) When the agency retains an employee for more than 30 days after the effective date of release of a higher standing employee from the same competitive level, it shall notify in writing each higher standing employee reached for release of the reasons for the exception and the date the lower standing employee's retention will end. When the agency retains a lower standing employee, it shall list opposite the employee's name on the retention register the reasons for the exception and the date this employee's retention will end.

Subpart G—Assignment Rights (Bump and Retreat)

§ 351.701 Assignment involving displacement.

(a) *General.* When a group I or II competitive service employee with a performance rating of minimally successful or equivalent, or higher, is released from a competitive level, an agency shall offer assignment, rather than furlough or separate, in accordance with paragraphs (b), (c), and (d) of this section to another competitive service position which requires no reduction or the least possible reduction in representative rate. The employee must be qualified for the offered position which shall be in the same competitive area and last at least three months.

(b) *Lower subgroup—bumping.* A released employee shall be assigned in accordance with paragraphs (a) and (d) of this section and bump to a position that:

(1) Is held by another employee in a lower tenure group or in a lower subgroup within the same tenure group; and

(2) Is no more than two grades (or appropriate grade intervals or equivalent) below the position from which the employee was released.

(c) *Same subgroup—retreating.* A released employee shall be assigned in accordance with paragraphs (a) and (d) of this section and retreat to a position that:

(1) Is held by another employee with lower retention standing in the same tenure group and subgroup;

(2) Is no more than one grade (or appropriate grade interval or equivalent) below the position from which the employee was released, except that for a preference eligible employee with a compensable service-connected disability of 30 percent or more the limit is five grades (or appropriate grade intervals or equivalent); and

(3) Is the same position, or an essentially identical one, previously held by the released employee in a Federal agency.

(d) *Limitations.* (1) An employee in a clerical position may be assigned only to a clerical position and an employee in a nonclerical position may be assigned only to a nonclerical position in an assignment made under paragraph (b) of this section.

(2) An employee with a current annual performance rating of minimally successful or equivalent may be assigned under paragraph (c) of this section only to a position held by another employee with a current annual performance rating no higher than minimally successful or equivalent.

(e) *Pay rates.* (1) The determination of equivalent grade intervals shall be based on a comparison of representative rates.

(2) Each employee's assignment rights shall be determined on the basis of the

pay rates in effect on the date of issuance of specific reduction-in-force notices, except that when it is officially known on the date of issuance of notices that new pay rates have been approved and will become effective by the effective date of the reduction in force, assignment rights shall be determined on the basis of the new pay rates.

§ 351.702 Qualifications for assignment.

(a) Except as provided in § 351.703, an employee is qualified for assignment under § 351.701 if the employee:

(1) Meets the OPM standards and requirements for the position, including any minimum educational requirement;

(2) Is physically qualified, with reasonable accommodation where appropriate, to perform the duties of the position;

(3) Meets any special qualifying condition which the OPM has approved for the position; and

(4) Clearly demonstrates on the basis of overall background, including recency of experience, a positive ability to successfully perform all critical elements of the specific position upon entry into it, without undue interruption to that activity and without any loss of productivity beyond that normally expected in the orientation of any new but fully qualified employee.

(b) The sex of an employee may not be considered in determining whether an employee is qualified for a position, except for positions which OPM has determined certification of eligibles by sex is justified.

(c) An employee who is released from a competitive level during a leave of absence because of a compensable injury may not be denied an assignment right solely because the employee is not physically qualified for the duties of the position if the physical disqualification resulted from the compensable injury. Such an employee must be afforded appropriate assignment rights subject to recovery as provided by 5 U.S.C. 8151 and Part 353 of this chapter.

(d) If an agency determines, on the basis of evidence before it, that a preference eligible employee who has a compensable service-connected disability of 30 percent or more is not able to fulfill the physical requirements of a position to which the employee would otherwise have been assigned under this part, the agency must notify the OPM of this determination. At the same time, the agency must notify the employee of the reasons for the determination and of the right to respond, within 15 days of the notification, to the OPM which will require the agency to demonstrate that the notification was timely sent to the employee's last known address. The OPM shall make a final determination concerning the physical ability of the employee to perform the duties of the position. This determination must be made before the agency may select any other person for the position. When the OPM has completed its review of the proposed disqualification on the basis of physical disability, it must send its finding to both the agency and the employee. The agency must comply with the findings of the OPM. The functions of the OPM under this paragraph may not be delegated to an agency.

(e) An agency may formally designate as a trainee or developmental position a position in a program with all of the following characteristics:

(1) The program must have been designed to meet the agency's needs and requirements for the development of skilled personnel;

(2) The program must have been formally designated, with its provisions made known to employees and supervisors;

(3) The program must be developmental by design, offering planned growth in duties and responsibilities, and providing advancement in recognized lines of career progression; and

(4) The program must be fully implemented, with the participants chosen through standard selection procedures. To be considered qualified for assignment under § 351.701 to a formally designated trainee or developmental position in a program having all of the characteristics covered in paragraphs (e) (1), (2), (3), and (4) of this section, an employee must meet all of the conditions required for selection and entry into the program.

§ 351.703 Exception to qualifications.

An agency may assign an employee under § 351.201(b) or § 351.701 without regard to OPM's standards and requirements for the position if:

(a) The employee meets any minimum education requirement for the position; and

(b) The agency determines that the employee has the capacity, adaptability, and special skills needed to satisfactorily perform the duties and responsibilities of the position.

§ 351.704 Rights and prohibitions.

(a) (1) An agency may satisfy an employee's right to assignment under § 351.701 by assignment under § 351.201(b) or § 351.705 to a position having a representative rate equal to that to which he or she would be entitled under § 351.701.

(2) An agency may, at its discretion, choose to offer a vacant other-than-full-time position to a full-time employee or to offer a vacant full-time position to an other-than-full-time employee in lieu of separation by reduction in force.

(b) Section 351.701 does not:

(1) Require an agency to assign an employee to a position having a higher representative rate;

(2) Authorize or permit an agency to displace a full-time employee by an other-than-full-time employee, or to satisfy an other-than-full-time employee's right to assignment by assigning the employee to a vacant full-time position.

(3) Authorize or permit an agency to displace an other-than-full-time employee by a full-time employee, or to satisfy a full-time employee's right to assignment by assigning the employee to a vacant other-than-full-time position.

§ 351.705 Administrative assignment.

(a) An agency may, at its discretion, adopt provisions which:

(1) Permit a competing employee to displace an employee with lower retention standing in the same subgroup consistent with §351.701 when the agency cannot make an equally reasonable assignment by displacing an employee in a lower subgroup;

(2) Permit an employee in subgroup III–AD to displace an employee in subgroup III–A or III–B, or permit an employee in subgroup III–A to displace an employee in subgroup III–B consistent with §351.701; or

(3) Provide competing employees in the excepted service with assignment rights similar to those in § 351.701 and in paragraphs (a)(1) and (2) of this section.

(b) Provisions adopted by an agency under paragraph (a) of this section:

(1) Shall be consistent with this part;

(2) Shall be uniformly and consistently applied in any one reduction in force;

(3) May not provide for the assignment of an other-than-full-time employee to a full-time position;

(4) May not provide for the assignment of a full-time employee to an other-than-full-time position;

(5) May not provide for the assignment of an employee in a competitive service position to a position in the excepted service; and

(6) May not provide the assignment of an employee in an excepted position to a position in the competitive service.

Subpart H—Notice to Employee

§ 351.801 Notice period.

(a) Each competing employee selected for release from a competitive level

under this part is entitled to a written notice at least 30 full days before the effective date of release. When a general notice is supplemented by a specific notice, an agency may not release an employee from his or her competitive level until at least 10 days after the employee's receipt of the specific notice.

(b) The notice shall not be issued more than 90 days before release except with the prior approval of OPM.

(c) The notice period begins the day after the employee receives the notice.

(d) When an agency retains an employee under § 351.606 or § 351.608, the notice to the employee shall cite the date on which the retention period ends as the effective date of the employee's release from the competitive level.

§ 351.802 General and specific notices.

When an agency cannot specifically determine all individual actions at the start of the notice period, it may issue general notices which shall later be supplemented by specific notices. The combined general and specific notice periods shall meet the requirements in § 351.801, and the combined contents of the general and specific notices shall meet the requirements in § 351.803.

§ 351.803 Content of notice.

(a) The notice shall state specifically the action to be taken and its effective date except as provided in paragraph (b) of this section; the employee's competitive area, competitive level, subgroup, service date, and annual performance ratings received during the last three years; the place where the employee may inspect the regulations and records pertinent to this case; the reasons for retaining a lower standing employee in the same competitive level under § 351.607 or § 351.608; the information on reemployment rights except as permitted by § 351.804; and the employee's right, as applicable, to grieve under a negotiated grievance procedure or to appeal to the Merit Systems Protection Board under the provisions of the Board's regulations. The agency shall comply with the provisions of § 1201.21 of this title.

(b) General notice shall inform the employee that action under this part may be necessary but a specific action has not yet been determined. The notice shall state that as soon as the agency determines what action, if any, will be taken under this part the employee will receive specific notice of the action to be taken. The general notice shall contain an expiration date. A general notice may also include other information specified in paragraph (a) of this section.

§ 351.804 Notice concerning consideration for reemployment.

An employee who receives a specific notice of separation under this part must also be given information concerning the right to reemployment consideration under the provisions of Subparts B and C of Part 330 of this chapter. This information should be included in or with the specific reduction-in-force notice; otherwise, a separate supplemental notice covering this information must be given to the employee.

§ 351.805 Expiration of notice.

(a) An agency may cancel an unexpired general notice, or may renew it for additional periods within maximum notice period referred to in § 351.801. A general notice expires as stated therein unless, on or before the expiration date, the employee receives a renewal of the general notice or a specific notice.

(b) A specific notice expires except when followed by the action specified, or by action less severe than specified, in the notice or in an amendment made to the notice before the agency takes the action. An agency may not take action before the effective date in the specific notice. An action taken after the specified date in the specific notice shall not be ruled invalid for that reason except when it is challenged by a higher standing employee in the competitive level who is reached out of order for reduction in force as a result of the action or when it results in a notice period longer than the maximum allowed.

§ 351.806 New notice required.

An employee is entitled to a new written notice of at least 30 full days if the agency decides to take an action more severe than first specified.

§ 351.807 Status during notice period.

When possible, the agency shall retain the employee on active duty during the notice period. When in an emergency the agency lacks work or funds for all or part of the notice period, it may place the employee on annual leave with or without his or her consent, on leave without pay with his or her consent, or in a nonpay status without his or her consent.

Subpart I—Appeals and Corrective Action

§ 351.901 Appeals.

An employee who has been furloughed for more than 30 days, separated, or demoted by a reduction-in-force action may appeal to the Merit Systems Protection Board. Unless the presiding official determines that there are material issues of fact in dispute that would require a hearing for resolution, the review of an agency action shall be confined to the written record.

§ 351.902 Correction by agency.

When an agency decides that an action under this part was unjustified or unwarranted and restores an individual to the former grade or rate of pay held or to an intermediate grade or rate of pay, it shall make the restoration retroactively effective to the date of the improper action.

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5 CFR Parts 300, 335, 430, 431, 451, 531, 532, 771

Performance Management System

AGENCY: Office of Personnel Management.

ACTION: Proposed rulemaking.

SUMMARY: The Office of Personnel Management is reissuing proposed regulations to implement Performance Management, including a Performance Based Incentive System for the General Schedule. These regulations, initially published in October 1983, reflect major comments on earlier proposals to create a system designed to pay employees based on performance. Additionally, they reflect changes required by enactment of title II of the Civil Service Retirement Spouse Equity Act of 1984, which established the Performance Management and Recognition System.

DATE: To be considered, comments must be received by September 30, 1985.

ADDRESS: Send or deliver written comments to: John W. Fossum, Assistant Director for Performance Management, Workforce Effectiveness and Development Group, Office of Personnel Management, 1900 E Street, N.W., Room 7520, Washington, D.C. 20415.

FOR FURTHER INFORMATION CONTACT: Allen B. Levan, 202-632-5653.

SUPPLEMENTARY INFORMATION:

Background

Regulations published as final rules on October 25, 1983, at 48 FR 49462, *et seq.*, concerning reduction-in-force (RIF), performance management, and the application of the Fair Labor Standards Act (FLSA) to the Federal work force became effective on July 3, 1985. They are hereby republished as a proposed rulemaking to afford interested parties the opportunity to comment on a proposed implementation schedule for the new performance management

system and the FLSA regulations and to allow interested parties the opportunity to consider substantive changes to parts of the regulations. Comments on any and all aspects of the notice will be received and considered. The current regulations in these areas remain in full force and effect, as they have been since July 3, 1985.

The Performance Management System regulations revised 5 CFR Parts 300, 335, 430, 451, 531, 532, and 540, and added a new part 431 that would require agencies to implement a Performance Management System. OPM is republishing the full text of the October 1983 Performance Management System regulations with the following exceptions:

1. Because the implementation schedules contained in Parts 430 and 431 are out of date, these proposed rules contain new implementation schedules.

2. Subsequent to publication of the Performance Management System (PMS) regulations, title II of Pub. L. 98-615 established the Performance Management and Recognition System (PMRS), replacing the merit pay system. Under the authority of that statute, OPM published interim regulations on March 25, 1985, at 50 FR 11788, to implement the PMRS.

It was necessary in the March 1985 PMRS regulations to amend many of the same parts in Title 5, Code of Federal Regulations, previously amended in the October 1983 Performance Management System (PMS) regulations.

Note.—In all cases, wherever the March 1985 regulations differ from the October 1983 regulations, the more recently published PMRS (March 25, 1985) regulations are in effect, and govern Federal agencies. One example: Part 540, Performance Management and Recognition System, published March 25, 1985, at 50 FR 11795, supersedes provisions contained in the Part 540, Merit Pay System, regulations published October 25, 1983. Therefore, Part 540 is not addressed in these proposed regulations.

3. Wherever the text of the regulations addressed merit pay employees, changes have been made to conform to the law and regulations implementing the Performance Management and Recognition System.

For the convenience of commenters, the Supplementary Information section of the October 1983 regulations, except for those changes mentioned above, is republished here.

Comments

Comments received on an earlier proposed rulemaking (48 FR 13342) are reflected in the Supplementary Information section of the rules proposed on July 14, 1983 (48 FR 32288). During the 30-day comment period on the July 14 proposal, OPM received comments from 40 Federal agencies, 10 professional organizations, 7 labor organizations, and 83 individuals, most of whom were Federal employees. Many of the comments contained specific, constructive suggestions; OPM is adopting many of those suggestions in this document.

Overview of the Performance Management System

The new Performance Management System regulations will meet OPM's primary objectives and, we believe, will also meet agency needs and objectives. The regulations establish pay for performance system for all employees.

All General Schedule employees who earn at least a "Fully Successful" rating on all critical elements and a "Fully Successful" summary rating will be eligible to receive within-grade increases. The proposal that General Schedule employees in top pay steps of their grade be rated at least "Exceeds Fully Successful" in order to receive within-grade increases has been deleted.

A written recommendation for appropriate monetary, non-monetary, or honorary recognition must be prepared for all employees who earn an "Outstanding" summary rating.

To emphasize the connection between performance and awards, Incentive Awards regulations have been divided into two parts: Performance Awards and Special Awards. Employees can earn a Performance Award for performance that "Exceeds Fully Successful" overall or on one or more critical elements of a job. To further strengthen the link between pay and performance in the minds of employees and their supervisors, performance awards and QSI's will be provided as soon as possible after annual performance ratings are approved.

The regulations meet agency and OPM concerns about the cost, paperwork, and time requirements of Performance Management. Agencies are not required to write performance standards at three element rating levels, although they are encouraged to do so. The minimum requirement is three element rating levels with written performance standards at the "Fully Successful" level. In addition, revised performance appraisal requirements will be implemented at the beginning of an agency's new appraisal cycle, avoiding a requirement for revision of individual Performance Plans in the middle of the current appraisal cycle.

Employees will be able to seek a reconsideration if they feel that performance ratings are unfair. Additional procedures for review of a performance rating, including a grievance procedure, can be established at the discretion of the agency head. Agencies will not be able to utilize preestablished rating distributions that interfere with appraisal of actual performance against standards. Agencies are required to provide for second level review of ratings in the interest of employee equity and ensuring that ratings are consistent with organizational accomplishments. Through that process, managers can change inaccurate appraisals. It is required that critical elements, non-critical elements, and performance standards be related to an employee's assigned work. Higher level approval of elements and standards is required.

The regulations require each agency to establish a Performance Management Plan for OPM approval. Agencies will be able to tie the establishment and revision of performance elements and standards to the beginning of management planning cycles so that employee performance expectations can clearly support achievement of organizational goals and objectives. Performance ratings and performance based personnel actions can now reflect each employee's contribution during the past year to achievements in support of the organization's purposes and mission.

The regulations standardize performance ratings among agencies by requiring five summary rating levels. Agencies may consider performance of non-critical elements in deriving summary ratings but more weight must be given to performance of critical elements. The regulations also standardize performance requirements for within-grade increases, performance awards, quality step increases, and career ladder promotions. For the first time, regulations are being established for SES performance appraisal. The SES regulations parallel requirements for other employees.

Key Issues in the Regulations

The following are the key issues raised in the proposed regulations, a general summary of comments which have been received in these areas, and an explanation of the current regulations.

1. Career Ladder Promotions and Time-In-Grade Restrictions.

a. Sections 300.602, 335.104.

b. Half of the agencies who commented on these proposals noted they were very pleased that longer time-in-grade restrictions were eliminated from the proposals. Most commenters continued to support the requirement

that an employee be rated "Fully Successful" overall to receive a career ladder promotion. A number of agencies, labor organizatons, and individual commenters were concerned with the new requirement for priority consideration for career ladder promotions for employees with the highest summary ratings in situations when not all eligible employees could receive promotions. Several thought that the scope of coverage must be narrower than "all employees" and requested clarification.

c. The regulation retains the requirement for a "Fully Successful" summary rating in order to be eligible for a career ladder promotion and for ratings of "Fully Successful" or better on all critical elements that are critical to the position at the next higher grade level in the career ladder. The requirement that employees with the highest summary ratings be given first consideration in career ladder promotions is clarified to indicate that the employees concerned must be in the *same career ladder.*

d. These regulations retain the connection of performance to career ladder promotions by requiring agencies to carefully consider both summary ratings and pertinent critical element ratings in making such promotions and to promote employees with higher summary ratings when not all employees in the same career ladder can be promoted at the same time. The phrase "same career ladder" should be interpreted to mean positions in the same series and, at agency discretion, usually in the same organization.

2. *Distinguishing Between the Terms "Appraisal" and "Performance Rating."*

a. Sections 430.201(d); 430.203; 430.204(b); 431.201(d); 431.203; 431.204(b), (u).

b. Several commenters indicated that the terms "appraisal" and "rating" appeared to have the same meaning in the proposed regulations.

c. The final regulations distinguish between appraisal of performance during an appraisal period and a written performance rating provided to the employee.

d. This change permits agencies to determine whether a regulation is referring to the act or process of reviewing and evaluating performance (appraisal) or to written records of element or overall performance (ratings).

3. *Definition of a Critical Element.*

a. Sections 430.203 and 431.203.

b. Regarding the definition of "critical element," a number of agencies recommended deleting, revising, or expanding the phrase "which contributes toward accomplishing organizational goals and objectives". Several agencies and a labor organization also pointed out that the phrase "in the position" is inconsistent with identifying critical elements for details to another position. Finally, agencies stated that the word "acceptable" was not defined.

c. The definition of a "critical element" has been revised by deleting the word "acceptable" which has several possible meanings and using the word "unacceptable", which is defined in law. Specifically, the July 14 proposal stated that a critical element "is of such importance that acceptable performance on the element is necessary for acceptable performance in the position," while the final regulation states that a critical element "is of such importance that unacceptable performance on the element would result in unacceptable performance of assigned work." It should also be noted that the revised definition refers to performance "of assigned work" instead of performance "in the position".

d. The phrase "which contributes toward accomplishing organizational goals and objectives" was not changed because it provides a minimum criterion for identification of critical elements. The goals and objectives referred to would be those for the unit where the employee works, not necessarily agency-wide objectives. Identified critical elements must be consistent with the planned work of the organizational unit. Use of the phrase "performance of assigned work" will enable agencies to consider performance in more than one position when deriving a summary rating, as long as an employee served in all positions considered for the agency's minimum appraisal period and during the annual appraisal period.

4. *References to Non-critical Elements.*

a. Sections 430.203, 431.203, 430.204(b), 431.204(b).

b. A few commenters noted that reference should be made to appraisal of non-critical elements in the definitions of several terms.

c. The definitions of the following terms have been amended by adding references to non-critical elements: "Appraisal System," "Performance," "Performance Plan," "Rating," and Performance Rating." In addition, regulations on the performance appraisal process provide that employees must be appraised and rated on any non-critical elements included in individual Performance Plans.

d. Although an agency is not required to establish or identify non-critical elements, the definitions indicate that when non-critical elements are included in individual Performance Plans, a written performance rating for the non-critical elements must be prepared.

5. *Use of Non-Critical Elements.*

a. Sections 430.203, 430.204(d)(1), 431.203, 431.204(d)(1).

b. Fourteen agencies, two associations, one labor organization and six individuals stated that performance on non-critical elements should be considered in derving a summary rating of performance. Commenters felt that employees should be held accountable for the whole job. Commenters also stated that appraisal of non-critical elements would be meaningful unless performance of non-critical elements had a bearing on an employee's summary rating.

c. The prohibitions on use of non-critical elements in deriving summary ratings have been deleted from non-SES and SES performance appraisal regulations.

d. Agencies will be required to include decision tables for deriving summary ratings in their Performance Management Plans. Agency procedures for deriving summary ratings may include consideration of ratings on non-critical elements but only if the procedures give more weight to performance of critical elements.

6. *Revision of Rating Level Definitions.*

a. Sections 430.204(h); 431.204(h).

b. Several agencies and individuals commented that quantity and timeliness criteria may not be pertinent to all positions and that production of work ahead of schedule may not be desirable for some position. Some agencies also indicated that the definitions of "Minimally Successful" and "Unacceptable" performance were too much alike. One comment objected to the phase "corrective action must be taken" in the definition of "Unacceptable" or Unsatisfactory" performance. About one-fourth of agencies and a few individuals asked that the same names be used for both SES and non-SES rating levels.

c. The definitions of "Outstanding" and "Exceeds Fully Successful" have been changed by adding the phrase "as warranted" to indicate selective application of quantity, timeliness, and amount of supervision as factors differentiating levels of performance. Also, the definitions of "Minimally Successful" and "Minimally Satisfactory" have been revised to indicate that performance needs improvement, but is not "Unacceptable" or Unsatisfactory." All references to

remedial and corrective action have been deleted from the SES rating level definitions. The phrase "consistent with required procedures" has been added to the requirement for corrective action for the "Unaccetpable" non-SES rating level.

d. These changes reflect the concept that quality of performance is a univerally applicable factor in measuring performance, while other factors should be applied only if appropriate to the type and level of position involved. The revised definitions also create a greater distinction between "Minimally Successful" and "Unacceptable" performance, especially if it is understood that the performance standards mentioned in the definition of the "Unacceptable" ("Unsatisfactory") rating level are those which have been written at the "Minimally Successful" ("Minimally Satisfactory") or "Unacceptable" ("Unsatisfactory") level. The standards describe a threshold of performance, below which performance is "Unaccetpable" or "Unsatisfactory."

Names of the two lowest rating levels have not been changed because of specific statutory references to "Unacceptable" performance of non-SES employees, "Satisfactory" performance as a requirement for Federal Wage System step increases and "Minimally Satisfactory" and "Unsatisfactory" summary rating levels for SES employees.

7. *Performance Rating Procedures.*

a. Sections 430.203, 430.204 (b), (c), (d), (e); 431.203, 431.204 (b), (c), (d), (e).

b. Almost one-third of agencies commenting, two labor organizations, and an individual commenter indicated a desire to continue with existing procedures using fewer than five element rating levels. Just over one-third of agencies preferred not to write performance standards at three element rating levels, many of them stating that agencies should have the flexibility to set the number of written standards. Half of those objecting saw no benefit, stated that costs would be high, and thought there would be too much paperwork and burden on supervisors. Half felt there should only be one standard, written at the "Fully Successful" level, while a few others thought there should be two.

c. Agencies are now required to have a minimum of three rating levels for all critical elements, written performance standards at the "Fully Successful" level for all elements, and five summary rating levels. At any time during the appraisal cycle when performance has been determined to be below "Fully Successful" on one or more critical elements, agencies are required to provide a Performance Improvement Plan to an employee if performance standards had not previously been established at the "Unacceptable" ("Unsatisfactory") level or the rating level immediately above the "Unacceptable" ("Unsatisfactory") level. The Performance Improvement Plan must explain employee deficiencies, explain steps to be taken in an attempt to resolve the deficiencies, and include performance standards established at the "Minimally Successful" ("Minimally Satisfactory") level. The Performance Improvement Plan must be provided to the employee at the beginning of a new appraisal period. 5 CFR Part 432 provides for an opportunity period to improve "Unacceptable" performance which is in addition to the new appraisal period described above. The length of the new appraisal period will be determined by the agency, but cannot be shorter than the agency's minimum appraisal period.

As an editorial change, the non-SES definition of the term "rating" and the SES definition of the term "performance rating" have been changed by deleting the names of rating levels.

d. The proposed regulations specify minimum requirements. Agencies are required to write performance standards at the "Minimally Successful" ("Minimally Satisfactory") level only when demonstrated performances is below "Fully Successful" on one or more critical elements. The minimum rating requirements provide a sufficient basis for within-grade increase determinations. Although these requirements are a minimum, agencies are encouraged to establish five element rating levels.

8. *Performance ratings for Reduction-In-Force.*

a. Sections 430.204 (k), (l), (m); 431.204 (l), (m), (n).

b. Agencies have asked if the annual performance ratings to be used as a basis for Reduction-In-Force could include ratings given for appraisal periods of less than one year.

c. The regulations state that agencies must take into consideration all performance ratings given during the annual appraisal period when preparing an annual rating. The regulations also state that one exception to use of annual performance ratings as a basis for RIF is when a new employee does not have a performance rating of record, but has served for the agency's minimum appraisal period. Agencies are required to rate the performance of the newly hired employee and use the rating as a basis for the RIF action.

d. These revisions provide that annual ratings used as a basis for RIF actions are not interim ratings or unscheduled ratings provided upon reassignment of a supervisor or employee, completion of a detail, because of poor performance, or for some other reason. Instead, annual ratings are prescheduled ratings given once a year.

9. *Grievance of a Performance Rating.*

a. Sections 430.204(p) and 771.206(c)(3).

b. Over half of the agencies disagreed with the July 14 proposal which stated that an "employee may not grieve or appeal a performance rating." About half of the agencies disagreeing were concerned with employees' perception of fairness and objectivity. About one-fourth were concerned with FLRA rulings and the scope of grievances. About one-fifth were concerned with potential disputes, and with employees seeking more expensive avenues of redress (such as EEO complaints), when they disagreed with their ratings. Two agencies noted that there might be inconsistent treatment of bargaining unit vs. non-bargaining unit members. Four of the 10 associations and all seven labor organizations disagreed with the proposal—as did one-fourth of the individual commenters, citing legal and FLRA issues as well as the employees' perception of fairness and objectivity in performance ratings.

c. The revised regulations require that an employee be provided an opportunity to request reconsideration of a performance rating by the supevisor or manager who approved the rating. The revised regulations also provide that an agency may, at the discretion of the agency head, establish a further review of a performance rating. The review procedure may be established under a negotiated agreement. However, SES performance evaluations are not covered by the Agency Grievance System procedures established under 5 CFR Part 771.

d. The revision will enable agencies to permit grievances of performance ratings, but agencies may determine that performance ratings will not be grievable.

10. *Performance Ratings for Details.*

a. Sections 430.204 (q), (r); 431.204 (p), (q).

b. A number of agencies stated that elements and standards cannot always be provided at the beginning of a detail within an agency because not all details are anticipated in advance. A few agencies also requested clarification of the regulations on details to other organizations.

c. The regulations provide that agencies should provide elements and standards as soon as possible but not later than 30 days after the beginning of a detail or temporary promotion within the same agency. The regulations also provide more detailed instructions on performance ratings for non-SES employees detailed to another organization. Agencies are required to prepare performance ratings if the employee had served for the minimum appraisal period in the agency. Failing that, agencies are required to make a reasonable effort to obtain appraisal information from the other organization sufficient to prepare a performance rating. If no rating can be prepared, the agency can extend an employee's rating of record for no longer than one year.

d. Regulations on details of SES employees to other organizations have not been revised because of the specific legal requirement for annual ratings based on performance during an appraisal period.

11. *Implementation.*

a. Sections 430.207, 430.301, 431.301.

b. As noted above, the implementation schedules for the PMS are out of date, due to delayed implementation of the regulations.

c. OPM proposes to add a new § 430.208 to replace § 430.301 of the October 1983 regulations (superseded by the March 1985 regulations). Section 430.208(a) would require agencies to submit Peformance Management plans to OPM by December 15, 1985. Section 430.208(b) would require performance appaisal provisions of Performance Management Plans to be implemented not later than February 1, 1986.

OPM proposes to make parallel change in Part 431. Section 431.301(a) would require submission of SES Performance Management Plans to OPM not later than December 15, 1985. Section 431.301(b) would require SES peformance appraisal provisions of Performance Management Plans to be implemented not later than February 1, 1986.

d. The regulations state that decisions based upon performance appraisal under an agency's Performance Management Plans must begin as soon as possible after performance appraisal provisions have been implemented. Also, a proposed requirement has been deleted which would have required agency reports of provisions of any negotiated agreement which conflict with Performance Management System regulations.

12. *Documentation for SES Performance Appraisals.*

a. Section 431.204 (o), (r).

b. In response to a few comments, the regulations have been revised to provide that SES employees must be provided a copy of a final performance rating. The regulations also provide that a senior executive's response to an initial rating must be provided to the official making the higher level review and to the Performance Review Board.

13. *Use of SES Appraisals as a Basis for Personnel Actions.*

a. Section 431.204 (u), (v).

b. Several commenters noted that performance appraisals would not have any impact on the base pay of SES employees.

c. The regulations provide that SES performance ratings may provide a basis for decisions to grant performance-related ES pay rate adjustments.

14. *Performance Salary Ceiling for General Schedule Employees.*

a. Section 531.404 (a).

b. Half of the agencies, individuals, and associations commenting and six labor organizations asked that the performance salary ceiling proposal for General Schedule employees be deleted. The proposal would have required a summary rating of "Exceeds Fully Successful" for within-grade increases above step 7 of each grade. Commenters cited a GAO opinion, the prospect of rating "inflation", and inconsistency with lower performance requirements for promotions.

c. The performance salary ceiling previously proposed for General Schedule employees has been deleted.

15. *Mandatory Quality Step Increases.*

a. Sections 430.204 (f), (t); 431.204 (f), (w); 531.504.

b. Seventeen agencies and two labor organizations objected to requiring quality step increases for "Outstanding" employees in steps 1–3 of their grade. Reasons for objections included reduced management flexibility, a preference for granting cash awards, concern that the QSI would be meaningless if the employee was quickly promoted, preference for treating all "Outstanding" employees the same, and concern that QSI's might not be appropriate if disciplinary or budgetary problems existed.

c. The proposed requirement for mandatory QSI's for "Outstanding" employees in steps 1–3 of each grade has been deleted.

d. The regulations require that written recommendations for appropriate monetary, non-monetary, or honorary recognition be provided for all employees with "Outstanding" summary performance ratings.

16. *Productivity Benefit Sharing Programs.*

a. Part 451, Subpart C (Reserved).

b. One agency asked whether it could continue developing and implementing specially designed Productivity Benefit Sharing Programs and like productivity programs.

c. The regulations now contain a "Reserved" Subpart for Productivity Benefit Sharing regulations, which OPM may publish in the future. In the meantime, nothing precludes agencies from continuing the development and implementation of Productivity Benefit Sharing Programs.

17. *Special Award may be granted alone or in addition to a Performance Award.*

a. Sections 451.201(b) and 541.208(c).

b. Almost one-fourth of the agency comments made evident the need for further clarification.

c. New language clarifies that a Special Award may be granted alone or in additon to a Performance Award. Presidential awards shall be granted only under Subpart B of Part 451.

18. *Definition of "Meritorious Action".*

a. Section 451.203.

b. Almost one-fourth of the agencies expressed the need for clarification of the difference between Performance Awards under Part 531, Subpart F, and Meritorious Action Awards under Part 451.

c. New language clarifies the purpose and use of Meritorious Action Awards under Part 451. Meritorious actions rewarded must be outside or beyond job responsibilities and performance standards, and must be highly exceptional and unusually outstanding. Language proposed on July 14 which stated that Special Awards "shall be in addition to a performance award" has been deleted to further clarify the distinction between awards for performance and Special Awards.

19. *Awards for One-Time Special Acts or Services.*

a. Sections 451.204 and 531.601(c).

b. Several agencies indicated a need to clarify the circumstances under which awards for special acts or services may be given.

c. One-time special acts or services within the scope of normal employee job responsibilities and performance standards shall be rewarded under the Special Awards component of the Performance Management Plan; those outside the scope of job responsibilities and performance standards shall be rewarded under the Special Awards Program.

20. *Coverage of Employees under other pay systems.*

a. Sections 531.603(a) and 541.203(a).

b. One agency and one individual comment reflected the need for further clarification.

c. New language clarifies that employees in the Senior Executive Service are not eligible for performance awards under Part 531, Subpart F, but that employees covered under the Performance Management and Recognition System (PMRS) established under Chapter 54 of Title 5, United States Code, are eligible for performance awards. The revision also clarifies that all PMRS and Senior Executive Service employees are eligible for Special Awards, but only under the agency Performance Management Plan.

21. *Definitions of Awards Terms.*

a. Sections 531.604 and 541.204.

b. A number of agencies commented on the need to aid definitions of the terms "honorary award", "monetary award", "non-monetary award", "contribution", "meritorious action" and "special act or service", and to provide a more precise definition for the terms "tangible benefits" and "intangible benefits."

c. New language provides definitions for each of these terms.

22. *Policy on Performance Awards and Special Awards.*

a. Sections 531.605(a) and 451.205(a).

b. New language provides further clarification regarding OPM policy for the Performance Awards and Special Awards Programs.

23. *Inclusion of any Within-Grade Increase and/or Quality Step Increase in the Limit of 15% of Employee Base Pay when Granting a Performance Award.*

a. Section 531.605(b)(3).

b. Several agencies and individuals and one professional association preferred that within-grade increases and QSI's not be included in the 15-percent-of-base-pay limitation on performance awards. These commenters felt the limits should be established by agencies, within OPM guidelines and agency budget limitations. Several agencies and individuals were also concerned about the possible conflict between the timing of a Performance Award and the timing of Within-Grade Increase, which could occur several months later.

c. The regulations provide that if the sum of a performance award recommended and any within-grade and/or quality step increase received by the employee during the previous twelve (12) months exceeds 20 percent, the award must be reduced to that maximum.

d. This provision is consistent with a 20 percent limitation on performance awards for SES employees.

24. *OPM Guidance to Agencies.*

a. Sections 531.608(a) and 451.208(a).

b. Earlier proposed regulations required that OPM provide guidance to agencies on honorary and non-monetary awards, including honorary Presidential awards.

c. New language requires that OPM provide guidance to agencies on how the entire Performance Awards component of the Performance Management Plan should be carried out.

d. This further reinforces the statutory requirement (5 U.S.C. 4506) that OPM provide guidance on all aspects of the awards program.

25. *Review and Approval of the Performance Award Component of the Agency Performance Management Plan.*

a. Section 531.608(b)

b. New language corrects an oversight in the earlier regulations.

c. The regulation requires that OPM review and approve the agency Performance Award component of the Performance Management Plan, as required under § 430.207.

26. *Documentation of Performance Awards and Special Awards in Official Personnel Folders.*

a. Section 531.609(a)(1) and 451.209(a)(8).

b. This requirement has been moved to "Agency Responsibilities" for purposes of clarity.

27. *Consideration of Performance Awards when Rating and Ranking an Employee for a Promotion.*

a. Sections 531.609(a)(2) and 451.209(a)(9).

b. Agencies called to our attention the need to maintain this requirement in the regulations in order to comply with a statutory requirement (5 U.S.C. 3362).

c. This provision corrects an oversight. It requires that due weight be given to a Performance Award or a Special Award when rating and ranking an employee for a promotion.

28. *Plan for determining the Performance Award Fund.*

a. Section 531.609(d)(6).

b. This provision is required under § 430.207 and should also appear in this Subpart.

c. Section 430.207(a)(4) requires that the agency Performance Management Plan include plans for determining and distributing Within-Grade Increases, Quality Step Increases, and the agency performance award fund, including previous years' and projected expenditures.

29. *Funds for Productivity Benefit Sharing Programs.*

a. Section 531.609(d)(6).

b. The regulations require that funds for awards for Productivity Benefit Sharing Programs be separate from funds for Performance Awards.

c. This provision was moved from § 531.608(b) to § 531.609(d)(6) for purposes of clarity.

30. *Labor-Management Demonstration Projects on Merit-Type Pay Systems.*

a. Section 430.207(d).

b. Before the white-collar workforce moves to a full merit-type pay system, the Office of Personnel Management (OPM) has determined that demonstration projects would first be necessary. It has determined that these would be most productive with labor organization involvement.

c. OPM has provided for up to the maximum eight demonstration projects now allowed under law, involving up to 5,000 employees each, under the demonstration projects authority of section 4703 of 5 U.S.C. The Office of Personnel Management would directly, or through agreement or contract with one or more agencies, conduct and evaluate these demonstration projects under the criteria set in the statute. The scope of such demonstration projects would cover all aspects related to a merit-type pay system for white collar employees in the demonstration project agencies.

E.O. 12291 Federal Regulation

OPM has determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation will only affect Government employees.

List of Subjects

5 CFR Part 300

Government employees, Administrative practice and procedure.

5 CFR Part 335

Government employees.

5 CFR Part 430

Government employees, Administrative practice and procedure, Reporting requirements.

5 CFR Part 431

Government employees, Administrative practice and procedure, Reporting requirements.

5 CFR Part 451

Decoration, Medals, Awards, Government employees.

5 CFR Part 531

Government employees, Wages, Administrative practice and procedure.

5 CFR Part 532

Administrative practice and procedure, Government employees, Wages.

5 CFR Part 771

Administrative practice and procedure, Government employees.

U.S. Office of Personnel Management.

Constance Horner,

Director.

Accordingly, the Office of Personnel Management proposes to amend Title 5, Code of Federal Regulations, as follows:

PART 300—EMPLOYMENT (GENERAL)

1. The authority citation of Part 300 continues to read as follows:

Authority: 5 U.S.C. 3301, 3302; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218, unless otherwise noted. Secs. 300.101–300.104 also issued under 5 U.S.C. 7151, 7154; E.O. 11478, 3 CFR, 1966–1970 Comp., p. 803, unless otherwise noted.

2. Section 300.602 will read as follows:

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Subpart F—Time-In Grade Restrictions

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§ 300.602 Restrictions.

The time-in-grade restrictions in this subpart are subject to the eligibility requirements based on performance in § 335.104 of this chapter.

(a) Advancement to positions at GS–12 and above. An agency may advance an employee to a position at GS–12 or above only after he or she has served a minimum of 1 year in the next lower grade.

(b) Advancement to positions at GS–6 through GS–11. An agency may advance an employee to a position at GS–6 through GS–11 only after he or she has served a minimum of:

(1) One year in a position two grades lower, when the position to which he or she is advanced is in a line of work properly classified at two-grade intervals; or

(2) One year at the next lower grade when the position to which he or she is advanced is in a line of work properly classified at one-grade intervals.

(c) Advancement to positions at GS–5 or below. An agency may advance an employee to a position at GS–5 or below which is not more than two grades above the lowest grade he or she held within the preceding year under a nontemporary appointment.

PART 335—PROMOTION AND INTERNAL PLACEMENT

3. The authority citation for Part 335 continues to read as follows:

Authority: 5 U.S.C. 3301, 3302; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218.

4. Section 335.104 is revised to read as follows:

Subpart A—General Provisions

* * * * *

§ 335.104 Eligibility for career ladder promotion.

(a) No employee shall receive a career ladder promotion unless his or her most recent summary rating under Part 430 of this chapter is "Fully Successful" or higher. In addition, no employee may receive a career ladder promotion who has a rating below "Fully Successful" on a critical element that is also critical to performance at the next higher grade of the career ladder.

(b) Employees with the highest summary ratings must be given first consideration for career ladder promotions when it is not possible to promote all eligible employees in the same career ladder at the same time.

5. In Part 430, Subparts A and B are revised to read as follows:

PART 430—PERFORMANCE MANAGEMENT

Subpart A—Performance Management System [Reserved]

Subpart B—Performance Appraisal for General Schedule and Wage Grade Employees

Sec.

430.201 Purpose.
430.202 Coverage.
430.203 Definitions.
430.204 The performance appraisal process.
430.205 Training and evaluation.
430.206 OPM review of appraisal systems.
430.207 Performance Management Plans.
430.208 Implementation of this part.

Authority: 5 U.S.C. 4305

Subpart A—Performance Management System [Reserved]

Subpart B—Performance Appraisal for General Schedule and Wage Grade Employees

§ 430.201 Purpose.

It is the purpose of this subpart to ensure that performance appraisal systems are used as a tool for executing basic management and supervisory responsibilities by:

(a) Communicating and clarifying agency goals and objectives,

(b) Identifying individual accountability for the accomplishment of organizational goals and objectives,

(c) Evaluating and improving individual and organizational accomplishments, and

(d) Using performance ratings as a basis for rewarding employees and other personnel actions.

§ 430.202 Coverage.

(a) *Employees and agencies covered by statute.* (1) 5 U.S.C. 4301(1) lists agencies covered by this part.

(2) 5 U.S.C. 4301(2) lists employees covered by statute by this part.

(b) *Statutory exclusions.* This subpart does not apply to:

(1) Agencies or employees excluded by 5 U.S.C. 4301 (1) and (2), the United States Postal Service and the Postal Rate Commission, or

(2) Employees covered under 5 U.S.C. 4302a and Subpart D of this part.

(c) *Administrative exclusions.* OPM may exclude any position or group of positions in the excepted service under the authority of 5 U.S.C. 4301(2)(G). The following are excluded:

(1) Positions in Schedule C as authorized by § 213.3301 of this chapter.

(2) Positions filled by Noncareer Executive Assignments under Part 305 of this chapter.

(3) Positions for which employment is not reasonably expected to exceed 120 calendar days in a consecutive 12-month period.

(d) Agency requests for exclusions. Heads of agencies or their designees may request the Director of the Office of Personnel Management to exclude positions in the excepted service. The request must be in writing, explaining why the exclusion would be in the interest of good administration.

§ 430.203 Definitions.

In this part, terms are defined as follows—

"Appraisal" means the act or process of reviewing and evaluating the performance of an employee against the described performance standard(s). This includes oral or written progress reviews.

"Appraisal period" means the period of time established by an appraisal system for which an employee's performance will be reviewed and for which a performance rating will be given.

"Appraisal system" means a performance appraisal system established by an agency or component of an agency under 5 U.S.C. 4301 and Subpart B of this part which provides for identification of critical and non-critical

elements, establishment of performance standards, communication of elements and standards to employees, establishment of methods and procedures to appraise performance against established standards, and appropriate use of appraisal information in making personnel decisions.

"Critical element" means a component of a job consisting of one or more duties and responsibilities which contributes toward accomplishing organizational goals and objectives and which is of such importance that "Unacceptable" performance on the element would result in "Unacceptable" performance of assigned work.

"Non-critical element" means a component of an employee's job which does not meet the definition of a critical element, but is of sufficient importance to warrant appraisal and the assignment of an element rating.

"Performance" means an employee's accomplishment of assigned duties and resonsibilities as specifed in the critical and non-critical elements of the employee's position.

"Performance Plan" means the aggregation of all of an employee's written critical and non-critical elements and performance standard(s).

"Performance standard" means a statement of the expectations or requirements established by management for a critical or non-critical element at a particular rating level. A performance standard may include, but is not limited to, factors such as quality, quantity, timeliness, and manner of performance.

"Rating" means the written record of the appraisal of each critical and non-critical element and overall performance.

§430.204 The performance appraisal process.

(a) As required by 5 U.S.C. 4302(a), each agency shall establish one or more appraisal systems for appraising the work performance of employees during an appraisal period.

(b) Critical elements must be included and non-critical elements may be included in individual Performance Plans. An employee must be appraised and rated on each critical and non-critical element in the employee's Performance Plan, unless the employee has had no opportunity to demonstrate performance on the element. An employee must also be given a summary rating. Agency appraisal systems may not provide for assignment of performance ratings to subelements.

(c) Agency appraisal systems shall provide for a minimum of three rating levels for each critical element. Performance standards must be written at the "Fully Successful" level for all critial and non-critical elements. The absence of a written standard at a given rating level shall not preclude the assignment of a rating at that level. Pass/fail elements are tasks, not true elements, and therefore cannot be used as elements in an appraisal.

(d) Agency appraisal systems shall provide for five summary rating levels. The required summary rating levels are "Outstanding", "Exceeds Fully Successful", "Fully Successful", "Minimally Successful", and "Unacceptable".

(1) Agency Performance Management Plans must include decision tables for deriving summary rating levels from performance ratings on critical elements and, at agency discretion, ratings on non-critical elements. If ratings on non-critical elements are considered in deriving summary ratings, the decision tables must show that more weight will be given to critical elements than to non-critical elements in determing an employee's summary rating.

(2) If an employee is rated "Unacceptable" on one or more critical elements, an "Unacceptable" summary rating must be given.

(e) The requirements of this paragraph apply only if performance standards have not been established at the "Unacceptable" level or at the element level immediately above the "Unacceptable" level.

(1) If at any time an employee's performance is determined to be below "Fully Successful" on one or more critical elements, agencies must start a new appraisal period which is not an opportunity period under Part 432 of this chapter.

(2) At the beginning of a new appraisal period, agencies must provide a Performance Improvement Plan (PIP) to each employee who has been determined to be below "Fully Successful" on one or more critical elements. The PIP must:

(i) Explain the employee deficiencies;

(ii) Explain steps to be taken in an attempt to resolve the deficiencies; and

(iii) Communicate performance standards at the "Minimally Successful" or "Unacceptable" level for those critical elements where performance has been determined to be below "Fully Successful."

(f) If performance standards have not been prepared at the "Outstanding" level or at the element level immediately below the "Outstanding" level, a written justification must be prepared for an "Outstanding" summary rating.

(g) An appraisal system shall not permit any preestablished distributions of expected levels of performance (such as the requirement to rate on a bell curve) that interfere with appraisal of actual performance against standards. However, agencies must provide for higher level management of the performance appraisal process in the interest of employee equity and in order to reflect organizational performance.

(h) Definitions of the five required summary rating levels follow. Performance standards and agency procedures for deriving summary ratings must be consistent with these definitions.

(1) "Outstanding" means performance of rare, very high quality. As warranted, an Outstanding performer produces an exceptional quantity of work significantly ahead of established schedules or deadlines and with very little supervision.

(2) "Exceeds Fully Successful" means performance of unusually good or excellent quality. As warranted, the employee produces a very high quantity of work ahead of established schedules or deadlines and with less than normal supervision.

(3) "Fully Successful" means performance which is of good quality. The employee produces the expected quantity of work and meets deadlines or schedules for completion of work.

(4) "Minimally Successful" means performance which is not "Unacceptable", but needs improvement to achieve the "Fully Successful" level. This may be evidenced by the need for close supervisory review, discussion, and correction of work products. When performance falls below "Fully Successful", it may be necessary to take remedial action.

(5) "Unacceptable" means performance which fails to meet established performance standards in one or more critical elements of the employee's position. When performance is "Unacceptable", corrective action must be taken consistent with required procedures.

(i) Each appraisal system shall provide for establishing performance standards based on requirements of employees' positions, providing written Performance Plans to employees at the beginning of each appraisal period, and appraising employees based on a comparison of performance with the standards established for the appraisal period. An agency shall encourage employee participation in establishing performance standards.

(j) Critical elements, non-critical elements, and performance standards must be related to the employee's assigned work.

(k) Employees shall generally be given performance ratings on an annual basis. Agencies may provide for longer appraisal periods when duties and responsibilities of a position or the tour of duty of a position so warrant. Agencies should take into consideration all performance ratings of assigned work given the employee throughout the appraisal period in arriving at the annual rating.

(l) Annual performance ratings shall be used as a basis for reduction-in-force actions, except that an employee without an annual performance rating of record shall be given a performance rating before a RIF if the employee has served for the minimum appraisal period.

(m) Agency appraisal systems shall establish a minimum appraisal period of not less than 90 calendar days. A performance rating of assigned work for the minimum appraisal period but less than one year shall constitute the annual rating only as required by paragraph (1) of this section or any other applicable provision of law or regulation. When a within-grade increase decision is not consistent with the employee's last performance rating, an additional and more current performance rating must be prepared.

(n) Critical elements, non-critical elements, and performance standards shall be in writing and shall be reviewed and approved by a supervisor or manager at a higher level than the appraising official.

(o) Periodic performance ratings and performance based personnel actions shall be reviewed and approved by a supervisor or manager at a higher level than the appraising official. Performance ratings shall be in writing and shall be provided to the employee. Performance ratings may not be communicated to employees prior to approval by a higher level reviewer.

(p) An employee must be given the right to ask for reconsideration of a performance rating by the supervisor or manager who aproved the performance rating. This reconsideration will be in the interest of insuring fairness of an individual's rating. Additional procedures for review of a performance rating may be established at the discretion of the agency head.

(q) Details within the same agency. Agencies shall provide written critical elements and performance standards to employees as soon as possible but no later than 30 calendar days after the beginning of a detail or temporary promotion within the same agency when the detail or temporary promotion is expected to last 120 calendar days or longer. Performance ratings on critical elements must be prepared for these details and temporary promotions and must be considered in deriving an employee's next annual summary rating.

(r) Details to another agency or organization. When an employee is or has been detailed or temporarily assigned outside of the agency, an annual performance rating must be prepared if the employee has served for the minimum appraisal period inside the agency.

(1) If an employee has not served in the agency for the established minimum appraisal period, but has served for the minimum appraisal period in another organization, the agency must make a reasonable effort to obtain appraisal information from the other organization sufficient to prepare an annual performance rating.

(2) When an annual performance rating cannot be prepared, the employee's performance rating of record may be extended for no longer than one year. (An extended performance rating shall not be used as basis for a within-grade increase determination which must be waived under § 531.409(d) of this chapter).

(3) During any period of time when an agency cannot prepare a new performance rating or extend a previous rating, the agency may assume that the employee's performance is "Fully Successful."

(s) Performance appraisals and ratings shall be used:

(1) To provide employees with information on their performance and how it may be improved.

(2) As a basis for decisions to grant awards; grant or without pay increases, i.e., within-grade increases, Federal Wage System step increases, and quality step increases; reassign; promote; develop; retain in reduction in force; and reduce in grade or remove.

(t) If an employee is given an "Outstanding" summary performance rating, a written recommendation for appropriate monetary, non-monetary, or honorary recognition must be prepared.

(u) The performance rating of a disabled veteran may not be lowered because the veteran has been absent from work to seek medical treatment in accordance with Executive Order 5396.

§ 430.205 Training and evaluation.

To assure that the requirements of the law will be effectively implemented, agencies must provide appropriate training and information to supervisors and employees on the appraisal process, and must establish methods and procedures to evaluate periodically the effectiveness of their appraisal system(s) and to improve the system(s).

§ 430.206 OPM review of appraisal systems.

(a) The Office of Personnel Mangement will review performance appraisal systems to determine if they conform to requirements of law and OPM regulations. The Office of Personnel Management will also review appraisal systems with respect to their contribution to agency effectiveness and efficiency and appropriate use of performance information in personnel decisions.

(b) If the Office of Personnel Management determines that an appraisal system does not meet the requirements of Subchapter I of 5 U.S.C. 43 or of this part, it shall direct the agency to implement an appropriate system or to correct operations under the system. The agency shall take any action so required.

§ 430.207 Performance Management Plans.

(a) Agencies must submit proposed Performance Mangement Plans to the Office of Personnel Management for review and approval. Performance Management Plans; shall include each of the following which is applicable to the agency and any additional information requested by OPM:

(1) Appraisal Systems required under 5 U.S.C. 4302 and 4312. Submissions may either be agency-wide appraisal systems or requirements which the systems of subordinate organizations must meet.

(2) Performance Award Plans required by Part 531 of this chapter.

(3) Plans for determining and distributing Within-Grade Increases, Quality Step Increases and the agency performance award fund, including previous years' and projected expenditures.

(b) Proposed changes to approved Performance Management Plans which would have an impact on how an agency meets legal or regulatory requirements must be submitted to the Office of Personnel Management for review and approval.

(c) Each agency shall maintain records and submit reports required by OPM regarding the operation of an agency Performance Management Plan or any part of a plan.

(d) Up to eight (8) performance management plans may be submitted as demonstration projects under 5 U.S.C. 4703 which would allow for consultation or negotiation, as appropriate, by an agency and recognized labor organizations. Such plans will not be restricted by the provisions of this part but shall investigate and implement different types of merit pay plans. They

may include proposals for waiting periods for within-grade increases, when within-grades shall be granted automatically or when granted earlier or later, career ladder promotions, grievance of ratings, gain sharing and other merit pay proposals. Any such plans shall meet all of the requirements of section 4703.

§ 430.208 Implementation of this part.

(a) Each agency covered by this subpart shall submit Performance Management Plans to the Office of Personnel Management for review by December 15, 1985.

(b) Agencies will be required to implement the performance appraisal provisions of an approved Performance Management Plan not later than February 1, 1986.

(c) Decisions based on performance appraisals under the agency's Performance Management Plan must begin as soon as possible after the performance appraisal provisions have been implemented and in accordance with provisions of an agency's Performance Management Plan approved by OPM.

(d) Agencies shall implement their Performance Management Plans except where provisions of an existing negotiated agreement are in explicit conflict with these OPM regulations in which case the provisions of the negotiated agreement shall be in effect until its expiration. Agencies may request OPM approval of the following exceptions:

(1) For specific provisions of OPM regulations that are not in explicit conflict with existing provisions of a labor agreement but would cause significant inequities if implemented in combination with provisions of the labor agreement, or

(2) Where apparently conflicting provisions of negotiated agreements are consistent with the intent of OPM regulations (e.g., where an agreement calls for five rating levels with different names).

6. Part 431 is revised to read as follows:

PART 431—PERFORMANCE APPRAISAL IN THE SENIOR EXECUTIVE SERVICE

Subpart A—Statutory Authority

Sec.
431.101 General.

Subpart B—Regulatory Requirements of the Office of Personnel Management

431.201 Purpose.
431.202 Coverage.
431.203 Definitions.
431.204 The Performance Appraisal Process.
431.205 Training and Evaluation.
431.206 OPM Review of SES Appraisal Systems.
431.207 Performance Management Plans.

Subpart C—Implementation

431.301 Implementation of this part.

Authority: 5 U.S.C. 43 Subchapter II.

Subpart A—Statutory Authority

§ 431.101 General.

Chapter 43 of title 5, United States Code (5 U.S.C. 4311–4315) provides for the establishment of Senior Executive Service performance appraisal systems and appraisals of senior executives' (as defined in 5 U.S.C. 3132(a)) performance. This part contains the regulations which the Office of Personnel Management has prescribed for performance appraisal in the Senior Executive Service, and supplements the provisions of 5 U.S.C. 4311–4315.

Subpart B—Regulatory Requirements of the Office of Personnel Management

§ 431.201 Purpose.

It is the purpose of this subpart to ensure that performance appraisal systems are used as a tool for executing basic performance management responsibilities by:

(a) Communicating and clarifying organizational goals and objectives,

(b) Identifying individual accountability for the accomplishment of agency goals and objectives,

(c) Evaluating and improving individual and organizational accomplishments, and

(d) Using performance ratings as a basis for rewarding employees and other personnel actions.

§ 431.202 Coverage.

(a) All senior executives covered by Subchapter II, of Chapter 31 of title 5, United States Code are covered by this part.

(b) 5 U.S.C. 3132(a)(1) identifies agencies covered by this part.

§ 431.203 Definitions.

In this part, terms are defined as follows—

"Appointing authority" means the agency or department head or his or her designee.

"Appraisal period" means the period of time established by an appraisal system for which the senior executive's performance will be reviewed and for which a performance rating will be given.

"Appraisal system" means a performance appraisal system established by an agency or component of an agency under Subchapter II of Chapter 43 of title 5 U.S.C., and Subpart B of this part which provides for identification of critical and non-critical elements, establishment of performance standards, communication of elements and standards to senior executives, establishment of methods and procedures to appraise performance against established standards, and appropriate use of appraisal information in making personnel decisions.

"Critical element" means a component of a job consisting of one or more duties and responsibilities which contributes toward accomplishing organizational goals and objectives and which is of such importance that "Unsatisfactory" performance on the element would result in "Unsatisfactory" performance of assigned work.

"Final rating" means the rating assigned by an appointing authority after considering the recommendations of a Performance Review Board.

"Initial rating" means the rating by the senior executive's immediate supervisor, the rating official.

"Non-critical element" means a component of an employee's job which does not meet the definition of a critical element, but is of sufficient importance to warrant appraisal and the assignment of an element rating.

"Performance" means the senior executive's accomplishment of assigned duties and responsibilities as specified in the critical and non-critical elements of the executive's position.

"Performance appraisal" means the act or process of reviewing and evaluating the performance of an executive against the described performance standards. This includes oral or written progress reviews.

"Performance Plan" means the aggregation of the senior executive's written critical and non-critical elements and performance standards.

"Performance Rating" means the written record of the appraisal of each critical and non-critical element and overall performance.

"Performance requirement" means performance standard.

"Performance standard" means a statement of the expectations or requirements established by management for a critical or non-critical element at a particular rating level. A performance standard may include, but is not limited to, factors such as quality, quantity, cost efficiency, timeliness, and manner of performance.

§ 431.204 The performance appraisal process.

(a) As required by 5 U.S.C. 4312(a), each agency shall establish one or more appraisal systems for appraising the individual and organizational work performance of senior executives during an appraisal period.

(b) Critical elements must be included and non-critical elements may be included in individual Performance Plans. An executive must be appraised and rated on each critical and non-critical element in the executive's Performance Plan, unless the employee has had no opportunity to demonstrate performance on the element. An executive must also be given a summary rating. Agency appraisal systems may not provide for assignment of performance ratings to subelements.

(c) Agency appraisal systems shall provide for a minimum of three rating levels for each critical element. Performance standards must be written at the "Fully Successful" level for all critical and non-critical elements. The absence of a written standard at a given rating level shall not preclude the assignment of a rating at that level. Pass/fail elements are tasks, not true elements, and therefore cannot be used as elements in an appraisal.

(d) Agency appraisal systems shall provide for five summary rating levels. The required summary rating levels are "Outstanding," "Exceeds Fully Successful," "Fully Successful," "Minimally Satisfactory," and "Unsatisfactory".

(1) Agency Performance Management Plans must include decision tables for deriving summary rating levels from performance ratings on critical elements and, at agency discretion, ratings on non-critical elements. If ratings on non-critical elements are considered in deriving summary ratings, the decision tables must show that more weight will be given to critical elements than to non-critical elements in determining an employee's summary rating.

(2) If an employee is rated "Unsatisfactory" on one or more critical elements, an "Unsatisfactory" summary rating must be given.

(e) The requirements of this paragraph apply only if performance standards have not been established at the "Unsatisfactory" level or at the element level immediately above the "Unsatisfactory" level.

(1) At the beginning of a new appraisal period, agencies must provide a Performance Improvement Plan (PIP) to each employee who has been rated below "Fully Successful" on one or more critical elements.

(2) The PIP must:

(i) Explain the employee deficiencies,

(ii) Explain steps to be taken in an attempt to resolve the deficiencies, and

(iii) Communicate performance standards at the "Minimally Satisfactory" or "Unsatisfactory" level for those critical elements which were rated below "Fully Successful".

(f) If performance standards have not been prepared at the "Outstanding" level or at the element level immediately below the "Outstanding" level, a written justification must be prepared for an "Outstanding" summary rating.

(g) An appraisal system shall not permit any preestablished distributions of expected levels of performance (such as the requirement to rate on a bell curve) that interfere with appraisal of actual performance against standards. However, agencies must provide for higher level management of the performance appraisal process in the interest of employee equity and in order to reflect organizational performance.

(h) Definitions of the five required summary rating levels follow. Performance standards and agency procedures for deriving summary ratings must be consistent with these definitions.

(1) "Outstanding" means performance of rare very high quality. As warranted, an Outstanding performer produces an exceptional quantity of work significantly ahead of established schedules or deadlines and with very little supervision.

(2) "Exceeds Fully Successful" means performance of unusually good or excellent quality. As warranted, the employee produces a very high quantity of work ahead of established schedules or deadlines and with less than normal supervision.

(3) "Fully Successful" means performance which is of good quality. The employee produces the expected quantity of work and meets deadlines or schedules for completion of work.

(4) "Minimally Satisfactory" means performance which is not "unsatisfactory", but needs improvement to achieve the "Fully Successful" level. This may be evidenced by the need for close supervisory review, discussion and correction of work products.

(5) "Unsatisfactory" means performance which fails to meet established performance standards in one or more critical elements of the executive's position.

(i) Each appraisal system shall provide for establishing performance standards based on the requirements of senior executives' positions, providing written Performance Plans to senior executives on or before the beginning of each appraisal period, and appraising senior executives based on a comparison of performance with the standards established for the appraisal period. An agency shall establish performance standards in consultation with the senior executive.

(j) Critical elements, non-critical elements, and performance standards must be related to the senior executive's assigned work and organizational performance requirements.

(k) Critical elements, non-critical elements, and performance standards shall be in writing and shall be reviewed and approved by an executive at a higher level than the appraising official or by a review committee. When elements and standards are written by the agency head, no further review is possible.

(l) Senior executives shall be given performance ratings on an annual basis. Agencies should take into consideration all performance ratings of assigned work given the employee throughout the appraisal period in arriving at the annual rating.

(m) Annual performance ratings shall be used as a basis for reduction-in-force actions, except that an employee without an annual performance rating of record shall be given a performance rating before a RIF if the employee has served for the minimum appraisal period.

(n) Agency appraisal systems shall establish a minimum appraisal period of not less that 90 calendar days. A performance rating of assigned work for the minimum appraisal period but less than one year shall constitute the annual rating only as required by paragraph (m) of this section or any other applicable provision of law or regulation.

(o) Agencies shall provide to each senior executive a copy of the following documents at the time they are prepared: the initial rating, along with notification of the right to respond in writing and to request a higher level review before the rating becomes final; any recommended changes by a higher level executive; and the final rating. Agencies must also provide a copy of critical elements, non-critical elements, and performance standards to each senior executive.

(p) Details within the same agency. Agencies shall provide written critical elements and performance standards to senior executives as soon as possible but no later than 30 calendar days after the beginning of a detail or temporary assignment within the same agency when the detail or temporary assignment is expected to last 120 calendar days or longer. Performance

ratings on critical elements must be prepared for these details and temporary assignments and must be considered in deriving a senior executive's next annual summary rating.

(q) When a senior executive is detailed or temporarily assigned outside the agency, the agency shall obtain relevant appraisal information from the agency or organization to which the executive is detailed or temporarily assigned.

(r) Agency performance appraisal systems must provide an opportunity for senior executives to respond in writing to an initial rating and have the rating reviewed by an employee in a higher executive level than the supervisor before review by the Performance Review Board (PRB). The senior executive's reponse shall be provided to both the official making the higher level review and to the PRB.

(1) Agency performance appraisal systems may provide for a mandatory second level review.

(2) A senior executive is entitled to only one higher level review unless the agency provides otherwise.

(3) Agencies shall provide copies of the reviewer's comments and recommendations to the senior executive, the supervisory official and the PRB.

(s) As required by 5 U.S.C. 4314(c), each agency is required to establish one or more PRB's to make recommendations to the appointing authority on the performance of senior executives in the agency.

(1) Each PRB in an agency shall have three or more members appointed by the head of the agency or by another official or group acting on behalf of the head of the agency.

(2) Notice of appointment to the PRB must be published in the **Federal Register.**

(3) The members of the PRB must be appointed in such a manner as to assure consistency, stability, and objectivity in performance appraisal.

(4) When appraising a career appointee, more than one-half of the membership of the PRB must be SES career appointees unless OPM determines that there exists an insufficient number of career appointees available to comply with the requirement.

(5) Each PRB will review and evaluate the initial rating, the senior executive's written response, if any, and the written comments, if any, on the initial rating by a higher level executive, and will conduct such further review as the PRB finds necessary.

(6) Individual PRB members must not take part in any PRB deliberations or appraisals involving themselves.

(7) The PRB must make a written recommendation concerning the senior executive's summary rating.

(t) Agencies are required to retain all documentation on performance appraisal decisions for no less than five years from the date of the appraisal.

(u) Final performance ratings shall provide a basis for decisions to remove senior executives from the SES.

(v) Final performance ratings may provide a basis for decisions to:

(1) Reassign or transfer senior executives within the SES;

(2) Grant performance awards to career senior executives; and

(3) Grant performance-related ES pay rate adjustments.

(w) If an employee is given an "Outstanding" summary performance rating, a written recommendation for appropriate monetary, non-monetary, or honorary recognition must be prepared.

§ 431.205 Training and evaluation.

To assure that the requirements of the law will be effectively implemented, agencies must provide appropriate training and information to supervisors and senior executives on the appraisal process, and must establish methods and procedures to evaluate periodically the effectiveness of their appraisal system(s) and to improve the system(s).

§ 431.206 OPM review of SES appraisal systems.

(a) SES performance appraisal systems must conform to requirements of law and OPM regulations. The Office of Personnel Management will review appraisal systems for conformance with these regulations as well as with respect to their contribution to agency effectiveness and efficiency and appropriate use of performance information in personnel decisions.

(b) If the Office of Personnel Management determines that an appraisal system does not meet the requirements of Subchapter II of Chapter 43 of title 5, United States Code or of this part, it shall direct the agency to implement an appropriate system or to correct operations under the system. The agency shall take any action so required.

§ 431.207 Performance Management Plans.

(a) Agencies must submit proposed Performance Management Plans to the Office of Personnel Management for review and approval as required by § 430.207 of this chapter.

(b) Proposed changes to approved Performance Management Plans which have an impact on how an agency meets legal or regulatory requirements must be submitted to the Office of Personnel Management for review and approval.

Subpart C—Implementation

§ 431.301 Implementation of this part.

(a) Each agency covered by this part shall submit Performance Management Plans to the Office of Personnel Management for review by December 15, 1985.

(b) Agencies will be required to implement the performance appraisal provisions of an approved Performance Management Plan not later than February 1, 1986 for employees covered under this part.

(c) Decisions based on performance appraisals under the agency's Performance Management Plan must begin as soon as possible after the performance appraisal provisions have been implemented and in accordance with provisions of an agency's Performance Management Plan approved by OPM.

7. Part 451 is revised to read as follows:

PART 451—SPECIAL AWARDS

Subpart A—[Reserved]

Subpart B—Regulatory Requirements of the Office of Personnel Management for Special Awards

Sec.

451.201 Applicability.
451.202 Purpose.
451.203 Coverage.
451.204 Definitions.
451.205 Policy.
451.206 Eligibility.
451.207 Payment.
451.208 Responsibilities of the Office of Personnel Management.
451.209 Agency responsibilities.

Subpart C—Regulatory Requirements of the Office of Personnel Management for Productivity Benefit Sharing Programs (Reserved)

Authority: 5 U.S.C. 4506, and 5407.

Subpart A—[Reserved]

Subpart B—Regulatory Requirements of the Office of Personnel Management for Special Awards

§ 451.201 Applicability.

(a) This subpart contains the regulatory requirements of the Office of Personnel Management for the establishment and conduct of the Special Awards Program for employee

suggestions, inventions, and meritorious actions.

(b) An award under this subpart may be granted alone or in addition to a performance award granted under Part 430 Subpart E, of this chapter.

(c) Refer to Part 430 Subpart E, of this chapter for the regulatory requirements on Performance Awards based on accomplishments and contributions within the scope of the employee's job responsibilities and performance standards.

§ 451.202 Purpose.

(a) The Federal Government employees' Special Awards Program is designed to improve Government operations and services. Its purpose is to motivate employees to increase productivity and creativity by rewarding those whose accomplishments and adopted ideas benefit the Federal Government.

(b) The Office of Personnel Management encourages agencies to make maximum use of their authorities under Chapters 45 and 54 of title 5, United States Code, to establish and administer special awards for suggestions, inventions, and meritorious actions that best support and enhance agency and national goals, and meet employee recognition needs.

§ 451.203 Coverage.

(a) This subpart applies to employees as defined by Section 2105 of title 5, United States Code, including those covered by the Performance Management and Recognition System established under Chapter 54 of title 5, United States Code.

(b) This subpart applies to agencies as defined in Section 4501 of title 5, United States Code.

§ 451.204 Definitions.

In this subpart, terms are defined as follows:

"Contribution" means a suggestion, an invention, a meritorious action or other personal or group effort that contributes to the efficiency, the economy, or other improvement of Government operations; or a special act or service in the public interest in connection with or related to official employment (5 U.S.C. 4503).

"Honorary award" means a medal, certificate, plaque, citation, badge, or other similar item that has an award or honor connotation.

"Intangible benefits" means benefits to the Federal Government that are very exceptional and cannot be measured or are difficult to measure in terms of dollars saved.

"Meritorious action" means any employee or group contribution which is highly exceptional and unusually outstanding and which is beyond or outside job responsibilities and performance standards.

"Non-monetary award" means an award tailored to meet special conditions and needs of an employee and/or organization. It usually has a monetary connotation for the agency but not for the employee.

"Presidential award" means an award granted by the President under Section 4504 of title 5, United States Code.

"Special act or service" under this part means a non-recurring contribution which is beyond or outside normal job responsibilities and performance standards; a single scientific achievement; or an act of heroism.

"Special award" or "award" means a monetary, an honorary, or a nonmonetary award based on the tangible savings and/or intangible benefits to Federal Government.

"Tangible savings" means savings to the Federal Government that can be measured in terms of dollars saved.

§ 451.205 Policy.

(a) The policy of the Special Awards Program shall be to:

(1) Grant recognition in keeping with the value of the contribution to the Federal Government;

(2) Consider employee contributions for application throughout the Federal Government; and

(3) Assure that awards are not used as a substitute for other personnel actions, or as a substitute for pay.

(b) A special award under this subpart shall be:

(1) Monetary, honorary, or non-monetary;

(2) Based on employee accomplishments and contributions that are clearly beyond or outside assigned job responsibilities and performance standards.

(c) Monetary awards based on tangible savings shall not exceed amounts indicated by the following scales:

(1) Awards of up to $10,000, based on tangible savings:

Tangible savings	Award
Up to $20,000	5 percent of savings.
$20,001 to $100,000	$1,000 plus 1.5 percent of savings over $20,000.
Over $100,000	$2,200 plus .25 percent of savings over $100,000 up to maximum award of $10,000.

(2) Awards over $10,000 based on tangible savings:

Savings (in millions)		Award
Savings will continue for 5 years or more. First year savings will be:	Savings that occur on a one-time basis will be:	
$5 to 7.4	$15	$15,000
7.5 to 9.9	20	20,000
10	25	25,000

(3) Presidential Awards based on tangible savings:

Savings (in millions)		Award
Savings will continue for 5 years or more. First year savings will be:	Savings that occur on a one-time basis will be:	
$20 or more	$75	$10,000 in addition to a $25,000 award, for a total of $35,000.

(d) In addition to special awards based on tangible savings under paragraphs (c)(1), (c)(2) and (c)(3) of this section, special awards may be granted for contributions having exceptional intangible benefits to the Government. OPM shall provide guidance to agencies regarding how to limit the use of monetary awards based on intangible benefits, and how they should be computed.

(e) OPM shall provide guidance to agencies regarding criteria for granting all honorary and non-monetary awards based on tangible savings and/or intangible benefits to Federal Government.

§ 451.206 Eligibility.

(a) A special award may be granted when the suggestion, invention, meritorious action or other personal or group effort:

(1) Meets the requirements under § 451.205 of this subpart;

(2) Benefits the Government as described in 5 U.S.C. 4503 and 4504;

(3) Was made while the contributor was a Government employee;

(4) Has been described in writing; and

(5) Has been approved by the benefiting organization at a management level higher than the individual who:

(i) Recommended use of the suggestion, invention, or meritorious action; or

(ii) Recommended the award.

(b) Special awards shall not be mandatory.

§ 451.207 Payment.

(a) Awards paid under this subpart do not increase the rate of basic pay.

(b) When a special award is approved for an employee of another agency, arrangements shall be made to transfer funds to the employing agency. If the administrative costs of transferring funds would exceed the amount of the award, the employing agency shall absorb the award costs.

§ 451.208 Responsibilities of the Office of Personnel Management.

(a) OPM shall provide guidance to agencies on how the Special Awards Program should be carried out (5 U.S.C. 4506)

(b) OPM shall review, and following verification of savings or benefits and relationship of contributions to job requirements, approve or disapprove recommendations for all awards in excess of $10,000 on a case-by-case basis. OPM shall limit approval of all awards to denominations of $15,000, $20,000 and $25,000.

(c) The Director, OPM, shall advise the President on monetary and honorary Presidential awards for Government employees which shall only be granted under this subpart. A monetary Presidential award granted in addition to a $25,000 award made under 5 U.S.C. 4503 shall be for $10,000.

§ 451.209 Agency responsibilities.

(a) The head of each agency shall establish an agency Special Awards Program that seeks to gain maximum benefits for the Government through improved employee motivation and productivity by providing for:

(1) The greatest motivational impact by allocating an adequate budget, staffing, and support services to assure prompt action on special award recommendations, and effective promotion and publicity activities;

(2) Delegation of authority and responsibility for approval of special awards to the appropriate management level;

(3) Special award recommendations involving the minimum amount of paperwork and processing which show that criteria are met and expenditure of appropriated funds for the award is justified;

(4) Central administration and review of the agency-wide program, including systematic evaluation, planning, and feedback reports to management officials and employees;

(5) The granting of special awards as soon as possible after an assessment of the contribution indicates that an award should be granted;

(6) Time limits for processing special award recommendations and granting of special awards;

(7) The integrity of the program by reviewing agency program results to assure that special awards are granted equitably, on the basis of the tangible savings and/or intangible benefits to the Government; that action is taken to grant special awards in a timely manner; and that information is made available concerning persons who have received special awards and the reason(s) why each award is granted;

(8) Documentation in the Official Personnel Folder to reflect the nature of a special award, including the amount of a monetary award;

(9) Due weight to a special award when rating and ranking an employee for a promotion, as provided in 5 U.S.C. 3362; and

(10) Consideration of accomplishments and adopted ideas for wider application both within the agency and Governmentwide, and prompt referral when appropriate.

(b) Each agency head may delegate the responsibilities in § 451.209(a) of this subpart as deemed appropriate for his or her organization.

(c) The head of each agency shall transmit to OPM:

(1) Award recommendations over $10,000;

(2) All recommendations for Presidential awards; and

(3) An annual report on program activities for the past fiscal year.

8. The heading for Part 531 and the authority citation for Part 531, Subpart D, are revised to read as follows:

PART 531—PERFORMANCE BASED INCENTIVE SYSTEM FOR THE GENERAL SCHEDULE

* * * * *

Subpart D—Within Grade Increases

Authority: 5 U.S.C. 5301, 5335, and 5338 and E.O. 11721 as amended, § 402, unless otherwise noted.

9. Section 531.401 is revised to read as follows:

§ 531.401 Principal Authorities.

The following are the principal authorities for the regulations in this subpart:

(a) 5 U.S.C.(b)(3) provides in part that ". . . appropriate incentives and recognition should be provided for excellence in performance."

(b) 5 U.S.C. 5301(a)(2) provides that "pay distinctions be maintained in keeping with work and performance distinctions."

(c) Section 402 of E.O. 11721, as amended, provides that "The Civil Service Commission [Office of Personnel Management] shall issue such regulations and standards as may be necessary to ensure that only those employees whose work is of an acceptable level of competence receive periodic step-increases under the provisions of section 5335 of title 5, United States Code."

10. Section 531.403 is amended by revising the terms "acceptable level of competence" and "critical element", to read as follows:

§ 531.403 Definitions.

In this subpart:

"Acceptable level of competence" means fully successful performance by an employee of the duties and responsibilities of his or her assigned position which warrants advancement of the employee's rate of basic pay to the next higher step of the grade of his or her position, subject to the requirements of § 531.404 of this subpart.

* * * * *

"Critical Element" has the meaning given that term in § 430.203 of this chapter.

* * * * *

11. Section 531.404 is revised to read as follows:

§ 531.404 Earning within-grade increase.

An employee paid at less than step 10 of the grade of his or her position shall only earn advancement in pay to the next higher step of that grade upon meeting the three requirements established by law:

(a) To earn a within-grade increase, the employee's performance of assigned work must be at an acceptable level of competence, as defined in this subpart by authority of Section 402 of E.O. 11721, as amended. Acceptable level of competence means a level of performance of assigned work of at least "Fully Successful", as defined in Part 430 of this chapter, for each critical element. In addition, the employee's most recent summary performance rating, as defined in the agency Performance Management Plan, must be at least "Fully Successful".

(b) The employee must have completed the required waiting period for advancement to the next higher step of the grade of his or her position; and

(c) The employee must not have received an equivalent increase during the waiting period.

12. In Section 531.408, paragraphs (b) and (c) are revised to read as follows:

§ 531.408 Communication of performance requirements.

* * * * *

(c) *Delay in determination.* An acceptable level of competence determination must be delayed when both of the following apply:

(1) An employee has not had the minimum period of time established by the agency to demonstrate acceptable performance because he or she has not been informed of the specific requirements for performance at an acceptable level of competence in his or her current position; and

(2) The employee has not been given a performance rating in any position within 90 days before the end of the waiting period. When an acceptable level of competence determination has been delayed under this subpart, the employee shall be informed that his or her determination is postponed and of the specific requirements for performance at an acceptable level of competence. The determination shall be based on a performance rating completed at the end of the minimum appraisal period established by the agency performance appraisal plan.

(d) Waiver of requirement for determination. An acceptable level of competence determination shall be waived and a within-grade increase granted when an employee has not served in any position for the minimum appraisal period under an applicable agency performance appraisal system during the final 52 calender weeks of the waiting period for one or more of the following reasons:

(1) Absences that are creditable service in the computation of a waiting period or periods under § 531.406 of this subpart;

(2) Because of paid leave;

(3) Because the employee received service credit under the back pay provisions of subpart H of Part 550 of this chapter;

(4) Because of details to another agency or employer; or

(5) Because of long term training.

In such a situation, there shall be a presumption that the employee would have performed at an acceptable level of competence had the employee performed the duties of his or her position of record for the minimum appraisal period under the applicable agency performance appraisal system.

§ 531.409 [Amended]

14. Section 531.409(e)(2)(i) is revised to read as follows:

* * * * *

(e) Notice of determination.

* * * * *

(2)* * *

(i) Set forth the reasons for the negative determination and the respects in which the employee must improve his or her performance in order to be granted a within-grade increase under § 531.411 of this subpart.

* * * * *

15. Section 531.411 is revised to read as follows:

§ 531.411 Continuing evaluation after withholding a within-grade increase.

When a within-grade increase has been withheld, an agency may, at any time thereafter, rate the employee and grant the within-grade increase when it determines that he or she has demonstrated sustained performance at an acceptable level of competence. However, the agency shall determine whether the employee's performance is at an acceptable level of competence after no more than 52 calendar weeks following the original eligibility date for the within-grade increase and, for as long as the within-grade increase continues to be denied, determinations will be made after no longer than each 52 calendar weeks.

16. In Subpart E, §§ 531.503 and 531.504 are revised to read as follows:

Subpart E—Quality Step Increases

* * * * *

§ 531.503 Purpose of quality step increases.

The purpose of quality step increases is to recognize outstanding performance by granting faster than normal step increases.

§ 531.504 Level of performance required for quality step increase.

A quality step increase shall not be required but may be granted only to an employee who receives a summary performance rating of "Outstanding", as defined in Part 430 of this chapter.

17. Section 531.505 is removed. Sections 531.506 through 531.508 are redesignated as §§ 531.505 through 531.507, and revised to read as follows:

§ 531.505 Restrictions on granting quality step increases.

As provided by 5 U.S.C. 5336, a quality step increase may not be granted to an employee who has received a quality step increase within the preceding 52 consecutive calendar weeks.

§ 531.506 Effective date of quality step increase.

Quality step increases shall be effective as soon as possible after annual performance appraisals are approved.

§ 531.507 Agency plans for granting quality step increases.

Each agency shall include a plan for granting quality step increases, as required by § 430.207(a)(4) of this chapter, in the agency's Performance Management Plan. The plan shall:

(a) Be as simple as practicable;

(b) Provide for delegation of authority to grant quality step increases to the lowest practicable level of management;

(c) Be reviewed and approved in accordance with § 430.207 of this chapter; and

(d) Provide for informing employees, at least annually, of the number of quality step increases granted in the agency by grade level.

18. Section 531.509 is redesignated § 531.508.

19. In Part 531, Subpart F would read as follows:

Subpart F—Performance Awards

Sec.

531.601 Applicability.
531.602 Purpose of performance awards.
531.603 Coverage.
531.604 Definitions.
531.605 Policy.
531.606 Eligibility.
531.607 Payment.
531.608 Responsibilities of the Office of Personnel Management.
531.609 Agency responsibilities.

Authority: 5 U.S.C. 4302(a) and 4506.

§ 531.601 Applicabilty.

(a) This subpart contains the Office of Personnel Management's regulatory requirements for establishment and conduct of the performance awards component of the Performance Management System, under the authority of title 5, United States Code, Chapters 43 and 45.

(b) An award under this subpart shall be supported by the employee's performance rating and based on accomplishments and contributions which are within the scope of the employee's assigned job responsibilities and performance standards.

(c) One-time special acts or services rewarded under this subpart shall be within the scope of job responsibilities and performance standards.

(d) Refer to Part 451 of this chapter for the regulatory requirements for granting awards to employees for suggestions, inventions, and meritorious actions.

§ 531.602 Purpose of performance awards.

(a) The purpose of performance awards is to motivate employees, and recognize and reward those who attain high levels of performance.

(b) The Office of Personnel Management encourages agencies to make maximum use of their authorities under Chapters 43 and 45 of title 5, United States Code, to establish and administer performance awards that best support and enhance agency and national goals and meet employee recognition needs.

§ 531.603 Coverage.

(a) This subpart applies to employees as defined by Section 2105, title 5, United States Code, but does not include those covered by the Performance Management and Recognition System established under Chapter 54 of title 5, United States Code, nor employees in the Senior Executive Service.

(b) This subpart applies to agencies as defined in section 4501 of title 5, United States Code.

§ 531.604 Definitions.

In this subpart, terms are defined as follows:

"Honorary award" means a medal, certificate, plaque, citation, badge, or other similar item that has an award or honor connotation.

"Monetary award" means a cash award which is not part of an employee's basic rate of pay.

"Non-monetary award" means an award tailored to meet special conditions and needs of an employee and/or an organization. It usually has a monetary connotation for the agency but not for the employee.

"Performance award" or "award" means a monetary, honorary, or non-monetary award.

"Plan" means a written statement submitted by the head of the agency and approved by OPM, implementing law and regulation for performance awards with specific attention to the monetary component of the overall Performance Management Plan as described in §430.207 of this chapter.

§ 531.605 Policy.

(a) The policy of the Performance Awards Program shall be to:

(1) Grant recognition in keeping with the value of the contribution to the Federal Government;

(2) Consider employee contributions for application throughout the Federal Government; and

(3) Assure that awards are not used as a substitute for other personnel actions, or as a substitute for pay.

(b) A performance award under this subpart shall be:

(1) Monetary, honorary, or non-monetary;

(2) Based on employee accomplishments and contributions which are within the scope of an employee's assigned job responsibilities and performance standards; and

(3) Based on a percentage of the employee's base pay, up to a maximum of 20 percent. However, if the sum of the performance award recommended and any within-grade and/or quality step increase received by the employee during the previous 12 months exceeds 20 percent, the award shall be reduced to that maximum.

§ 531.606 Eligibility.

(a) A performance award may be granted to an employee when performance accomplishments or other contributions:

(1) Are within the scope of his or her assigned job responsibilities and performance standards;

(2) Benefit the Government as described in 5 U.S.C. 4503 and 4504;

(3) Were made while the contributor was a Government employee;

(4) Have been supported by a performance rating of at least "Exceeds Fully Successful" on one or more elements of a job or a summary performance rating of at least "Exceeds Fully Successful"; and

(5) Have been approved at a management level higher than the official who recommended the performance award.

(b) Performance awards shall not be mandatory except as required by §§ 430.204(t) and 431.204(w) of this chapter.

§ 531.607 Payment.

Awards paid under this subpart do not increase the rate of basic pay and are subject to the withholding of income taxes.

§ 531.608 Responsibilities of the Office of Personnel Management.

(a) OPM shall provide guidance to agencies on how the performance awards components of the Performance Management System should be carried out.

(b) OPM shall review and approve the agency performance award component of the Performance Management Plan, and any proposed plan revisions which have an impact on how an agency meets statutory and regulatory requirements.

§ 531.609 Agency responsibilities.

(a) The head of each agency shall establish all performance awards as a component of the Performance Management Plan. The plan must provide for:

(1) Documentation in the employee's Official Personnel Folder to reflect the nature of a performance award, including the amount of a monetary award; and

(2) Due weight to a performance award when rating and ranking an employee for a promotion, as provided in 5 U.S.C. 3362.

(b) The head of each agency shall transmit to OPM:

(1) All award recommendations over $10,000;

(2) A Performance Management Plan which includes a performance awards component, and proposed plan revisions for review and approval, as required by § 430.207(a) of this chapter; and

(3) An annual report on performance awards activities for the past fiscal year.

(c) The performance awards component of the Performance Management Plan to be submitted to OPM shall include the following provisions:

(1) Use of the agency's performance rating under Part 430 of this chapter as the basis for granting monetary, honorary, and non-monetary performance awards;

(2) Delegation of authority and responsibility for approval of monetary, honorary and non-monetary performance awards to the appropriate management level;

(3) Performance award recommendations to involve the minimum amount of paperwork and processing which show that criteria are met and that expenditure of appropriated funds for the award is justified;

(4) Granting of performance awards as soon as possible after performance ratings are approved, or as soon as possible after an assessment of performance indicates that an award should be granted; and

(5) A plan for determining the performance award fund, including previous years' and projected expenditures, as required by § 430.207(a)(4) of this chapter. Funds for any agency Productivity Benefit Sharing Program shall not be included in the performance award fund, inasmuch as these are separate from performance awards.

PART 532—PREVAILING RATE SYSTEMS

20. In Part 532, Subpart H would read as follows:

* * * * *

Subpart H—Performance and Special Awards

Sec.

532.801 General

Authority: 5 U.S.C. 5343, 5346.

Subpart H—Performance and Special Awards

§ 532.801 General

(a) Performance awards for prevailing rate employees are covered under the provisions of Subpart F of Part 531 of this chapter.

(b) Awards for employee accomplishments beyond normal job responsibilities and performance standards are covered under Part 451 of this chapter.

PART 771—AGENCY ADMINISTRATIVE GRIEVANCE SYSTEM

21. The authority citation for Part 771 continues to read as follows:

Authority: 5 U.S.C. 1302, 3301, 3302, 7310; E.O. 9830, 3 CFR, 1943–1948 Comp., pp. 606–624; E.O. 11222, 3 CFR, 1964–1969 Comp., p. 306.

22. Section 771.206(c)(3) would read as follows:

Subpart B—General

§ 771.206 Exclusions.

* * * * *

(c) Matters excluded.

* * * * *

(3) An agency may, in its discretion, exclude performance appraisals and/or ratings (under Part 430, Subpart B, of this chapter) from coverage under this part.

[FR Doc. 85–20539 Filed 8–27–85; 4:37 pm]

BILLING CODE 6325–01–M

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5 CFR Part 551

Pay Administration Under the Fair Labor Standards Act: Exemptions

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: On October 25, 1983, the Office of Personnel Management (OPM) published final regulations to provide modified, clarified criteria for determining a Federal employee's exemption status under the Fair Labor Standards Act (FLSA). These regulations were first published at 48 FR 49494 on October 25, 1983, and were involved in judicial and Congressional action, which delayed implementation until July 3, 1985. OPM is now republishing these regulations for readers' convenience and proposing a 120 day implementation period from July 3, 1985, before their effective date. The modifications were intended to facilitate FLSA administration in the Federal sector and to alleviate the discrepancy between OPM's exemption criteria and the exemption criteria that are applicable to employees in the private sector. They also provided criteria for applying the FLSA to employees on temporary duty and to employees who travel to or from foreign areas.

DATE: Written comments will be considered if received no later than September 30, 1985.

ADDRESS: Send or deliver written comments to Anthony Ingrassia, Assistant Director for Agency Compliance and Evaluation, Office of Personnel Management, Room 5459, 1900 E Street, NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Michael Clogston, (202) 632–5691.

SUPPLEMENTARY INFORMATION:

Background

Regulations published as final rules on October 25, 1983, at 48 FR 49462, *et seq.*, concerning reduction-in-force (RIF), performance management, and the application of the Fair Labor Standards Act (FLSA) to the Federal workforce became effective on July 3, 1985. They are hereby republished as a proposed rulemaking to afford interested parties the opportunity to comment on a proposed implementation schedule for the new performance management system and the FLSA regulations and to allow interested parties the opportuity to consider substantive changes to parts of the regulation. Comments on any and all aspects of the notice will be received and considered. The current regulations in these areas remain in full force and effect, as they have been since July 3, 1985. As we did when these regulations were published as a final rule in October 1983, we are again proposing a 120 day period starting July 3, 1985, to permit agencies to complete necessary transition and review work to affect these changes. This means that with the 120 day delay, the full and final effective date is the first pay period on or after November 1, 1985. We are also providing the first 90 days of this period until October 1, 1985, for agency headquarters to submit requests for an OPM advisory opinion on exceptions to the presumption of exemption. On August 2, 1985, a memorandum was provided to Directors of Personnel notifying them that these regulations are now effective, providing the 120 day delay from July 3, 1985, and outlining procedures for requesting exception to the presumption of exemption.

Under these new regulations, it is assumed that if a position is properly classified at the GS–11 or above level (or equivalent level in other white collar salary systems), the position would properly be exempt under the provisions of the FLSA. However, we do recognize that there could exist rare occasions when there might be an exception to this presumption. For those unusual situations when an agency feels that an exception might exist, we propose a regulatory procedure for requesting a waiver (see § 551.207). We propose that these requests be made as soon as possible within the first 90 days of the 120 day implementation period. We will then make every effort to provide our advisory opinion to the agency headquarters prior to the expiration of the 120 day implementation period.

After the regulations become effective, all GS–11 and above employees (or equivalent level in other white collar salary systems) will be presumed to be exempt *unless* a waiver is granted by OPM. This means that if OPM does not grant the waiver during the 120 day period, the affected employees would be exempt when the regulations become effective. Of course, a waiver granted at a later date would have prospective effect only.

If an agency feels that it has a unique situation and seeks an advisory opinion (waiver) from OPM, the request must be submitted by the agency headquarters. These requests must be limited to specific occupational series, include copies of position descriptions and evaluation statements for the positions involved, and provide a clear, detailed analysis and explanation of why the exemption criteria are not met.

Discussion of Proposed Changes

The regulations as published in the October 25, 1983, **Federal Register**, are proposed to remain unchanged except for one minor revision in the mailing address for requesting advisory opinions in § 551.207.

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it provides procedures for applying the exemption criteria of the Fair Labor Standards Act to Federal employees.

List of Subjects in 5 CFR Part 551

Administrative practice and procedure, Fair Labor Standards Act, Government employees, Manpower training programs, Travel, Wages.

U.S. Office of Personnel Management.

Constance Horner,

Director.

It is proposed to amend Part 551 as follows:

PART 551—PAY ADMINISTRATION UNDER THE FAIR LABOR STANDARDS ACT

1. The authority for Part 551 is revised to read as follows:

Authority: Sec. 4(f) of the Fair Labor Standards Act as amended by Pub. L. 93–259 enacted April 8, 1974, 88 Stat. 55; 29 U.S.C. 204f.

2. Paragraph (h) of § 551.102 would continue to read as follows:

§ 551.102 Definitions.

* * * * *

(h) "Exempt area" means any foreign country, or any territory within the jurisdiction of the United States other than the following locations:

(1) A State of the United States;

(2) The District of Columbia;

(3) Puerto Rico;

(4) The Virgin Islands;

(5) Outer Continental Shelf Lands as defined in the Outer Continental Shelf Lands Act (67 Stat. 462);

(6) American Samoa;

(7) Guam;

(8) Wake Island;

(9) Eniwetok Atoll;

(10) Kwajalein Atoll; and

(11) Johnston Island.

2. Subpart B of Part 551 would continue to read, with the exception of § 551.207, which is revised, as follows:

Subpart B—Exemptions

Sec.

551.201 Agency authority.
551.202 General principles governing exemptions.
551.203 Exemption of General Schedule employees.
551.204 Executive exemption criteria.
551.205 Administrative exemption criteria.
551.206 Professional exemption criteria.
551.207 Exceptions by OPM.
551.208 Foreign exemption.
551.209 Application of the executive, administrative, and professional exemption criteria for periods of temporary duty.

Subpart B—Exemptions

§ 551.201 Agency authority

The employing agency shall exempt from the overtime provisions of the Act any employee who meets the exemption criteria of this subpart and such supplemental interpretations or instructions as shall be issued by the Office of Personnel Management.

§ 551.202 General principles governing exemptions.

In all exemption determinations, the agency shall observe the principles that:

(a) Exemption criteria shall be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption.

(b) The burden of proof rests with the agency that asserts the exemption.

(c) All employees who clearly meet the criteria for exemption must be exempted.

§ 551.203 Exemption of General Schedule employees

(a) Any employee properly classified at GS–4 or below (or the equivalent level in other white collar pay systems) shall be nonexempt;

(b) Any employee properly classified at GS–5 through GS–10 (or the equivalent level in other white collar pay systems) shall be exempt only if the employee is an executive, administrative, or professional employee as defined in §§ 551.204, 551.205, and 551.206 of this subpart;

(c) Except as provided in § 551.207 of this subpart, any employee properly classified at GS–11 or above (or the equivalent level in other white collar pay systems) shall be presumed to be exempt under this subpart. An agency that properly classifies an employee at GS–11 or above shall be deemed to have satisfied the burden of proof for asserting exemption.

§ 551.204. Executive exemption criteria.

An "executive" employee is a supervisor, foreman, or manager who supervises at least three subordinate employees and who meets all the following criteria:

(a) The employee's primary duty consists of management or supervision. This primary duty requirement is met if:

(1) The employee is a General Schedule employee whose position is determined to be "Supervisory" or "Managerial" under the Supervisory Grade-Evaluation Guide;

(2) The employee is a Federal Wage System employee whose position fully meets or exceeds the "Foreman range of responsibility" as defined in the Job Grading Standard for Supervisors; or

(3) The employee is subject to a pay system other than the General Schedule or the Federal Wage System and the employee's position meets or exceeds the definition of Supervisor in the Supervisory Grade-Evaluation Guide or the employee's position fully meets or exceeds the "Foreman range of responsibility" as defined in the Job Grading Standard for Supervisors.

(b) In addition to the primary duty criterion that applies to all employees, Foreman level supervisors in the Federal Wage System (or the equivalent in other wage systems) and employees classified at GS–5 or GS–6 (or the equivalent in other white collar pay systems) must spend 80 percent or more of the worktime in a representative workweek on supervisory and closely related work.

§ 551.205 Administrative exemption criteria.

An administrative employee is an advisor, assistant, or representative of management, or a specialist in a management or general business function or supporting service who meets all of the following criteria:

(a) The employee's primary duty consists of work that:

(1) Significantly affects the formulation or execution of management policies or programs; or

(2) Involves general management or business functions or supporting services of substantial importance to the organization serviced; or

(3) Involves substantial participation in the executive or administrative functions of a management official.

(b) The employee performs office or other predominantly nonmanual work which is:

(1) Intellectual and varied in nature; or

(2) Of a specialized or technical nature that requires considerable special training, experience, and knowledge.

(c) The employee must frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(d) In addition to the primary duty criterion that applies to all employees, General Schedule employees classified at GS–5 or GS–6 (or the equivalent in other white collar systems) must spend 80 percent or more of the worktime in a representative workweek on administrative functions and work that is an essential part of those functions.

§ 551.206 Professional exemption criteria.

A professional employee is an employee who meets all of the following criteria, or any teacher who is engaged in the imparting of knowledge or in the administration of an academic program in a school system or educational establishment.

(a) The employee's primary duty consists of:

(1) Work that requires knowledge in a field of science or learning customarily and characteristically acquired through education or training that meets the requirements for a bachelor's or higher degree, with major study in or pertinent

to the specialized field as distinguished from general education; or is performing work, comparable to that performed by professional employees, on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field; or

(2) Work in a recognized field of artistic endeavor that is original or creative in nature (as distinguished from work which can be produced by a person endowed with general manual or intellectual ability and training) and the result of which depends on the invention, imagination, or talent of the employee.

(b) The employee's work is predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought process for satisfactory performance.

(c) The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(d) In addition to the primary duty criterion that applies to all employees, General Schedule employees classified at GS–5 or GS–6 (or the equivalent in other systems), must spend 80 percent or more of the worktime in a representative workweek in professional functions and work that is an essential part of those functions.

§ 551.207 Exceptions by OPM.

The Office of Personnel Management will provide advisory opinions on agency-proposed exceptions to the presumption of exemption for specific occupations at GS–11 or above (or the equivalent level in other white collar pay systems) which is specified in § 551.203(c) of this subpart. Exceptions may not be made before OPM consideration. Requests for advisory opinions from agencies should be sent to: Office of Personnel Management, Agency Compliance and Evaluation, 1900 E Street, NW., Washington, D.C. 20415.

§ 551.208 Foreign exemption.

(a) This section provides criteria for applying the "foreign exemption" contained in section 13(f) of the Act. An employee who is exempt under the foreign exemption is not subject to the minimum wage and overtime provisions of the Act. The exemption status of an employee to whom the foreign exemption is not applicable shall be determined under the general criteria contained in this subject.

(b) Except as provided in § 551.208(d), an agency shall apply the foreign exemption to any employee who is permanently stationed in an "exempt area" as defined in § 551.102(h).

(c) An agency shall also apply the foreign exemption on a workweek basis to an employee on temporary duty who is not permanently stationed in an exempt area, but who performs *all* hours of work in a given workweek in an exempt area.

(d) The foreign exemption is not applicable to an employee permanently stationed in an exempt area for any given workweek in which the employee performs *any* hours of work in the United States or in a territory under the jurisdiction of the United States.

§ 551.209 Application of the executive, administrative, and professional exemption criteria for periods of temporary duty.

(a) This section is not applicable when an employee is detailed to an identical additional position or to a position of the same grade, series code, and basic duties as the employee is regularly assigned to. This section applies only when an employee is assigned to perform duties which are not included in the employee's representative workweek. For the period of any such temporary duty, the exemption criteria contained in §§ 551.202 through 551.207 of this subpart shall be applied using the procedures specified in this section.

(b) A nonexempt employee who is assigned to perform duties which are not included in the employee's permanent position shall remain nonexempt for the entire period of the temporary duty unless the following three conditions apply:

(1) The temporary duty exceeds 30 days;

(2) The employee occupies a permanent position, or is temporarily promoted to a position which is either:

(i) Classified at GS–7 or above (or the equivalent level in other white collar pay systems); or

(ii) Classified as a General Foreman (or the equivalent level in other wage systems);

(3) The employee's primary duty for the period of temporary duty is exempt duty as defined in this subpart.

(c) Except as provided in § 551.209(e), an exempt employee who is assigned to perform duties which are not included in the employee's permanent position shall remain exempt for the entire period of the temporary duty unless the following three conditions apply:

(1) The termporary duty exceeds 30 days;

(2) The employee occupies a permanent position, or is temporarily promoted to a position which is either:

(i) Classified at GS–7 or above (of the equivalent level in other white collar pay systems); or

(ii) Classified as a General Foreman (of the equivalent level in other wage systems);

(3) The employee's primary duty for the period of temporary duty is *not* exempt duty as defined in this subpart.

(d) An employee who becomes exempt under the criteria contained in § 551.209(b) shall be considered exempt for the entire period of temporary duty. An employee who becomes nonexempt under the criteria contained in § 551.209(c) shall be considered nonexempt for the entire period of temporary duty.

(e) An exempt employee who is classified at GS–5 or GS–6 (or the equivalent level in other white collar pay systems), or who is classified below General Foreman (or the equivalent level in other wage systems) who is assigned to perform duties which are not included in the employee's permanent position shall remain exempt *only* if the employee spends more than 80% of a given workweek performing exempt duties, in which case the employee is exempt for that workweek.

(f) Notwithstanding any other provision of this section, and regardless of an employee's grade level, the agency may determine that an emergency situation exists which threatens the life or safety of people, or serious damage to property, or serious disruption to the operations of an activity, and there is no recourse other than to assign qualified employees to perform emergency duties. In such a designated emergency the exemption status of an employee shall be determined on a workweek basis and the employee shall be nonexempt for any workweek in which the employee performs more than 20% nonexempt work.

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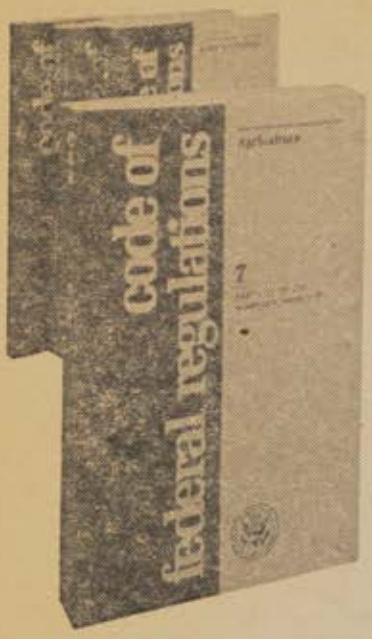

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