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Contents

Federal Register

Vol. 59, No. 217

Thursday, November 10, 1994

Agricultural Marketing Service
RULES
Olives grown in California and imported olives, 55985–55987
PROPOSED RULES
Cranberries grown in Massachusetts et al., 56007–56008
Onions (sweet) grown in Washington and Oregon, 56254–56273

Agriculture Department
See Agricultural Marketing Service
See Federal Crop Insurance Corporation
See Forest Service

Army Department
NOTICES
Environmental statements; availability, etc.:
Base realignment and closure—
Sacramento Army Depot, CA, 56062
Fort Rucker, AL; installations and master plan update operations, 56061–56062

Blind or Severely Disabled, Committee for Purchase From People Who Are
See Committee for Purchase From People Who Are Blind or Severely Disabled

Commerce Department
See Export Administration Bureau
See Foreign-Trade Zones Board
See International Trade Administration
See Minority Business Development Agency
See National Institute of Standards and Technology
See National Oceanic and Atmospheric Administration
See National Telecommunications and Information Administration
See Patent and Trademark Office
NOTICES
Agency information collection activities under OMB review, 56033

Committee for Purchase From People Who Are Blind or Severely Disabled
NOTICES
Procurement list; additions and deletions, 56061

Customs Service
RULES
Fines, penalties, and forfeitures:
Transshipped textiles and textile products; penalty guidelines, 55997–55999
North American Free Trade Agreement (NAFTA):
Customs modernization; technical corrections, 55996–55997
PROPOSED RULES
Customs inspectional services; baggage examination, 56014–56015

Defense Department
See Army Department
See Navy Department
NOTICES
Meetings:
Armed Forces Roles and Missions Commission, 56063
U.S. Court of Appeals for Armed Forces Code Committee, 56063

Drug Enforcement Administration
NOTICES
Schedules of controlled substances; production quotas:
Schedules I and II—
1994 aggregate, 56094

Education Department
NOTICES
Grants and cooperative agreements; availability, etc.:
Independent living services for older individuals who are blind program, 56322

Energy Department
See Energy Efficiency and Renewable Energy Office
See Energy Information Administration
See Federal Energy Regulatory Commission
NOTICES
Environmental statements; availability, etc.:
Paducah, KY, et al.—
Depleted uranium hexafluoride; long-term management and use, 56324–56328
Meetings:
Demonstration and Commercial Application of Renewable Energy and Energy Efficiency Technologies Advisory Committee, 56063–56064
Environmental Management Site Specific Advisory Board—
Savannah River Site, 56064

Energy Efficiency and Renewable Energy Office
NOTICES
Consumer product test features; waiver petitions:
York International, 56064–56066

Energy Information Administration
NOTICES
Agency information collection activities under OMB review, 56066–56070

Environmental Protection Agency
RULES
Hazardous waste program authorizations:
North Carolina, 56000–56003
Utah
Correction, 56114
PROPOSED RULES
Air programs:
Stratospheric ozone protection—
Production and consumption of various ozone-depleting substances; phaseout requirements, 56276–56320
Air quality implementation plans; approval and promulgation; various States:
New Jersey, 56019–56027
Pesticides; tolerances in food, animal feeds, and raw agricultural commodities:
FD & C Yellow No. 6 Aluminum Lake, etc., 56027–56029

NOTICES
Agency information collection activities under OMB review, 56076–56077
Environmental statements; availability, etc.:
Agency statements—
Comment availability, 56077–56078
Weekly receipts, 56078
Hazardous waste:
Land disposal restrictions—
Chemical Waste Management, Inc., 56078
Meetings:
Environmental Policy and Technology National Advisory Council, 56078–56079
Pesticide registration, cancellation, etc.:
Mevinphos et al., 56079

Executive Office of the President
See Trade Representative, Office of United States

Export Administration Bureau
NOTICES
Export privileges, actions affecting:
Govaerts, Franciscus B., 56033

Federal Aviation Administration
RULES
Airworthiness directives:
Bombardier, 55990–55992
British Aerospace, 55992–55993
Fokker, 55988–55990
McDonnell Douglas, 55993–55995
Correction, 56114
Teledyne Continental Motors, 55995
Restricted areas, 55995–55996
PROPOSED RULES
Airworthiness directives:
Boeing, 56008–56011
McDonnell Douglas, 56011–56014
NOTICES
Meetings:
Aviation Rulemaking Advisory Committee, 56104
Propeller and rotor driven aircraft quiet aircraft technology, Congressional report; availability, 56104–56105

Federal Communications Commission
PROPOSED RULES
Radio stations; table of assignments:
Texas, 56029

Federal Crop Insurance Corporation
NOTICES
Crop insurance:
Small grains, nursery, potatoes, and sugarcane endorsements; sales closing date extension, 56030

Federal Election Commission
NOTICES
Meetings; Sunshine Act, 56113

Federal Emergency Management Agency
RULES
Flood elevation determinations:
Florida et al., 56003–56004

Federal Energy Regulatory Commission
NOTICES
Electric rate and corporate regulation filings:
Commonwealth Edison Co. et al., 56072–56073
Wisconsin Power & Light Co. et al., 56073–56074
Natural gas certificate filings:
Texas Gas Transmission Corp. et al., 56074–56076
Applications, hearings, determinations, etc.:
Algonquin Gas Transmission Co., 56070
Allard, Jean, 56070
ANR Pipeline Co., 56070–56071
KN Interstate Gas Transmission Co., 56071
Natural Gas Pipeline Co. of America, 56071
Reed, Cordell, 56071
Texas Gas Transmission Corp., 56072

Federal Maritime Commission
NOTICES
Freight forwarder licenses:
Advanced International Freight Services Inc. et al., 56079–56080
Pactrans (USA) Inc. et al, 56080

Federal Reserve System
RULES
Membership of State banking institutions (Regulation H):
State member bank condition reports; removal of requirement to publish, 55987–55988
NOTICES
Meetings; Sunshine Act, 56113
Applications, hearings, determinations, etc.:
Cho Hung Bank et al., 56080
Community First Bankshares, Inc., 56080–56081
Lewis, Fred C., 56081
PAB Bankshares, Inc., et al., 56081

Financial Management Service
See Fiscal Service

Fiscal Service
NOTICES
Surety companies acceptable on Federal bonds:
Frontier Pacific Insurance Co., 56106

Fish and Wildlife Service
RULES
Endangered and threatened species:
Mann's bluegrass, 56330–56333
Pendant kihi fern, etc. (12 plants from Hawaii), 56333–56351
NOTICES
Endangered and threatened species permit applications, 56089

Food and Drug Administration
RULES
Animal drugs, feeds, and related products:
Sponsor name and address changes—
SmithKline Beecham Animal Health, 55999–56000

Foreign-Trade Zones Board
NOTICES
Applications, hearings, determinations, etc.:
South Carolina, 56034
Tennessee
Columbia Specialties, Inc., 56033–56034

Forest Service
NOTICES
Environmental statements; availability, etc.:
Caribou National Forest, ID, 56030–56032
Exxon Valdez oil spill area; Prince William Sound, Gulf of Alaska, and Alaska Peninsula, AK, 56032–56033

Health and Human Services Department
See Food and Drug Administration
See Health Care Financing Administration
See National Institutes of Health
See Public Health Service

Health Care Financing Administration
RULES
Medicare and medicaid:
Skilled nursing facilities; survey, certification, and enforcement, 56116–56252

Health Resources and Services Administration
See Public Health Service

Housing and Urban Development Department
RULES
Public and Indian housing:
Section 5(h) homeownership program, 56354–56371
NOTICES
Fair housing:
Substantially equivalent agencies certification; list, 56086–56089
Grants and cooperative agreements; availability, etc.:
Facilities to assist homeless—
Excess and surplus Federal property, 56086

Interior Department
See Fish and Wildlife Service
See Land Management Bureau
NOTICES
Environmental statements; availability, etc.:
Exxon Valdez oil spill area; Prince William Sound, Gulf of Alaska, and Alaska Peninsula, AK, 56032–56033

International Trade Administration
NOTICES
Antidumping:
Stainless steel angle from—
Japan, 56053–56055
Tapered roller bearings, four inches or less in outside diameter, and components, from—
Japan, 56035–56053
Antidumping and countervailing duties:
Administrative review requests, 56034–56035
Countervailing duties:
Agricultural tillage tools from—
Brazil, 56057
Ceramic tile from—
Mexico, 56057–56059
Cut-to-length carbon steel plate from—
Belgium and Spain, 56056
Textile mill products from—
Peru, 56057
Applications, hearings, determinations, etc.:
University of—
California, et al., 56056–56057
Michigan et al., 56055–56056

Interstate Commerce Commission
NOTICES
Railroad operation, acquisition, construction, etc.:
Burlington Northern Inc., et al., 56089–56093
Railroad services abandonment:
Consolidated Rail Corp., 56093
Norfolk & Western Railway Co., 56093

Justice Department
See Drug Enforcement Administration

Labor Department
NOTICES
North American Agreement on Labor Cooperation; submission acceptance for review:
United Electrical, Radio, and Machine Workers of America, 56094–56095

Land Management Bureau
NOTICES
Environmental statements; availability, etc.:
Caribou National Forest, ID, 56030–56032

Legal Services Corporation
NOTICES
Meetings; Sunshine Act, 56113

Minority Business Development Agency
NOTICES
Business development center program applications:
Alaska, 56059–56060

National Highway Traffic Safety Administration
NOTICES
Meetings:
Rulemaking, research and enforcement programs, 56105–56106

National Institute of Standards and Technology
NOTICES
Information processing standards, Federal:
POSIX; portable operating system interface; correction, 56114

National Institutes of Health
NOTICES
Meetings:
Advisory Committee to Director, 56081
National Heart, Lung and Blood Institute, 56082
Research Grants Division special emphasis panels, 56082

National Oceanic and Atmospheric Administration
RULES
Fishery conservation and management:
Western Pacific crustacean, 56004–56006
PROPOSED RULES
Fishery conservation and management:
Gulf of Mexico reef fish
Hearings, 56029
NOTICES
Permits:
Endangered and threatened species, 56060

National Telecommunications and Information Administration
NOTICES
Meetings:
Information Society G–7 ministerial level conference, 56060–56061

Navy Department
NOTICES
Environmental statements; availability, etc.:
Base realignment and closure—
Naval Base, Charleston, SC, 56062–56063

Nuclear Regulatory Commission
NOTICES
Environmental statements; availability, etc.:
Commonwealth Edison Co., 56095–56096

Maine Yankee Atomic Power Co., 56096–56097
Applications, hearings, determinations, etc.:
Power Authority of State of New York, 56097–56098
Radiation Management Consultants, 56098–56099

Office of United States Trade Representative
See Trade Representative, Office of United States

Patent and Trademark Office
PROPOSED RULES
Patent cases:
Term extensions for patents, 56015–56019

Public Health Service
See Food and Drug Administration
See National Institutes of Health
NOTICES
Agency information collection activities under OMB review, 56083–56086

Securities and Exchange Commission
NOTICES
Self-regulatory organizations; proposed rule changes:
Delta Government Options Corp., 56099–56100
Depository Trust Co.; correction, 56114
Government Securities Clearing Corp., 56100–56102
Midwest Clearing Corp. et al.; correction, 56114
National Association of Securities Dealers, Inc., 56102–56103

Small Business Administration
NOTICES
Disaster loan areas:
Georgia, 56103–56104
Wisconsin, 56104
Meetings; district and regional advisory councils:
Hawaii, 56104

Special Counsel Office
NOTICES
Senior Executive Service:
Performance Review Board; membership, 56099

Thrift Supervision Office
NOTICES
Receiver appointments:
Carteret Federal Savings Bank of Florida, 56106
Cherokee Valley Federal Savings Association, 56106
Home F.S.B., 56106
Second National Federal Savings Association, 56106–56107
TransOhio F.S.B., 56107
Applications, hearings, determinations, etc.:
Catlettsburg Federal Savings & Loan Association, 56107
Central Kentucky Federal Savings & Loan Association, 56107
Fed One Bank, M.H.C., 56107
First Federal Savings & Loan Association, 56107
First Federal Savings Bank of Frankfort, 56107
First Keystone F.S.B., 56107–56108
Gilmer Savings Bank F.S.B., 56108
Home Building Savings Bank, F.S.B., 56108
Huntington Federal Savings & Loan Association, 56108
Investors Federal Savings, 56108
Lafayette Savings Bank, F.S.B., 56108
Mutual Savings Bank, F.S.B., 56108
Perry County Savings Bank, F.S.B., 56109
Twin City F.S.B., 56109
Washington Federal Bank for Savings, 56109
Watsonville Federal Savings & Loan Association, 56109

Trade Representative, Office of United States
NOTICES
Japan:
Auto parts replacement market access barriers; investigation and request for comments, 56099

Transportation Department
See Federal Aviation Administration
See National Highway Traffic Safety Administration

Treasury Department
See Customs Service
See Fiscal Service
See Thrift Supervision Office

United States Information Agency
NOTICES
Grants and cooperative agreements; availability, etc.:
Newly Independent States (NIS)—U.S. academic studies inbound/outbound program, 56109–56111

Veterans Affairs Department
NOTICES
Advisory committees; annual reports; availability, 56111–56112

Separate Parts In This Issue

Part II
Department of Health and Human Services, Health Care Financing Administration, 56116–56252

Part III
Department of Agriculture, Agricultural Marketing Service, 56254–56273

Part IV
Environmental Protection Agency, 56276–56320

Part V
Department of Education, 56322

Part VI
Department of Energy, 56324–56328

Part VII
Department of the Interior, Fish and Wildlife Service, 56330–56351

Part VIII
Department of Housing and Urban Development, 56354–56371

Reader Aids
Additional information, including a list of public laws, telephone numbers, and finding aids, appears in the Reader Aids section at the end of this issue.

Electronic Bulletin Board
Free **Electronic Bulletin Board** service for Public Law numbers, **Federal Register** finding aids, and a list of documents on public inspection is available on 202–275–1538 or 275–0920.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

7 CFR
932.....55985
944.....55985
Proposed Rules:
929.....56007
956.....56254

12 CFR
208.....55987

14 CFR
39 (6 documents).....55988, 55990, 55992, 55993, 55995, 56114
73 (2 documents).....55995, 55996
Proposed Rules:
39 (2 documents).....56008, 56011

19 CFR
133.....55996
171.....55997
Proposed Rules:
123.....56014
148.....56014

21 CFR
520.....55999
522.....55999

24 CFR
905.....56354
906.....56354

37 CFR
Proposed Rules:
1.....56015

40 CFR
271.....56000
272.....56114
Proposed Rules:
52.....56019
82.....56276
180.....56027

42 CFR
401.....56116
431.....56116
435.....56116
440.....56116
441.....56116
442.....56116
447.....56116
483.....56116
488.....56116
489.....56116
498.....56116

44 CFR
65.....56003

47 CFR
Proposed Rules:
73.....56029

50 CFR
17 (2 documents).....56330, 56333
681.....56004
Proposed Rules:
641.....56029

Rules and Regulations

Federal Register
Vol. 59, No. 217
Thursday, November 10, 1994

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.

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 932 and 944

[Docket No. FV94–932–1FIR]

Olives Grown in California and Imported Olives; Final Rule Establishing Limited Use Olive Requirements During the 1994–95 Crop Year

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (Department) is adopting as a final rule without change, the provisions of an interim final rule which authorized the use of smaller sized olives in the production of limited use styles for California olives during the 1994–95 crop year. This rule is intended to allow more olives into fresh market channels and is consistent with current market demand for olives. As required under section 8e of the Agricultural Marketing Agreement Act of 1937, this rule also changes the olive import regulation.

EFFECTIVE DATE: December 12, 1994.

FOR FURTHER INFORMATION CONTACT: Caroline C. Thorpe, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2523–S, Washington, D.C. 20090–6456; telephone (202) 720–5127, or Terry Vawter, California Marketing Field Office, Fruit and Vegetable Division, AMS, USDA, 2202 Monterey Street, Suite 102–B, Fresno, CA 93721, telephone (209) 487–5901.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement No. 148 and Order No. 932 (7 CFR Part 932), as amended, regulating the handling of olives grown in California, hereinafter referred to as the order. The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the Act.

This rule is also issued under section 8e of the Act, which requires the Secretary of Agriculture to issue grade, size, quality, or maturity requirements for certain listed commodities, including olives, imported into the United States that are the same as, or comparable to, those requirements imposed upon the domestic commodities regulated under the Federal marketing orders.

The Department is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and requesting a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after date of the entry of the ruling.

There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of import regulations issued under section 8e of the Act.

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility. Import regulations issued under the Act are based on those established under Federal marketing orders.

There are 5 handlers of California olives that will be subject to regulation under the order during the current season, and there are about 1,200 olive producers in California. There are approximately 25 importers of olives subject to the olive import regulation. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.601) as those whose annual receipts are less than $500,000, and small agricultural service firms, which include handlers and importers, have been defined by the Small Business Administration as those having annual receipts of less than $5,000,000. None of the domestic olive handlers may be classified as small entities. The majority of olive producers and importers may be classified as small entities.

Nearly all of the olives grown in the United States are produced in California. The growing areas are scattered throughout California with most of the commercial production coming from inland valleys. The majority of olives are produced in central California. California olives are primarily used for canned ripe whole and whole pitted olives which are eaten out of hand as hors d'oeuvres or used as an ingredient in cooking and in salads. The canned ripe olive market is essentially a domestic market. A few shipments of California olives are exported.

Olive production has fluctuated from a low of 24,200 tons during the 1972–73 crop year to a high of 163,023 tons during the 1992–93 crop year. The California Olive Committee (committee) indicated that 1993–94 production totalled about 120,049 tons. Total production for the 1994–95 crop year is estimated to be 95,000 tons. Because olive trees need to restore their nutrients from one season to the next, various varieties of olives produced in California have alternate bearing

tendencies. This results in high production one year and low the next, which usually causes the total crop to vary greatly from year to year. This crop year's estimated production is expected to be smaller than last year due to weather conditions early in the season which resulted in poor fruit pollination.

However, based on past production and marketing experience, the committee believes that handlers will need smaller sized olives during the 1994–95 crop year to meet market demand for limited use styles of canned olives. Limited use olives are too small to meet the minimum size requirements established for whole and whole pitted canned ripe olives. However, they are large enough to be suitable for processing into limited use styles such as wedges, halves, slices, or segments. Absent this action, olives which are smaller than those authorized for whole and whole pitted canning uses would have to be disposed of by handlers into non-canning uses such as crushing into oil.

Paragraph (a)(3) of § 932.52 of the order provides that processed olives smaller than the sizes prescribed for whole and whole pitted styles may be used for limited uses if recommended by the committee and approved by the Secretary. Until October 1, 1991, paragraph (a)(3) also prescribed minimum sizes, by variety group, which could be authorized for use in the production of limited use styles by the Secretary.

Effective October 1, 1991, certain non-canning size disposition requirements specified in § 932.51(a)(3) and minimum sizes authorized for limited use specified in § 932.52(a)(3) of the marketing order were suspended. The committee may now recommend the use of olives for limited uses that are smaller than those previously permitted under the order. Minimum size and grade requirements may be recommended annually by the committee and approved by the Secretary. During the past three crop years, 1991–92, 1992–93, and 1993–94, the committee recommended sizes smaller than those previously authorized.

The minimum sizes which could previously be authorized for limited uses were established in a 1971 amendment to the marketing order. Olives smaller than the prescribed minimum sizes which could be authorized for limited uses had to be disposed of through less profitable non-canning uses such as crushing for oil. Returns to producers are lower on fruit used for such purposes. The use of smaller sized olives for limited use styles has been authorized in all but two crop years since the order was promulgated in 1965.

This final rule finalizes an interim final rule that will help growers and handlers to meet the growing market demand for limited use style olives based upon current conditions. The limited use size requirements allow the use of sizes which would otherwise have to be disposed of for less profitable, non-canning uses. Permitting the use of such smaller olives for limited use styles would therefore improve grower returns.

On July 13, 1994, the committee recommended by a vote of 15–1, to establish grade and size regulations for limited use size olives during the 1994–95 crop year pursuant to paragraph (a)(3) of § 932.52 of the order. The one handler member who dissented was concerned that approval of limited use size olives would be detrimental to handlers, due to already large inventories of such olives from the two previous seasons. The recommended grade and size requirements are the same as those established during the 1990–91 crop year, which means slightly larger minimum sizes than were in effect during the 1991–92, 1992–93, and 1993–94 crop years.

The specified sizes for the different olive variety groups are the minimum sizes which are deemed desirable for use in the production of limited use styles at this time. As in past years, permitting the use of the smaller olives in the production of limited use styles allowed handlers to take advantage of the strong market for halved, segmented, sliced, and chopped canned ripe olives. Handlers will be able to market more olives with this relaxation in size requirements than under regulations effective prior to the interim final rule.

The committee also based its decision on certain production and market factors. The last three crop years were the first crop years that limited use olives were authorized at sizes below the 1990–91 crop year minimum size requirements. Prior to the 1990–91 crop year, the committee investigated limited use olives that were below permitted minimum sizes. From investigations and surveys within the industry, the committee determined that limited use olives below 1990–91 minimum sizes could be efficiently sliced using current technology. However, consumer interest in and need for such olives also had to be determined, specifically for smaller sliced olive rings. Thus, minimum size requirements below the 1990–91 crop year were recommended and became effective for limited use olives.

During the following three seasons, the industry experienced a higher percentage of broken pieces in the smaller olives than with the slightly larger sizes. The U.S. Standards for Grades of Canned Ripe Olives (Standards) define a broken piece as any piece of olive that is less than three quarters of a full unit. This situation had a negative impact on the California olive market as the extra broken pieces caused customers to complain about the lack of uniformity and poorer quality of product from these smaller sizes. Such olives also had to compete with imported sliced olives that had fewer broken pieces. Therefore, the committee recommended slightly larger minimum size requirements for limited use olives in order to improve the quality of and enhance the market for California limited use olives.

Also, the committee estimates that production for this crop year is expected to be at 95,000 tons, which is smaller than the previous two seasons. Weather conditions early in the crop year caused poor pollination resulting in a smaller crop with an uneven distribution of sizes. The 1992–93 and 1993–94 crop years produced large crops of 163,023 tons and 120,049 tons, respectively. During years with large olive crops, the ratio of limited use olives to other sizes tends to be higher; there are more limited use size olives in proportion to the other sizes. During years with small olive crops, the ratio of smaller olives to other sizes is smaller; there tends to be fewer limited use size olives in proportion to the other sizes. The increased availability of limited use sized fruit could be reflected in handler processing for the last three seasons. For example, during the 1992–93 crop year, 19 percent of the olives (163,024 tons) processed by handlers were limited use, and during the 1991–92 crop year, 11 percent of total olives (63,259 tons) processed by handlers were limited use. Although limited use minimum sizes were larger during the 1990–91 season, limited use olives processed by handlers were 16 percent of total olives (126,879 tons) purchased by handlers. Thus, unlike the two previous seasons, fewer small limited use olives are expected to be harvested this season. The percentage of limited use olives is expected to be smaller. The slight increase in minimum limited use size requirements being established for the 1994–95 season is therefore not expected to greatly impact available supplies.

Thus, it is found that permitting limited use olives as recommended by the committee is expected to improve market conditions, and grower returns,

and meet market needs for limited use style olives.

Section 8(e) of the Act requires that whenever grade, size, quality, or maturity requirements are in effect for olives under a domestic marketing order, imported olives must meet the same or comparable requirements. This action allows smaller olives for limited use styles under the marketing order. Therefore, a corresponding change is needed in the olive import regulation.

Canned ripe olives, and bulk olives for processing into canned ripe olives, imported into the United States must meet certain minimum grade and size requirements specified in Olive Regulation 1 (7 CFR 944.401). All canned ripe olives are required to be inspected and certified prior to importation (release from custody of the United States Custom Service), and all bulk olives for processing into canned ripe olives must be inspected and certified prior to canning. "Canned ripe olives" means olives in hermetically sealed containers and heat sterilized under pressure, of two distinct types, "ripe" and "green-ripe", as defined in the Standards. The term does not include Spanish-style green olives.

Any lot of olives failing to meet the import requirements may be exported, disposed of, or shipped for exempt uses. Exportation or disposal of such olives would be accomplished under the supervision of the Processed Products Branch of the Fruit and Vegetable Division, with the costs of certifying the disposal of the olives borne by the importer. Exempt olives are those imported for processing into oil or donation to charity. Any person may also import up to 100 pounds (drained weight) of canned ripe olives or bulk olives exempt from these grade and size requirements.

This final rule finalizes an interim final rule that modified paragraph (b)(12) of the olive import regulation to authorize the importation of bulk olives which do not meet the minimum size requirements established for olives for whole and whole pitted uses to be used in the production of limited use styles during the 1994–1995 crop year. This rule also finalizes establishment of size regulations for such olives in paragraph (b)(12).

The committee recommended authorizing establishment of minimum sizes for use in the production of limited use styles during the 1994–95 crop year. The sizes are specified in terms of minimum weights for individual olives in various variety groups and are the same for both domestic and imported olives. An extra category is continued in the import regulation to apply comparable requirements for varieties not grown domestically. The minimum sizes for import requirements are as follows:

Variety Group 1, except the Ascolano, Barouni, or St. Agostino varieties—1/90 pound

Variety Group 1 of the Ascolano, Barouni, or St. Agostino varieties—1/140 pound

Variety Group 2, except the Obliza variety—1/180 pound

Variety Group 2 of the Obliza variety—1/140 pound

Olives not identifiable as to variety or variety group—1/180 pound

Each of the categories includes a 35 percent tolerance for olives weighing less than the specified minimum size.

Continuing to permit the use of smaller olives in the production of limited use styles will allow importers to take better advantage of the strong market for halved, segmented, sliced, and chopped canned ripe olives. Importers will be able to import and market more olives than would be permitted under regulations prior to the interim final rule that relaxed size requirements. This additional opportunity is provided to maximize the use of the available olive supply and facilitate market expansion. Prior to the interim final rule, the smaller fruit could not be imported for limited uses, and would have to be disposed of through less profitable, non-canning uses under the supervision of the inspection service, exported, or utilized in exempt outlets.

Based on these considerations, the Administrator of the AMS has determined that this action will not have a significant economic impact on a substantial number of small entities.

In accordance with section 8e of the Act, the U.S. Trade Representative has concurred with the issuance of this final rule.

After consideration of all relevant material presented, including the committee's recommendation, and other available information, it is found that this final rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

List of Subjects

7 CFR Part 932

Marketing agreements, Olives, Reporting and recordkeeping requirements.

7 CFR Part 944

Avocados, Food grades and standards, Grapefruit, Grapes, Imports, Kiwifruit, Limes, Olives, Oranges.

For the reasons set forth in the preamble 7 CFR Parts 932 and 944 are amended as follows:

1. The authority citation for 7 CFR Parts 932 and 944 continue to read as follows:

Authority: 7 U.S.C. 601–674.

PART 932—OLIVES GROWN IN CALIFORNIA

Accordingly, the interim final rule amending 7 CFR Part 932 which was published at 59 FR 46907 on September 13, 1994, is adopted as a final rule without change.

PART 944—FRUITS; IMPORT REGULATIONS

Accordingly, the interim final rule amending 7 CFR Part 944 which was published at 59 FR 46907 on September 13, 1994, is adopted as a final rule without change.

Dated: November 4, 1994.

Eric M. Forman,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 94–27920 Filed 11–9–94; 8:45 am]

BILLING CODE 3410–02–P

FEDERAL RESERVE SYSTEM

12 CFR Part 208

[Regulation H; Docket No. R–0854]

Membership of State Banking Institutions in the Federal Reserve System

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board is amending its Regulation H to remove the requirement that a state member bank publish its reports of condition. The amendment implements section 308 of the Riegle Community Development and Regulatory Improvements Act of 1994 which contains a number of measures to reduce the burden of federal regulation in depository institutions.

EFFECTIVE DATE: November 10, 1994.

FOR FURTHER INFORMATION CONTACT: Lawranne Stewart, Senior Attorney (202/452–3513), Legal Division; or Nancy Rawlings, Senior Financial Analyst, (202/ 452–3059), Division of Banking Supervision and Regulation. For the hearing impaired *only*, Telecommunications Device for the Deaf ("TDD"), Dorothea Thompson (202/ 452–3544).

SUPPLEMENTARY INFORMATION: Title III of the Riegle Community Development and

Regulatory Improvements Act of 1994 (Pub. L. 103–325, 108 Stat. 2160) (the Act) contains a number of measures to reduce the burden of federal regulation on depository institutions, Title III, section 308, amended the Federal Reserve Act to repeal the requirement in section 9, paragraph 6 (12 U.S.C. 324) that state member banks publish their reports of condition. Section 308 also removed similar publication requirements in the National Bank Act and the Federal Deposit Insurance Act.

The Board's Regulation H, Membership of State Banking Institutions in the Federal Reserve System, currently requires that a state member bank publish its report of condition (Forms FFIEC 031–034) within 20 days of the date the call for a report of condition is issued. 12 CFR 208.10(a). The report of condition is included in the Consolidated Reports of Condition and Income, usually referred to as the "Call Report," that state member banks generally are required to submit on a quarterly basis.

In order to achieve the reduction in regulatory burden intended under the Act, the Board is removing the provisions of Regulation H that require publication of a state member bank's report of condition. The amendments delete paragraphs (a) and (b) of § 208.10 of the regulation. Additionally, the section is renamed to reflect the subject of the remaining paragraph, in which the Board exercises its authority under section 21 of the Federal Reserve Act to waive submission of reports of affiliates by state member banks required under section 9 of the Federal Reserve Act.

The Board notes that a bank's Call Reports, including its reports of condition, will continue to be publicly available through the National Technical Information Service of the United States Department of Commerce under the Board's Rules Regarding Availability of Information. See 12 CFR 261.6(c)(3). Additionally, state member banks will continue to be required to advise shareholders, customers, and the general public of the availability of year-end Call Reports or other financial information under § 208.17 of Regulation H. See 12 CFR 208.17. The Board believes that these provisions are sufficient to ensure that adequate information is available to the public with respect to the condition of a state member bank. Additionally, the amendment has no effect on any publication requirements that may be imposed on a state member bank under state law.

Notice and Public Participation

The provisions of the Administrative Procedure Act relating to notice and public participation (5 U.S.C. 553(b)) have not been followed in connection with the adoption of these amendments, as the amendments implement a statutory provision that is intended to reduce the regulatory burden on banks. The Board therefore finds good cause for determining, and so determines, that notice and public participation are unnecessary and contrary to the public interest.

The provisions of the Act relating to notice of the effective date of a rule (5 U.S.C. 553(d)) have not been followed in connection with the adoption of these amendments. Section 308 of the Act was effective as of the date of enactment (September 24, 1994), and the Board is amending Regulation H promptly to implement the statutory provision. For this reason, the Board finds there is good cause to determine, and so determines, that notice is not necessary and would be contrary to the purpose of section 308. These amendments have therefore been published in final with an immediate effective date.

Regulatory Flexibility Act

Because the Board finds that no notice of proposed rulemaking is required, a statement concerning the effects of the rule on small entities is also not required under the Regulatory Flexibility Act. 5 U.S.C. 604. The Board notes, however, that the proposed amendments will reduce the regulatory burden imposed on all state member banks. The amendments should be particularly helpful to smaller institutions for which the publication requirement represent a more significant cost burden.

List of Subjects in 12 CFR Part 208

Accounting, Agriculture, Banks, banking, Capital adequacy, Confidential business information, Currency, Federal Reserve System, Reporting and recordkeeping requirements, Securities.

For the reasons set forth in the preamble, the Board amends 12 CFR part 208 as set forth below.

PART 208—MEMBERSHIP OF STATE BANKING INSTITUTIONS IN THE FEDERAL RESERVE SYSTEM (REGULATION H)

1. The authority citation for Part 208 is revised to read as follows:

Authority: 12 U.S.C. 36, 248(a), 248(c), 321–338a, 371d, 461, 481–486, 601, 611, 1814, 1823(j), 1828(o), 1831o, 1831p-1, 3105, 3310, 3331–3351 and 3906–3909; 15 U.S.C. 78b, 781(b), 781(g), 781(j), 78o-4(c)(5), 78q, 78q-1 and 78w; 31 U.S.C. 5318.

2. Section 208.10 is amended as follows:

a. The section heading is revised;

b. Paragraphs (a) and (b) are removed; and

c. The paragraph designation and heading for paragraph (c) are removed.

The revised Section heading reads as follows:

§ 208.10 Waiver of reports of affiliates.

* * * * *

Subpart A—[Amended]

3. In Subpart A, footnotes 11 through 13 are redesignated as footnotes 9 through 11, respectively.

§ 208.17 [Amended]

4. Section 208.17 is amended by removing the undesignated text following paragraph (a)(2).

By order of the Board of Governors of the Federal Reserve System, November 4, 1994.

William W. Wiles,

Secretary of the Board.

[FR Doc. 94–27870 Filed 11–9–94; 8:45am]

Billing Code 6210–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 93–NM–197–AD; Amendment 39–9054; AD 94–22–05]

Airworthiness Directives; Fokker Model F28 Mark 0100 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Fokker Model F28 Mark 0100 series airplanes, that requires inspections to detect cracks of certain demountable flange (inboard) wheel subassemblies and of the bolt bosses on certain demountable flange (outboard) wheel subassemblies, and modification or replacement of the wheel subassemblies. This amendment is prompted by reports of cracks and broken spokes found on certain main wheel assemblies of these airplanes. The actions specified by this AD are intended to prevent loss of a main wheel assembly during takeoff or landing.

DATES: Effective December 12, 1994.

The incorporation by reference of certain publications listed in the

regulations is approved by the Director of the Federal Register as of December 12, 1994.

ADDRESSES: The service information referenced in this AD may be obtained from Fokker Aircraft USA, Inc., 1199 North Fairfax Street, Alexandria, Virginia 22314. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Tim Dulin, Aerospace Engineer, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (206) 227–2141; fax (206) 227–1320.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain Fokker Model F28 Mark 0100 series airplanes was published in the **Federal Register** on February 28, 1994 (59 FR 9450). That action proposed to require inspections to detect cracks of certain demountable flange (inboard) wheel subassemblies and of the bolt bosses on certain demountable flange (outboard) wheel subassemblies, and modification or replacement of the wheel subassemblies.

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

One commenter supports the proposed rule.

One commenter requests that proposed paragraphs (a) and (b) be revised to provide credit for inspections accomplished within the last 500 landings before the final rule becomes effective. This commenter has been performing the repetitive inspections proposed in the AD. The commenter indicates that accomplishment of these inspections has proven to provide an acceptable level of safety by detecting all cracking before a critical cumulative defect size has been exceeded.

The FAA does not concur with the commenter's request. The FAA finds that the requested change is unnecessary because such credit is provided by the statement in the AD, "Required as indicated, unless accomplished previously." Any operator that has accomplished the required inspections may take credit for those inspections provided that the repetitive inspections are accomplished in accordance with the requirements of this AD.

The same commenter also requests that paragraphs (a)(1) and (b)(1) of the proposed rule be revised to clarify that the modification must be accomplished prior to further flight following the third inspection accomplished after the effective date of the AD. Since the commenter has been conducting the proposed inspections, the FAA infers from this commenter's request that it would like credit for those inspections without having to modify the wheel subassemblies sooner than the AD would require had the operator not conducted any inspections.

The FAA concurs that clarification is necessary, and has revised paragraphs (a)(1) and (b)(1) of the final rule to clarify its intent that the modification must be accomplished prior to further flight following the third inspection accomplished after the effective date of this AD.

This commenter also requests that paragraph (c) of the proposed rule be revised to delete the words "and modified." The commenter points out that wheel subassemblies that are inspected in accordance with the proposal may remain in service until the third inspection after the effective date of the AD, at which time those subassemblies must be modified. Therefore, a wheel subassembly that has been inspected in accordance with the proposed rule would be considered to be safe. The FAA finds that clarification is necessary. Paragraph (c) of the final rule has been revised to specify that certain parts may not be installed on the airplane unless the part has been inspected and subsequently modified in accordance with the requirements of this AD.

The FAA has revised paragraphs (a)(2) and (b)(2) of the final rule to indicate that the replacement procedures required by those paragraphs are found in the Airplane Maintenance Manual. This information was omitted inadvertently from the proposal.

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

The FAA estimates that 87 airplanes of U.S. registry will be affected by this AD, that it will take approximately 14 work hours per airplane to accomplish the required actions, and that the average labor rate is $55 per work hour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $66,990, or $770 per airplane.

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

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

94–22–05 Fokker: Amendment 39–9054. Docket 93–NM–197–AD.

Applicability: Model F28 Mark 0100 series airplanes equipped with Aircraft Braking Systems Corporation (ABSC) main wheel assembly, part number 5008131–4, serial numbers APR91–0570 through FEB93–0965 inclusive; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent loss of a main wheel assembly during takeoff or landing, accomplish the following:

(a) For airplanes equipped with a demountable flange (inboard) wheel subassembly, part number 5008142–4, serial numbers APR91–0570 through OCT92–0858 inclusive, or S–APR91–0097 through S–MAY92–0126 inclusive: Within 100 landings after the effective date of this AD, or at the next tire change, whichever occurs first, perform an eddy current inspection to detect cracks of the wheel subassembly, in accordance with paragraph C. of SECTION II—ACCOMPLISHMENT INSTRUCTIONS of ABSC Service Bulletin Fo100–32–46, dated December 24, 1992. Repeat this inspection thereafter at intervals not to exceed 500 landings or at each tire change, whichever occurs first.

(1) If no crack is found during any inspection required by paragraph (a) of this AD: Prior to further flight following the third inspection accomplished after the effective date of this AD, modify the wheel subassembly in accordance with paragraph D. of SECTION II—ACCOMPLISHMENT INSTRUCTIONS of the service bulletin. After modification, continue to inspect in accordance with paragraph (a) of this AD. If no crack is found during the first two inspections conducted after modification, no further action is required by this paragraph.

(2) If any crack is found during any inspection required by paragraph (a) of this AD, prior to further flight, replace the wheel subassembly, part number 5008142–4, with a serviceable part in accordance with the Airplane Maintenance Manual. Such replacement constitutes terminating action for the repetitive inspections required by paragraph (a) of this AD.

(b) For airplanes equipped with a demountable flange (outboard) wheel subassembly, part number 5008140–1, serial numbers APR91–0570 through FEB93–0965 inclusive, or S–MAR91–0002 through S–FEB93–0010 inclusive: Within 100 landings after the effective date of this AD, or at the next tire change, whichever occurs first, perform an eddy current inspection to detect cracks of the bolt bosses of the wheel subassembly, in accordance with paragraph B. of SECTION II—ACCOMPLISHMENT INSTRUCTIONS of ABSC Service Bulletin Fo100–32–48, dated March 10, 1993. Repeat this inspection thereafter at intervals not to exceed 500 landings or at each tire change, whichever occurs first.

(1) If no crack is found during any inspection required by paragraph (b) of this AD: Prior to further flight following the third inspection accomplished after the effective date of this AD, modify the wheel subassembly in accordance with paragraph C. of SECTION II—ACCOMPLISHMENT INSTRUCTIONS of the service bulletin. Such modification constitutes terminating action for the repetitive inspections required by paragraph (b) of this AD.

(2) If any crack is found during any inspection required by paragraph (b) of this AD, prior to further flight, replace the wheel subassembly, part number 5008140–1, with a serviceable part in accordance with the Airplane Maintenance Manual. Such replacement constitutes terminating action for the repetitive inspections required by paragraph (b) of this AD.

(c) After the effective date of this AD, no person shall install any of the following parts on any airplane unless that part has been inspected in accordance with paragraph (a) or (b) of this AD, as applicable. Following installation of any such part, the part must be repetitively inspected and modified in accordance with paragraphs (a) or (b) of this AD, as applicable.

(1) ABSC demountable flange (inboard) wheel subassembly, part number 5008142–4, having serial numbers APR91–0570 through OCT92–0858 inclusive, or S–APR91–0097 through S–MAY92–0126 inclusive;

(2) ABSC demountable flange (outboard) wheel subassembly, part number 5008140–1, having serial numbers APR91–0570 through FEB93–0965 inclusive, or S–MAR91–0002 through S–FEB93–0010 inclusive;

(3) Main wheel assembly, part number 5008131–4, having serial numbers APR91–0570 through FEB93–0965 inclusive.

(d) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Standardization Branch, ANM–113.

Note: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Standardization Branch, ANM–113.

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

(f) The inspections and modifications shall be done in accordance with ABSC Service Bulletin Fo100–32–46, dated December 24, 1992; or ABSC Service Bulletin Fo100–32–48, dated March 10, 1993. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Fokker Aircraft USA, Inc., 1199 North Fairfax Street, Alexandria, Virginia 22314. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(g) This amendment becomes effective on December 12, 1994.

Issued in Renton, Washington, on October 24, 1994.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 94–26719; Filed 11–9–94; 8:45 am]

BILLING CODE 4910–13–U

14 CFR Part 39

[Docket No. 93–NM–213–AD; Amendment 39–9055; AD 94–22–06]

Airworthiness Directives; Bombardier (Formerly Canadair) Model CL–600–2B19 (Regional Jet Series 100) Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Bombardier Model CL–600–2B19 series airplanes, that requires modification of the stall protection system (SPS) input wiring; a revision to the FAA-approved Airplane Flight Manual (AFM) to specify that a pre-flight check of the slip/skid indications must be conducted prior to engine start; and modification of the stall protection computer (SPC) to accept restored dual attitude and heading reference system (AHRS) input. This amendment is prompted by a report that the AHRS could send conflicting input to the SPC on the airplane. The actions specified by this AD are intended to prevent the loss of stall warning protection on the airplanes.

DATES: Effective December 12, 1994.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 12, 1994.

ADDRESSES: The service information referenced in this AD may be obtained from Bombardier, Inc., Canadair, Aerospace Group, P.O. Box 6087, Station Centreville, Montreal, Quebec H3C 3G9, Canada. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Engine and Propeller Directorate, New York Aircraft Certification Office, 181 South Franklin Avenue, Valley Stream, New York; or at the Office of the Federal Register, 800

North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Peter Cuneo, Electrical Engineer, Systems and Equipment Branch, ANE-173, FAA, Engine and Propeller Directorate, New York Aircraft Certification Office, 181 South Franklin Avenue, Room 202, Valley Stream, New York 11581; telephone (516) 791–6427; fax (516) 791–9024.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain Bombardier Model CL–600–2B19 (Regional Jet Series 100) series airplanes was published in the **Federal Register** on March 4, 1994 (59 FR 10340). That action proposed to require modification of the stall protection system (SPS) input wiring; a revision to the Normal Procedures section of the FAA-approved Airplane Flight Manual (AFM) to specify that a pre-flight check of the slip/skid indications must be conducted prior to engine start; and modification of the attitude and heading reference system (AHRS) to restore the dual AHRS inputs to the SPC.

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

One commenter requests that the FAA revise the final rule to indicate that it is not the AHRS that will be modified, but the stall protection computer (SPC). The FAA concurs, and has revised the preamble and paragraph (c) of the final rule to clarify its intent that the SPC be modified to restore the dual AHRS inputs to the SPC.

The commenter also requests that the proposed compliance time of 6 months for modification of the SPC, as specified in paragraph (c) of the proposed rule, be extended due to the complex nature of the SPC modification and the need to modify additional equipment to support the SPC change. The commenter proposes a target date of April 4, 1995, for accomplishment of the modification. As justification for this suggested extension, the commenter states that the SPC software will detect a loss of AHRS input to both SPC channels, and a "STALL FAIL" amber message will be displayed; additionally, the AFM defines abnormal procedures to be followed when loss of the SPS occurs. The commenter adds that there are several components in the SPS that can fail and cause the loss of stall protection on any one flight. The commenter believes that the loss of AHRS input is no worse than, and the system is just as reliable as, a system with two independent AHRS inputs.

The FAA does not concur. Compliance times for AD's are normally based on a parameter related to failure of a particular component. The FAA has determined that there is no apparent direct relationship between the transmittal of conflicting input from the AHRS to the SPC (and subsequent loss of stall warning protection on the airplane) and a calendar date. Therefore, the FAA does not consider that the compliance time for modification of the SPC should be expressed in terms of a calendar date, as suggested by the commenter.

Further, in developing a compliance time for this requirement of the rule, the FAA considered not only the safety implications, but the availability of required parts and the practical aspect of installing the required modification within a maximum interval of time allowable for all affected airplanes to continue to operate without compromising safety. In light of these items, the FAA finds that a compliance time of 6 months is appropriate. (Additionally, based on the effective date of this final rule, the compliance time for operators to perform the modification will fall close to the calendar date requested by the commenter.)

A new paragraph (d) has been added to the final rule to clarify the FAA's intent that modification of the SPC constitutes terminating action for the AFM revision required by paragraph (b) of this AD. Therefore, once the SPC is modified, the AFM revision may be removed from the AFM.

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

The FAA estimates that 9 airplanes of U.S. registry will be affected by this AD, that it will take approximately 2 work hours per airplane to accomplish the required actions, and that the average labor rate is $55 per work hour. The cost for required parts will be minimal. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $990, or $110 per airplane.

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

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

94–22–06 Bombardier, Inc. (Formerly Canadair): Amendment 39–9055. Docket 93–NM–213–AD.

Applicability: Model CL–600–2B19 (Regional Jet Series 100) series airplanes; serial numbers 7003 through 7026, inclusive; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent the loss of stall warning protection on the airplane, accomplish the following:

(a) Within 30 days after the effective date of this AD, modify the stall protection system (SPS) input wiring in accordance with Canadair Regional Jet Alert Service Bulletin A601R–34–028, Revision "A," dated October 22, 1993.

(b) Prior to further flight after accomplishment of the modification required by paragraph (a) of this AD, revise the Normal Procedures section of the FAA-approved Airplane Flight Manual (AFM) by inserting the following into the AFM as facing page 04–20–13 <FAA> to advise the flight crew that a pre-flight check of the slip/skid indications must be accomplished as a "Before Start" item. This may be accomplished by inserting a copy of this AD into the AFM.

"Change step (4) within paragraph E, Before Start, to read as follows:

(4) EFIS .....Checked and Set

- Check that no annunciations are displayed on EFIS
- EFIS slip/skid indications .....Normal
- Indications of a one-half (½) symbol width lateral deviation should be interpreted as an AHRS failure.

NOTE

- One-half (½) symbol width displacement corresponds to approximately one-half displacement on a conventional inclinometer.
- EFIS .....Set for Departure"

Note 1: Insertion of Canadair Regional Jet Airplane Flight Manual CSP A–012, Temporary Revision RJ/26, dated October 21, 1993, in the Normal Procedures section of the AFM is an acceptable method of compliance with the requirements of paragraph (b) of this AD.

(c) Within 9 months after the effective date of this AD, modify the stall protection computer (SPC) to accept restored dual attitude and heading reference system (AHRS) input, in accordance with a method approved by the Manager, New York Aircraft Certification Office (ACO), FAA, Engine and Propeller Directorate.

(d) Modification of the SPC in accordance with paragraph (c) of this AD constitutes terminating action for the AFM revision required by paragraph (b) of this AD. Following accomplishment of that modification, the AFM revision may be removed from the FAA-approved AFM.

(e) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, New York ACO. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, New York ACO.

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

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

(g) The modification shall be done in accordance with Canadair Regional Jet Alert Service Bulletin A601R–34–028, Revision "A," dated October 22, 1993. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Bombardier, Inc., Canadair, Aerospace Group, P.O. Box 6087, Station Centreville, Montreal, Quebec H3C 3G9, Canada. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Engine and Propeller Directorate, New York Aircraft Certification Office, 181 South Franklin Avenue, Valley Stream, New York; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(h) This amendment becomes effective on December 12, 1994.

Issued in Renton, Washington, on October 24, 1994.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 94–26721; Filed 11–9–94; 8:45 am]

BILLING CODE 4910–13–U

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14 CFR Part 39

[Docket No. 94–NM–41–AD; Amendment 39–9061; AD 94–22–11]

Airworthiness Directives; British Aerospace Model ATP Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain British Aerospace Model ATP airplanes, that requires modification of the power supply for the communications system. This amendment is prompted by reports of loss of power to the communications system due to an electrical fault in the ground crew jack box or the handset of the public address (PA) system. The actions specified by this AD are intended to prevent the inability of the flight crew to communicate with passengers via the PA system and with air traffic control due to loss of power to the communication system, which may lead to unsafe operation of the airplane.

DATES: Effective December 12, 1994.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 12, 1994.

ADDRESSES: The service information referenced in this AD may be obtained from Jetstream Aircraft, Incorporated, P.O. Box 16029, Dulles International Airport, Washington, DC 20041–6029. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: William Schroeder, Aerospace Engineer, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (206) 227–2148; fax (206) 227–1320.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain British Aerospace Model ATP airplanes series airplanes was published in the **Federal Register** on May 11, 1994 (59 FR 24382). That action proposed to require modification of the power supply for the communications system.

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were submitted in response to the proposal or the FAA's determination of the cost to the public.

Since issuance of the notice, Jetstream has issued errata sheets Numbers 1, 2, and 4, pertaining to Service Bulletin ATP–23–21–35288A. Erratum No. 1 was issued March 14, 1994, and adds an additional part number to the list of pertinent cable looms that appeared in Revision 2 of Jetstream Service Bulletin ATP–23–21–35288A. Erratum No. 2 was issued April 25, 1994, and corrects certain editorial errors that appeared in that same service bulletin. Erratum No. 4 was issued June 1, 1994, and includes an additional reference to the fuse and circuit breaker index that appeared in that same service bulletin. The final rule has been revised to add a note referencing the existence of these errata sheets. These errata sheets do not require any further work by operators who have previously complied with Jetstream Service Bulletin ATP–23–21–35288A, Revision 2, dated February 15, 1994.

After careful review of the available data, the FAA has determined that air safety and the public interest require the adoption of the rule with the change previously described. The FAA has determined that this change will neither increase the economic burden on any

operator nor increase the scope of the AD.

The FAA estimates that 10 airplanes of U.S. registry will be affected by this AD, that it will take approximately 30 work hours per airplane to accomplish the required actions, and that the average labor rate is $60 per work hour. Required parts will be provided by the manufacturer at no cost to the operator. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $18,000, or $1,800 per airplane.

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

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

94–22–11 British Aerospace: Amendment 39–9061. Docket 94–NM–41–AD.

Applicability: Model ATP airplanes having constructor's numbers 2002 through 2063 inclusive, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent the inability of the flight crew to communicate with passengers via the public address system and with air traffic control due to loss of power to the communication system, which may lead to unsafe operation of the airplane, accomplish the following:

(a) Within 675 hours time-in-service after the effective date of this AD, modify the power supply of the communications system (Modification 35288A) in accordance with Jetstream Service Bulletin ATP–23–21–35288A, Revision 2, dated February 15, 1994.

Note 1: Jetstream Service Bulletin ATP–23–21–35288A Erratum No. 1, dated March 14, 1994; Erratum No. 2, dated April 25, 1994; and Erratum No. 4, dated June 1, 1994; describe certain editorial corrections to Jetstream Service Bulletin ATP–23–21–35288A, Revision 2.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Standardization Branch, ANM–113.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Standardization Branch, ANM–113.

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

(d) The modification shall be done in accordance with Jetstream Service Bulletin ATP–23–21–35288A, Revision 2, dated February 15, 1994, which contains the following list of effective pages:

Page No.	Revision level shown on page	Date shown on page
1, 3, 6, 15	2	February 15, 1994.
2, 4, 5, 7–14, 16–19.	1	February 1, 1994.

This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Jetstream Aircraft, Incorporated, P.O. Box 16029, Dulles International Airport, Washington, DC 20041–6029. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(e) This amendment becomes effective on December 12, 1994.

Issued in Renton, Washington, on October 26, 1994.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 94–27048 Filed 11–9–94; 8:45 am]

BILLING CODE 4910–13–U

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14 CFR Part 39

[Docket No. 94–NM–65–AD; Amendment 39–9056; AD 94–22–07]

Airworthiness Directives; McDonnell Douglas Model DC–8–70 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to all McDonnell Douglas Model DC–8–70 series airplanes, that currently requires replacement of all attachment screws at the exhaust nozzle plug splice, and a check of nut plates for running torque and replacement of nut plates, if necessary. This amendment requires modification of the engine exhaust plug assemblies as terminating action for the currently required replacement and check. This amendment is prompted by reports of loose or missing attachments at the splice joint of the engine forward and aft exhaust plugs, and loss of the rear exhaust plug following an engine bird strike. The actions specified by this AD are intended to prevent reduced integrity of the engine exhaust plug installation, which may lead to separation of exhaust plugs from the airplane, and create a hazard to persons and property on the ground.

DATES: Effective December 12, 1994.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 12, 1994.

ADDRESSES: The service information referenced in this AD may be obtained from McDonnell Douglas Corporation, P.O. Box 1771, Long Beach, California 90801–1771, Attention: Business Unit Manager, Technical Administrative

Support, Dept. L51, M.C. 2–98. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Robert Baitoo, Aerospace Engineer, Propulsion Branch, ANM–141L, FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California 90806–2425; telephone (310) 988–5245; fax (310) 988–5210.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 83–02–05, amendment 39–4544 (48 FR 5539, February 7, 1983), which is applicable to all McDonnell Douglas Model DC–8–70 series airplanes, was published in the **Federal Register** on July 27, 1994 (59 FR 38144). The action proposed to require replacement of all attachment screws at the exhaust nozzle plug splice, and a check of nut plates for running torque and replacement of nut plates, if necessary. The action also proposed to require modification of the engine exhaust plug assemblies; when accomplished, this modification would terminate the need for the currently required replacement and check.

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

One commenter supports the proposed rule.

One commenter requests that the compliance time for the accomplishment of the modification be extended from the proposed 24 months to 60 months. This commenter states that it would have to procure additional spare engines and would need to special schedule its fleet of airplanes to accomplish this modification within the proposed compliance time. This would entail considerable expense over what was estimated in the FAA's cost impact analysis. The commenter indicates that a compliance time of 60 months would allow the modification to be accomplished during regularly scheduled maintenance, thereby eliminating any additional expenses.

The FAA does not concur. In developing an appropriate compliance time for this action, the FAA considered the safety implications, parts availability, and the practical aspect of installing the required modification during normal maintenance schedules. In light of this, the FAA does not consider it appropriate to change the compliance time for all operators based on the unique circumstances of an individual operator. On the other hand, paragraph (c) of the AD provides that an individual may request an adjustment of compliance time that provides an acceptable level of safety, and this would be the appropriate means for the commenter to seek the requested relief.

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

There are approximately 110 Model DC–8–70 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 78 airplanes of U.S. registry will be affected by this AD, that it will take approximately 46 work hours per airplane to accomplish the required modification, and that the average labor rate is $55 per work hour. Required parts will cost approximately $21,400 per airplane. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $1,866,540, or $23,930 per airplane.

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by removing amendment 39–4544 (48 FR 5539, February 7, 1983), and by adding a new airworthiness directive (AD), amendment 39–9056, to read as follows:

94–22–07 McDonnell Douglas: Amendment 39–9056. Docket 94–NM–65–AD. Supersedes AD 83–02–05, Amendment 39–4544.

Applicability: All Model DC–8–70 series airplanes, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent reduced integrity of the engine exhaust plug installation, which may lead to separation of exhaust plugs from the airplane, and create a hazard to persons and property on the ground, accomplish the following:

(a) Within 300 flight hours after February 7, 1983 (the effective date of AD 83–02–05, amendment 39–4544), accomplish the procedures specified in paragraphs (a)(1) and (a)(2) of this AD in accordance with McDonnell Douglas DC–8–70 Alert Service Bulletin A78–107, dated November 30, 1982; McDonnell Douglas DC–8–70 Service Bulletin 78–107, dated January 16, 1984; or McDonnell Douglas DC–8–70 Service Bulletin 78–107, Revision 1, dated June 12, 1984.

(1) Replace all NAS560XK4–5 screws with NAS560XK4–4 screws at the exhaust nozzle plug splice.

(2) Check nut plates for running torque and replace all nut plates not meeting the minimum run down torque of five inch-pounds.

(b) Within 24 months after the effective date of this AD, modify the engine exhaust plug assemblies in accordance with McDonnell Douglas DC–8–70 Service

Bulletin 78–112, Revision 2, dated March 8, 1994. Accomplishment of this modification constitutes terminating action for the replacement and check requirements of paragraph (a) of this AD.

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Los Angeles Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Los Angeles ACO.

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

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

(e) The modification shall be done in accordance with McDonnell Douglas DC–8–70 Service Bulletin 78–112, Revision 2, dated March 8, 1994. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from McDonnell Douglas Corporation, P.O. Box 1771, Long Beach, California 90801–1771, Attention: Business Unit Manager, Technical Administrative Support, Dept. L51, M.C. 2–98. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California 90806–2425; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(f) This amendment becomes effective on December 12, 1994.

Issued in Renton, Washington, on October 25, 1994.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 94–26875 Filed 11–9–94; 8:45 am]

BILLING CODE 4910–13–U

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14 CFR Part 39

[Docket No. 93–ANE–44; Amendment 39–9006; AD 94–01–03 R1]

Airworthiness Directives; Teledyne Continental Motors (Formerly Bendix) S–20, S–200, S–600, and S–1200 Series Magnetos

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; correction.

SUMMARY: This document makes a correction to Airworthiness Directive (AD) 94–17–11 applicable to Teledyne Continental Motors (TCM) (formerly Bendix) S–20, S–200, S–600, and S–1200 series magnetos that was published in the **Federal Register** on August 22, 1994 (59 FR 43029). The AD number is incorrect. This document corrects the error in the AD number. In all other respects, the original document remains the same.

DATES: Effective November 10, 1994.

SUPPLEMENTARY INFORMATION: A final rule airworthiness directive (AD) applicable to Teledyne Continental Motors (TCM) (formerly Bendix) S–20, S–200, S–600, and S–1200 series magnetos, was published in the **Federal Register** on August 22, 1994 (59 FR 43029). The AD was inadvertently assigned a new number, 94–17–11. Since the AD is a revision to a current AD, it should retain the original AD number, 94–01–03, with the suffix R1. The following correction is needed:

On page 43029, in the center column, in the header, in the second line, "AD 94–17–11" should read "AD 94–01–03 R1."

On page 43030, in the right column, in the title of the compliance section, in the first line, "94–17–11" should read "94–01–03 R1."

Issued in Burlington, MA, on November 3, 1994.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 94–27851 Filed 11–9–94; 8:45 am]

BILLING CODE 4910–13–P

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14 CFR Part 73

[Airspace Docket No. 94–AGL–27]

Addition of Controlling Agency for Restricted Area R–3302; Savanna, IL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action adds the Chicago Air Route Traffic Control Center (ARTCC) as the controlling agency for Restricted Area R–3302, Savanna, IL. This is an administrative change initiated by the Chicago ARTCC to facilitate joint use of the airspace. There are no changes to the boundaries, altitudes, time of designation, or activities conducted within the restricted area.

EFFECTIVE DATE: 0901 UTC, February 2, 1995.

FOR FURTHER INFORMATION CONTACT: Robert Kadechka, Military Operations Program Office (ATM–420), Office of Air Traffic System Management, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–7683.

SUPPLEMENTARY INFORMATION:

The Rule

This amendment to part 73 of the Federal Aviation Regulations adds the Chicago ARTCC as the controlling agency for R–3302, Savanna, IL. This change was initiated by the Chicago ARTCC and coordinated with the U.S. Army to facilitate joint use of the airspace. This will allow access for general aviation aircraft when the special use airspace is not active. Because this action is a minor technical amendment in which the public is not particularly interested, I find that notice and public procedure under 5 U.S.C. 553(b) are unnecessary. Section 73.33 of part 73 of the Federal Aviation Regulations was republished in FAA Order 7400.8B dated March 9, 1994.

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

Environmental Review

This action adds the controlling agency for the restricted area. There are no changes to the boundaries, altitudes, time of designation, or activities conducted within the restricted area. Accordingly, this action is not subject to environmental assessments and procedures as set forth in FAA Order 1050.1D, "Policies and Procedures for Considering Environmental Impacts."

List of Subjects in 14 CFR Part 73

Airspace, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 73 as follows:

PART 73—[AMENDED]

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

Authority: 49 U.S.C. app. 1348(a), 1354(a), 1510, 1522; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

§ 73.33 [Amended]

2. Section 73.33 is amended as follows:

R–3302 Savanna, IL [Amended]

By adding the following: "Controlling agency. FAA, Chicago ARTCC."

Issued in Washington, DC, on November 2, 1994.

Nancy B. Kalinowski,

Acting Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 94–27911 Filed 11–9–94; 8:45 am]

BILLING CODE 4910–13–P

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14 CFR Part 73

[Airspace Docket No. 94–AGL–22]

Amendment to Using Agency for Restricted Areas R–3403A, B, and C; Jefferson Proving Ground, IN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action changes the using agency for Restricted Areas R–3403A, B, and C, from "Commanding Officer, Jefferson Proving Ground, Madison, IN" to "Adjutant General, Indiana National Guard." This is an administrative change initiated by the U.S. Army due to decisions of the Base Realignment and Closure Commission. There are no changes to the boundaries, designated altitudes, times of designation, or activities conducted within the affected restricted areas.

EFFECTIVE DATE: 0901 UTC, February 2, 1995.

FOR FURTHER INFORMATION CONTACT: Robert Kadechka, Military Operations Program Office (ATM–420), Office of Air Traffic System Management, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–7683.

SUPPLEMENTARY INFORMATION:

The Rule

This amendment to part 73 of the Federal Aviation Regulations changes the using agency for Restricted Areas R–3403A, B, and C, Jefferson Proving Ground, IN, from "Commanding Officer, Jefferson Proving Ground, Madison, IN" to "Adjutant General, Indiana National Guard." This is an administrative change initiated by the U.S. Army due to decisions of the Base Realignment and Closure Commission. There are no changes to the boundaries, designated altitudes, times of designation, or activities conducted within the affected restricted areas. Because this action is a minor technical amendment in which the public is not particularly interested, I find that notice and public procedure under 5 U.S.C. 553(b) are unnecessary. Section 73.34 of part 73 of the Federal Aviation Regulations was republished in FAA Order 7400.8B dated March 9, 1994.

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

Environmental Review

This action changes the using agency of the restricted areas. There are no changes to the boundaries, designated altitudes, times of designation, or activities conducted within the affected restricted areas. Accordingly, this action is not subject to environmental assessments and procedures as set forth in FAA Order 1050.1D, "Policies and Procedures for Considering Environmental Impacts."

List of Subjects in 14 CFR Part 73

Airspace, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 73 as follows:

PART 73—[AMENDED]

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

Authority: 49 U.S.C. app. 1348(a), 1354(a), 1510, 1522; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

§ 73.34 [Amended]

2. Section 73.34 is amended as follows:

R–3403A Jefferson Proving Ground, IN [Amended]

By removing "Using agency. Commanding Officer, Jefferson Proving Ground, Madison, IN." and substituting the following: "Using agency. Adjutant General, Indiana National Guard."

R–3403B Jefferson Proving Ground, IN [Amended]

By removing "Using agency. Commanding Officer, Jefferson Proving Ground, Madison, IN." and substituting the following: "Using agency. Adjutant General, Indiana National Guard."

R–3403C Jefferson Proving Ground, IN [Amended]

By removing "Using agency. Commanding Officer, Jefferson Proving Ground, Madison, IN." and substituting the following: "Using agency. Adjutant General, Indiana National Guard."

Issued in Washington, DC, on November 2, 1994.

Nancy B. Kalinowski,

Acting Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 94–27910 Filed 11–9–94; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Part 133

[T.D. 94–90]

Technical Corrections to the Customs Regulations Relating to Customs Modernization

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

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by making certain technical corrections necessitated by one of the Customs Modernization provisions of the North American Free Trade Agreement Implementation Act, which went into effect when signed on December 8, 1993. The changes involve the time period that Customs must retain goods seized for certain intellectual property violations before the goods can be sold.

EFFECTIVE DATE: November 10, 1994.

FOR FURTHER INFORMATION CONTACT: George F. McCray, Intellectual Property Rights Branch, at 202–482–6960.

SUPPLEMENTARY INFORMATION:

Background

The Customs Modernization provisions contained in Title VI of the North American Free Trade Agreement Implementation Act of 1993, Public Law 103–182, 107 Stat. 2057 (the NAFTA Act), went into effect when the NAFTA

Act was signed on December 8, 1993 (section 692 of the NAFTA Act). One of the changes effected by this legislation was an amendment to 19 U.S.C. 1526(e)(3), which involves the time period for retention of goods seized by Customs for certain intellectual property rights violations. Section 663 of the NAFTA Act amended 19 U.S.C. 1526(e)(3) to allow Customs to sell merchandise bearing a counterfeit trademark at a public auction 90 days after the forfeiture of the merchandise if Customs has determined that a need for the merchandise has not been established by any federal, state, or local government or eleemosynary institution. Prior to this amendment, the statute had required Customs to wait more than one year before the sale of the merchandise by appropriate Customs officers.

As a result of the changes in 19 U.S.C. 526(e)(3), corresponding changes are required in the Customs Regulations, in § 133.52(c)(3) (19 CFR 133.52(c)(3)).

Discussion of Changes

In 19 CFR 133.52(c)(3), the time period is changed from "one year" to "90 days," and the entity responsible for the sale is changed from "the Commissioner or his designee" to "the Customs Service."

Inapplicability of Public Notice and Comment Requirements, Delayed Effective Date Reguirements, the Regulatory Flexibility Act, and Executive Order 12866

Inasmuch as these amendments merely conform the Customs Regulations to existing law, pursuant to 5 U.S.C.(a)(2) and (b)(3)(B), good cause exists for dispensing with notice and public procedure thereon as unnecessary. For the same reason, good cause exists for dispensing with the requirement for a delayed effective date, under 5 U.S.C. (a)(2) and (d)(3). Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This amendment does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

Drafting Information

The principal author of this document was Janet L. Johnson, Regulations Branch. However, personnel from other offices participated in its development.

List of Subjects in 19 CFR Part 133

Copyright, Customs duties and inspection, Imports, Reporting and recordkeeping requirements, Trade names, Trademarks.

Amendments to the Regulations

Part 133 of the Customs Regulations (19 CFR Part 133) is amended as set forth below:

PART 133—TRADEMARK, TRADE NAMES AND COPYRIGHTS

1. The general authority citation for Part 133 continues to read and specific authority for § 133.52 is added to read as follows:

Authority: 17 U.S.C. 101, 601, 602, 603; 19 U.S.C. 66, 1624; 31 U.S.C. 9701.

* * * * *

Section 133.52 also issued under 19 U.S.C. 1526;

* * * * *

§ 133.52 [Amended]

2. Section 133.52(c)(3) is amended by removing the words "1 year" in the first sentence and adding in their place "90 days"; and removing the words "Commissioner or his designee" wherever they appear and adding in their place the words "Customs Service".

George J. Weise,

Commissioner of Customs.

Approved: October 24, 1994.

Dennis M. O'Connell,

Acting Deputy Assistant Secretary of the Treasury.

[FR Doc. 94–27906 Filed 11–9–94; 8:45 am]

BILLING CODE 4820–02–P

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19 CFR Part 171

(T.D. 94–89)

Penalty Guidelines Applicable to Transshipped Textiles and Textile Products

AGENCY: Customs Service, Treasury.

ACTION: Final rule.

SUMMARY: This document amends the revised penalty guidelines pertaining to section 592 of the Tariff Act of 1930, as amended, by adopting the interim rule that added, as an example of an aggravating factor in arriving at a final administrative penalty decision, violations involving the illegal importation and entry of transshipped textiles and textile products. This amendment will enhance the U.S. textile import program and other programs or laws administered or enforced by Customs which involve a determination of the country of origin of imported merchandise.

DATES: Final rule is effective on November 10, 1994. This final rule is applicable to all textiles and textile products entered or withdrawn from warehouse for consumption, on or after, November 10, 1994.

FOR FURTHER INFORMATION CONTACT: Robert Pisani, Penalties Branch, Office of Regulations and Rulings (202–482–6950).

SUPPLEMENTARY INFORMATION:

Background

Customs is confronted with a continuing problem involving textiles and textile products which, after exportation from their country of origin, are transshipped through a second country, thereby facilitating a false or otherwise unlawful statement, act, or omission regarding the country of origin of the merchandise when ultimately imported and entered in the United States. Such statements, acts or omissions may impinge on a number of programs or laws administered or enforced by Customs, including country of origin marking requirements, textile quota limitations and visa requirements under the U.S. textile import program, duty assessment and collection, and collection of trade statistics. The consequences of such unlawful statements, acts or omissions may include interference with the consumer's right to make an informed decision regarding a prospective purchase, undermining of bilateral and multilateral textile agreements to which the United States is a party and with resulting injury to domestic producers of textiles and textile products, loss of revenue, and inability to maintain proper trade statistics to support overall U.S. trade policy and analysis.

Under section 592 of the Tariff Act of 1930, as amended (19 U.S.C. 1592), a penalty may be assessed against any party who has committed fraud, gross negligence or negligence in connection with the unlawful entry of any merchandise in the United States, including textiles and textile products that have been transshipped in the circumstances described above. Provisions relating to the filing of petitions, and action upon petitions, for relief from fines, penalties and forfeitures incurred under laws administered by Customs, including penalties under section 592, are set forth in Part 171 of the Customs Regulations (19 CFR Part 171). Appendix B to Part 171 sets forth Revised Penalty Guidelines under section 592. Although Appendix B is not intended to have regulatory effect, it represents the official Customs position regarding the standards that are generally applicable to the administrative review of petitions

for remission or mitigation of penalties incurred under section 592. Appendix B includes, in section (G), certain factors that may be determined by Customs to be aggravating factors in arriving at a final administrative penalty decision. Appendix B is currently undergoing review within Customs with a view to publication of a proposed revision of those guidelines, with opportunity for public comment, in the near future.

Notwithstanding the upcoming revision of Appendix B to Part 171 and the intended solicitation of public comments thereon, Customs determined that immediate action should be taken in a penalty mitigation context to address the textile and textile products transshipment problem described above. Customs notes that transshipments have resulted in material false statements, acts or omissions regarding the country of origin of the imported merchandise, including false designations of origin. Consequently, it is Customs position that transshipment must be susceptible to treatment as an aggravating factor in arriving at a final mitigated section 592 penalty decision under Part 171 of the regulations.

On March 30, 1994, Customs published as T.D. 94–29 an interim rule in the **Federal Register** (59 FR 14745) to amend section (G) of Appendix B to Part 171 by adding a reference to "transshipment in the case of textiles and textile products affecting a country of origin determination" as an aggravating factor. Although this change was effective for merchandise entered, or withdrawn from warehouse for consumption, on or after April 1, 1994, Customs stated that it would consider any comments submitted.

Customs received eleven comments in response to the interim rule. The comments received, and Customs responses to them, where appropriate, are set forth below.

Comment Analysis

The comments received ostensibly fell into two categories: those unequivocally endorsing the interim rule as written (three comments); and those opposing the interim rule or seeking to limit its application (eight comments).

Comments Supporting the Interim Rule

The three commenters supporting the interim rule expressed concern over Customs ability to combat transshipment resulting in an unlawful entry of textiles and textile products, and were of the opinion that the interim rule, as written, would serve as a useful deterrent to such unlawful practices.

Comments Opposing the Interim Rule

Regarding the eight commenters opposing the interim rule or seeking to limit its application, three claimed that the interim rule unfairly discriminated against textile importers by holding such importers to a higher standard of care than that required of parties importing other merchandise. Two of these three commenters indicated that it was illogical for Customs to consider the act of transshipment an aggravating factor when, in fact, the act of transshipment constitutes the violation in question or, at least, an element of the violation. Put another way, these two commenters were of the opinion that aggravating factors cannot constitute the violation in question. Otherwise, according to one of these commenters, undervaluation logically would have to be an aggravating factor in cases involving understatement of value.

Two other commenters stated that the interim rule should be limited in its application to those instances where the importer had actual knowledge of the improper transshipment of the textile products at issue.

Regarding the remaining three commenters fully opposed to the interim rule, they objected on the basis that the rule constituted the imposition of unfair additional penalties and that mitigation in such cases would become meaningless. These commenters felt that existing guidelines were adequate and that the interim rule was not in keeping with the spirit of the recently enacted Customs Modernization Act. One of these commenters also expressed concern that the rule would permit Customs to raise the assessed penalty in cases involving transshipment. Finally, one of the commenters indicated that rules such as the interim rule have forced the closure of his apparel importing company.

Customs Response

Customs acknowledges the concerns expressed by those commenters opposed to the interim rule on the basis that the rule discriminates against textile importers, but the importing community and domestic industry must, in Customs opinion, acknowledge the dilemma faced by the agency, namely, balancing the interests of the importer against the explosion of illegal transshipments to the United States. Aside from the obvious negative impact such shipments can have on domestic industry, illegally transshipped goods deceive U.S. consumers regarding the country of origin of imported merchandise, as well as distort the application of bilateral agreements with our trading partners. When faced with similar situations, Customs has had to take enforcement actions which focus on specific commodities or types of merchandise. In effect, the interim rule provides a warning to textile importers about the threat of illegal transshipment and suggests that such importers take extra pre-importation measures to ensure the accuracy of the country of origin of the products in question.

Contrary to some commenters' views, it is clear that these textile transshipments do not, *per se*, constitute a violation of section 1592. Such transshipments may, or may not, result in false statements concerning the country of origin on entry documents, or goods being falsely marked with an incorrect country of origin. Consequently, a violation occurs at the time when the transshipped textile goods arrive for entry in the United States and are falsely marked, or the entry documents contain culpable, material false statements, omissions or acts. In other words, with respect to the circumstances under discussion, the act of textile transshipment does not, in and of itself, constitute a violation of section 1592.

With respect to those commenters who recommended implementation of the rule provided that it only apply to those instances where the importer has actual knowledge of the improper transshipment, Customs notes that application of this aggravating factor would first require that Customs establish a violation of section 1592. If the importer is an innocent party to the transaction, then that importer will not be considered culpable, and therefore, cannot be charged with a violation of section 1592.

Customs also would like to clear up what appears to be a misunderstanding regarding the meaning of the term "aggravating factor" and the practical impact of the presence of an aggravating factor in a penalty situation. First, as indicated above, aggravating factors alone do not constitute a violation of section 1592. Second, contrary to some commenters' belief, the presence of an aggravating factor does not increase or decrease the asserted level of culpability set forth in Customs section 1592 prepenalty and/or penalty notices. For example, in the case of an importer's material grossly negligent false statement of origin on an entry document, Customs does not increase the asserted level of culpability to fraud because the goods were transshipped. Rather, in arriving at the administrative disposition in a penalty action, Customs treats the presence of an aggravating factor (designated as such in the

Customs guidelines) as an offset to the presence of a mitigating factor. It should also be noted that because the interim rule involves Customs penalty guidelines and such guidelines are neither statutory nor regulatory, per se, certain circumstances may warrant deviation from the ordinary application of the guidelines.

Customs also is of the opinion that the interim rule is, in fact, in keeping with the spirit of the Customs Modernization provisions (Title VI) of the North American Free Trade Agreement Implementation Act (the Act), Public Law 103–182, 107 Stat. 2057 (December 8, 1993). Both the language of the Act and its legislative history clearly set forth the concepts of "shared responsibility" and "informed compliance" as critical to its effectiveness and application. In the instant situation, the interim rule is one of the measures Customs intends to use to address the significant problem of illegal transshipment. The interim rule informs the textile importer that he or she can avoid application of the interim rule by taking adequate measures prior to importation to attempt to ensure the accuracy and completeness of the information provided to Customs at the time of entry, including proper marking or other indication of the country of origin of the articles. In light of the problems associated with illegal transshipment, Customs believes that it is not unreasonable to expect textile importers to exert diligence in attempting to verify the source of their goods prior to importation commensurate with the statutory requirement to exercise reasonable care in presenting documentation to Customs during the entry process. If a textile importer can demonstrate that such measures were taken (i.e., the importer was not culpable and acted with reasonable care), then there can be no violation of section 1592 because culpability is a requisite element of such a violation. Put another way, the interim rule does not apply to those textile importers who responsibly take such adequate measures prior to importation.

In view of the foregoing, Customs is adopting the text of the interim rule as final without change.

The Regulatory Flexibility Act, and Executive Order 12866

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the amendment will not have a significant economic impact on a substantial number of small entities. This document does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

List of Subjects in 19 CFR Part 171

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

Amendment to 19 CFR Chapter I

For the reasons stated above, the interim rule amending part 171 of the Customs Regulations (19 CFR part 171), which was published at 59 FR 14745–14746 on March 30, 1994 (T.D. 94–29), is adopted as a final rule without change.

Michael H. Lane,

Acting Commissioner of Customs.

Approved: October 24, 1994.

Dennis M. O'Connell,

Acting Deputy Assistant Secretary of the Treasury.

[FR Doc. 94–27905 Filed 11–9–94; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 520 and 522

Animal Drugs, Feeds, and Related Products; Change of Sponsor

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect a change of sponsor for eight new animal drug applications (NADA's) from Hoffmann-La Roche, Inc., to SmithKline Beecham Animal Health.

EFFECTIVE DATE: November 10, 1994

FOR FURTHER INFORMATION CONTACT: Benjamin A. Puyot, Center for Veterinary Medicine (HFV–130), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–594–1646.

SUPPLEMENTARY INFORMATION: Hoffmann-LaRoche, Inc., Nutley, NJ 07110, has informed FDA that it has transferred ownership of, and all rights and interests in, the following approved NADA's to SmithKline Beecham Animal Health, 1600 Paoli Pike, West Chester, PA 19380:

NADA Number	Ingredient	Trade name
15–102	Sulfadimethoxine	Albon Tablets.
31–205	Sulfadimethoxine	Albon Drinking Water Solution.
31–715	Sulfadimethoxine	Albon Bolus.
41–245	Sulfadimethoxine	Albon Injection 40%.
43–785	Sulfadimethoxine	Albon Oral Suspension 5%.
46–285	Sulfadimethoxine	Albon Soluble Powder.
93–107	Sulfadimethoxine	Albon Sustained-Release Bolus.
100–929	Sulfadimethoxine/ormetoprim	Primor Tablets.

Accordingly, the agency is amending the regulations in 21 CFR 520.2220a(b), 520.2220b(b)(1), 520.2220c(c), 520.2220d(b) and 522.2220(a)(2)(i) to reflect the change of sponsor.

List of Subjects

21 CFR Part 520

Animal drugs.

21 CFR Part 522

Animal drugs.

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, 21 CFR parts 520 and 522 are amended as follows:

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

1. The authority citation for 21 CFR part 520 continues to read as follows:

Authority: Sec. 512 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b).

§ 520.2220a [Amended]

2. Section 520.2220a *Sulfadimethoxine oral solution and soluble powder* is amended in paragraph (b) by removing "000004" and by adding in its place "053571".

§ 520.2220b [Amended]

3. Section 520.2220b *Sulfadimethoxine tablets and boluses* is amended in paragraph (b)(1) by removing "000004" and by adding in its place "053571".

§ 520.2220c [Amended]

4. Section 520.2220c *Sulfadimethoxine oral suspension* is amended in paragraph (c) by removing "000004" and by adding in its place "053571".

§ 520.2220d [Amended]

5. Section 520.2220d *Sulfadimethoxine-ormetoprim tablets* is amended in paragraph (b) by removing "000004" and by adding in its place "053571".

PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS

6. The authority citation of 21 CFR part 522 continues to read as follows:

Authority: Sec. 512 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b).

§ 522.2220 [Amended]

7. Section 522.2220 *Sulfadimethoxine injection* is amended in paragraph (a)(2)(i) by removing "000004" and by adding in its place "053571".

Dated: November 2, 1994.

Robert C. Livingston,

Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.

[FR Doc. 94–27793 Filed 11–9–94; 8:45 am]

BILLING CODE 4160–01–F

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[FRL–5101–4]

North Carolina; Final Authorization of Revisions to State Hazardous Waste Management Program

AGENCY: Environmental Protection Agency.

ACTION: Immediate final rule.

SUMMARY: North Carolina has applied for final authorization of revisions to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). North Carolina's revisions consist of the provisions of HSWA Cluster I promulgated November 8, 1984, through June 30, 1987. The Environmental Protection Agency has reviewed North Carolina's application and has made a decision, subject to review and comment, that North Carolina's hazardous waste program revision satisfies all of the requirements necessary to qualify for final authorization. Thus, EPA intends to approve North Carolina's hazardous waste program revisions. North Carolina's application for program revisions is available for public review and comment.

DATES: Final authorization for North Carolina's program revisions shall be effective January 9, 1995 unless EPA publishes a prior **Federal Register** action withdrawing this immediate final rule. All comments on North Carolina's program revision application must be received by the close of business, December 12, 1994.

ADDRESSES: Copies of North Carolina's program revision application are available during normal business hours at the following addresses for inspection and copying: North Carolina Department of Environment, Health, and Natural Resources, Hazardous Waste Branch, P.O. Box 27687, Raleigh, North Carolina 27611–7687; U.S. EPA Region IV, Library, 345 Courtland Street, NE, Atlanta, Georgia 30365; (404) 347–4216. Written comments should be sent to Al Hanke at the address listed below.

FOR FURTHER INFORMATION CONTACT: Al Hanke, Chief, State Programs Section, Waste Programs Branch, Waste Management Division, U.S. Environmental Protection Agency, 345 Courtland Street, NE, Atlanta, Georgia 30365; (404) 347–2234.

SUPPLEMENTARY INFORMATION

A. Background

States with final authorization under Section 3006(b) of the Resource Conservation and Recovery Act ("RCRA" or "the Act"), 42 U.S.C. 6926(b), have a continuing obligation to maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal hazardous waste program. In addition, as an interim measure, the Hazardous and Solid Waste Amendments of 1984 (Public Law 98–616, November 8, 1984, hereinafter "HSWA") allows States to revise their programs to become substantially equivalent instead of equivalent to RCRA requirements promulgated under HSWA authority. States exercising the latter option receive "interim authorization" for the HSWA requirements under Section 3006(g) of RCRA, 42 U.S.C. 6926(g), and later apply for final authorization for the HSWA requirements.

In accordance with Part 271, § 271.21(a) of Title 40 of the Code of Federal Regulations (40 CFR 271.21(a)), revisions to State hazardous waste programs are necessary when Federal or State statutory or regulatory authority is modified or when certain other changes occur. Most commonly, State program revisions are necessitated by changes to EPA's regulations in 40 CFR parts 124, 260 through 268 and 270.

B. North Carolina

North Carolina initially received final authorization for its base RCRA program effective on December 31, 1984, (49 FR 48694). North Carolina most recently received final authorization effective June 3, 1994, for RCRA Cluster II (59 FR 15633, April 4, 1994). On October 29, 1991, North Carolina submitted a program revision application for additional program approval for the requirements of HSWA Cluster I. EPA granted North Carolina interim authorization for HSWA Cluster I effective June 1, 1993. Today, North Carolina is seeking final authorization of its program revisions in accordance with 40 CFR 271.21(b)(3).

EPA has reviewed North Carolina's application and has made an immediate final decision that North Carolina's hazardous waste program revisions satisfy all of the requirements necessary to qualify for final authorization. Consequently, EPA intends to grant final authorization for the HSWA Cluster I program modifications to North Carolina. The public may submit written comments on EPA's immediate final decision up until December 12, 1994.

Copies of North Carolina's application for these program revisions are available for inspection and copying at the locations indicated in the "Addresses" section of this notice.

Approval of North Carolina's program revisions shall become effective January 9, 1995, unless an adverse comment pertaining to the State's revisions discussed in this notice is received by the end of the comment period.

If an adverse comment is received, EPA will publish either: (1) A withdrawal of the immediate final decision; or (2) a notice containing a response to comments which either affirms that the immediate final decision takes effect or reverses the decision.

EPA issues, administers, and enforces RCRA hazardous waste permits, or portions of permits, that contain

conditions based upon the Federal program provisions for which the State has not received authorization. Upon the effective date of this authorization, EPA will suspend issuance of any further permits under the provisions for which the State is being authorized. Any permits, or portions of permits, that were issued by EPA prior to the effective date of this authorization will be terminated pursuant to 40 CFR 124.5(d). Those permits, or portions of permits, issued by EPA not terminated pursuant to 40 CFR 124.5(d) will either: (1) Be modified to allow for an earlier expiration date pursuant to 40 CFR 270.41 (a); or (2) be administered by the State until the permit is reissued.

North Carolina is today seeking authority to administer the following Federal requirements promulgated between November 8, 1984, through June 30, 1987:

Federal requirements	HSWA or FR notice	Promulgation	State authority
Hazardous and Used Oil Fuel Criminal Penalties.	HSWA 3006(h), 3008(d), 3014		NCGS 130A–294(c)(1)&(15) NCGS 150B–14(a)(1)&(c)
Dioxin Waste Listing and Management Standards.	50 FR 1978	1/14/85	15A NCAC 13A.0006(a) 15A NCAC 13A.0006(d) 15A NCAC 13A.0006(e) 15A NCAC 13A.0009(j) 15A NCAC 13A.0009(k) 15A NCAC 13A.0009(l)(1) 15A NCAC 13A.0009(m) 15A NCAC 13A.0009(n) 15A NCAC 13A.0009(o) 15A NCAC 13A.0009(q) 15A NCAC 13A.0010(a) 15A NCAC 13A.0010(o) 15A NCAC 13A.0010(p) 15A NCAC 13A.0013(b)
Fuel Labeling	HSWA 3004(r)(1)		NCGS 130A–294(c)(1)&(15) NCGS 150B–14(a)(1)&(c)
Paint Filter Test	50 FR 18370	4/30/85	15A NCAC 13A.0009(c) 15A NCAC 13A.0009(f) 15A NCAC 13A.0009(o) 15A NCAC 13A.0010(b) 15A NCAC 13A.0010(e) 15A NCAC 13A.0010(n)
Prohibition of Liquids in Landfills	HSWA 3004(c)	5/8/85	NCGS 130A–294(c)(1)&(15) NCGS 150B–14(a)(1)&(c)
Expansion During Interim Status—Waste Piles.	HSWA 3015(a)	5/8/85	NCGS 130A–294(c)(1)&(15) NCGS 150B–14(a)(1)&(c)
Expansion During Interim Status—Landfills and Surface Impoundments.	HSWA 3015(b)	5/8/85	NCGS 130A–294(c)(1)&(15) NCGS 150B–14(a)(1)&(c)
Sharing of Information Agency for Toxic Substances and Disease Registry.	HSWA 3019(b)	7/15/85	NCGS 130A–294(c)(1)&(15) NCGS 150B–14(a)(1)&(c)
Delisting	50 FR 28702	7/15/85	15A NCAC 13A.0003(b)
Household Waste	50 FR 28702	7/15/85	15A NCAC 13A.0006(a)
Waste Minimization	50 FR 28702	7/15/85	15A NCAC 13A.0007(d) 15A NCAC 13A.0007(h) 15A NCAC 13A.0009(f) 15A NCAC 13A.0013(f) 15A NCAC 13A.0013(j)
Location Standards for Salt Domes, Salt Beds, Underground Mines and Caves.	50 FR 28702	7/15/85	15A NCAC 13A.0009(c) 15A NCAC 13A.0010(b)
Liquids in Landfills	50 FR 28702	7/15/85	15A NCAC 13A.0009(o) 15A NCAC 13A.0010(n) 15A NCAC 13A.0013(b)
Dust Suppression	50 FR 28702	7/15/85	15A NCAC 13A.0011(a)
Double Liners	50 FR 28702	7/15/85	15A NCAC 13A.0009(l)(1) 15A NCAC 13A.0009(o) 15A NCAC 13A.0010(k) 15A NCAC 13A.0010(l) 15A NCAC 13A.0010(n)
Groundwater Monitoring	50 FR 28702	7/15/85	15A NCAC 13A.0009(g) 15A NCAC 13A.0009(l)(1) 15A NCAC 13A.0009(m) 15A NCAC 13A.0009(o)
Cement Kilns	50 FR 28702	7/15/85	15A NCAC 13A.0006(a) 15A NCAC 13A.0006(d) 15A NCAC 13A.0011(b)
Fuel Labeling	50 FR 28702	7/15/85	15A NCAC 13A.0011(b)
Corrective Action	50 FR 28702	7/15/85	15A NCAC 13A.0009(g) 15A NCAC 13A.0013(i)
Pre-Construction Ban	50 FR 28702	7/15/85	15A NCAC 13A.0013(b)

Federal requirements	HSWA or FR notice	Promulgation	State authority
Permit Life	50 FR 28702	7/15/85	15A NCAC 13A.0013(g) 15A NCAC 13A.0013(h)
Omnibus Provision	50 FR 28702	7/15/85	15A NCAC 13A.0013(f)
Interim Status	50 FR 28702	7/15/85	15A NCAC 13A.0013(b) 15A NCAC 13A.0013(f) 15A NCAC 13A.0013(j)
Research and Development	50 FR 28702	7/15/85	15A NCAC 13A.0013(b) 15A NCAC 13A.0013(i)
Exposure Information	50 FR 28702	7/15/85	15A NCAC 13A.0013(b)
Listing of TDI, DNT, and TDA Waste.	50 FR 42936	10/23/85	15A NCAC 13A.0006(d) 15A NCAC 13A.0006(e)
Burning of Waste Fuel and Used Oil Fuel in Boilers and Industrial Furnaces.	50 FR 49164	11/29/85	15A NCAC 13A.0006(a) 15A NCAC 13A.0009(q) 15A NCAC 13A.0010(o) 15A NCAC 13A.0011(b) 15A NCAC 13A.0011(c)
Listing of Spent Solvents	50 FR 53315	12/31/85	15A NCAC 13A.0006(d)
Listing of EDB Waste	51 FR 5327	2/13/86	15A NCAC 13A.0006(d) 15A NCAC 13A.0006(e)
Listing of Four Spent Solvents	51 FR 6537	2/25/86	15A NCAC 13A.0006(d) 15A NCAC 13A.0006(e)
Generators of 100 to 1000kg Hazardous Waste.	51 FR 10146	3/24/86	15A NCAC 13A.0002(b) 15A NCAC 13A.0006(a) 15A NCAC 13A.0006(d) 15A NCAC 13A.0007(b) 15A NCAC 13A.0007(c) 15A NCAC 13A.0007(d) 15A NCAC 13A.0008(b) 15A NCAC 13A.0013(a) 15A NCAC 13A.0013(b)
Codification Rule	51 FR 19176	5/28/86	15A NCAC 13A.0010(n)
Standards for Hazardous Waste Storage and Treatment Tank Systems.	51 FR 25422	7/14/86	15A NCAC 13A.0002(b) 15A NCAC 13A.0006(a) 15A NCAC 13A.0007(c) 15A NCAC 13A.0009(c) 15A NCAC 13A.0009(f) 15A NCAC 13A.0009(h) 15A NCAC 13A.0009(i) 15A NCAC 13A.0009(k) 15A NCAC 13A.0010(b) 15A NCAC 13A.0010(e) 15A NCAC 13A.0010(g) 15A NCAC 13A.0010(h) 15A NCAC 13A.0010(j) 15A NCAC 13A.0013(b)
Biennial Report	51 FR 28556	8/8/86	15A NCAC 13A.0009(f) 15A NCAC 13A.0010(e)
Standards for Generators, Waste Minimization Certifications.	51 FR 35190	10/1/86	15A NCAC 13A.0007(h)
Listing of EBDC	51 FR 37725	10/24/86	15A NCAC 13A.0006(d) 15A NCAC 13A.0006(e)

With the passage of the Hazardous and Solid Waste Amendments of 1984 (HSWA), responsibilities for hazardous waste permitting in North Carolina were split between EPA and the State. Upon receiving interim authorization for HSWA corrective action, North Carolina assumed responsibility for HSWA corrective action for new permits. EPA continued to administer and enforce federal permits issued prior to the interim authorization. Upon final authorization of the State program for those provisions specified above, EPA will suspend issuance of federal permits in those areas for which the State is receiving authorization. Additionally, EPA will terminate, pursuant to 40 CFR 124.5(d), federal permits or portions of permits containing those provisions specified above and issued prior to the effective date of this authorization. A discussion of how North Carolina and EPA will delineate permitting responsibilities is contained in the EPA-North Carolina Memorandum of Agreement.

North Carolina is not authorized to operate the federal program on Indian lands. This authority remains with EPA unless provided otherwise in a future statute or regulation.

C. Decision

I conclude that North Carolina's application for program revision meets all of the statutory and regulatory requirements established by RCRA. Accordingly, North Carolina is granted final authorization to operate its hazardous waste program as revised.

North Carolina now has responsibility for permitting treatment, storage, and disposal facilities within its borders and carrying out other aspects of the RCRA program described in its revised program application, subject to the limitations of HSWA, the Memorandum of Agreement, and this notice. North Carolina also has primary enforcement responsibilities, although EPA retains the right to conduct inspections under Section 3007 of RCRA and to take enforcement actions under Sections 3008, 3013, and 7003 of RCRA.

Compliance With Executive Order 12866

The Office of Management and Budget has exempted this rule from the requirements of section 6 of Executive Order 12866.

Certification Under the Regulatory Flexibility Act

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this authorization will not have a significant economic impact on a substantial number of small entities. This authorization effectively suspends the applicability of certain Federal regulations in favor of North Carolina's program, thereby eliminating duplicative requirements for handlers of hazardous waste in the State. It does not impose any new burdens on small entities.

This rule, therefore, does not require a regulatory flexibility analysis.

List of Subjects in 40 CFR Part 271

Administrative practice and procedure, Confidential business information, Hazardous materials transportation, Hazardous waste, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control, Water supply.

Authority: This notice is issued under the authority of sections 2002(a), 3006 and 7004(b) of the Solid Waste Disposal Act as amended (42 U.S.C. 6912(a), 6926, 6974(b)).

Dated: October 25, 1994.

Patrick M. Tobin,

Acting Regional Administrator.

[FR Doc. 94-27296 Filed 11-9-94; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 65

[Docket No. FEMA-7115]

Changes in Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, FEMA.

ACTION: Interim rule.

SUMMARY: This interim rule lists communities where modification of the base (100-year) flood elevations is appropriate because of new scientific or technical data. New flood insurance premium rates will be calculated from the modified base (100-year) flood elevations for new buildings and their contents.

DATES: These modified base flood elevations are currently in effect on the dates listed in the table and revise the Flood Insurance Rate Map(s) (FIRMs) in effect prior to this determination for each listed community.

From the date of the second publication of these changes in a newspaper of local circulation, any person has ninety (90) days in which to request through the community that the Associate Director reconsider the changes. The modified elevations may be changed during the 90-day period.

ADDRESSES: The modified base flood elevations for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the following table.

FOR FURTHER INFORMATION CONTACT: Michael K. Buckley, P.E., Chief, Hazard Identification Branch, Mitigation Directorate, 500 C Street, SW., Washington, DC 20472, (202) 646-2756.

SUPPLEMENTARY INFORMATION: The modified base (100-year) flood elevations are not listed for each community in this interim rule. However, the address of the Chief Executive Officer of the community where the modified base flood elevation determinations are available for inspection is provided.

Any request for reconsideration must be based upon knowledge of changed conditions, or upon new scientific or technical data.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 et seq., and with 44 CFR part 65.

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

The modified base (100-year) flood elevations are the basis for the floodplain management measures that the community is required to either adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program.

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

The changes in base flood elevations are in accordance with 44 CFR 65.4.

National Environmental Policy Act

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

Regulatory Flexibility Act

The Associate Director, Mitigation Directorate, certifies that this rule is exempt from the requirements of the Regulatory Flexibility Act because modified base flood elevations are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are required to maintain community eligibility in the National Flood Insurance Program. No regulatory flexibility analysis has been prepared.

Regulatory Classification

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

Executive Order 12612, Federalism

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

Executive Order 12778, Civil Justice Reform

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

List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains, Reporting and recordkeeping requirements.

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

PART 65—[AMENDED]

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

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

§ 65.4 [Amended]

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

State and county	Location	Dates and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
Florida: Pasco County ..	Unincorporated Areas .	August 19, 1994, August 26, 1994, West Pasco Press.	Mr. John Gallagher, Pasco County Administrator, 7530 Little Road, New Port Richey, Florida 34654.	August 12, 1994.	120230 D
Illinois: Will County	Village of Crete	August 18, 1994, August 25, 1994, Crete Record.	Mr. David L. Wallace, Crete Village Administrator, 524 Exchange Street, Crete, Illinois 60417.	August 11, 1994.	170700 B
Maryland: Prince George's.	Unincorporated Areas of Prince George's County.	March 18, 1994, March 25, 1944, The Prince George's Journal.	Mow-Soung Cheng, Ph.D., P.E., Section Head, Watershed Programs Section of Environmental Department, 9400 Peppercorn Place, Sixth Floor, Landover, Maryland 20785.	March 10, 1994.	245208 C
Ohio: Fairfield & Franklin Counties.	City of Columbus	August 24, 1994, August 31, 1994, The Columbus Dispatch.	The Honorable Greg S. Lashutka, Mayor of the City of Columbus, 99 North Front Street, Columbus, Ohio 43215–2838.	February 16, 1995.	390170 B
Ohio: Unincorporated Areas.	Franklin County	August 24, 1994, August 31, 1994, The Columbus Areas.	Ms. Dorothy Teater, President of the Franklin County Board of Commissioners, 373 South High Street, Columbus, Ohio 43215.	February 16, 1995.	390167 B

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

Dated: November 1, 1994.

Frank H. Thomas,

Deputy Associate Director, Mitigation Directorate.

[FR Doc. 94–27884; Filed 11–9–94; 8:45 am]

BILLING CODE 6718–03–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 681

[Docket No. 940818–4301; I.D. 072094A]

RIN 0648–AF82

Western Pacific Crustacean Fisheries

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues a final rule to implement selected measures of Amendment 8 to the Fishery Management Plan for the Crustacean Fisheries of the Western Pacific Region (FMP). The rule eliminates a 2-year landing requirement for permit renewal, which had an unintended detrimental effect on lobster fishery permit holders. The rule also modifies existing notification and reporting procedures. The implemented changes are intended to improve administration, monitoring, and enforcement of the fishery.

EFFECTIVE DATE: December 12, 1994.

ADDRESSES: Copies of Amendment 8 and the associated environmental assessment may be obtained from Ms. Kitty M. Simonds, Executive Director, Western Pacific Fishery Management Council (WPFMC), 1164 Bishop St., Suite 1405, Honolulu, HI 96813.

Comments on the information collection should be sent to the Director, Southwest Region, NMFS, 501 W. Ocean Blvd., Long Beach, CA 90802–4213, and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, D.C. 20503 (Attention: NOAA Desk Officer).

FOR FURTHER INFORMATION CONTACT: Ms. Kitty M. Simonds, WPFMC, at (808) 522–8220; Mr. Svein Fougner, NMFS, at (310) 980–4034; or Mr. Alvin Z. Katekaru, NMFS, at (808) 973–2937.

SUPPLEMENTARY INFORMATION: The WPFMC developed Amendment 8 to the FMP and submitted it to NMFS for approval. A proposed rule to implement Amendment 8 was published in the **Federal Register** on August 9, 1994 (59 FR 40515). The proposed rule provided background on the following provisions of Amendment 8: (1) Removing the requirement for a vessel to land at least four lobsters for each trap normally used during 1 of the 2 most recent years in which fishing was allowed as a condition of permit renewal; (2) establishing a framework procedure for reviewing, with the possibility of changing, the target catch-per-unit-of effort (CPUE) used in the formula to derive the quota for the fishery from 1.0 lobster per trap-haul to a number that is more reflective of the current status of the lobster resource; (3) establishing a framework procedure authorizing, under some circumstances, fishing for the purposes of obtaining fisheries data or alleviating economic hardship, when the initial quota is zero; (4) requiring vessel owners to notify NMFS of the location and time of offloading of their catch; and (5) requiring information from the first-level buyer to be attached to the Sales Report, if available, and requiring first-level buyers to make records of their transactions involving management unit species available to authorized officials.

The measures establishing framework procedures for the review and possible change of the target level of the CPUE in the model used to calculate the annual quota and to allow fishing under some circumstances when the initial quota is zero (numbers 2 and 3 above) have been disapproved by NMFS. These two measures are neither necessary nor appropriate for conservation and management of the fishery as required by section 303(a)(1)(A) of the Magnuson Act.

There has been a substantial decrease in recruitment to the lobster fishery. This, the total closure of the fishery during the 1993 season, and the great difference between the initial quota and the final quota during the 1994 season has prompted a complete review of the model used to determine the annual quotas and the quota system in general. For this reason, the provision allowing changes in the target CPUE pursuant to framework procedures is premature. Any change in the model should be postponed until an analysis of the model is available.

The purposes of the framework procedure under which fishing might be

allowed when the initial quota is zero are to obtain fisheries data or to relieve economic hardship. The proposal to consider allowing fishing to relieve economic hardship is ambiguous because the term "economic hardship" is not defined. Without defining the term, it is unclear how and when allowing fishing would be considered and how it would meet the goals of the FMP. Allowing fishing to collect data duplicates section 681.26 of the implementing regulations regarding experimental fishing. Issuing experimental fishing permits is an effective way of allowing fishing that ordinarily would not be permitted so that fisheries data can be collected. The other provisions of Amendment 8 have been approved.

Comment and Response

Only one comment was received on the proposed rule.

Comment: One individual commented that eliminating the landing requirement gives the resource in perpetuity to those who currently hold permits. He felt the point system for new entry should be maintained. The holders of these permits may or may not view the fishery as a long-term trust. This commenter also indicated it was a mistake to allow the transfer of permits given that carrying capacity now exceeds the capacity of the resource.

Response: The issues of maintaining the point system or not allowing the transfer of permits are not within the scope of Amendment 8.

Nevertheless, the landing requirement, coupled with transferable limited entry permits, was intended to ensure that there always would be sufficient capacity to harvest the optimum yield. The number of permitted vessels was based on an assumption of stable recruitment and would provide the greatest economic return from the fishery. Presently, productivity of the resource is low and the harvesting capacity of the fleet is greater than needed; however, the Council did not propose changing the number of permits allowed in the fishery. There are numerous restrictions to protect the resource, including size limits, a closed season, protection of berried females, and a quota based on productivity of the resource. When productivity is low, the quota is low.

Eliminating the landing requirement relieves vessel owners from fishing for lobster when investing fishing effort would be poor business; therefore, an unforeseen and unintended economic burden will be removed. The point system has not resulted in and would not be expected to result in new entry. Permits are transferable, and permit holders would likely transfer permits rather than forfeit them. In addition, at low quota levels, there may be risks of overrunning the quota before the fishery can be closed.

Changes From the Proposed Rule

The changes in the Quota Management Program (§ 681.31) described in the proposed rule have not been approved; therefore, those revisions have been dropped from the final rule and § 681.31 remains unchanged. Also in the final rule, the definition of "forecast quota" is not added to replace the definition of "initial quota" because this was intended to implement one of the disapproved measures. No other changes were made to the proposed rule.

Classification

This rule has been determined to be not significant for purposes of E.O. 12866.

This rule contains collection-of-information requirements subject to the Paperwork Reduction Act. The collection of this information has been approved by the OMB under OMB Control Number 0648–0214. A notification requirement before offloading of the catch is added. The existing sales report is modified by eliminating certain data elements. First-level buyers can choose to submit a worksheet in lieu of allowing an authorized officer to access, inspect, and copy records relating to their sales. The estimated total reporting burden (assuming that all 15 permit holders will take 4 trips per year) is estimated at 5 minutes per response. This includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to NMFS and OMB (see **ADDRESSES**).

List of Subjects in 50 CFR Part 681

Fisheries, Reporting and recordkeeping requirements.

Dated: November 4, 1994.

Charles Karnella,

Acting Program Management Officer, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 681 is amended as follows:

PART 681—WESTERN PACIFIC CRUSTACEAN FISHERIES

1. The authority citation for part 681 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. In § 681.2, the definition of "Land or Landing" is removed, and definitions of "Council", "First-level buyer", "Landing", "Management unit species", and "Off-loading" are added, in alphabetical order, to read as follows:

§ 681.2 Definitions.

* * * * *

Council means the Western Pacific Fishery Management Council established by the Magnuson Act.

* * * * *

First-level buyer means:

(1) The first person who purchases, with the intention to resell, management unit species, or portions thereof, that were harvested by a vessel that holds a permit under this part or that is otherwise regulated under this part; or

(2) A person who provides recordkeeping, purchase, or sales assistance in the first transaction involving management unit species (such as the services provided by a wholesale auction facility).

* * * * *

Landing means bringing management unit species to shore for the purpose of offloading.

* * * * *

Management unit species means spiny lobster (*Panulirus* spp.), slipper lobster (family Scyllaridae), and Kona crab (family Raninidae).

Off-loading means removing management unit species from a vessel.

* * * * *

3. Section 681.5 is amended by revising paragraph (a), the heading in paragraph (b), paragraphs (c) and (d), and by adding a new paragraph (e) to read as follows:

§ 681.5 Recordkeeping and reporting.

(a) *Daily Lobster Catch Report.* The operator of any vessel engaged in commercial fishing for lobster subject to this part must maintain onboard the fishing vessel, while fishing for lobster, an accurate and complete NMFS Daily Lobster Catch Report on a form provided by the Regional Director. All information specified on the form and specified in paragraph (b) of this section must be recorded on the form within 24 hours after the completion of the fishing day. The Daily Lobster Catch Reports for a fishing trip must be submitted to the Regional Director within 72 hours of each landing of lobsters.

(b) *Information Requirements for Daily Lobster Catch Report.* * * *

* * * * *

(c) *Lobster Sales Report.* The operator of any vessel engaged in commercial fishing for lobster subject to this part must submit to the Regional Director, within 72 hours of off-loading of lobster, an accurate and complete Lobster Sales Report on a form provided by the Regional Director, and attach packing or weighout slips provided to the operator by the first-level buyer(s), unless the packing/weighout slips have not been provided in time by the buyer(s).

(d) *Information Requirements for Lobster Sales Report.* The Lobster Sales Report must be signed and dated by the vessel operator and include the following information:

(1) Vessel information.

(i) Name of vessel.

(ii) Permit number.

(2) First-level buyer information.

(i) Name of first-level buyer(s).

(ii) Address(es) and phone number(s).

(3) Landing information.

(i) Date of off-loading.

(ii) Port of landing.

(4) Sales information.

(i) Total number or weight of spiny lobsters sold and total number or weight not sold by product type.

(ii) Total number or weight of slipper lobsters sold and total number or weight not sold by product type.

(iii) Total number or weight of octopus sold and total number or weight not sold by product type.

(iv) Total number or weight of other fishery products sold and total number or weight not sold by product type.

(v) If available, packing/weighout slip or other sales information, including information on revenue by species, product type, and size categories.

(e) *Modification of reporting requirements.* The Regional Director may, after consultation with the Council, initiate rulemaking to modify the information to be provided on the Daily Lobster Catch Report or the Lobster Sales Report.

4. Section 681.7 is amended by revising paragraph (b)(5) and by adding paragraph (b)(14) to read as follows:

§ 681.7 Prohibitions.

* * * * *

(b) * * *

(5) Fail to report before landing or off-loading as specified in § 681.25.

* * * * *

(14) Refuse to make available to an authorized officer for inspection and copying any records that must be made available in accordance with § 681.11.

* * * * *

5. Section 681.11 is added to subpart A to read as follows:

§ 681.11 Availability of records for inspection.

(a) Upon request, any first-level buyer must allow an authorized officer to access, inspect, and copy all records relating to the harvest, sale, or transfer of management unit species taken by vessels that have permits issued under this part or that are otherwise subject to this part, including, but not limited to, information concerning:

(1) The name of the vessel involved in each transaction and the owner or operator of the vessel;

(2) The amount, number, and size of each species of fish involved in each transaction; and

(3) Prices paid by the buyer and proceeds to the seller in each transaction.

(b) This requirement may be met by furnishing the information on a worksheet provided by the Regional Director.

6. Section 681.25 is revised to read as follows:

§ 681.25 Notification requirements.

(a) The operator of any vessel that has on board management unit species taken from Permit Area I must:

(1) Report, not less than 24 hours, but not more than 36 hours, before landing, the port, the approximate date and the approximate time at which lobsters will be landed; and

(2) Report, not less than 6 hours and not more than 12 hours before offloading, the location and time that offloading of the lobster will begin.

(b) The Regional Director shall notify permit holders of any change in the reporting method and schedule at least 30 days prior to the opening of the fishing season.

7. In § 681.30, paragraph (c) is revised to read as follows:

§ 681.30 Limited access management program.

* * * * *

(c) *Renewal.* Applications for renewal of a limited entry permit for the next calendar year must be submitted to the Pacific Area Office by December 31.

* * * * *

[FR Doc. 94-27840 Filed 11-9-94; 8:45 am]
BILLING CODE 3510-22-W

Proposed Rules

Federal Register
Vol. 59, No. 217
Thursday, November 10, 1994

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 929

[FV94–929–3PR]

Cranberries Grown in States of Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York; Establishment of Late Payment and Increase in Interest Charges on Delinquent Assessments

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would increase the interest charge from 1 percent to 1½ percent per month and add a late payment charge of 5 percent on delinquent assessments owed by handlers under Marketing Order No. 929 covering cranberries grown in ten states. This rule would contribute to the efficient operation of the program by ensuring that adequate funds are available to cover budgeted expenses incurred under the marketing order.

DATES: Comments must be received by December 12, 1994.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, Room 2525–S, P.O. Box 96456, Washington, D.C. 20090–6456. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: Mark Hessel or Patricia Petrella, Marketing Specialists, Marketing Order Administration Branch, F&V, AMS, USDA, Room 2522–S, P.O. Box 96456, Washington, D.C. 20090–6456: telephone: (202) 720–5127.

SUPPLEMENTARY INFORMATION: This proposal is issued under Marketing Agreement and Order No. 929 (7 CFR Part 929), as amended, regulating the handling of cranberries grown in ten states, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the "Act."

The Department of Agriculture (Department) is issuing this rule in conformance with Executive Order 12866.

This proposal has been reviewed under Executive Order 12778, Civil Justice Reform. This rule is not intended to have retroactive effect. This proposal will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after date of the entry of the ruling.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 30 handlers of cranberries who are subject to regulation under the order and approximately 1,050 producers of cranberries in the regulated area.

Small agricultural service firms have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts of less than $5,000,000, and small agricultural producers are defined as those having annual receipts of less than $500,000. The majority of handlers and producers of cranberries may be classified as small entities.

The Cranberry Marketing Committee (committee), the agency responsible for local administration of the order, met on August 23, 1994, and unanimously recommended modifying the administrative rules in effect under the order concerning delinquent handler assessments. The modification would increase the interest charge from 1 percent to 1½ percent per month and add a late payment charge of 5 percent on delinquent handler assessments.

Under section 929.41 of the order, each person who first handles cranberries is required to pay a pro-rata share of the cost of administering the program. This cost is in the form of a uniform assessment rate applied to each handler's acquisitions.

Section 929.41 also provides that if a handler does not pay an assessment within the time prescribed by the committee, the assessment may be subject to an interest or late payment charge, or both.

Section 929.152 of the rules and regulations in effect under the order specifies that delinquent assessments be subject to an interest charge of 1 percent per month on any unpaid assessment balance beginning 30 days from the due date prescribed by the committee. The committee currently schedules two assessment payments during the crop year which begins on September 1. Assessments equal to 100 percent of the prior crop year's assessment obligation are due on October 1. If a handler's October 1 payment is not sufficient to meet the current crop year's assessment obligation then a second payment, making up the difference, is required by April 1. If the October 1 payment exceeds the current crop year's

assessment obligation then the committee refunds the difference on or before April 15.

Assessments are the main source of funds to pay committee expenses. The failure of handlers to pay assessment obligations promptly results in added expense and operational problems for the committee. The committee has frequently encountered difficulty in collecting assessments from some handlers. To attempt to collect, the committee must incur the added expense of sending out additional invoices and contacting each delinquent handler by phone, in person, or by fax. Nonpayment or late payment of assessments hampers the operation of the committee.

The authority to levy late payment and interest charges on delinquent assessments was added in 1973 to address the failure of handlers to pay their assessments promptly. Consequently, in 1978 an informal rulemaking change (43 FR 29764, July 11, 1978) was approved which established a one percent interest charge per month to address this problem.

However, the current interest charge of one percent per month is not sufficient to induce handlers to comply with the assessment provisions. Competition in the cranberry industry has increased. The number of handlers regulated by the order has increased, and many of these additional handlers have been more reluctant to pay assessments in a timely manner. The increase in charges on delinquent assessments would encourage these handlers to pay their assessments more promptly.

Charges would not be imposed until the end of the month if handler assessments are invoiced up to the 15th of the month and would be levied at the end of the following month if the handler assessment is invoiced later than the 15th of the month. Handlers would have ample time to pay their assessments and avoid incurring the additional charges. Any amount paid by the handler would be credited upon receipt in the committee office. These additional charges would apply to any unpaid assessments which become due to the committee after the effective date of this rule change.

A 30-day comment period is provided to allow interested persons an opportunity to respond to this proposal. All written comments timely received will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 929

Cranberries, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR Part 929 is proposed to be amended as follows:

1. The authority citation for 7 CFR Part 929 continues to read as follows:

Authority: 7 U.S.C. 601–674.

PART 929—CRANBERRIES GROWN IN STATES OF MASSACHUSETTS, RHODE ISLAND, CONNECTICUT, NEW JERSEY, WISCONSIN, MICHIGAN, MINNESOTA, OREGON, WASHINGTON, AND LONG ISLAND IN THE STATE OF NEW YORK

2. Section 929.152 is revised to read as follows:

§ 929.152 Delinquent assessments.

There shall be a late payment charge of five percent and an interest charge of 1½ percent per month applied to any assessment not received at the committee's office before the end of the month in which such assessment was first invoiced to the handler: *Provided*, That if an assessment is first invoiced later than the 15th of the month, no late payment or interest charge shall be levied if such assessment is received at the committee office by the end of the following month in which the assessment was first invoiced to the handler.

Dated: November 4, 1994.

Eric M. Forman,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 94–27921 Filed 11–9–94; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 94–NM–123–AD]

Airworthiness Directives; Boeing Model 747 Series Airplanes, Excluding Airplanes Equipped with Pratt & Whitney PW4000 and General Electric CF6–80C2 Series Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Boeing Model 747 series airplanes. This proposal would require replacement of certain fuse pins on the upper link of the inboard and outboard struts. This AD also would require inspections to detect corrosion or cracks of certain fuse pins, and replacement, if necessary. This proposal is prompted by reports of cracked or corroded fuse pins on the upper link of the inboard and outboard struts, which could result in fracturing of the pins. The actions specified by the proposed AD are intended to prevent failure of the strut and separation of an engine from the airplane due to fracturing of the fuse pins.

DATES: Comments must be received by January 10, 1995.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 94–NM–123–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Tim Backman, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Transport Airplane Directorate, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (206) 227–2776; fax (206) 227–1181.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by

interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 94–NM–123–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 94–NM–123–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The FAA received several reports of cracked fuse pins on the upper link of the inboard and outboard struts on Boeing Model 747 series airplanes. Several pins also showed evidence of corrosion. The fuse pins involved in these reports were "bottle bore style" fuse pins installed in the forward position of the struts. The cracking initiated in a machining groove in the inner recess of the pin bore, and it propagated due to fatigue. Cracking of the pins occurred on some airplanes as early as 9,366 total flight cycles (on the airplane) and 42,493 total flight hours. One of the reports involved the complete fracture of both shear planes on the fuse pin; consequently, that pin had no load carrying capability. Analysis of several of the cracked fuse pins indicated that fracturing occurred in the recess area of the pin bore.

Corrosion may cause cracking of the fuse pins; this could lead to fracturing of the fuse pins. This condition, if not corrected, could result in failure of the strut and separation of an engine from the airplane.

The FAA has reviewed and approved Boeing Alert Service Bulletin 747–54A2166, dated April 28, 1994, which describes procedures for replacement of "bulkhead style" and "bottle bore style" fuse pins, installed in the forward position of the upper link on the inboard and outboard struts, with either a 15–5 corrosion-resistant steel fuse pin (also known as a "third generation" pin) or a new bulkhead style pin. (This alert service bulletin specifies that installation of the third generation pin is preferred.) The alert service bulletin also describes procedures for repetitive detailed visual inspections to detect corrosion of the bulkhead style pins; magnetic particle inspections to detect cracks in these pins; and replacement of any cracked or corroded pin with a third generation pin or a new bulkhead style pin.

The alert service bulletin references Boeing Service Bulletin 747–54–2155, dated September 23, 1993, as an additional source of service information for replacement of certain fuse pins, installed in the forward and aft positions of the upper link, with third generation pins. (Although there have been no reports of cracked pins in the aft position, replacement of the pin in the forward position with a third generation pin necessitates that the aft pin also be replaced with a third generation pin in order to preserve the function and location of the primary structural fuse.)

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would require replacement of bottle bore style fuse pins, installed in the forward position of the upper link on the inboard and outboard struts, with either third generation fuse pins or new bulkhead style pins. This proposed AD also would require repetitive detailed visual inspections to detect corrosion of bulkhead style fuse pins; magnetic particle inspections to detect cracks in those pins; and replacement of any corroded or cracked bulkhead style fuse pin with a third generation fuse pin or with a new bulkhead style pin. Installation of a third generation fuse pin, if accomplished, would constitute terminating action for the inspection requirements of the proposed AD. The actions would be required to be accomplished in accordance with the alert service bulletin described previously.

The manufacturer has advised that it is currently developing a modification program for the engine strut that will positively address the unsafe condition addressed by this AD. Once this modification program is developed, approved, and available, the FAA may consider additional rulemaking.

There are approximately 869 Model 747 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 147 airplanes of U.S. registry would be affected by this proposed AD.

It would take approximately 122 work hours per airplane to accomplish the proposed replacement of fuse pins with bulkhead style pins. The average labor rate is $60 per work hour. Based on these figures, the total cost impact on U.S. operators who replace fuse pins with bulkhead style pins is estimated to be $7,320 per airplane.

It would take approximately 140 work hours per airplane to accomplish the proposed replacement of fuse pins with third generation pins. The average labor rate is $60 per work hour. Based on these figures, the total cost impact on U.S. operators who replace fuse pins with third generation pins is estimated to be $8,400 per airplane.

It would take approximately 1.5 work hours per airplane to accomplish the proposed inspections (in addition to the work hours necessary for fuse pin replacement). The average labor rate is $60 per work hour. Based on these figures, the total cost impact on U.S. operators for the proposed inspections is estimated to be $90 per airplane per inspection.

The cost of required replacement parts would vary from airplane to airplane, depending upon the current airplane configuration.

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

The number of required work hours, as indicated above, is presented as if the accomplishment of the proposed inspection and replacement actions were to be conducted as "stand alone" actions. However, in actual practice, these actions, for the most part, would be accomplished coincidentally or in combination with normally scheduled airplane inspections and other maintenance program tasks. Therefore, the actual number of necessary additional work hours would be minimal in many instances. Additionally, any costs associated with special airplane scheduling would be minimal.

The FAA recognizes that the obligation to maintain aircraft in an airworthy condition is vital, but sometimes expensive. Because AD's require specific actions to address specific unsafe conditions, they appear to impose costs that would not otherwise be borne by operators. However, because of the general obligation of operators to maintain aircraft in an airworthy condition, this appearance is deceptive. Attributing those costs solely to the issuance of this AD is unrealistic because, in the interest of maintaining safe aircraft, prudent operators would accomplish the required actions even if they were not required to do so by the AD.

A full cost-benefit analysis has not been accomplished for this proposed

AD. As a matter of law, in order to be airworthy, an aircraft must conform to its type design and be in a condition for safe operation. The type design is approved only after the FAA makes a determination that it complies with all applicable airworthiness requirements. In adopting and maintaining those requirements, the FAA has already made the determination that they establish a level of safety that is cost-beneficial. When the FAA, as in this proposed AD, makes a finding of an unsafe condition, this means that the original cost-beneficial level of safety is no longer being achieved and that the proposed actions are necessary to restore that level of safety. Because this level of safety has already been determined to be cost-beneficial, a full cost-benefit analysis for this proposed AD would be redundant and unnecessary.

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

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

Boeing: Docket 94–NM–123–AD.

Applicability: Model 747 series airplanes; line numbers 1 through 967 inclusive, and 969 through 992 inclusive; excluding airplanes equipped with Pratt & Whitney PW4000 or General Electric CF6–80C2 series engines; certificated in any category.

Note 1: This AD does not require that the actions be accomplished on the struts of airplanes having straight bore fuse pins (installed on Model 747 series airplanes equipped with Pratt & Whitney PW4000 or General Electric CF6–80C2 series engines) or 15–5 corrosion resistant steel (third generation) fuse pins.

Compliance: Required as indicated, unless accomplished previously.

To prevent failure of the strut and loss of an engine due to corrosion or cracking of the fuse pins, accomplish the following:

(a) For airplanes having bottle bore style fuse pins in the forward position on the upper link: Replace any bottle bore style fuse pin with a new bulkhead style fuse pin in the forward position, or with 15–5 corrosion resistant steel (third generation) fuse pins in the forward position, in accordance with Boeing Alert Service Bulletin 747–54A2166, dated April 28, 1994, at the later of the times specified in paragraphs (a)(1) and (a)(2) of this AD.

(1) Prior to the accumulation of 5,000 landings on the fuse pin, or within 5 years since installation of the pin, whichever occurs first. Or

(2) Within 6 months after the effective date of this AD.

Note 2: Third generation fuse pins are installed in pairs (in the forward and aft positions). Therefore, replacement of an individual upper link fuse pin in the forward position with a third generation pin also would necessitate replacement of the pin in the aft position.

Note 3: The alert service bulletin references Boeing Service Bulletin 747–54–2155, dated September 23, 1993, as an additional source of service information for replacement of the fuse pins with 15–5 corrosion resistant steel (third generation) fuse pins. Installation of these third generation fuse pins is preferred over installation of bulkhead style fuse pins.

(b) For airplanes having bulkhead style fuse pins in the forward position on the upper link: Perform a detailed visual inspection to detect corrosion of the pins, and a magnetic particle inspection to detect cracks, in accordance with Boeing Alert Service Bulletin 747–54A2166, dated April 28, 1994, at the later of the times specified in paragraphs (b)(1) and (b)(2) of this AD.

(1) Prior to the accumulation of 8,000 landings on the fuse pin, or within 8 years since installation of the pin, whichever occurs first. Or

(2) Within 12 months after the effective date of this AD.

(c) If no corrosion or crack is found during the inspection required by paragraph (b) of this AD, repeat the inspections thereafter at the intervals specified in paragraph (c)(1) or (c)(2) of this AD, as applicable.

(1) For the inboard and outboard struts on airplanes other than those identified in paragraph (c)(2) of this AD: Repeat the inspections at intervals not to exceed 1,000 landings.

(2) For the outboard struts on airplanes equipped with Rolls-Royce RB211–524G or –524H series engines: Repeat the inspections at intervals not to exceed 2,000 landings.

Note 4: The outboard struts of airplanes equipped with Rolls-Royce RB211–524G or –524H series engines are equipped with thick wall "4330 steel" bulkhead style fuse pins in the forward position of the upper link. Crack propagation to critical length in these thick wall pins is slower than for pins installed on the struts of airplanes equipped with engines other than the Rolls-Royce RB211–524G or –524H series.

(d) If any corrosion or crack is found during any inspection required by this AD, prior to further flight, replace the corroded or cracked pin with either a new bulkhead style fuse pin in the forward position of the upper link, or with 15–5 corrosion resistant steel (third generation) fuse pins in the forward and aft positions of the upper link, in accordance with Boeing Alert Service Bulletin 747–54A2166, dated April 28, 1994.

(1) If the corroded or cracked fuse pin is replaced with a new bulkhead style fuse pin, prior to the accumulation of 8,000 landings on the new pin, or within 8 years since installation of the new pin, whichever occurs first, perform a detailed visual inspection to detect corrosion of the new pin, and a magnetic particle inspection to detect cracks of the new pin, in accordance with Boeing Alert Service Bulletin 747–54A2166, dated April 28, 1994. Repeat these inspections thereafter at the interval specified in paragraph (d)(1)(i) or (d)(1)(ii) of this AD, as applicable.

(i) For the inboard and outboard struts on airplanes other than those identified in paragraph (d)(1)(ii) of this AD: Repeat the inspections at intervals not to exceed 1,000 landings.

(ii) For the outboard struts on airplanes equipped with Rolls-Royce RB211–524G or –524H series engines: Repeat the inspections at intervals not to exceed 2,000 landings.

(2) If the corroded or cracked fuse pin is replaced with a 15–5 corrosion resistant steel (third generation) fuse pin, no further action is required by this AD.

(e) Installation of 15–5 corrosion resistant steel (third generation) fuse pins in the forward and aft positions of the upper link on the inboard or outboard strut constitutes terminating action for the requirements of this AD.

(f) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be

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

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

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

Issued in Renton, Washington, on November 4, 1994.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 94–27852 Filed 11–9–94; 8:45 am]

BILLING CODE 4910–13–U

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14 CFR Part 39

[Docket No. 94–NM–92–AD]

Airworthiness Directives; McDonnell Douglas Model DC–9, DC–9–80, and C–9 (Military) Series Airplanes, and Model MD–88 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the supersedure of an existing airworthiness directive (AD), applicable to McDonnell Douglas Model DC–9, DC–9–80, and C–9 (military) series airplanes, and Model MD–88 airplanes, that currently requires certain inspections and structural modifications. This action would require additional inspections and structural modifications. This proposal is prompted by an evaluation conducted by the Airworthiness Assurance Working Group (AAWG), Model DC–9/MD–80 Task Group, which identified additional modifications for mandatory action. The actions specified by the proposed AD are intended to prevent degradation in the structural capabilities of the affected airplanes. This action also reflects the FAA's decision that long term continued operational safety should be assured by actual modification of the airframe, where feasible, rather than only by repetitive inspections for known service problems.

DATES: Comments must be received by December 23, 1994.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 94–NM–92–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from McDonnell Douglas Corporation, P.O. Box 1771, Long Beach, California 90801–1771, Attention: Business Unit Manager, Technical Administrative Support, Department L51, M.C. 2–98. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California.

FOR FURTHER INFORMATION CONTACT: David Y. J. Hsu, Aerospace Engineer, Airframe Branch, ANM–122L, FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California 90806–2425; telephone (310) 988–5323; fax (310) 988–5210.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 94–NM–92–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 94–NM–92–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

On August 6, 1990, the FAA issued AD 90–18–03, amendment 39–6701 (55 FR 34704, August 24, 1990), applicable to Model DC–9, DC–9–80, and C–9 (military) series airplanes, and Model MD–88 airplanes, to require certain inspections and structural modifications. That action was prompted by reports of incidents involving fatigue cracking, corrosion, and stress corrosion cracking in transport category airplanes that are approaching or have exceeded their economic design goal. These incidents have jeopardized the airworthiness of the affected airplanes. The requirements of that AD are intended to prevent degradation in the structural capabilities of the affected airplanes.

Since the issuance of that AD, the Airworthiness Assurance Working Group (AAWG), Model DC–9/MD–80 Task Group, comprised of representatives from operators of Model DC–9/MD–80 series airplanes, the manufacturer, and the FAA, has completed its review of certain service bulletins that are applicable to aging Model DC–9/MD–80 series airplanes. The Task Group has recommended these service bulletins for mandatory inspection and structural modification in order to reduce the potential for major structural failure of those airplanes.

Consequently, McDonnell Douglas has issued Revision B to Report No. MDC K1572, "DC–9/MD80 Aging Aircraft Service Action Requirements Document," dated January 15, 1993. The Task Group's most recent recommendations for mandatory actions are contained in Tables 2.3, 2.4, and 3.1 of that document. (The actions contained in Tables 2.1 and 2.2 were made mandatory by AD 90–18–03.) The FAA has reviewed and approved that document. Tables 2.3 and 2.4 of the document reference the following service bulletins:

1. One service bulletin that describes inspections and modification of the slat drive mechanism;

2. Four service bulletins that describe inspections and modifications of the doors;

3. Eleven service bulletins that describe inspections and modifications of the fuselage;

4. Four service bulletins that describe inspections and modifications of the horizontal stabilizers;

5. Two service bulletins that describe inspections and modifications of the wings;

6. One service bulletin that describes inspections and modification of the engine thrust reverser system;

7. One service bulletin that describes inspections and modification of the nose gear steering;

8. Two service bulletins that describe inspections and modifications of the engine pylon;

9. One service bulletin that describes inspections and modification of the rudder; and

10. Two service bulletins that describe inspections and modifications of the main landing gear structures.

Table 3.1 of the document references the following service bulletins for mandatory inspections:

1. One service bulletin that describes inspections of the doors;

2. One service bulletin that describes inspections of the engine pylons; and

3. Two service bulletins that describe inspections of the wings. (These two service bulletins were made mandatory by AD 90–18–03.)

The Task Group has also recommended, for mandatory modification, the actions contained in McDonnell Douglas DC–9 Service Bulletin 53–230, Revision 1, dated January 12, 1993. The FAA has reviewed and approved this service bulletin, which describes procedures for installation of doublers and clips at the intersections of upper longerons/intercostals and fuselage frames between longerons 10L and 10R at various overwing stations between Y=484.000 and Y=851.000, as applicable, depending upon series of the airplane. Accomplishment of these modifications would terminate the inspections required by AD 88–24–08 R2, amendment 39–6469 (55 FR 1002, January 11, 1990), which requires external eddy current inspection to detect cracking of the fuselage skin and certain longerons, internal visual inspections of certain longerons, and repair of any findings of cracking.

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would supersede AD 90–18–03 to require additional structural modifications and inspections. The actions would be required to be accomplished in accordance with the document described previously.

There are approximately 892 Model DC–9 and C–9 (military) series airplanes of the affected design in the worldwide fleet.

The FAA estimates that 568 Model DC–9 and C–9 (military) series airplanes of U.S. registry were originally affected by AD 90–18–03. The requirements of that AD were estimated to take approximately 946 work hours to accomplish, at a current average labor rate of $55 per work hour. The cost for required modification kits was estimated to be $15,140 per airplane. Based on these figures, the FAA estimated that the total cost impact of AD 90–18–03 on U.S. operators of Model DC–9 and C–9 (military) series airplanes would be $38,152,560, or $67,170 per airplane, over the initial 4-year time period. (These figures do not include the cost of downtime, planning, set-up, familiarization, or tool acquisition.)

The FAA estimates that a total of 511 Model DC–9 and C–9 (military) series airplanes of U.S. registry would be affected by the new requirements specified in this proposed AD. The new additional requirements proposed by this AD action would take approximately 638 additional work hours per airplane to accomplish, at an average labor rate of $55 per work hour. Required parts would cost an additional $37,027 per airplane. Based on these figures, the total additional cost impact of this proposed AD on U.S. operators is estimated to be $36,851,787, or $72,117 per airplane, over a 4-year time period. (These figures do not include the cost of downtime, planning, set-up, familiarization, and tool acquisition.)

There are approximately 1,090 Model DC–9–80 series airplanes and Model MD–88 airplanes of the affected design in the worldwide fleet.

The FAA estimates that 173 Model DC–9–80 series airplanes and Model MD–88 airplanes of U.S. registry were originally affected by AD 90–18–03. The requirements of that AD were estimated to take approximately 47 work hours to accomplish, at a current average labor rate of $55 per work hour. The cost for required modification kits was estimated to be $752 per airplane. Based on these figures, the FAA estimated that the total cost impact of AD 90–18–03 on U.S. operators of Model DC–9–80 series airplanes and Model MD–88 airplanes would be $577,301, or $3,337 per airplane, over the initial 4-year time period. (These figures do not include the cost of downtime, planning, set-up, familiarization, or tool acquisition.)

The FAA estimates that a total of 615 Model DC–9–80 series airplanes and Model MD–88 airplanes of U.S. registry would be affected by the new requirements specified in this proposed AD. This increase in the number of affected airplanes is due to various reasons, including transfer of ownership and the fact that additional airplanes have accumulated time-in-service since the issuance of AD 90–18–03 and have reached the threshold for modification/inspection. The new additional requirements proposed by this AD action would take approximately 13 additional work hours per airplane to accomplish, at an average labor rate of $55 per work hour. Required parts would cost an additional $943 per airplane. Based on these figures, the total additional cost impact of this proposed AD on U.S. operators is estimated to be $1,019,670, or $1,658 per airplane, over a 4-year time period. (These figures do not include the cost of downtime, planning, set-up, familiarization, or tool acquisition.)

The total cost impact figure discussed above is based on assumptions that no operator has yet accomplished the currently required or the newly proposed requirements of this AD action; however, it can reasonably be assumed that a majority of affected operators have already initiated the inspections and structural modifications required by AD 90–18–03 [retained in paragraphs (a) and (d) of this AD] and many may have already initiated the additional inspections and structural modifications proposed in this new AD action.

The number of required work hours, as indicated above, is presented as if the accomplishment of the actions proposed in this AD were to be conducted as "stand alone" actions. However, in actual practice, these actions for the most part would be accomplished coincidentally or in combination with normally scheduled airplane inspections and other maintenance program tasks. Therefore, the actual number of necessary additional work hours would be minimal in many instances. Additionally, any costs associated with special airplane scheduling would be minimal.

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

For the reasons discussed above, I certify that this proposed regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not

a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by removing amendment 39–6701 (55 FR 34704, August 24, 1990), and by adding a new airworthiness directive (AD), to read as follows:

McDonnell Douglas: Docket 94–NM–92–AD. Supersedes AD 90–18–03, Amendment 39–6701.

Applicability: Model DC–9–10, -20, -30, -40, -50 series airplanes; Model DC–9–81 (MD–81), -82 (MD–82), -83 (MD–83), and -87 (MD–87) series airplanes; Model MD–88 airplanes; and C–9 (military) series airplanes; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent structural failure, accomplish the following:

(a) Within the threshold for inspections specified in the service bulletins listed in either Table 2.1 [for Model DC–9–10, -20, -30, -40, -50, and C–9 (military) series airplanes], or Table 2.2 [for Model DC–9–81, -82, -83, -87 (MD–81, -82, -83, -87), and Model MD–88 airplanes], as applicable, of McDonnell Douglas Report No. MDC K1572, "DC–9/MD–80 Aging Aircraft Service Action Requirements Document," Revision A, dated June 1, 1990 (hereinafter referred to as "SARD, Revision A"), or within one repetitive inspection period specified in those service bulletins after September 24, 1990 (the effective date of AD 90–18–03, Amendment 39–6701), whichever occurs later: Inspect to detect cracks in accordance with those service bulletins. Repeat these inspections thereafter at the intervals specified in the service bulletins listed in either Table 2.1 [for Model DC–9–10, -20, -30, -40, -50, and C–9 (military) series airplanes], or Table 2.2 [for Model DC–9–81, -82, -83, -87 (MD–81, -82, -83, -87), and Model MD–88 airplanes], as applicable, of SARD, Revision A, until the applicable terminating modification required by paragraph (d) of this AD is accomplished.

Note 1: Paragraph (a) of this AD restates the requirements for an initial inspection and the repetitive inspections contained in paragraph A. of AD 90–18–03. Therefore, for operators who have previously accomplished at least the initial inspection in accordance with AD 90–18–03, paragraph (a) of this AD requires that the next scheduled inspection be performed within the specified repetitive inspection interval after the last inspection performed in accordance with paragraph A. of AD 90–18–03.

(b) Within the threshold for inspections specified in the service bulletins listed in Tables 2.3 and 3.1 [for Model DC–9–10, -20, -30, -40, -50, and C–9 (military) series airplanes], or Table 2.4 [for Model DC–9–81, -82, -83, -87 (MD–81, -82, -83, -87), and Model MD–88 airplanes], as applicable, of McDonnell Douglas Report No. MDC K1572, "DC–9/MD–80 Aging Aircraft Service Action Requirements Document," Revision B, dated January 15, 1993 (hereinafter referred to as "SARD, Revision B"), or within one repetitive inspection period specified in those service bulletins after the effective date of this AD, whichever occurs later: Inspect to detect cracks in accordance with those service bulletins. Repeat these inspections thereafter at the intervals specified in the service bulletins listed in either paragraph (b)(1) or (b)(2) of this AD, as applicable, until the applicable terminating modification required by paragraph (e) of this AD is accomplished.

(1) For Model DC–9–10, -20, -30, -40, -50, and C–9 (military) series airplanes: The service bulletins listed in Tables 2.3 and 3.1 of SARD, Revision B. Or

(2) For Model DC–9–81, -82, -83, -87 (MD–81, -82, -83, -87), and Model MD–88 airplanes: The service bulletins listed in Table 2.4 of SARD, Revision B.

(c) If any crack is found during any inspection required by this AD, prior to further flight, either accomplish the applicable terminating modification in accordance with paragraph (d) or (e) of this AD, or repair in accordance with a method approved by the Manager, Los Angeles Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate.

Note 2: Detection of any discrepancy, other than cracking, necessitates appropriate corrective action in accordance with the provisions of part 43 of the Federal Aviation Regulations (14 CFR part 43).

(d) Prior to reaching the incorporation thresholds listed in either Table 2.1 [for Model DC–9–10, -20, -30, -40, -50, and C–9 (military) series airplanes], or Table 2.2 [for Model DC–9–81, -82, -83, -87 (MD–81, -82, -83, -87), and Model MD–88 airplanes], as applicable, of SARD, Revision A or Revision B, or within 4 years after September 24, 1990 (the effective date of AD 90–18–03), whichever occurs later: Accomplish the structural modifications specified in the service bulletins listed in either Table 2.1 [for Model DC–9–10, -20, -30, -40, -50, and C–9 (military) series airplanes], or Table 2.2 [for Model DC–9–81, -82, -83, -87 (MD–81, -82, -83, -87), and Model MD–88 airplanes], as applicable, of SARD, Revision A or Revision B. Accomplishment of these modifications constitutes terminating action for the applicable inspections required by paragraph (a) of this AD.

Note 3: Paragraph (d) of this AD restates the modification requirements of paragraph B. of AD 90–18–03. As allowed by the phrase, "unless accomplished previously," if the requirements of paragraph B. of AD 90–18–03 have been accomplished previously, paragraph (d) of this AD does not require that they be repeated.

Note 4: The service bulletin revision levels listed under "Recommended Modification" in either Table 2.1 [for Model DC–9–10, -20, -30, -40, -50, and C–9 (military) series airplanes], or Table 2.2 [for Model DC–9–81, -82, -83, -87 (MD–81, -82, -83, -87), and Model MD–88 airplanes], as applicable, of SARD, Revision B, are acceptable revisions for modifications accomplished prior to September 24, 1994.

(e) Prior to reaching the incorporation thresholds listed in either Table 2.3 [for Model DC–9–10, -20, -30, -40, -50, and C–9 (military) series airplanes], or Table 2.4 [for Model DC–9–81, -82, -83, -87 (MD–81, -82, -83, -87), and Model MD–88 airplanes], as applicable, of SARD, Revision B, or within 4 years after the effective date of this AD, whichever occurs later: Accomplish the structural modifications specified in the service bulletins listed in either Table 2.3 [for Model DC–9–10, -20, -30, -40, -50, and C–9 (military) series airplanes], or Table 2.4 [for Model DC–9–81, -82, -83, -87 (MD–81, -82, -83, -87), and Model MD–88 airplanes], as applicable, of SARD, Revision B.

Accomplishment of this modification constitutes terminating action for the applicable inspections required by paragraph (b) of this AD.

Note 5: The service bulletin revision levels listed under "Recommended Modification" in either Table 2.3 [for Model DC–9–10, -20, -30, -40, -50, and C–9 (military) series airplanes], or Table 2.4 [for Model DC–9–81, -82, -83, -87 (MD–81, -82, -83, -87), and Model MD–88 airplanes] of SARD, Revision B, are acceptable revisions for modifications accomplished prior to the effective date of this AD.

Note 6: The modifications required by paragraphs (d) and (e) of this AD do not terminate the inspection requirements of any other AD unless that AD specifies that any such modification constitutes terminating action for those specified inspection requirements.

(f) For Model DC–9–10, -20, -30, -40, -50, and C–9 (military) series airplanes: Prior to the accumulation of 100,000 total landings, accomplish the modifications specified in McDonnell Douglas DC–9 Service Bulletin 53–230, Revision 1, dated January 12, 1993.

Accomplishment of these modifications constitute terminating action for the inspections required by AD 88-24-08 R2, amendment 39-6469.

(g) Accomplishment of the modifications in accordance with the service bulletins listed in Tables 2.1 and 2.3 [for Model DC-9-10, -20, -30, -40, -50, and C-9 (military) series airplanes], or Tables 2.2 and 2.4 [for Model DC-9-81, -82, -83, -87 (MD-81, -82, -83, -87), and Model MD-88 airplanes] of SARD, Revision A or B, terminates the individual inspection requirements of the applicable service bulletin.

(h) The requirements of this AD exclude the actions specified in the following McDonnell Douglas service bulletins that are referenced in the following tables of SARD, Revision A or B:

Table(s)	Service Bulletin
2.1 and 2.2	MD-80 Service Bulletin 53-186.
2.2	MD-80 Service Bulletin 53-216

(i) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Los Angeles Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Los Angeles ACO.

Note 7: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Los Angeles ACO.

(j) Alternative methods of compliance previously granted for amendment AD 90-18-03, 39-6701 continue to be considered as acceptable alternative methods of compliance with this amendment.

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

Issued in Renton, Washington, on November 4, 1994.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 94-27853 Filed 11-9-94; 8:45 am]

BILLING CODE 4910-13-U

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Parts 123 and 148

RIN 1515-AB56

Examination of Baggage

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

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations in order to more clearly reflect Customs statutory authority to open and examine baggage and vehicles without the permission of the owners of the baggage and vehicles. These amendments will make the pertinent Customs regulations consistent with Customs statutory authority to inspect and search baggage and vehicles coming into the United States.

DATES: Comments must be received on or before January 9, 1995.

ADDRESSES: Written comments (preferably in triplicate) may be submitted to and inspected at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229. Comments submitted may be inspected at the Regulations Branch, Office of Regulations & Rulings, 1099 14th Street NW., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Lars-Erik Hjelm, Office of the Chief Counsel, U.S. Customs Service, 202-927-6900.

SUPPLEMENTARY INFORMATION:

Background

There are several statutory provisions which give the U. S. Customs Service the authority to open and examine baggage. The primary provisions are sections 482, 1461, 1462, 1496, 1581 and 1582 of Title 19, United States Code (19 U.S.C. 482, 1461, 1462, 1496, 1581, and 1582). Section 482 authorizes Customs to search vehicles and persons and to seize undeclared merchandise or merchandise imported contrary to law. Section 1461 authorizes Customs to inspect all merchandise and baggage brought into the United States from contiguous countries. Section 1461 also authorizes Customs officers to require that owners of baggage open it or furnish keys for doing so.

Section 1462 authorizes Customs to inspect the contents of all baggage and vehicles brought into the United States. Section 1462 also authorizes Customs to seize and forfeit the contents of such imported baggage or vehicle which is subject to duty or which constitutes a prohibited importation. Section 1496 authorizes Customs to examine the baggage of people arriving in the United States. Section 1581(a) authorizes Customs to board vessels and vehicles and to examine, inspect and search the vessels or vehicles and everyone and everything thereon. Section 1582 authorizes the Secretary of the Treasury to write regulations concerning the search of persons and baggage. It also authorizes officers or agents of the United States Government to detain and search, under such regulations, any persons coming into the United States from foreign countries.

Proposal

The statutes cited above grant Customs broad authority to inspect, search and seize baggage and vehicles coming into the United States. The current Customs Regulations do not accurately reflect these statutes; therefore, Customs intends to revise the regulations, specifically 19 CFR 123.63 and 19 CFR 148.21, to more clearly reflect the fact that Customs has the statutory authority to open and examine baggage, vehicles and compartments thereof without the permission of the owners. Of course, if at all possible, Customs will ask the owner or operator to unlock the vehicle, compartment or baggage.

Comments

Before adopting this proposal, consideration will be given to written comments timely submitted to Customs. Submitted comments will be available for public inspection in accordance with the Freedom of Inspection Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m., at the Regulations Branch, Office of Regulations and Rulings, 1099 14th Street NW., Suite 4000, Washington, D.C.

Regulatory Flexibility Act and Executive Order 12866

Based upon the supplementary information set forth above and because the opening and examination of baggage and merchandise is mandated by the statutes cited above, pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the proposed amendments would not have a significant economic impact on a substantial number of small entities. Accordingly, the proposed amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 or 604. This document does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

Drafting Information

The principal author of this document was Janet L. Johnson, Regulations Branch. However, personnel from other offices participated in its development.

List of Subjects

19 CFR Part 123

Canada, Customs duties and inspection, Freight, International boundaries, Mexico, Motor carriers, Railroads, Reporting and recordkeeping requirements, Vessels.

19 CFR Part 148

Airmen, Customs duties and inspection, Foreign officials, Government employees, International organizations, Reporting and recordkeeping requirements, Vessels.

Proposed Amendments

For the reasons set forth above, it is proposed to amend parts 123 and 148 of the Customs Regulations (19 CFR parts 123 and 148) as set forth below.

PART 123—CUSTOMS RELATIONS WITH CANADA AND MEXICO

1. The general authority citation for part 123 and the specific relevant authority citation for § 123.63 continue to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 17, Harmonized Tariff Schedule of the United States), 1624.

* * * * *

Section 123.63 also issued under 19 U.S.C. 1461, 1462;

* * * * *

2. It is proposed to revise § 123.63 to read as follows:

§ 123.63 Examination of baggage from Canada or Mexico.

(a) *Opening vehicle or compartment to examine baggage.* Customs officers are authorized to unlock, open, and examine vehicles and compartments thereof for the purposes of examining baggage under sections 461, 462, 496, 581(a) and 582, Tariff Act of 1930, as amended (19 U.S.C. 1461, 1462, 1496, 1581(a), and 1582) and 19 U.S.C. 482. However, to the extent practical, the Customs officer should ask the owner or operator to unlock such vehicle or compartment first. Where the owner or operator is unavailable or refuses to unlock the vehicle or compartment or where it is not practical to ask the owner or operator to unlock the same, it shall be opened by the Customs Officer. If any article is subject to duty, or any prohibited article is found upon opening by the Customs Officer, the whole contents and the vehicle shall be subject to forfeiture pursuant to 19 U.S.C. 1462.

(b) *Inspection of baggage.* A Customs officer has the right to inspect all merchandise and baggage brought into the United States from contiguous countries under 19 U.S.C. 1461. He also has the right, under the same statute, to require that owners of such baggage open it or furnish keys for doing so. Where the owner or agent is unavailable or refuses to open the baggage or furnish keys or where it is not practical to ask the owner or agent to open or furnish keys to the same, it shall be opened by the Customs Officer. If any article is subject to duty, or any prohibited article is found upon opening by the Customs Officer, the whole contents and the baggage shall be subject to forfeiture pursuant to 19 U.S.C. 1462.

PART 148—PERSONAL DECLARATIONS AND EXEMPTIONS

1. The general authority citation for Part 148 will be revised to read as set forth below, and the specific sectional authority for § 148.21 will continue to read as follows:

Authority: 19 U.S.C. 66, 1496, 1624. The provisions of this part, except for subpart C, are also issued under 19 U.S.C. 1202 (General Note 17, Harmonized Tariff Schedule of the United States).

Section 148.21 is also issued under 19 U.S.C. 1461, 1462;

* * * * *

2. It is proposed to revise § 148.21 to read as follows:

§ 148.21 Opening of baggage, compartments, or vehicles.

A Customs officer has the right to open and examine all baggage, compartments and vehicles brought into the United States under Sections 461, 462, 496 and 582, Tariff Act of 1930, as amended (19 U.S.C. 1461, 1462, 1496, and 1582) and 19 U.S.C. 482. To the extent practical, the owner or his agent should be asked to open the baggage, compartment or vehicle first. If the owner or his agent is unavailable or refuses to open the baggage, compartment, or vehicle, it shall be opened by the Customs officer. If any article subject to duty, or any prohibited article is found upon opening by the Customs officer, the whole contents and the baggage or vehicle shall be subject to forfeiture, pursuant to 19 U.S.C. 1462.

Peter J. Baish,

Acting Commissioner of Customs.

Approved: October 20, 1994.

Dennis M. O'Connell,

Acting Deputy Assistant Secretary of the Treasury.

[FR Doc. 94–27907 Filed 11–9–94; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 1

[Docket No. 941087–4287]

RIN 0651–AA52

Amendment to Rules for Extension of Patent Term

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Patent and Trademark Office (Office) proposes to amend the rules directed to the extension of patent term to implement the provisions of Public Law 103–179 (December 3, 1993) and to clarify the requirements for eligibility. The proposed rules establish procedures for the Commissioner to issue an interim extension of the term of a patent where the original term would expire before a product covered by the patent has received regulatory approval for commercial marketing or use. The rules also are proposed to be amended to clarify that an application for patent term extension must be based on regulatory activities performed by the patent owner or its agent.

DATES: Written comments must be submitted on or before January 12, 1995. There will be no oral hearing.

ADDRESSES: Address written comments to Commissioner of Patents and Trademarks, Washington, D.C. 20231 marked to the attention of Charles E. Van Horn, Deputy Assistant Commissioner for Patent Policy and Projects, or by FAX to (703) 305–8825.

FOR FURTHER INFORMATION CONTACT: Charles E. Van Horn by telephone at (703) 305–9054 or Gerald A. Dost by telephone at (703) 305–9282 or by mail addressed to Commissioner of Patents and Trademarks, Washington, D.C. 20231 marked to the attention of Charles E. Van Horn, Deputy Assistant Commissioner for Patent Policy and Projects, or by FAX to (703) 305–8825.

SUPPLEMENTARY INFORMATION: Patent term extension has been available under 35 U.S.C. 156 for patents that claim certain products that are subject to regulatory review before being commercially marketed or used. Prior to enactment of Public Law 103–179, eligibility for patent term extension was dependent on regulatory approval of the product before the original patent term expired. Public Law 103–179 has made it possible, under appropriate circumstances, to obtain interim extensions of patent term where the regulatory process is likely to extend

beyond the expiration of the patent term.

One purpose of the proposed rule change is to revise the present regulations contained in 37 CFR Part 1, Subpart F, to include provisions for interim extension of the patent term prior to regulatory approval of the product that can now form the basis of patent term extension. These proposed rules set forth procedures that govern the content and submission of applications for an interim extension of a patent term, and procedures governing the interim extension determination and issuance of interim patent term extension certificates by the Office.

Initial guidelines directed to the preparation and filing of applications for interim extensions of patent terms as authorized by Public Law 103–179 were published as "Guidelines For Interim Extension Under 35 U.S.C. 156(d)(5) of a Patent Term Prior To Regulatory Approval of a Product For Commercial Marketing or Use—Public Law 103–179 (December 3, 1993)" in the *Official Gazette* at 1159 Off. Gaz. Pat. Office 12 (February 1, 1994). It is intended that those guidelines will continue in effect until the promulgation of final rules based on the proposed rulemaking.

It is important to keep in mind the distinction between an interim patent term extension under § 156(e)(2) and the interim patent term extension provided for by Public Law 103–179 under § 156(d)(5). The former applies after regulatory approval has occurred and is addressed in 37 CFR 1.706. Interim patent term extensions under § 156(e)(2) are not affected by the proposed changes to the rules. The latter applies before regulatory approval has occurred and is addressed in 37 CFR 1.780 and 1.790.

The eligibility criteria for obtaining an interim extension under § 156(d)(5) are substantially the same as for obtaining patent term extension under § 156 after regulatory approval has occurred. Under the provisions of Public Law 103–179, a patent owner or its agent may submit an application for an interim patent term extension within six months, but not later than 15 days, of the original expiration date of the patent. At the time the application is submitted, the regulatory review period must have advanced to the approval phase a defined in § 156(g), but must not have ended. For a new drug, for example, the approval phase is defined in § 156(g)(1)(B)(ii) as the period beginning on the date a new drug application was initially submitted for the new drug under section 505 of the Federal Food, Drug and Cosmetic Act.

The content of the application for interim extension is proposed to be the same as for an application for patent term extension following regulatory review, with certain modifications necessitated by the circumstances. For example, the application for interim term extension will not be required to contain information about regulatory approval since that event has not occurred. A fee is proposed for each interim extension application filed before regulatory approval occurs—$400.00 for the initial application for interim extension and $200.00 for each supplementary application for interim extension.

The processing of an application for interim patent term extension under Pub. L. No. 103–179 will not require transmission of a copy of the application to the regulatory agency. However, it is contemplated that the Office will consult with the regulatory agency, as it has been doing for the past 10 years under § 156, on the question of eligibility for patent term extension.

If the patent is eligible for extension but for the fact that it is still under regulatory review, the Office can extend the patent term is one-year increments not to exceed five years from the expiration date. Any such extension would terminate 60 days after market approval. Before the 60-day period expires, the patentee could submit an application for patent term extension, supplying any additional information necessary to obtain any additional extension available under § 156.

The interim extension of patent term available under § 156(d)(5) cannot exceed the extension from the original patent term that would be available after regulatory approval. Thus, for example, a patent that was subject to the two-year extension limitation of § 156(g)(6)(C), could not obtain interim extension beyond two years from the original patent term expiration date. However, after an interim extension under § 156(d)(5) has been granted, the amount of patent term extension available after regulatory review is controlled by either § 156(d)(5) or § 156(g)(6) (A) or (B). In no case would the extension go beyond five years from the original expiration date of the patent. However, for those situations falling under § 156(g)(6)(C), where regulatory approval occurs within the two-year period after the original expiration date of the patent, the extension after approval is measured from the date on which the product receives permission for commercial marketing or use. § 156(d)(5)(E)(ii).

Review of recent applications for patent term extension has revealed that the provisions of 37 CFR 1.785(c) may be read as being inconsistent with 35 U.S.C. 156. The statute requires that an application for patent term extension be filed by the patent owner or its agent. 35 U.S.C. 156(d)(1). The statute further requires under § 156(d)(1)(D) a description of the activities undertaken by the applicant (i.e., the patent owner or its agent) during the regulatory review period, and specifies in § 156(d)(2)(B)(i) that the lack of due diligence by the applicant during the regulatory review period may be taken into account. Given these statutory requirements, the Office has held that in order to be eligible for patent term extension, the patent owner or its agent must have undertaken the activities that lead to regulatory approval. If a patent owner has not been involved, either directly or indirectly, in the regulatory review process, that patent owner has not lost any effective patent life since it never invested time and resources necessary to obtain approval for commercial marketing or use. Accordingly, to the extent that § 1.785 could be interpreted to permit a patent owner to obtain a patent term extension where neither the patent owner nor its agent were responsible for activities leading to regulatory approval, it was misleading and contrary to both the letter and intent of § 156.

Discussion of Specific Rules

Section 1.750, if amended as proposed, would be changed to also provide for an eligibility determination which will be made on applications for interim extension filed in compliance with § 1.790. The section is further modified to limit the mailing of a notice of a final determination to applications filed in compliance with § 1.740 after the regulatory approval process is complete.

Section 1.760, if amended as proposed, would have the title recite that the section is directed to requests for interim extensions of patent term under 35 U.S.C. 156(e)(2), to distinguish it from interim extensions available under Pub. Law No. 103–179, proposed to be addressed in § 1.780.

Section 1.765(a) if amended as proposed, would change the phrase (two occurrences) "the Office of the Secretary" to read "the Office or the Secretary." The change provides that the applicant has a duty of disclosure to both the Patent and Trademark Office and the Secretary of Health and Human Services or the Secretary of Agriculture.

Section 1.780, if amended as proposed, would provide that a certificate of interim extension under 35 U.S.C. 156(d)(5) will be issued to the applicant. Section 1.780 would also provide for notification of the issuance of the certificate of interim extension

under 35 U.S.C. § 156(d)(5), including the identity of the product currently under regulatory review, to be published in the **Federal Register.**

Section 1.785, if amended as proposed, would require the applicant for extension, i.e., the patent owner or its agent, to also have been the marketing applicant who obtained regulatory approval of the product for commercial marketing or use. While regulatory approval can be obtained by a party other than the patent owner, that other party must have been an agent of the patent owner when obtaining the regulatory approval in order for the patent owner to be eligible to apply for extension of the patent term.

Section 1.790, if added as proposed, would provide for one or more interim extensions for periods of up to one year for patents where the applicable regulatory review period described in paragraph (1)(B)(ii), (2)(B)(ii), (3)(B)(ii), (4)(B)(ii), or (5)(B)(ii) of section 156(g) that began for the patented product may extend beyond the expiration of the patent term in effect.

Paragraph (a) of proposed § 1790 defines the time periods in which the initial interim extension application and each subsequent interim extension application must be filed in the Office. In no event will interim extensions be granted under proposed § 1.790 for a period of extension longer than that to which the applicant would be entitled to under 35 U.S.C. 156(c).

Paragraph (b) of proposed § 1.790 would establish that the content requirements of the initial interim extension applications are substantially the same as the content requirements for a formal application for extension of patent term under § 1.740 and a complete application under § 1.741, except that the content requirements relate to a product currently undergoing regulatory review. In other words, the interim extension applications contain information available to the patent owner or its agent at the time the application is filed.

Paragraph (c) of proposed § 1.790 permits each interim extension application after the initial interim extension application to be limited to a request for a subsequent interim extension along with a statement that the regulatory review period has not been completed and any materials or information required under §§ 1.740 and 1.741 not present in the preceding interim extension application.

Section § 1.795, if added as proposed, would provide that any interim extension granted under 35 U.S.C. 156(d)(5) terminates at the end of the 60-day period beginning on the date on which the product involved receives permission for commercial marketing or use. If within that 60-day period the patent owner or its agent files additional information required under 35 U.S.C. 156(d)(1) not contained in the applications for interim extension, the patent shall be further extended in accordance with the provisions of 35 U.S.C. 156.

Other Considerations

The proposed rule changes are in conformity with the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., E.O. 12612, and the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq. The proposed rule changes have been determined to be not significant for the purposes of E.O. 12866.

The General Counsel of the Department of Commerce has certified to the Chief Counsel for Advocacy, Small Business Administration, that the proposed rule changes will not have a significant economic impact on a substantial number of small entities (Regulatory Flexibility Act, 5 U.S.C. 605(b)), because the proposed rules would affect only a very small number of patents eligible for interim patent term extension.

The Office has also determined that this notice has no federalism implications affecting the relationship between the National Government and the States as outlined in E.O. 12612.

These rule changes will impose no substantial additional burden under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq. The paperwork burden imposed by adherence to the patent term extension rules is currently approved by the Office of Management and Budget under Control Number 0651–0020. Comments relating to this requirement should be directed to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for Commerce, Patent and Trademark Office.

List of Subjects in 37 CFR Part 1

Administrative practice and procedure, Authority delegations (government agencies), Conflict of interest, Courts, Inventions and patents, Lawyers.

For the reasons given in the preamble and pursuant to the authority granted to the Commissioner of Patents and Trademarks by 35 U.S.C. 6 and 156, the Office proposes to amend Title 37 of the Code of Federal Regulations as set forth below:

It is proposed to amend 37 CFR Part 1, Subparts A and F, as follows wherein removals are indicated by brackets and additions by arrows:

PART 1—RULES OF PRACTICE IN PATENT CASES

1. (a) An authority citation for 37 CFR Part 1, subpart A would be added to read as follows:

Authority: 35 U.S.C. 6, unless otherwise noted.

1. (b) The authority citation for 37 CFR Part 1, subpart F would continue to read as follows:

Authority: 35 U.S.C. 6 and 156.

2. Section 1.20 is proposed to be amended by revising paragraph (j) to read as follows:

§ 1.20 Post-issuance fees.

* * * * *

(j) For filing an application for extension of the term of a patent

>(1) Application for extension under § 1.740<[(§ 1.740)]—$1,000.00

>(2) Initial application for interim extension under § 1.790—$400.00

(3) Subsequent application for interim extension under § 1.790—$200.00<

3. Section 1.750 is proposed to be revised to read as follows:

§ 1.750 Determination of eligibility for extension of patent term.

A determination as to whether a patent is eligible for extension may be made by the Commissioner solely on the basis of the representations contained in the application for extension filed in compliance with § 1.740> or § 1.790<. This determination may be delegated to appropriate Patent and Trademark Office officials and may be made at any time before the certificate of extension is issued. The Commissioner or other appropriate officials may require from applicant further information or make such independent inquiries as desired before a final determination is made on whether a patent is eligible for extension. >In an application for extension filed in compliance with § 1.740,a< [A] notice will be mailed to applicant containing the determination as to the eligibility of the patent for extension and the period of time of the extension, if any. This notice shall constitute the final determination as to the eligibility and any period of extension of the patent. A single request for reconsideration of a final determination may be made if filed by the applicant within such time as may be set in the notice of final determination or, if no time is set, within one month from the date of the final determination. The time periods set forth herein are subject to the provisions of [37 CFR]> § <1.136.

4. In § 1.760, the heading is proposed to be revised to read as follows:

§ 1.760 Interim extension of patent term > under 35 U.S.C. § 156(e)(2)<.

5. Section 1.765(a) is proposed to be revised to read as follows:

§ 1.765 Duty of disclosure in patent term extension proceedings.

(a) A duty of candor and good faith toward the Patent and Trademark Office and the Secretary of Health and Human Services or the Secretary of Agriculture rests on the patent owner or its agent, on each attorney or agent who represents the patent owner and on every other individual who is substantively involved on behalf of the patent owner in a patent term extension proceeding. All such individuals who are aware, or become aware, of material information adverse to a determination of entitlement to the extension sought, which has not been previously made of record in the patent term extension proceeding must bring such information to the attention of the Office [of] > or < the Secretary, as appropriate, in accordance with paragraph (b) of this section, as soon as it is practical to do so after the individual becomes aware of the information. Information is material where there is a substantial likelihood that the Office [of] > or < the Secretary would consider it important in determinations to be made in the patent term extension proceeding.

6. Section 1.780 is proposed to be revised to read as follows:

§ 1.780 Certificate of extension of patent term.

If a determination is made pursuant to § 1.750 that a patent is eligible for extension and that the term of the patent is to be extended, a certificate of extension, under seal,>or certificate of interim extension under 35 U.S.C. 156(d)(5)<will be issued to the applicant for the extension of the patent term. Such certificate will be recorded in the official file of the patent and will be considered as part of the original patent. Notification of the issuance of the certificate of extension will be published in the Official Gazette of the Patent and Trademark Office. >Notification of the issuance of the certificate of interim extension under 35 U.S.C. 156(d)(5), including the identity of the product currently under regulatory review, will be published in the Official Gazette of the Patent and Trademark Office and in the Federal Register.< No certificate of extension will be issued if the term of the patent cannot be extended, even though the patent is otherwise determined to be eligible for extension. In such situations the final determination made pursuant to § 1.750 will indicate that no certificate will issue.

7. Section 1.785 is proposed to be revised to read as follows:

§ 1.785 Multiple applications for extension of term of the same patent or of different patents for the same regulatory review period for a period.

(a) Only one patent may be extended for a regulatory review period for any product (§ 1.720[(g)]>(h)<). If more than one application for extension of the same patent is filed, the certificate of extension of patent term, if appropriate, will be issued based upon the first filed application for extension.

(b) If more than one application for extension is filed by a single applicant which seeks the extension of the term of two or more patents based upon the same regulatory review period, and the [applications or] > patents are < otherwise eligible for extension pursuant to the requirements of this subpart, in the absence of an election by the applicant, the certificate of extension of patent term, if appropriate, will be issued upon the application for extension of the patent > term < having the earliest date of issuance of those patents for which extension is sought.

(c) If an application for extension is filed which seeks the extension of the term of a patent based upon the same regulatory review period as that relied upon in one or more applications for extension pursuant to the requirements of this subpart, the certificate of extension of patent term will be issued on the application only if [—

(1) The applicant for extension] > the patent owner or its agent < is the holder of the regulatory approval granted with respect to the regulatory review period [, or

(2) The holder of the regulatory approval granted with respect to the regulatory review period is not an applicant and the applicant for extension holds express and exclusive authorization from the holder of the regulatory approval to rely upon the regulatory review period as the basis for the application for extension, or

(3) The holder of the regulatory approval granted with respect to the regulatory review period is not an applicant and no applicant for extension holds an express and exclusive authorization from the holder of the regulatory approval to rely upon the regulatory review period as the basis for the application for extension and the application is for extension of the patent having the earliest date of issuance of those patents for which extension is sought based upon the same regulatory review period].

(d) An application for extension shall be considered complete and formal regardless of whether it contains the identification of the holder of the regulatory approval granted with respect to the regulatory review period [or express and exclusive authorization from the holder of the regulatory approval to rely on the regulatory review period for extension]. When an application contains such information, or is amended to contain such information, it will be considered in determining whether an application is eligible for an extension under this section. A request may be made of any applicant to supply such information within a non-extendable period of not less than one (1) month whenever multiple applications for extension of more than one patent are received and rely upon the same regulatory review period. Failure to provide such information within the period for response set shall be regarded as conclusively establishing that the applicant is not the holder of the regulatory approval [and is not expressly and exclusively authorized by the holder of the regulatory approval to seek the extension being sought].

(e) Determinations made under this section shall be included in the notice of final determination of eligibility for extension of the patent term pursuant to § 1.750 and shall be regarded as part of that determination.

8. Section 1.790 is proposed to be added to read as follows:

>§ 1.790 Interim extension of patent term under 35 U.S.C. 156(d)(5).

(a) An owner of record of a patent or its agent who reasonably expects that the applicable regulatory review period described in paragraph (1)(B)(ii), (2)(B)(ii), (3)(B)(ii), (4)(B)(ii), or (5)(B)(ii) of subsection (g) of 35 U.S.C. 156 that began for a product that is the subject of such patent may extend beyond the expiration of the patent term in effect may submit one or more applications for interim extensions for periods of up to one year each. The initial application for interim extension must be filed during the period beginning 6 months and ending 15 days before the patent term is due to expire. Each subsequent application for interim extension must be filed during the period beginning 60 days before and ending 30 days before the expiration of the preceding interim extension. In no event will the interim extensions granted under this section be longer than the maximum period of extension to which the applicant would be entitled under 35 U.S.C. 156(c).

(b) A complete application for interim extension under this section shall

include all of the information required for a formal application under § 1.740 and a complete application under § 1.741. Sections (a)(1), (a)(2), (a)(4), and (a)(6) through (a)(17) of § 1.740 and § 1.741 shall be read in the context of a product currently undergoing regulatory review. Paragraphs (a)(3) and (a)(5) of § 1.740 are not applicable to an application for interim extension under this section.

(c) The content of each subsequent interim extension application may be limited to a request for a subsequent interim extension along with a statement that the regulatory review period has not been completed and any materials or information required under § 1.740 and § 1.741 not present in the preceding interim extension application. <

9. Section 1.791 is proposed to be added to read as follows:

>§ 1.791 Termination of interim extension granted prior to regulatory approval of a product for commercial marketing or use.

Any interim extension granted under 35 U.S.C. 156(d)(5) terminates at the end of the 60-day period beginning on the date on which the product involved receives permission for commercial marketing or use. If within that 60-day period the patent owner or its agent files an application for extension under § 1.740 and § 1.741 including any additional information required under 35 U.S.C. 156(d)(1) not contained in the application for interim extension, the patent shall be further extended in accordance with the provisions of 35 U.S.C. 156. <

Dated: November 2, 1994.

Bruce A. Lehman,

Assistant Secretary of Commerce and Commissioner of Patents and Trademarks.

[FR Doc. 94-27881 Filed 11-9-94; 8:45 am]

BILLING CODE 3510-16-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[Region II Docket No. 131, NJ 15-1-6341; FRL-5104-8]

Approval and Promulgation of Implementation Plans; Carbon Monoxide State Implementation Plan Revision, State of New Jersey

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve portions of a request from New Jersey to revise its State Implementation Plan (SIP) related to the control of carbon monoxide and disapprove remaining portions. EPA is proposing approval of New Jersey's vehicle miles travelled forecast, carbon monoxide emission inventory, oxygenated fuels rule, and multi-state coordination. EPA is also proposing approval of the employee commute option and transportation control measures as contingency measures. In addition, EPA is proposing a limited approval and a limited disapproval of New Jersey's new source review regulation which covers all nonattainment pollutants. EPA proposes to disapprove New Jersey's November 15, 1993, proposal for an enhanced inspection and maintenance program. In addition, the attainment demonstration is also being disapproved since it relies on the enhanced inspection and maintenance program as a control measure. These revisions have been submitted in response to requirements established in the Clean Air Act as amended in 1990.

DATES: Comments must be received on or before December 12, 1994.

ADDRESSES: Written comments should be addressed to:

William J. Muszynski, P.E., Deputy Regional Administrator, Environmental Protection Agency, Region II Office, 26 Federal Plaza, New York, New York 10278 Attention: William S. Baker.

Copies of the State submittal are available at the following addresses for inspection during normal business hours:

Environmental Protection Agency, Region II Office, Library, 26 Federal Plaza, Room 402, New York, New York 10278.

New Jersey Department of Environmental Protection, Office of Energy, Bureau of Air Quality Planning, 401 East State Street, CN027, Trenton, New Jersey 08625.

FOR FURTHER INFORMATION CONTACT: William S. Baker, Chief, Air Programs Branch, Environmental Protection Agency, 26 Federal Plaza, room 1034A, New York, New York 10278, (212) 264-2517.

SUPPLEMENTARY INFORMATION:

Background

The Clean Air Act (Act), as amended in 1990, sets forth a number of requirements that states designated as moderate nonattainment for carbon monoxide had to submit as revisions to their State Implementation Plans (SIPs) by November 15, 1992. These requirements are: an attainment demonstration, an enhanced vehicle inspection and maintenance program, an oxygenated fuels rule, a vehicle miles travelled forecast, contingency measures, a carbon monoxide emission inventory, a revised New Source Review program, and multi-state coordination. In addition, a conformity plan is required to be submitted by November 25, 1994.

On November 15, 1992, New Jersey submitted to the Environmental Protection Agency (EPA) proposed revisions to its carbon monoxide SIP that addressed each of the above requirements for its two moderate carbon monoxide nonattainment areas. In addition, in a submittal dated October 4, 1993, New Jersey submitted to EPA information on TCMs which New Jersey will use as a contingency measure.

The New Jersey portion of the New York-Northern New Jersey-Long Island carbon monoxide nonattainment area is classified as a moderate 2 area (an area that has a design value of 12.8–16.4 ppm.), while the other area, Camden County, is classified as a moderate 1 area (an area with a design value of 9.1–12.7 ppm). The New York-Northern New Jersey-Long Island carbon monoxide nonattainment area is part of the New York-Northern New Jersey-Long Island Consolidated Metropolitan Statistical Area and includes the Counties of Bergen, Essex, Hudson, Union, and parts of Passaic. The nonattainment area in Passaic County includes the Cities of Clifton, Paterson, and Passaic. The remainder of the State is either in attainment or is not classified.

EPA has issued a "General Preamble" describing its preliminary views on how it intends to review SIPs and SIP revisions submitted in order to meet title I requirements (see generally 57 FR 13498 (April 16, 1992) and 57 FR 18070 (April 28, 1992)). The reader should refer to the General Preamble for a more detailed discussion of the title I requirements and what EPA views as necessary to adequately comply with title I provisions. The following summarizes EPA's evaluation of New Jersey's SIP submittals and EPA's proposed actions. The details of EPA's review of New Jersey's submittals are contained in the Technical Support Document available at EPA's Region II office.

Attainment Demonstration

Section 187(a)(7) of the Act requires each state that contains all or part of a moderate 2 area to submit to the Administrator an attainment demonstration by November 15, 1992. This attainment demonstration should

document how the State will attain the 8-hour carbon monoxide National Ambient Air Quality Standard (NAAQS) of 9 ppm by December 31, 1995.

New Jersey, using emissions from the EPA-approved MOBILE4.1 model, demonstrated attainment of the carbon monoxide standard with the EPA-approved CAL3QHC air quality dispersion model. New Jersey took emission reductions credit from an enhanced inspection and maintenance program, oxygenated fuels, and the federal motor vehicle control program (vehicle turnover) as control measures to attain the standard. The following is a summary of the methods and modeling techniques New Jersey used in its attainment demonstration. A more detailed explanation of this modeling is contained in the Technical Support Document.

To begin the modeling process, New Jersey first selected then ranked the "worst case" intersections that the New Jersey Department of Transportation, working in conjunction with the county and local governments, had identified. Next, New Jersey chose a background concentration and an ambient temperature for use in the CAL3QHC intersection model. Once all the parameters were selected, the modeling was performed and maximum future carbon monoxide concentrations were predicted.

New Jersey ranked the "worst case" intersections with a technique other than that prescribed by the EPA guidance, "Guideline for Modeling Carbon Monoxide from Roadway Intersections." This guidance specifies that such rankings use Level Of Service (LOS) calculations which measure the operating conditions in the intersection and how those conditions affect traffic flow and delay. As such, LOS is a measure of the combined traffic volume, signal timing, and related congestion and delay. New Jersey did not have LOS data in its database, and the time and cost of collecting this data prohibited the use of this method. Instead, New Jersey used traffic volume information and a survey conducted by the New Jersey Department of Transportation which examined the geometry of various intersections. Since this traffic volume information is closely related to delay, it is a valid alternative method for ranking.

New Jersey then used the EPA default background carbon monoxide value of 3.5 ppm for a central business district from the "Guideline for Modeling Carbon Monoxide from Roadway Intersections." This background was used in place of EPA's Urban Airshed Model (UAM) or RAM model. Given the lack of reliable gridded traffic information, the UAM or RAM model would have no advantage over the default value in this instance. Further, the default value was shown to be conservative when compared with background values for the entire New York-Northern New Jersey-Long Island carbon monoxide nonattainment area.

New Jersey, using the above parameters along with additional traffic and air quality data inputs required by the CAL3QHC intersection model, then performed an air quality modeling analysis on the 25 "worst case" intersections. This analysis demonstrated that all of the modeled intersections will attain the 8-hour carbon monoxide standard of 9 ppm. The highest value obtained was 8.0 ppm, which is 11% below the 8-hour carbon monoxide standard. Since air quality at the most congested intersections was determined to be below the standard, New Jersey has demonstrated that the entire area will be in attainment for carbon monoxide by December 31, 1995.

New Jersey used appropriate modeling techniques and modeling inputs in this demonstration, however one of the control measures used to demonstrate attainment, the enhanced inspection and maintenance program, submitted on November 15, 1993 has not been fully adopted in accordance with State requirements. In addition, New Jersey has publicly declared its intention to make a revised submittal at a later date. Therefore, EPA is proposing to disapprove the attainment demonstration because it is dependent on an unadopted program.

Enhanced Inspection and Maintenance Program

Section 187(a)(6) of the Act requires implementation of enhanced inspection and maintenance programs in moderate 2 carbon monoxide nonattainment areas which includes provisions as required under section 182(c)(3) concerning serious ozone nonattainment areas. Such provisions require implementation of an enhanced inspection and maintenance program in urbanized areas with a population greater than 200,000.

On November 15, 1993 New Jersey submitted proposed regulations and other information pertaining to the enhanced inspection and maintenance program. Since New Jersey did not submit a fully adopted enhanced inspection and maintenance program, on February 2, 1994 EPA notified the State that this submittal was incomplete and a sanctions process was begun. Because these regulations were not adopted at the time of their submittal (or since), EPA is proposing the disapproval of the enhanced inspection and maintenance program as submitted.

Oxygenated Fuels Rule—Subchapter 25

Section 211(m) of the Act requires that states submit revisions to their SIPs to require an oxygenated gasoline program by no later than November 1, 1992. This requirement applies to all states with moderate carbon monoxide nonattainment areas having a design value of 9.1 ppm or greater based generally on 1988 and 1989 air quality data. Each state's oxygenated gasoline program must require gasoline for the specified control area(s) to contain not less than 2.7% oxygen by weight during that portion of the year in which the areas are prone to high ambient concentrations of carbon monoxide. Under section 211(m)(2), the oxygenated gasoline requirements generally are to cover all gasoline sold or dispensed in the larger of either the Consolidated Metropolitan Statistical Area or the Metropolitan Statistical Area in which the nonattainment area is located. Under section 211(m)(2), the length of the control period, to be established by the EPA Administrator, shall not be less than four months unless a state can demonstrate that, because of meteorological conditions, a reduced control period will assure that there will be no carbon monoxide exceedances outside of such reduced period. EPA announced guidance on the establishment of control periods by area in the **Federal Register** on October 20, 1992 (57 FR 47849).

In this guidance, EPA also announced the availability of an oxygenated gasoline credit program. Under a credit program, marketable oxygen credits may be generated from the sale of gasoline with a higher oxygen content than is required (i.e. an oxygen content greater than 2.7% by weight). These oxygen credits may be used to offset the sale of gasoline with a lower oxygen content than is required. Where a credit program has been adopted, EPA's guidelines provide that no gallon of gasoline should contain less than 2.0% oxygen by weight. EPA also issued labeling regulations under section 211(m)(4) of the Act, which were published in the **Federal Register** on October 20, 1992.

New Jersey was required to submit a revised SIP by November 15, 1992 under section 110 and part D of title I of the Act and which was to include an oxygenated gasoline program for the New Jersey portions of the New York-Northern New Jersey-Long Island Consolidated Metropolitan Statistical Area and the Philadelphia-Wilmington-

Trenton Consolidated Metropolitan Statistical Area.

As part of the November 15, 1992, submittal, the New Jersey Department of Environmental Protection (NJDEP) submitted adopted amendments and new rule Subchapter 25, "Control and Prohibition of Air Pollution by Vehicular Fuels," of Chapter 27, Title 7 of the New Jersey Administrative Code. Subchapter 25 contains the requirements for New Jersey's oxygenated gasoline program, which was adopted by New Jersey on September 1, 1992.

A more detailed analysis of the submittal is contained in the Technical Support Document. The following is EPA's review of the major elements of the State's submittal.

Type of Program and Oxygen Content Requirement

New Jersey has elected to adopt a regulation requiring 2.7% oxygen content for each gallon of gasoline sold in a control area. The regulation also contains a variance that allows, upon individual facility request and subsequent State approval, the establishment of a 2.0% minimum oxygen content. Under EPA's credit program guidelines, all gasoline sold or dispensed during the control period by each control area responsible party (CAR or Blender CAR) must contain an average oxygen content of not less than 2.7% by weight. New Jersey has adopted an oxygen content requirement, though it also provides for variances from this requirement.

Applicability and Program Scope

Section 211(m)(2) requires oxygenated gasoline to be sold during a control period established by the EPA Administrator based on air quality monitoring data. New Jersey has established control periods consistent with the EPA guidance.

Subchapter 25 has an "averaging period" scheme which provides that all gasoline sold or dispensed within the control areas during a one month averaging period must comply with the 2.7% average oxygen content standard.

Subchapter 25 requires oxygenated gasoline to be sold statewide and divides New Jersey into a northern and southern area. The two areas differ only in the relative length of their control periods: seven months (October 1 to April 30) in the northern area and four months (November 1 to the last day of February) in the southern area. The length of each control period is consistent with the requirements of section 211(m)(2) of the Act.

Registration and Reporting Requirements

EPA's credit program guidelines specify that all parties intending to sell or dispense gasoline obtained from a Control Area Terminal should register with the state at least 30 days in advance of each control season. At the time of registration, every CAR will be required to declare its intention to comply with the regulation. Upon acceptance, CAR identification numbers should be issued by the state. EPA guidelines specify that no party should be allowed to generate, trade, buy or sell credits without a CAR identification number.

Subchapter 25 provides CAR identification numbers. However, if the applicant fails to provide all information requested by the NJDEP, the application may be denied.

EPA has also specified that records should be retained by all parties in the gasoline distribution system. EPA's guidelines impose responsibilities on various parties in the gasoline industry. Persons who produce or import gasoline are responsible for assuring that the gasoline is tested and that the accompanying documentation accurately reflects oxygen content. Persons who transport, store, or sell gasoline have various responsibilities associated with assuring that only oxygenated gasoline is sold or dispensed for use in control areas. Terminal owners and operators are responsible for assuring that the oxygen content of the gasoline they receive, handle, or dispense is accurate. Retailers and wholesale purchaser-consumers are responsible for assuring that gasoline intended for sale during the control period contains at least 2.0% oxygen by weight if they are participating in the averaging program.

New Jersey requires all parties in the gasoline distribution network who are located or do business within a control area, and whose product is eventually sold into the control area for ultimate use, to keep records concerning certain day-to-day activities.

New Jersey's regulation requires any terminal or facility that is granted a variance to submit to the NJDEP, on a monthly basis during the applicable averaging period, a report that states the contemporaneous average of the oxygen content of the gasoline transferred to or from that terminal or facility during that month.

With respect to the implementation of an averaging program, EPA guidelines also require that CARs commission an annual attest engagement (a report detailing relevant activities), performed by either an internal auditor or independent Certified Public Accountant. Since New Jersey does not provide for the use of oxygenate credits in their averaging program, there is no need for a requirement to conduct a review or audit for averaging purposes.

Prohibited Activities

EPA's credit program guidelines contain provisions designed to ensure that gasoline that fails to meet the minimum oxygen content requirement is not available for use within a control area. Generally, CARs or blender CARs may not transfer gasoline for use in a control area that contains less than the minimum percentage of oxygen by weight to parties who are not themselves registered as CARs or blender CARs. EPA's guidelines further recommend that records be maintained. New Jersey's program addresses these requirements.

Transfer Documents

EPA's credit program guidelines specify that transfer documents should include the following information: date of the transfer, name and address of the transferor, name and address of the transferee, the volume of gasoline which is being transferred, the proper identification of the gasoline as oxygenated or nonoxygenated, the location of the gasoline at the time of the transfer, the type of oxygenate, and the oxygen content of the gasoline (for transfers upstream of the control area terminal and for transfers between CARs, include the oxygenate volume of the gasoline). Records are to be kept in a location where they are available for state review.

Subchapter 25 requires that facilities and terminals keep such records available, upon request, for review by the NJDEP.

Subchapter 25 includes requirements related to transfer documentation in its regulation. These transfer document requirements will enhance the enforcement of the oxygenated gasoline regulation by providing a paper trail for each gasoline sample taken by State enforcement personnel.

Enforcement and Penalty Schedules

State oxygenated gasoline regulations must be enforceable by the state oversight agency. EPA recommends that states visit at least 20% of the regulated parties during a given control period. Inspections should consist of product sampling and record review. In addition, EPA guidelines recommend that each state should devise a comprehensive penalty schedule. Penalties should reflect the severity of a

party's violation, the compliance history of the party, as well as the potential environmental harm associated with the violation. New Jersey's regulation contains a comprehensive penalty schedule in accordance with EPA guidance. New Jersey, in addition to having authority to assess a civil administrative penalty, reserves its authority to revoke a violator's operating certificate or variance.

Test Methods and Laboratory Review

EPA's sampling procedures are detailed in Appendix D of 40 Code of Federal Regulation part 80. EPA has recommended, in its credit program guidelines, that states adopt these sampling procedures. New Jersey has adopted EPA sampling procedures, which include established federal testing procedures and tolerances.

Labeling

EPA requires the labeling of gasoline pumps and has strongly recommended that states adopt their own labeling regulations, consistent with the federal regulation. New Jersey has adopted labeling regulations consistent with the federal regulation.

EPA's review of subchapter 25 and supporting materials indicates that New Jersey has adopted an oxygenated gasoline regulation that meets the requirements of the Act. Therefore, EPA is proposing to approve New Jersey's Subchapter 25 oxygenated fuels program.

Vehicle Miles Travelled Forecast

Section 187(a)(2)(A) of the Act requires moderate carbon monoxide nonattainment areas, such as that portion of New Jersey included in the New York-Northern New Jersey-Long Island nonattainment area, to submit a SIP revision that forecasts vehicle miles travelled (VMT) through the year 1995. In addition, annual reports and annual updates are required by the state, the first of these is required by September 30, 1994.

The VMT forecast must meet two requirements. First, it must estimate the VMT from 1990 through 1995 using a method acceptable to EPA, and must be conducted in the appropriate geographic area. Second, there must be proper coordination between the state agencies involved in developing the VMT forecast.

Contingency measures are to be implemented in a case where the actual annual VMT or the updated forecast exceeds the most recent prior VMT forecast by 5.0 percent in 1994, 4.0 percent in 1995, and 3.0 percent thereafter. In addition, if these annual exceedances are less than these maximum percentages but cumulatively exceed 5 percent, then contingency measures are also triggered.

The estimated VMT for 1990 and 1991 are 94.9 and 97.4 million miles per day, respectively. In addition, the future forecasts are (in million miles per day) 99.8 for 1992, 102.2 for 1993, 104.6 for 1994, and 107.1 for 1995.

EPA proposes to find that New Jersey has submitted documentation satisfying these requirements, and therefore proposes approval of its VMT forecast SIP revision.

Contingency Measures

Section 187(a)(3) of the Act requires that states adopt contingency measures to take effect without further action by the Administrator or the state if the state fails to attain the NAAQS by the required date or if the VMT forecast is exceeded beyond the allowable limit as discussed in the VMT forecast section. New Jersey submitted three contingency measures, the Employee Commute Option (ECO) program, an enhanced inspection and maintenance program (benefit from emission reductions outside of the carbon monoxide nonattainment area), and Transportation Control Measures (TCMs) to fulfill this requirement. The ECO program will act as a contingency measure for failure to attain the carbon monoxide standard while the state-wide enhanced inspection and maintenance program and the TCMs will be used as measures for exceeding the VMT forecast.

1. *ECO Program* New Jersey is required by section 182(d)(1) of the Act to submit its ECO program as part of its ozone nonattainment SIP. New Jersey's program will apply to employers with 100 or more employees who arrive at the workplace between the hours of 6 and 10 a.m. The goal of this program is to increase the average passenger occupancies (APO) by 25% above the average for vehicles arriving at the workplace. This would decrease the amount of automobiles arriving at the workplace, and therefore, decrease the VMT.

New Jersey submitted a SIP revision on November 15, 1993 that contained an adopted ECO program. EPA is proposing to approve the State's ECO program as a carbon monoxide contingency measure since it is an adopted measure which will serve to reduce VMT. However, EPA will be taking action on the ECO program submittal as a requirement of the ozone SIP in a separate **Federal Register** notice since there are specific requirements an ECO program must meet for an ozone SIP but not for a carbon monoxide SIP.

2. *Statewide Enhanced Inspection and Maintenance Program* New Jersey also submitted this program as a revision for its ozone SIP, and it is identical to that required by section 187(a)(6) of the Act (see section on enhanced inspection and maintenance program earlier in this notice). Since the program is being established on a state-wide basis, carbon monoxide reductions derived from outside of the Northeastern New Jersey nonattainment area will have a benefit in the carbon monoxide nonattainment areas and could be used for contingency purposes. Once adopted, the enhanced inspection and maintenance program will act as an additional contingency measure should the VMT forecast be exceeded.

3. *TCMs* The Act requires states in carbon monoxide non-attainment areas to develop VMT forecasts. In addition, states must develop TCMs that will be used as contingency measures in the event that the VMT forecast included in the 1992 carbon monoxide SIP is exceeded.

New Jersey's SIP submittal includes TCMs as contingency measures. These TCMs are incorporated into three major program areas, which includes traffic flow improvements, park & ride lots, and increased ridesharing. EPA proposes to approve these TCMs as viable contingency measures to offset excess growth in VMT.

EPA proposes to approve the ECO program as an adequate contingency measure for failure to attain the carbon monoxide standard. While New Jersey identified two contingency measures should the VMT forecast be exceeded, only one measure was adopted. EPA proposes to approve the TCMs as an adequate contingency measure for exceeding the VMT forecast. Once the enhanced inspection and maintenance program is adopted, it will act as an additional contingency measure should further carbon monoxide reductions be necessary.

Carbon Monoxide Emission Inventory

New Jersey submitted a comprehensive carbon monoxide emission inventory on November 15, 1992 as required by section 187(a)(1) and as described in section 172(c)(3) of the Act. Additional inventory information was submitted on January 12, 1993.

The emission inventory represents a comprehensive, actual inventory of all carbon monoxide emission sources in the nonattainment areas. It includes emissions from point, area, and mobile sources (see 1990 base year carbon monoxide emissions summary in Tables 1 and 2).

The inventory was developed according to EPA guidance and has been quality assured. Sources that emit in excess of 100 tons per year of carbon monoxide are defined as point sources. Stationary sources that emit below this threshold are too small to be considered point sources and are, therefore, considered to be area sources. The area and off-highway mobile sources include such categories as stationary source fuel combustion, aircraft, marine vessels, and railroads. Highway mobile source emissions were calculated using EPA's MOBILE 4.1 model. Input parameters to this model included VMT, speed, temperature, and registration distribution.

EPA proposes to approve New Jersey's 1990 base year emission inventory for carbon monoxide.

In addition, it should be noted that New Jersey may be undertaking a revised analysis of its attainment demonstration and emissions budget based on more recent traffic information now being developed. EPA would evaluate, in a future **Federal Register** notice, any additional information provided by New Jersey.

TABLE 1.—SUMMARY OF 1990 BASE YEAR CARBON MONOXIDE EMISSIONS BY SOURCE CATEGORY FOR NEW JERSEY PORTION OF THE NEW YORK-NORTHERN NEW JERSEY-LONG ISLAND CARBON MONOXIDE NONATTAINMENT AREA

Source category	CO emissions (tons/day)
Point	36.43
Area	31.98
Non-Road Mobile	228.40
On-Road Mobile	1613.56
Total	1910.37

TABLE 2.—SUMMARY OF 1990 BASE YEAR CARBON MONOXIDE EMISSIONS BY SOURCE CATEGORY FOR CAMDEN COUNTY CARBON MONOXIDE NONATTAINMENT AREA

Source category	CO emissions (tons/day)
Point	1.12
Area	11.78
Non-Road Mobile	33.47
On-Road Mobile	576.39
Total	622.76

Multi-State Coordination

Section 187(e) of the Act establishes the requirements for "multi-state carbon monoxide nonattainment areas," which are defined as single carbon monoxide nonattainment areas that cover more than one state. To satisfy this requirement, states must develop and submit to EPA a joint workplan to demonstrate early cooperation and integration. This workplan can be in the form of a letter co-signed by all states in the nonattainment area, or EPA has decided, it can consist of signed individual letters from each of the states. New Jersey submitted its letter, containing a detailed schedule of milestones and a commitment to coordinate with EPA and each of the states involved, on October 27, 1992.

Therefore, EPA proposes to find that New Jersey has fulfilled this requirement and proposes approval of this SIP revision.

Conformity Plan

Section 176(c) of the Act requires states to revise their SIPs to establish criteria and procedures to ensure that federal actions, before they are taken, conform to the air quality planning goals in the applicable state SIP. The requirement to determine conformity applies to transportation plans, programs and projects developed, funded or approved under title 23 U.S.C. or the Federal Transit Act ("transportation conformity"), as well as to all other federal actions ("general conformity"). Section 176 further provides that the conformity revisions to be submitted by states must be consistent with federal conformity regulations that the Act required EPA to promulgate. Congress provided for the state revisions to be submitted one year after the date for promulgation of final EPA conformity regulations. When that date passed without such promulgation, EPA's General Preamble for the Implementation of title I informed states that its conformity regulations would establish a submittal date (see 57 FR 13498 (April 16, 1992)).

The USEPA promulgated final transportation conformity regulations on November 24, 1993 (58 FR 62188) and general conformity regulations on November 30, 1993 (58 FR 63214). These conformity rules require that states adopt both transportation and general conformity provisions in the SIP for areas designated nonattainment or subject to a maintenance plan approved under section 175A of the Act. Pursuant to § 51.396 of the transportation conformity rule, the State of New Jersey is required to submit a SIP revision containing transportation conformity criteria and procedures consistent with those established in the federal rule by November 25, 1994. Similarly, New Jersey is required to submit a SIP revision containing general conformity criteria and procedures consistent with those established in the federal rule by November 30, 1994, pursuant to § 51.851 of the general conformity rule. Those deadlines have not yet come due.

The State of New Jersey has committed to develop and submit a SIP revision containing conformity procedures that are consistent with the final federal conformity rules. EPA will evaluate and take action at a later time on any such submittal. Until EPA approves a conformity SIP revision for New Jersey, EPA's general conformity and transportation conformity rules, along with the provisions of section 176(c), will govern conformity determinations.

According to EPA's transportation conformity regulation, 40 CFR 93.128, the conformity status of the transportation plan and TIP shall lapse 120 days following the date of final disapproval of the control strategy implementation plan revision, and no new project-level conformity determinations may be made. No new transportation plans, TIPs, or projects may be found to conform until another control strategy implementation plan revision is submitted and conformity is demonstrated according to transitional period criteria and procedures. Therefore, should EPA's proposed disapproval be finalized, the conformity status of the North Jersey Transportation Planning Authority's transportation plan and TIP will lapse 120 days later.

New Source Review Regulation—Subchapter 18

Section 173 of the Act requires states to submit New Source Review (NSR) revisions that, among other things, incorporate new offset ratios and applicability limits in new source review permitting regulations by November 15, 1992.

I. Background

EPA is currently developing a proposed rule to implement all changes required by the 1990 Amendments in the new source review provisions in parts C and D of title I of the Act. EPA will refer to the proposed rule as the most authoritative guidance available regarding the approvability of the submittals. When final federal regulations are promulgated, EPA will review those NSR SIP submittals on which it may have taken final action to determine whether additional SIP revisions are necessary.

In this proposed rulemaking on New Jersey's nonattainment NSR SIP, Subchapter 18 "Control and Prohibition

of Air Pollution from New and Altered Sources Affecting Ambient Air Quality," EPA is applying its current view of the Act's requirements. New Jersey addressed all pollutants in its revision to Subchapter 18 and therefore, EPA is taking action on the NSR program as it relates to all criteria pollutants.

II. Evaluation of State Program

The following summarizes EPA's evaluation of New Jersey's revised NSR rule and EPA's proposed action. The State of New Jersey held a public hearing on November 5, 1992 to entertain public comment on its revised NSR implementation plan. Subchapter 18 was adopted on February 19, 1993, and submitted to EPA on the same date as part its proposed revision to its ozone SIP. EPA found the submittal to be complete on April 29, 1993.

General Nonattainment NSR Requirements

The statutory requirements for nonattainment NSR review permitting SIPs are found at sections 172, 173 and 182–189 of the Act. It is on this basis that EPA is making its decision today. The Act requires all states to have submitted the following nonattainment NSR requirements to EPA by November 15, 1992:

1. Provisions to ensure that the construction bans imposed by EPA may be lifted by states. New Jersey had no such bans because it had an approved nonattainment NSR regulation in place. This provision, therefore, does not apply to New Jersey.

2. Provisions to assure that calculation of emissions offsets, as required by section 173(a)(1)(A) of the Act, are based on the same emissions baseline used in the demonstration of reasonable further progress. New Jersey's emissions baseline for offsets calculation is an inventory based on actual 1990 emissions. This provision meets federal requirements and is, therefore, approvable.

3. Provisions, in accordance with section 173(c)(1) of the Act, to allow offsets to be obtained in another nonattainment area, if the area has an equal or higher nonattainment classification and emissions from the other nonattainment area contribute to a NAAQS violation in the area in which the source would construct. New Jersey has chosen not to allow offsets from other nonattainment areas. This approach is more restrictive than the federal requirement and is, therefore, approvable.

4. Provisions, in accordance with section 173(c)(1) of the Act, to assure that any emissions offsets obtained in conjunction with the issuance of a permit to a new or modified source must be in effect and enforceable by the time the new or modified source commences operation. New Jersey has included a provision requiring such a demonstration from all permit applicants. However subchapter 18 does not contain definitions of "initiation of construction or operation." In addition New Jersey's rule does not specify that changes to existing permits from sources which are to provide offsets must be in place by the time of permit issuance to the new or altered source. New Jersey's rule must be clarified accordingly. Therefore, these deficiencies are a basis for disapproval.

5. Provisions to assure that emissions increases from new or modified major stationary sources are offset by real reductions in actual emissions as required by section 173(c)(1) of the Act. New Jersey has defined reductions to be used as offsets as actual reductions in emissions that must be federally enforceable. This definition also applies to the use of banked emission reductions. This definition meets federal requirements and is, therefore, approvable.

6. Provisions, in accordance with section 173(c)(2) of the Act, to prevent emissions reductions otherwise required by the Act from being credited for purposes of satisfying the part D offset requirements. New Jersey has defined reductions used as offsets as reductions not otherwise required pursuant to any federal or state law, rule, order, permit, or other legal document. In addition, its definition states that emission reductions to be used as offsets cannot have been relied upon to demonstrate attainment, maintenance of reasonable further progress or of a NAAQS. This definition satisfies the requirements of the Act and is, therefore, approvable.

7. Provisions, in accordance with sections 172(c)(4) and 173(a)(1)(B) of the Act, that reflect changes in the use of growth allowances. Though New Jersey has no growth allowance program in place, it does have a program for banking emissions reductions to be used as offsets. This program incorporates pre-1990 reductions which have been incorporated into the emission inventory as future growth. This approach is consistent with the requirements for the achievement of reasonable further progress. This provision meets the requirement of section 172(c)(4) of the Act and is, therefore, approvable.

8. Provisions, in accordance with section 173(a)(5) of the Act, that require as a prerequisite to the issuance of any part D permit, an analysis of alternative sites, sizes, production processes, and environmental control techniques for proposed sources that demonstrates that the benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification. New Jersey has included this analysis as part of its permit requirements. This provision is, therefore, approvable.

9. Provisions, in accordance with section 173(d) of the Act, for supplying information from nonattainment NSR permits to EPA's control technology clearinghouse. New Jersey has not included this provision in its revised NSR nonattainment rule. New Jersey must revise its rule to incorporate this provision. Therefore, EPA finds this as a basis for disapproval.

10. Provisions, in accordance with section 173(e) of the Act, that allow any existing or modified source that tests rocket engines or motors to use alternative or innovative means to offset emissions increases from firing and related cleaning if certain conditions are met, or impose a fee on such source. New Jersey's NSR nonattainment rule does not include provisions which allow for these alternative means of meeting offset requirements. While the Act requires this provision, since New Jersey has no sources which fall into this category, we are not proposing to disapprove on this basis.

11. Provisions, in accordance with section 819 of the Act, that effectively exempt activities related to stripper wells from the new NSR requirements of new subparts 2, 3, and 4 for PM–10, ozone, or carbon monoxide nonattainment areas classified as serious or less, and having a population of less than 350,000. New Jersey's NSR nonattainment rule does not include provisions which allow for these exemptions. However, since states are allowed under the Act to implement NSR provisions that are more stringent than the Act requirements, New Jersey's approach is acceptable.

12. Provisions, in accordance with section 328 of the Act, to assure that sources located on the outer continental shelf are subject to the same requirements applicable if the source were located in the corresponding onshore area. New Jersey's NSR nonattainment rule does not include provisions which address this requirement. It is EPA's understanding that New Jersey has no sources to which this requirement would apply.

13. A definition, in accordance with sections 302(z) and 111(a)(3) of the Act, of "stationary source" reflecting

Congressional intent that certain internal combustion engines be subject to control under state programs, but excluding the newly defined category of "nonroad engines." New Jersey's NSR nonattainment rule does not include provisions which address this requirement. New Jersey must revise its definition of "stationary source" to exclude this category. EPA, therefore, finds this as a basis for disapproval. EPA will be proposing a definition of "nonroad engines" in its rulemaking package to implement provisions of part D of the Act.

14. Exemptions, in accordance with section 415(b)(2) of the Act, from nonattainment NSR provisions for installation, operation, cessation, or removal of a temporary clean coal technology demonstration project. New Jersey's NSR nonattainment rule does not include provisions which allow for these exemptions. However, since states are allowed under the Act to implement NSR provisions that are more stringent than the Act requirements, New Jersey's approach is acceptable.

15. Provisions in accordance with section 173(a)(3) of the Act, that owners or operators of each proposed new or modified major stationary source demonstrate the compliance of all other major stationary sources under the same ownership in the state. New Jersey's revised rule requires this demonstration from all permit applicants. This provision is approvable.

16. For new major stationary sources, Lowest Achievable Emission Rate (LAER) is to apply to each nonattainment pollutant which the source has the potential-to-emit in major amounts. New Jersey's definition of LAER incorporates all necessary requirements. New Jersey's regulations specify that LAER applies to sources which have the potential to emit regulated pollutants above threshold levels. Application of LAER to the equipment constructed or altered is a requirement for permit issuance. These provisions meet the federal requirements and are approvable.

NSR Requirements for Ozone

The statutory permit requirements for ozone nonattainment areas are generally contained in sections 172 and 173, and in subpart 2 of part D of the Act. For all classifications of ozone nonattainment areas and for ozone transport regions, states must adopt the appropriate major source thresholds and offset ratios, and provisions to ensure that any new or modified major stationary source of nitrogen oxides (NO_X) satisfies the requirements applicable to any major source of volatile organic compounds (VOC), unless a special NO_X exemption is granted by the Administrator under the provision of section 182(f) of the Act. For serious and severe ozone nonattainment areas, state plans must implement the requirements of sections 182(c) (6), (7) and (8) with regard to modifications.

Though New Jersey contains marginal, moderate and severe ozone nonattainment areas, it has elected to treat the entire State as a severe nonattainment areas for purposes of nonattainment review. Consequently, it has adopted uniform major source threshold, offset ratio, and NO_X provisions for the entire State.

These are:

Area classification	Major source threshold	Minimum offset ratio	NO_X provisions
Severe	25 tons/year.	1.3:1.0	LAER/Emission offsets equivalent to VOC requirements.

These provisions meet the requirements for severe nonattainment areas at sections 182(d) and (d)(2) of the Act. In addition, New Jersey has adopted offset ratios for all pollutants, except lead, which increase with distance from the source. Since this approach is stricter than that required under the Act, these offset ratios are approvable.

New Jersey's rule submittal does not include the additional modification provisions for serious and severe areas required by sections 182(c) (6), (7) and (8) of the Act. First, the amended Act establishes a de minimis emissions threshold of 25 tons for both VOC and (where applicable) NO_X. Second, it requires an aggregation of past net increases over a 5-year period, even when the proposed increase itself is below the de minimis level. The Act establishes different requirements if the modification occurs at sources emitting less than 100 tons per year (TPY) of VOC or emitting 100 TPY or more of VOC. New Jersey must revise its rule to conform to these requirements. Therefore, EPA finds this as a basis for disapproval.

NSR Requirements for Carbon Monoxide

The general statutory permit requirements for carbon monoxide nonattainment areas are contained in revised section 173, and in subpart 3 of part D of the Act. States must adopt the appropriate major source threshold and offset ratio.

New Jersey contains areas classified as moderate nonattainment for carbon monoxide. New Jersey has established a major source threshold of 100 TPY and an offset ratio that equals or exceeds 1.0:1.0 for these areas. These provisions meet the federal requirements and are, therefore, approvable.

NSR Requirements for PM–10

The general statutory permit requirements for PM–10 nonattainment areas are contained in section 173 and in subpart 4 of part D of the Act. For both classifications of PM–10 nonattainment areas, moderate and severe, states must adopt the appropriate major source threshold, offset ratio, significance level for modifications, and provisions for PM–10 precursors.

New Jersey has no areas classified as PM–10 nonattainment areas. New Jersey has established a major source threshold of 25 TPY, a minimum offset ratio which equals or exceeds 1.0:1.0, and a modification significance level of 15 TPY. These provisions exceed the minimum federal requirements and are, therefore, approvable. If any area is subsequently reclassified as nonattainment for PM–10, New Jersey will be required to amend its SIP and include the requirements for PM–10 precursors and the applicable threshold offset and significance level requirements for that area classification

NSR Requirements for Sulfur Dioxide

The general statutory permit requirements for SO_2 nonattainment areas are contained in section 173, and in subpart 5 of part D of the Act. For SO_2 nonattainment areas, states must adopt the appropriate major source threshold, offset ratio, and significance level for modifications.

New Jersey has one SO_2 nonattainment area. New Jersey has established a major source threshold of 100 TPY, a minimum offset ratio which equals or exceeds 1.0:1.0, and a modification significance level of 40 TPY. These provisions meet the federal requirements and are, therefore, approvable.

NSR Requirements for Lead

The general statutory permit requirements for lead nonattainment areas are generally contained in section 173, and in subpart 5 of part D of the Act. For lead nonattainment areas, states must adopt the appropriate major source threshold, offset ratio, and significance level for modifications.

New Jersey has no lead nonattainment areas. New Jersey has established a major source threshold of 10 TPY, an offset ratio of 1.0:1.0, and a modification significance level of 0.6 TPY. These provisions meet the federal requirements for offset ratio and significance level, and exceed the requirements for major threshold level and are, therefore, approvable.

NSR Requirements for Nitrogen Dioxide

The statutory permit requirements for nitrogen dioxide nonattainment areas are contained in section 173, and in subpart 5 of part D of the Act. For nitrogen dioxide nonattainment areas, states must adopt the appropriate major source threshold, offset ratio, and significance level for modifications. New Jersey did not address this requirement since there are no nitrogen dioxide nonattainment areas in the State.

General Savings Clause

Section 193 of the Act states that no control requirement, in effect before November 15, 1990, in any area which is a nonattainment area for any air pollutant, may be modified after November 15, 1990 unless the modification ensures equivalent or greater emission reductions of that air pollutant. New Jersey's revised NSR rule contains three modifications to control requirements. First, the revised regulations relax the NO_X emission offset ratio from 2.0:1.0 to 1.3:1.0. Second, the revised regulations relax the VOC offset ratio from 2.0:1.0 to 1.3:1.0. Third, the revised regulations relax the carbon monoxide applicability threshold from 50 to 100 TPY. In all three instances, New Jersey has demonstrated that the revised rule, taken as a whole, provides equivalent or greater emission reductions than the current rule. It thus complies with section 193, the General Savings Clause.

EPA Policy Issues

EPA has identified the following provisions of New Jersey's NSR rule which do not adhere to current EPA guidance.

1. Net Air Quality Benefit. Current EPA guidance (1989 SO_2 Guidance EPA–450/2–89–019) states that a net air quality benefit analysis must be demonstrated for sources that do not satisfy the location requirements for emission offsets as specified in 40 CFR part 51, appendix S. According to that guidance, the net air quality benefit is made with a modeling analysis that predicts that the LAER and emission offsets proposed will result in a net concentration change that is less than zero at an agreed upon number of receptors within the nonattainment area of the emission increase.

As in the Act prior to 1990, section 173(a) specifies that emission increases from a proposed major source or major modification must achieve LAER and sufficient offsetting emission reductions in order to represent, when considered together with other provisions of the SIP, reasonable further progress towards attainment of the NAAQS.

Section 173(c)(1), which was added in the 1990 amendments, specifies conditions on the location of emission reductions that may qualify as offsets. EPA intends to continue to require the net air quality benefit test consistent with prior practice, so that it can be assured that the area affected by the source progresses toward attainment on balance. It need not be interpreted as requiring an air quality improvement at every location affected by the new source (44 FR 3279, (January 16, 1979)), but rather assuring progress toward attainment for the area where the new source is locating. Also, as explained in the Offset Rule, the reviewing authority should consider atmospheric simulation modeling for SO_2, particulates, and carbon monoxide sources. Also, EPA's view in the Offset Rule continues to apply that in most cases the permitting authority may assume that offsets obtained from an existing source on the same premises or in the immediate vicinity of the new source and from the same effective stack height satisfy the net air quality benefit test.

EPA believes that it is prudent for states to reserve the right in their regulations to reject emission reductions proposed to satisfy offset requirements which do not provide a net air quality benefit in the nonattainment area where the proposed emission increase will occur. EPA does not believe that a new source should be permitted which will inhibit progress toward attainment due to the fact that the offsets are obtained from an inappropriate location.

New Jersey's approach toward a net air quality benefit analysis is inadequate. This is because the Air Quality Impact Analysis Section does not specifically require a dispersion modeling analysis which demonstrates a net decrease in ambient impacts on balance in the nonattainment area where the net emission increase is proposed. This test is required for major new or modified sources whose emission decrease (offset) does not meet the location requirements specified in 40 CFR part 51, appendix S. This test need not be performed at every location but rather on balance in the nonattainment area of the proposed emission increase (refer to Technical Support Document). EPA requires that the NJDEP modify subchapter 18, 7:27–18.4 to 18.5 to include a net air quality benefit test. Therefore, EPA finds this as a basis for disapproval.

2. Calculation of "Net Emission Increase". EPA has identified a problem with the provision which requires the calculation of "Net Emission Increase." As part of EPA's review of New Jersey's revised nonattainment NSR rule, EPA evaluated whether the formula used to determine whether a source is subject to this rule follows EPA guidance for determining applicability. New Jersey's rule determines a "net emission increase" by using a modified "potential to potential" test. However, 40 CFR 51.165 requires that an "actual to potential" test be performed. Consequently, EPA cannot approve this methodology and New Jersey must correct this deficiency in its rule. Therefore, EPA finds this as a basis for disapproval.

3. Definition of "Contemporaneous". New Jersey defines "contemporaneous," in reference to the construction of new or altered equipment as "* * * occurring within a time period which includes: 1. The five years prior to the initiation of the construction; and 2. The period between the initiation of construction and the initiation of operation of that new or altered equipment." However, New Jersey has not specifically defined the terms "initiation of construction" and "initiation of operation." Consequently, EPA cannot approve this definition of "contemporaneous" and New Jersey must correct this deficiency in its rule. Therefore, EPA finds this as a basis for disapproval.

NSR Conclusion

The EPA is proposing to grant a limited approval and limited disapproval to New Jersey's rule for NSR in nonattainment areas (NJAC 7:27–18). EPA cannot grant full approval under section 110(k)(3) of the Act because the rule does not fully meet the requirements of part D of the Act.

In addition, because the provisions are not composed of separable parts, EPA cannot grant partial approval as provided under section 110(k)(3). However, the rule does contain the major new requirements under the Act for new offset requirements, lower emission thresholds, and new provisions for NO_X in ozone nonattainment areas. Consequently, this rule strengthens New Jersey's SIP. In light of EPA's rulemaking authority under section 301(a), EPA is granting a limited approval of the rule in order to

further progress in air quality in the state.

At the same time, EPA is also proposing a limited disapproval of New Jersey's nonattainment NSR rule because the rule lacks provisions that will:

1. Revise offset provisions such that permit changes in existing permits providing offsets must be in effect by the time of permit issuance.
2. Supply information from nonattainment NSR permits to EPA's control technology clearinghouse;
3. Revise the definition of "stationary source" to exclude the new category of "nonroad engines;"
4. Add provisions for modifications in serious and severe ozone nonattainment areas required under sections 182(c)(6), (7) and (8);
5. Provide a net air quality benefit test; and
6. Provide a methodology for calculating net emissions increase that adheres to EPA guidance and policy.
7. Provide definitions for "initiation of construction" and "initiation of operation."

If finalized, this disapproval would constitute a disapproval under section 179(a)(2) of the Act (see generally 57 FR 13566–13567). It should be noted that EPA's limited disapproval does not prevent EPA and the State of New Jersey from enforcing the NSR rule.

Summary

EPA is proposing approval of New Jersey's vehicle miles travelled forecast, emission inventory, Subchapter 25—oxygenated fuels rule, and the employee commute option and transportation control measures as contingency measures, and the multi-state coordination as revisions to its carbon monoxide SIP. EPA is also proposing a limited approval and a limited disapproval of New Jersey's Subchapter 18—new source review regulation. EPA is proposing a disapproval of New Jersey's enhanced inspection and maintenance program since it has not been adopted. In addition, since the attainment demonstration relies on the enhanced inspection and maintenance program, the attainment demonstration is also being proposed for disapproval.

For those elements for which EPA is proposing disapproval, under section 179(a) of the Act, the State of New Jersey would have up to 18 months after final disapproval to correct the deficiencies responsible for the disapproval before EPA would be required to impose sanctions. Section 179(b) describes the sanctions available to the Administrator. Any final disapproval also would trigger the section 110(c)(1) Federal Implementation Plan provision of the Act. To obtain full approval of this carbon monoxide SIP, New Jersey must correct the identified deficiencies in the new source review regulation, and an enhanced inspection and maintenance program must be submitted and approved.

Nothing in this rulemaking should be construed as permitting or allowing or establishing a precedent for any future request for revision to any SIP. Each request for revision to any SIP shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

This proposed rule has been classified as a Table 2 action by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214–2225), as revised by an October 4, 1993 memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation. A future document will inform the general public of these tables. On January 6, 1989, the Office of Management and Budget waived Table 2 and 3 SIP revisions (54 FR 2222) from the requirements of section 3 of Executive Order 12291 for two years. The EPA has submitted a request for a permanent waiver for Table 2 and 3 SIP revisions. The Office of Management and Budget has agreed to continue the temporary wavier until such time as it rules on EPA's request. This request continues in effect under Executive Order 12866 which superseded Executive Order 12291 on September 30, 1993.

Under 5 U.S.C. 605(b), the Administrator certifies that SIP approvals under sections 107, 110 and 172 will not have a significant economic impact on a substantial number of small entities. SIP approvals do not create any new requirements but simply approve requirements that are already state law. SIP approvals, therefore, do not add any additional requirements for small entities. Moreover, due to the nature of the federal-state relationship under the Act, preparation of a flexibility analysis for a SIP approval would constitute federal inquiry into the economic reasonableness of the state actions. The Act forbids EPA to base its actions concerning SIPs on such grounds.

List of Subjects in 40 CFR Part 52

Air pollution control, Carbon monoxide, Hydrocarbons, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxide, Volatile organic compounds.

Authority: 42 U.S.C. 7401–7671q.

Dated: October 3, 1994.

William J. Muszynski,

Deputy Regional Administrator.

[FR Doc. 94–27876; Filed 11–9–94; 8:45 am]

BILLING CODE 6560–50–P

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40 CFR Part 180

[OPP–300365; FRL–4917–9]

RIN 2070–AC18

FD & C Yellow No. 6 Aluminum Lake, 2-(2'-Hydroxy-5'-Methylphenyl)Benzotriazole and Octadecyl 3,5-Di-Tert-Butyl-4-Hydroxyhydrocinnamate; Tolerance Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This document proposes that an exemption from the requirement of a tolerance be established for residues of FD & C Yellow No. 6 Aluminum Lake (CAS Reg. No. 15790-07-5), 2-(2'-hydroxy-5'-methylphenyl)benzotriazole (CAS Reg. No. 2440-22-4), and octadecyl 3,5-di-tert-butyl-4-hydroxyhydrocinnamate (CAS Reg. No. 2082-79-3) when used as inert ingredients (components of ear tags and similar slow-release devices) in pesticide formulations applied to animals. Y-Tex Corp. requested this proposed regulation.

DATES: Comments, identified by the document control number [OPP-300365], must be received on or before December 12, 1994.

ADDRESSES: By mail, submit written comments to: Public Response and Program Resources Branch, Field Operations Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring comments to: Rm. 1132, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA 22202.

Information submitted as a comment concerning this document may be claimed confidential by marking any part of all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential will be included in the public docket by

the EPA without prior notice. The public docket is available for public inspection in Rm. 1132, at the address given above, from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: By mail: Kerry B. Leifer, Registration Support Branch, Registration Division (7505W), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: 2800 Crystal Drive, Arlington, VA 22202, (703)-308-8323.

SUPPLEMENTARY INFORMATION: Y-Tex Corp., P.O. Box 1450, 1825 Big Horn Ave., Cody, WY 82414, submitted a pesticide petition to EPA requesting that the Administrator, pursuant to section 408(e) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 346a(e), propose to amend 40 CFR 180.1001(e) by establishing an exemption from the requirement of a tolerance for residues of acrylonitrile-butadiene copolymer (CAS Reg. No. 900318-3), FD & C Yellow No. 6 Aluminum Lake (CAS Reg. No. 15790-07-5), 2-(2'-hydroxy-5'-methylphenyl)-benzotriazole (CAS Reg. No. 244022-4), and octadecyl 3,5-di-tert-butyl-4-hydroxyhydrocinnamate when used as inert ingredients (components of ear tags and similar slow-release devices) in pesticide formulations applied to animals. In the **Federal Register** of February 3, 1989 (54 FR 5502), EPA proposed such exemptions. One comment was received in response to the proposal. The commenter claimed that among the bases for approval of the acrylonitrile-butadiene copolymer was an erroneous interpretation of the results of a risk assessment conducted on acrylonitrile-butadiene copolymer by the U. S. Food and Drug Administration (FDA). The Agency agreed with the commenter and, based upon additional information, reproposed the exemption for acrylonitrile-butadiene copolymer in the **Federal Register** of July 27, 1994 (59 FR 38151).

No comments were received in response to the February 3, 1989 proposal on the tolerance exemptions for residues of the other three substances, FD & C Yellow No. 6 Aluminum Lake, 2-(2'-hydroxy-5'-methylphenyl)-benzotriazole, and octadecyl 3,5-di-tert-butyl-4-hydroxyhydrocinnamate. However, because of the length of time that has elapsed since the original proposal, EPA is reproposing the exemption for FD & C Yellow No. 6 Aluminum Lake, 2-(2'-hydroxy-5'-methylphenyl)-benzotriazole, and octadecyl 3,5-di-tert-butyl-4-hydroxyhydrocinnamate.

Interested persons are invited to submit written comments on the proposed regulation. Comments must bear a notation indicating the document control number, [OPP-300365]. All written comments filed in response to this petition will be available in the Public Response and Program Resources Branch, at the address given above from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays.

The Office of Management and Budget has exempted this rule from the requirements of section 2 of Executive Order 12866.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the **Federal Register** of May 4, 1981 (46 FR 24950).

List of Subjects in 40 CFR Part 180

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

Dated: October 26, 1994.

Stephen L. Johnson,

Director, Registration Division, Office of Pesticide Programs.

Therefore, it is proposed that 40 CFR part 180 be amended as follows:

Part 180—[Amended]

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

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

2. Section 180.1001(e) is amended in the table therein by adding and alphabetically inserting the inert ingredients, to read as follows:

§ 180.1001 Exemptions from the requirement of a tolerance.

* * * * *

(e) * * *

Inert ingredients	Limits	Uses
* * *	*	* * *
FD & C Yellow No. 6 Aluminum Lake (CAS Reg. No. 15790-07-5).	Not more than 2% by weight of pesticide formulation.	Pigment in animal tag and similar slow-release devices.
* * *	*	* * *
2-(2'-Hydroxy-5'-methylphenyl)-benzotriazole (CAS Reg. No. 2440-22-4).	Not more than 0.5% by weight of pesticide formulation.	Ultraviolet light absorber/stabilzer in animal tag and similar slow-release devices.
* * *	*	* * *
Octadecyl 3,5-di-tert-butyl-4-hydroxyhydrocinnamate (CAS Reg. No. 2082-79-3).	Not more than 0.5% by weight of pesticide formulation.	Thermal stabilizer/antioxidant in animal tag and similar slow-release devices.
* * *	*	* * *

[FR Doc. 94–27843 Filed 11–9–94; 8:45 am]
BILLING CODE 6560–50–F

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 94–125, RM–8534]

Radio Broadcasting Services; Fredericksburg and Helotes, Texas

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by October Communications Group, Inc., seeking the reallotment of Channel 266C from Fredericksburg, Texas, to Helotes, Texas, and the modification of Station KONO–FM's license to specify Helotes as its community of license. Channel 266C, if reallotted, would provide Helotes with its first local aural transmission service. Channel 266C can be allotted to Helotes in compliance with the Commission's minimum distance separation requirements at Station KONO–FM's presently licensed transmitter site, at coordinates 29–50–26 North Latitude and 98–49–32 West Longitude, which is 32.2 kilometers (20 miles) northwest of Helotes.

DATES: Comments must be filed on or before December 29, 1994, and reply comments on or before January 13, 1995.

ADDRESSES: Federal Communications Commission, Washington, D.C. 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: John Joseph McVeigh, Esq., Multinational Legal Services, P.C., 11 Dupont Circle, Suite 700, Washington, D.C. 20036 (Counsel to petitioner).

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

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 94–125, adopted October 26, 1994, and released November 7, 1994. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW., Washington, D.C. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Services, Inc., (202) 857–3800, 2100 M Street, NW., Suite 140, Washington, D.C. 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission

John A. Karousos,

Acting Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 94–27875 Filed 11–9–94; 8:45 am]
BILLING CODE 6712–01–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 641

[I.D. 110294C]

Reef Fish Fishery of the Gulf of Mexico; Public Hearings

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Public hearings; request for comments.

SUMMARY: The Gulf of Mexico Fishery Management Council will convene nine public hearings on Draft Amendment 8 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico. Draft Amendment 8 contains alternatives for limited access systems for the Gulf commercial red snapper fishery, including license limitation and individual transferable quota systems.

DATES: Written comments on the proposed amendment will be accepted until January 4, 1995. Public hearings will be held in December. See **SUPPLEMENTARY INFORMATION** for specific dates and times of the hearings.

ADDRESSES: Comments should be addressed to Wayne E. Swingle, Executive Director, Gulf of Mexico Fishery Management Council, 5401 West Kennedy Boulevard, Suite 331, Tampa, FL 33609; fax: 813–225–7015. Public hearings will be held in TX, LA, MS, AL, and FL. See **SUPPLEMENTARY INFORMATION** for locations of the hearings.

FOR FURTHER INFORMATION CONTACT: Wayne E. Swingle, 813–228–2815.

SUPPLEMENTARY INFORMATION: The hearings are scheduled from 7 p.m. to 10 p.m. as follows:

1. December 5, 1994—Port Isabel Community Center, Corner of Yturia and Maxan, Port Isabel, TX.

2. December 6, 1994—Visitor's Center Auditorium, University of Texas, 750 Channel View Drive, Port Aransas, TX.

3. December 7, 1994—Holiday Inn on the Beach, Ballroom South, 5002 Seawall Boulevard, Galveston, TX.

4. December 8, 1994—Policy Jury Annex, Courthouse Square, Cameron, LA.

5. December 12, 1994—Venice Fire House, Highway 23, Venice, LA.

6. December 13, 1994—Larose Regional Park, Versailles Room, 2001 East 5th Street, Larose, LA.

7. December 14, 1994—J.L. Scott Marine Education Center and Aquarium, Auditorium, 115 East Beach Boulevard (U.S. Highway 90), Biloxi, MI.

8. December 15, 1994—Orange Beach Community Center, 27301 Canal Road, Orange Beach, AL.

9. December 16, 1994—NMFS, Panama City Laboratory, Conference Room, 3500 Delwood Beach Road, Panama City, FL.

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Julie Krebs (see **ADDRESSES**) by November 28, 1994.

Dated: November 4, 1994.

David S. Crestin,

Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 94–27891 Filed 11–9–94; 8:45 am]
BILLING CODE 3510–22–F

Notices

Federal Register
Vol. 59, No. 217
Thursday, November 10, 1994

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

Federal Crop Insurance Corporation

Wheat Crop Insurance

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Notice of extension of sales closing date (acceptance of applications).

SUMMARY: Effective for the 1995 crop year only, the Federal Crop Insurance Corporation (FCIC) gives notice of its determination to extend the date for acceptance of wheat crop insurance applications for those counties where producers are offered the winter coverage endorsement. The sales closing date of September 30 previously extended to October 31 shall be further extended to November 4, 1994.

EFFECTIVE DATE: October 31, 1994.

FOR FURTHER INFORMATION CONTACT: Joan Rogers, Regulatory Specialist, Federal Crop Insurance Corporation, U.S. Department of Agriculture, Washington, DC 20250, telephone (202) 254–8314.

SUPPLEMENTARY INFORMATION: Under its regulations for insuring crops, FCIC requires that applications for crop insurance protection must be filed on or before the policy sales closing date. On Tuesday, October 4, 1994, FCIC published in the **Federal Register** (59 FR 50559), effective for the 1995 winter wheat crop year only, a sales closing date extension to October 31. FCIC has determined that an additional extension of the sales closing date may be needed for wheat counties in which the winter coverage endorsement is available. By extending the sales closing date, farmers will have more time to make crop insurance decisions for the 1995 wheat crop year. The Manager has determined that extension of the sales closing date for the 1995 wheat crop year only in counties in which the winter coverage endorsement is available will not adversely affect the actuarial status of the crop insurance program. Therefore, the Manager of FCIC has determined that the October 31 sales closing date shall be further extended to November 14 for wheat counties in which the winter coverage endorsement is available. No other crop insurance program dates are affected or extended at this time.

Under the provisions of the General Crop Insurance Regulations (§ 457.8), the sales closing date for accepting applications may be extended by notice in the **Federal Register** upon determination that no adverse effect will result from such extension. FCIC has determined that no adverse effect will result from this extension.

FCIC will discontinue the acceptance of applications if it determines that adverse conditions develop and that insurance risk becomes excessive.

Notice

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation (FCIC) herewith gives notice that, effective for the 1995 crop year only, applications for wheat crop insurance in counties in which the winter coverage endorsement is available with published sales closing dates of September 30, 1994, will be accepted up to the *close of business on November 4, 1994*. This sales closing date may be terminated by the Corporation prior to November 4, 1994, if FCIC determines that adverse conditions develop and that insurance risk becomes excessive.

Authority: 7 U.S.C. 1501, as amended.

Done in Washington, DC on November 3, 1994.

Kenneth D. Ackerman,

Acting Deputy Administrator, Federal Crop Insurance Corporation.

[FR Doc. 94–27777 Filed 11–9–94; 8:45 am]

BILLING CODE 3410–08–M

DEPARTMENT OF AGRICULTURE

Forest Service

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

Phosphate Leasing, Caribou National Forest, Caribou County, ID

AGENCY: Forest Service, USDA and Bureau of Land Management, USDI.

ACTION: Notice of intent to prepare environmental impact statement.

SUMMARY: The Department of Agriculture, Forest Service (FS), Caribou National Forest, and the Department of the Interior, Bureau of Land Management (BLM), Idaho Falls District, will jointly prepare an Environmental Impact Statement (EIS) for a proposal to issue two new phosphate leases within the Caribou National Forest. The Dairy Syncline Tract lies about 13 air miles east of Soda Springs, Idaho, and the Manning Creek Tract lies about 14 air miles southwest of Afton, Wyoming. If a lease(s) is issued pursuant to the mineral leasing regulations at 43 CFR part 3500, the lessee has a right to develop a mine and necessary ancillary facilities for the purposes of mining the phosphate ore reserves within the lease boundaries. However, before actual mining could occur, the lessee would be required to obtain an approved mining and reclamation plan, which would require a NEPA document addressing the site specific proposed mine development.

SCOPING PROCEDURE: The scoping procedure to be used for this EIS has or will involve the following: a wide-scale mailing asking for comments, issues and concerns to interested and potentially affected individuals, groups, Federal, State, and local governments; public information gathering meetings; news releases; and a scoping meeting. The scoping meeting will be held in Chubbuck, Idaho on Monday, November 21, 1994, at 7:00 p.m. in the Aspen-Willow Room, Days Inn, 133 West Burnside Avenue. Public information meetings were announced in a newsletter by the EIS contractor and held in Pocatello and Soda Springs, Idaho and Afton, Wyoming on October 18–20, 1994, respectively.

DATE: Written comments concerning the scope of the analysis described in this Notice should be received by December 12, 1994.

ADDRESSES: Send written comments and suggestions to Steve Robison, Caribou National Forest, 250 South 4th Avenue, Pocatello, Idaho 83201.

FOR FURTHER INFORMATION CONTACT: Questions concerning the proposed action and EIS should be directed to Steve Robison, Geologist, Caribou National Forest, 250 South 4th Avenue, Pacatello, Idaho 83201, phone: (208) 236–7573, or Dennis Hoyem, Environmental Coordinator, Bureau of Land Management, 940 Lincoln Rd., Idaho Falls, Idaho, phone: (208) 524–7525.

SUPPLEMENTARY INFORMATION: The Bureau of Land Management (BLM) has received proposals to lease two parcels of land for the development and mining of phosphate reserves within the Caribou National Forest (FS). The 1920 Leasing Act, as amended, gives the primary responsibility for leasing of solid minerals, like phosphate, to the BLM, even though the surface of the lands may be administered by other agencies such as the FS. The FS develops recommendations to the BLM concerning whether or not leases should be issued, and if so, what stipulations or mitigation measures should be included with each lease to protect the surface resources. Although the BLM decision to be made based on this EIS (the FS only makes recommendations) is whether or not to lease the two proposed Tracts, and if so, under what conditions, lease issuance confers a right to mine. Therefore, the anticipated impacts from mining and transportation of the ore must also be analyzed in this EIS.

These Tracts have only received sufficient exploration to determine the presence of mineable phosphate ore and rough estimates of ore reserves. Because of this limited information, and because there is no lessee that has developed a site-specific mining and reclamation plan, only conceptual mine plans have been developed for analysis in this EIS. The ore from both Tracts would be removed by surface mining methods.

The proposed Dairy Syncline Tract contains 3,380 acres, with preliminary phosphate ore reserves estimated at about 20 million tons. Phosphate rock mined from the Tract would probably be transported to primary users (phosphate fertilizer or elemental phosphorus plants) by one of the following methods: hauling ore by truck or conveyor to existing railroad loading facilities located about 4.5 road miles from the Tract; by building a new railroad spur to the Tract (about 5–7 road miles depending on where loading facilities were located); or by the development of a slurry pipeline (it could parallel an existing slurry pipeline for all but about 4 miles of its length). About 14 miles of existing road into the area may need to be upgraded to accommodate mine related traffic (not ore haul), and new power/phone lines to the lease Tract area would need to be constructed. Mine life for this lease Tract is estimated at 10–20 years, depending on annual mine production.

The proposed Manning Creek Tract covers 2,000 acres, with preliminary estimated phosphate ore reserves in the range of 18–50 million tons. Mineable reserves may be about 30 million tons. The lease Tract could be developed as an extension of an existing, operating mine, or ore could be transported from the lease Tract in a slurry pipeline. Based on the phosphate ore reserves in the proposed leases, the following options do not appear to be economically feasible at this time: build a phosphate processing plant near the lease Tract; build a railroad facility to the lease Tract area; or transport the ore to existing railroad facilities or phosphate plants by means other than a slurry pipeline. If this proposed lease Tract were to be developed separate from the existing mine, as many as 8 miles of new pipeline may be necessary to reach an existing slurry line corridor, about 5 miles of new mine access road would be required, as many as 7 miles of existing road upgraded to accommodate mine traffic (not ore haul), and new power/phone lines built. Mine life is estimated to be 10–25 years.

This EIS will tier to the final EIS for the caribou National Forest Land and Resource Management Plan (Forest Plan). The Caribou Forest Plan provides the overall guidance (Goals, Objectives, Standards, and Management Area direction) to achieve the Desired Future Condition for the area being analyzed, and contains specific management area prescriptions for the entire Forest.

Preparation of the EIS will include the following steps:

1. Define the purpose of and need for action.
2. Identify potential issues.
3. Eliminate issues of minor importance or those that have been covered by previous and relevant environmental analysis.
4. Select issues to be analyzed in depth.
5. Identify reasonable alternatives to the proposed action.
6. Describe the affected environment.
7. Identify the potential environmental effects of the alternatives.

Steps 2, 3, and 4 have started and will be completed through the scoping process.

Step 5 will consider a range of alternatives developed from the key issues. Four alternatives have been drafted to date:

Alternative 1, no lease or the no action alternative.

Alternative 2, issue both leases as delineated (proposed action).

Alternative 3, issue the Manning Creek lease only.

Alternative 4, issue the Dairy Syncline lease only.

Other alternatives could be developed based on key issues.

Step 6 will describe the physical attributes of the area to be affected by this proposal, with special attention to the environmental factors that could be adversely affected.

Step 7 will analyze the environmental effects of each alternative. This analysis will be consistent with management direction outlined in the Forest Plan. The direct, indirect, and cumulative effects of each alternative will be analyzed and documented. In addition, the site specific mitigation measures for each alternative will be identified and the effectiveness of these mitigation measures will be disclosed.

The Forest Service and BLM are seeking information and comments from Federal, State and local agencies as well as individuals and organizations who may be interested in, or affected by, the proposed action as part of the scoping process. The scoping process is designed to guide project analysis and documentation and obtain input to identify significant issues and alternatives to the proposal. The EIS will consider a range of alternatives based on the issues, concerns and opportunities identified for the project. Comments should be submitted to the Forest Service within 30 days from the date of publication of this Notice in the **Federal Register**.

The estimated date for completion of the draft EIS is June, 1995. A public meeting(s) will be held in conjunction with the issuance of the draft EIS. The comment period on the draft EIS will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**.

The Forest Service and BLM believe it is important to give reviewers notice at this early stage in the process of court rulings related to public participation in the environmental review process. Reviewers of draft EISs must structure

their participation in the environmental review of the proposal so that it is meaningful and alerts the agencies to the reviewers' position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553 (1978). Environmental objections that could have been raised at the draft stage may be waived if not raised until after completion of the final EIS. *City of Angoon* v. *Hodel*, (9th Circuit, 1986) and *Wisconsin Heritages, Inc.* v. *Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). We mention these court cases to ensure that substantive comments and objections are made available to the BLM and FS at a time when they can meaningfully consider them and respond in the Final EIS.

To assist the Forest Service and BLM in identifying and considering issues and concerns related to the proposed action, comments for scoping, and later for the draft EIS, should be as specific as possible. It would be helpful if comments on the draft EIS refer to specific pages or chapters of the draft or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act, 40 CFR 1503.3, in addressing these points.

The final EIS is expected to be available in December, 1995.

The BLM Idaho State Director, who is the responsible official for the EIS, will then make a decision regarding this proposal, considering: FS recommendations; comments; responses; anticipated environmental consequences discussed in the Final EIS; and applicable laws regulations, and policies. The reasons for the decision will be documented in the Record of Decision.

Dated: November 3, 1994.

Harold W. Klein,

Acting Forest Supervisor, Caribou National Forest.

Jeff S. Steele,

Area Manager, Pocatello Resource Area.

[FR Doc. 94–27882 Filed 11–9–94; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Availability of the Record of Decision for the "Exxon Valdez" Oil Spill Restoration Plan

AGENCIES: Department of Agriculture and the Department of the Interior. The National Oceanic and Atmospheric Administration, Department of Commerce is a cooperating agency.

ACTION: Notice of availability of the record of decision for the *Exxon Valdez* restoration plan.

SUMMARY: On behalf of the *Exxon Valdez* Trustee Council, the Department of Agriculture, Forest Service and the Department of the Interior announce the availability of the Record of Decision (ROD) for the *Exxon Valdez* Oil Spill Restoration Plan. The responsible officials for the ROD are the Secretaries of the Departments of Agriculture and of the Interior, and the Administrator for the National Oceanic and Atmospheric Administration, U.S. Department of Commerce. The Restoration Plan will establish management direction and guide all natural resource restoration activities covered by the civil settlement following the *Exxon Valdez* oil spill.

DATE: The decision was made on the Restoration Program by the responsible officials on October 31, 1994.

ADDRESSES: Copies of the ROD are available on request from the Oil Spill Public Information Office, 645 G. Street, Anchorage, Alaska 99501. Phone number (907) 278–8008 or within Alaska (800) 478–7745, outside Alaska (800) 283–7745. Copies also will be sent to public libraries in Anchorage, Juneau, Fairbanks, Valdez, Cordova, Kodiak, Homer, and Seward, Alaska.

SUPPLEMENTARY INFORMATION:

A. Introduction

On October 8, 1991, a federal court approved settlement between the State and Federal governments and Exxon under which Exxon will pay $1 billion in criminal restitution and civil damages to the governments. The State and Federal Trustees will receive $900 million in civil damages from Exxon over the 10 years. The funds are to be used to restore the natural resources and the services they provide, injured by the *Exxon Valdez* oil spill. This includes the restoration of any natural resources injured, lost or destroyed and the services provided by that resource or which replaces or substitutes for the injured, lost or destroyed resource and affected services. Restoration includes all phases of injury assessment, restoration, replacement, and enhancement of natural resources, and acquisition of equivalent resources and services.

Under the applicable court decrees, all decisions about restoration and use of the civil settlement funds are made by six natural resources Trustees, three Federal and three State. The three Federal Trustees are: The Administrator for the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, and the Secretaries of the Departments of Agriculture and of the Interior. The three State Trustees are: The Commissioners of Fish and Game, and Environmental Conservation, and the Alaska Attorney General. A Trustee Council, located in Alaska, composed of the three State Trustees and designees of the three Federal Trustees, has been assigned responsibility for decisions relating to the assessment of injuries, use of the civil settlement funds, and all restoration activities including the preparation of a Restoration Plan.

On April 10, 1992 (57 FR 12473–12475) on behalf of the Exxon Valdez Oil Spill Trustee Council, the Forest Service published a Notice of Intent to prepare an Environmental Impact Statement (EIS) on the Restoration Plan. This was later revised on January 14, 1994 (59 FR 2352–2353).

The Trustee Council released a Draft Restoration Plan in November 1993, which was the proposed action for the analysis conducted in the EIS. The Draft EIS was released for public comment on June 17, 1994 (59 FR 31191) followed by a 45-day comment period ending on August 1, 1994. This was followed by the release of the Final EIS on September 30, 1994 (59 FR 49925).

B. The Decision

The proposed action (Draft Restoration Plan) consisted of policy statements, a discussion of categories of restoration actions and broad objectives for injured resources and services. The policies for identifying and conducting restoration actions have been revised and reorganized into policy groups in response to public comments received on the Draft EIS. People commented that some of the policies needed clarification. This was done in the Final EIS.

Based on the analysis contained in the EIS and the recommendation of the Trustee Council, it is the decision of the Federal Trustees to adopt Alternative 5 and its policies as identified in the Final EIS. This includes the establishment of a restoration reserve.

Copies of the ROD may be requested from the Oil Spill Public Information Office, 645 G. Street, Anchorage, Alaska 99501. Phone number 907 278–8008 or within Alaska 800 478–7745, outside Alaska 800 283–7745.

Dated: November 3, 1994.

Deborah L. Williams,

Special Assistant to the Secretary for Alaska, Department of the Interior.

Phil Janik,

Regional Forester, Alaska Region, Forest Service, Department of Agriculture.

[FR Doc. 94–27904 Filed 11–9–94; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

Agency Forms Under Review by the Office of Management and Budget

DOC has submitted to the Office of Management and Budget for clearance the following proposals for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: International Trade Administration.

Title: Mission/Exhibition Evaluation.

Agency Form Number: ITA–4075P.

OMB Approval Number: 0625–0034.

Type of Request: Revision of a currently approved collection.

Burden: 167 hours.

Number of Respondents: 2,000.

Avg Hours Per Response: 5 minutes.

Needs and Uses: Information is collected on the results of a firm's participation in an overseas trade event managed and funded from participant contributions. The information is used to evaluate the efficiency, impact and effectiveness of an event from the participant's perspective.

Affected Public: Businesses or other for–profit institutions, small businesses or organizations.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Don Arbuckle, (202) 395–7340.

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Ocean Thermal Energy Conversion Licensing Regulations.

Agency Form Number: None but requirements are found at 15 C.F.R, Chapter IX, Part 981.

OMB Approval Number: 0648–0144.

Burden: 1 hour assigned for purposes of OMB approval.

Number of Respondents: None anticipated at this time.

Avg Hours Per Response: N/A.

Needs and Uses: In order to own, construct and operate an Ocean Thermal Energy Conversion facility or plantship, a U.S. citizen requires a license issued by NOAA. The application to NOAA is, by statute, also an application for all other Federal licenses, permits and authorizations required. The regulations specify what information must be submitted for these purposes. No applications are expected to be submitted until there is a sufficient profit incentive to do so.

Affected Public: State or local governments, businesses or other for–profit institutions, federal agencies.

Frequency: On occasion, annually, recordkeeping.

Respondent's Obligation: Required to obtain or retain a benefit.

OMB Desk Officer: Don Arbuckle, (202) 395–7340.

Copies of the above information collection proposals can be obtained by calling or writing Gerald Tache, DOC Forms Clearance Officer, (202) 482–3271, Department of Commerce, Room 5327, 14th and Constitution Avenue, N.W., Washington, D.C. 20230.

Written comments and recommendations for the proposed information collections should be sent to Don Arbuckle, OMB Desk Officer, Room 10202, New Executive Office Building, Washington, D.C. 20503.

Dated: November 4, 1994

Gerald Tache,

Departmental Forms Clearance Officer, Office of Management and Organization.

[FR Doc. 94–27915 Filed 11–9–94; 8:45 am]

BILLING CODE 3510–CW–F

Bureau of Export Administration

[Docket No. 0108–01]

Action Affecting Export Privileges

Order

Whereas, on March 6, 1991, then-Under Secretary for Export Administration Dennis E. Kloske entered an Order [1] denying Franciscus B. Govaerts, individually and doing business as Printlas Europa (hereinafter collectively referred to as Govaerts), all U.S. export privileges for a period of 10 years, five of which were suspended during a five-year probationary period, based on a finding that Govaerts had violated the Export Administration Act of 1979, as amended (currently codified at 50 U.S.C.A. app. §§ 2401–2420 (1991, Supp. 1993, and Pub. L. No. 103–227, July 5, 1994)) (the Act),[2] and the Export Administration Regulations (currently codified at 15 C.F.R. Parts 768–799 (1994)) (the Regulations);

Whereas, the March 6, 1991 Order entered against Govaerts identified his address and that of his business as "Torenakker 8–5731 CC, Mierlo, Netherlands";

Whereas, the Office of Export Enforcement, Bureau of Export Administration, U.S. Department of Commerce (Department), has confirmed that Govaerts has ceased doing business at Torenakker 8–5731 CC, Mierlo, Netherlands, and is presently operating his business at Van Lokvenstraat 117, 5731 Mierlo, Netherlands; and

Whereas, as a result of the information the Department obtained regarding a new address for Govaerts, the Department has requested that an order be issued amending the March 6, 1991 Order to reflect that new address for Govaerts;

Accordingly, it is hereby ordered that the March 6, 1991 Order denying all U.S. export privileges to Franciscus B. Govaerts, individually and doing business as Printlas Europa, is amended by changing his address and that of his business to "Van Lokvenstraat 117, 5731 Mierlo, Netherlands."

This Order, which is effective immediately, shall be published in the **Federal Register.**

Entered this 2d day of November 1994.

William A. Reinsch,

Under Secretary for Export Administration.

[FR Doc. 94–27790 Filed 11–9–94; 8:45 am]

BILLING CODE 3510–DT–M

[1] 56 FR 10532, March 13, 1991.

[2] The Act expired on August 20, 1994. Executive Order 12924 (59 FR 43437, August 23, 1994) continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C.A. §§ 1701–1706 (1991)).

Foreign-Trade Zones Board

[Docket 33–94]

Foreign-Trade Zone 78—Nashville, TN; Application for Subzone Status; Columbia Specialties, Inc., Plant (Room Air Conditioners/Dehumidifiers) Columbia, TN

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Metropolitan Nashville Port Authority, grantee of FTZ 78, requesting special-purpose subzone status for the room air conditioner and dehumidifier manufacturing plant of Columbia Specialties, Inc., (CSI) (subsidiary of Fedders North America, Inc.), located in Columbia, Tennessee. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR Part 400). It was formally filed on October 28, 1994.

The CSI plant (62 acres/200,000 sq. ft.) is located at 1027 Industrial Park Road, Columbia (Maury County), Tennessee, some 30 miles south of Nashville. The facility (375 employees) is used to produce room air conditioners and dehumidifiers (duty rate—2.2%).

Materials and components purchased from abroad (some 15% of total value) include polymers of styrene, articles of plastic and rubber, fasteners, articles of copper (bars, rods, profiles, tubes, pipes, fittings), aluminum foil, taps, cocks, valves, electric motors and switches, electric heating apparatus, rotary and other compressors and parts, capacitors, optical fiber cables, and automatic regulating and controlling apparatus (duty rate range: free—14%, $0.9/kg+9.2%). Some 5 percent of the finished units is exported.

Zone procedures would exempt CSI from Customs duty payments on the foreign components used in export production. On its domestic sales, CSI would be able to choose the duty rate that applies to finished room air conditioners and dehumidifiers (2.2%) for the foreign components noted above. The application indicates that the savings from zone procedures would help improve the plant's international competitiveness.

In accordance with the Board's regulations, a member of the FTZ Staff has been appointed examiner to investigate the application and report to the Board.

Public comment on the application is invited from interested parties. Submissions (original and three copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is January 9, 1995. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (to January 24, 1995).

A copy of the application and the accompanying exhibits will be available for public inspection at each of the following locations:

U.S. Department of Commerce District Office, Parkway Towers, Suite 114, 404 James Robertson Parkway, Nashville, TN 37219

Office of the Executive Secretary, Foreign-Trade Zones Board, U.S. Department of Commerce, Room 3716, 14th Street & Constitution Avenue, NW., Washington, DC 20230

Dated: October 28, 1994.

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 94–27786 Filed 11–9–94; 8:45 am]

BILLING CODE: 3510–25–P

[Docket 50–93]

Foreign-Trade Zone 21—Dorchester County, South Carolina; Application for Expansion; Amendment of Application

The pending application of the South Carolina State Ports Authority (SCSPA), grantee of FTZ 21, requesting authority to expand its zone (Docket 50–93, filed 9/14/93, 58 FR 50330, 9/27/93, amended 8/9/94, 59 FR 40519), has been further amended to request an additional site.

The application as previously amended requested authority to expand the zone's two existing sites and to include within the zone project SCSPA's terminal complex at the Port of Charleston (8 parcels—2,040 acres) and two new industrial park sites.

The further amendment requests inclusion of an additional site (19 acres) located at 4 Meadow Street, Loris, Horry County, South Carolina, some 55 miles from the Georgetown, South Carolina Customs Port of Entry. The new site, owned and operated by Southern Ammunition Company, Inc. (SACI), would be used for general-purpose zone warehousing activity. The application indicates that several firms are interested in using this site for storage activity. SACI plans to use zone procedures in conjunction with its warehousing of small arms parts, accessories and ammunition.

The comment period is reopened until [45 days from date of publication].

The application and amendment materials are available for public inspection at the following locations:

U.S. Department of Commerce, District Office, Room 128 C Long Building, 9 Liberty Street, Charleston, South Carolina 29424

Office of the Executive Secretary, Foreign-Trade Zones Board, U.S. Department of Commerce, 14th and Pennsylvania Avenue NW., Room 3716, Washington, D.C. 20230.

Dated: November 2, 1994.

John J. Da Ponte, Jr.,

Executive Secretary.

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International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Opportunity to Request Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation.

Background

Each year during the anniversary month of the publication of an antidumping or countervailing duty order, finding, or suspension of investigation, an interested party, as defined in section 771(9) of the Tariff Act of 1930, as amended, may request, in accordance with section 353.22 or 355.22 of the Department of Commerce (the Department) Regulations (19 CFR 353.22/355.22 (1993)), that the Department conduct an administrative review of that antidumping or countervailing duty order, finding, or suspended investigation.

Opportunity To Request a Review

Not later than November 30, 1994, interested parties may request administrative review of the following orders, findings, or suspended investigations, with anniversary dates in November for the following periods:

Antidumping duty proceedings	Period
Argentina: Barbed Wire and Barbless Fencing Wire (A–357–405)	11/1/93–10/31/94
Argentina: Carbon Steel Wire Rods (A–357–007)	11/1/93–10/31/94
Brazil: Circular Welded Non-Alloy Steel Pipe (A–351–809)	11/1/93–10/31/94
Germany: Drycleaning Machinery (A–428–037)	11/1/93–10/31/94
Japan: Bicycle Speedometers (A–588–038)	11/1/93–10/31/94
Japan: Light Scattering Instruments (A–588–813)	11/1/93–10/31/94
Japan: Titanium Sponge (A–588–020)	11/1/93–10/31/94
Korea: Circular Welded Non-Alloy Steel Pipe (A–580–809)	11/1/93–10/31/94
Mexico: Circular Welded Non-Alloy Steel Pipe (A–201–805)	11/1/93–10/31/94
Singapore: Rectangular Pipes & Tubes (A–559–502)	11/1/93–10/31/94
Taiwan: Circular Welded Non-Alloy Steel Pipe (A–583–814)	11/1/93–10/31/94

Antidumping duty proceedings	Period
The People's Republic of China: Tungsten Ore Concentrates (A–570–909)	11/1/93–10/31/94
Venezuela: Circular Welded Non-Alloy Steel Pipe (A–307–805)	11/1/93–10/31/94

Suspension agreements	Period
Japan: Certain Small Motors (A–588–090)	11/1/93–10/31/94

Countervailing duty proceedings	Period
Argentina: Oil Country Tubular Goods (C–357–403)	1/1/93–12/31/93
Peru: Deformed Steel Concrete Reinforcing Bar (C–333–502)	1/1/93–12/31/93

In accordance with sections 353.22(a) and 355.22(a) of the regulations, an interested party as defined by 353.2(k) may request in writing that the Secretary conduct an administrative review. For antidumping reviews, the interested party must specify for which individual producers or resellers covered by an antidumping finding or order it is requesting a review, and the requesting party must state why it desires the Secretary to review those particular producers or resellers. If the interested party intends for the Secretary to review sales of merchandise by a reseller (or a producer if that producer also resells merchandise from other suppliers) which were produced in more than one country of origin, and each country of origin is subject to a separate order, then the interested party must state specifically which reseller(s) and which countries of origin for each reseller the request is intended to cover.

Seven copies of the request should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, room B–099, U.S. Department of Commerce, Washington, DC 20230. The Department also asks parties to serve a copy of their requests to the Office of Antidumping Compliance, Attention: John Kugelman, in room 3065 of the main Commerce Building. Further, in accordance with section 353.31(g) or 355.31(g) of the regulations, a copy of each request must be served on every party on the Department's service list.

The Department will publish in the **Federal Register** a notice of "Initiation of Antidumping (Countervailing) Duty Administrative Review," for requests received by November 30, 1994. If the Department does not receive, by November 30, 1994, a request for review of entries covered by an order or finding listed in this notice and for the period identified above, the Department will instruct the Customs Service to assess antidumping or countervailing duties on those entries at a rate equal to the cash deposit of (or bond for) estimated antidumping or countervailing duties required on those entries at the time of entry, or withdrawal from warehouse, for consumption and to continue to collect the cash deposit previously ordered.

This notice is not required by statute, but is published as a service to the international trading community.

Dated: November 1, 1994.

Joseph A. Spetrini,

Deputy Assistant Secretary for Compliance.

[FR Doc. 94–27791 Filed 11–9–94; 8:45 am]

BILLING CODE 3510–DS–M

[A–588–054]

Tapered Roller Bearings, Four Inches or Less in Diameter, and Components Thereof, From Japan

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of Final Results and Partial Termination of Antidumping Duty Administrative Reviews.

SUMMARY: On December 30, 1993, the Department of Commerce published in the **Federal Register** the preliminary results of administrative reviews of the antidumping finding on tapered roller bearings, four inches or less in outside diameter, and components thereof, from Japan. The reviews cover 14 manufacturers/exporters of the subject merchandise to the United States generally during the periods April 1, 1979 through July 31, 1980; August 1, 1980 through July 31, 1981; August 1, 1981 through July 31, 1982; August 1, 1982, through July 31, 1983; August 1, 1983 through July 31, 1984; August 1, 1984 through July 31, 1985; and August 1, 1985 through July 31, 1986. Based on our analysis of comments received, the dumping margins for some companies have changed from the margins contained in the preliminary results.

EFFECTIVE DATE: November 10, 1994.

FOR FURTHER INFORMATION CONTACT: Maureen McPhillips (Koyo), Chip Hayes (NSK), Valerie Turoscy (Toyota), Lisa Raisner (Yamaha, Nissan, Mazda, MC International, Nachi-Fujikoshi, Niigata Converter, Toyosha, Suzuki, Maekawa, Sumitomo Yale, Sumitomo Corp., Mitsubishi), Chip Hayes, Charles Vannatta, or John Kugelman, Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, D.C. 20230, telephone: (202) 482–5253.

SUPPLEMENTARY INFORMATION:

Background

On December 30, 1993, the Department of Commerce (the Department) published in the **Federal Register** (58 FR 69336) the preliminary results of administrative reviews of the antidumping finding on tapered roller bearings (TRBs), four inches or less in outside diameter, and components thereof, from Japan (41 FR 34374, August 18, 1976). We have now completed these reviews in accordance with section 751 of the Tariff Act of 1930, as amended (the Tariff Act).

Scope of the Reviews

Imports covered by these reviews are TRBs, four inches or less in outside diameter when assembled, including inner race or cone assemblies and outer races or cups, sold either as a unit or separately. During the review periods such merchandise was classifiable under item numbers 680.3932, 680.3934, and 680.3938 of the Tariff Schedules of the United States Annotated (TSUSA). This merchandise is currently classified under the Harmonized Tariff Schedule (HTS) item numbers 8708.70.6060, 8708.99, and 8482.99.4510. These TSUSA and HTS item numbers are provided for convenience and Customs purposes only. The written description remains dispositive.

These reviews cover TRB sales by Koyo Seiko Company, Ltd. (Koyo), for the periods 1979 through 1986, NSK Ltd. (formerly Nippon Seiko, K.K.) (NSK), for the periods 1980 through 1986, Mitsubishi Corp. (Mitsubishi), for the periods 1980 through 1985, Sumitomo Yale Co., Ltd. (Sumitomo Yale), for the periods 1980 through 1985, and Sumitomo Corporation (Sumitomo Corp.), Nachi-Fujikoshi, Niigata Converter, Toyosha, Toyota, Yamaha, Suzuki, and Maekawa Bearing Manufacturer (Maekawa), for the periods 1985 through 1986. Nachi-Fujikoshi and Niigata Converter claimed no shipments during the 1985–86 period of review (POR). Consequently, for both firms we have used each firm's rate from the last prior period in which they had shipments. Finally, as stated in the preliminary results, for these final results we are terminating the reviews of Nissan, Mazda (formerly Toyo Kogyo Co. Ltd.), and MC International.

Analysis of Comments Received

We gave interested parties an opportunity to comment on the preliminary results. We received written comments from petitioner, the Timken Company (Timken), and respondents NSK, Koyo, Mazda, and Sumitomo Corp. Rebuttal briefs were submitted by Timken, NSK, and Koyo. At the request of Timken, NSK, Koyo, and Mazda, we held a hearing on February 18, 1994.

Comments are addressed in the following order:

1. General Issues
2. Terminations
3. Annual Average Foreign Market Value (FMV), Model Match, and Cost Test Methodology
4. Calculation of FMV
5. Calculation of U.S. Price (USP)
6. Cost of Production (COP) and Constructed Value (CV)
7. Use of Best Information Available (BIA)
8. Clerical Errors

Comments Regarding General Issues

Comment 1: Timken proposes that assessment of duties should be based on the actual value of the entries suspended by the U.S. Customs Service, as Timken states was done in *Antifriction Bearings from France, et al.*, 58 FR 39729 (July 26, 1993) (*AFBs III*), and was upheld for the first antifriction bearing (AFB) administrative review by the Court of International Trade (CIT) in *Koyo Seiko Co., Ltd.* v. *United States*, 796 F. Supp. 1526, 1529, *modified*, 806 F.Supp. 1008 (1992) (*Koyo Seiko*). Timken acknowledges that, although the Department's approach in the AFB cases was necessary due to the Department's sampling methodology, compelling reasons exist in these reviews to adopt the same approach.

Further, Timken cites *Timken Company* v. *United States*, Slip Op. 94–1 at 11–12 (January 3, 1994) (*Timken III*), wherein the CIT did not order a remand for further investigation, but required the Department to order liquidation of the merchandise in accordance with the *AFBs III* methodology (*i.e.*, collect the full amount of antidumping duties calculated to be due in this case by assessing these duties over all suspended entries of the merchandise). Timken submits that this is the only reasonable method of assessing antidumping duties in this long-delayed proceeding.

Timken argues that assessing antidumping duties in these reviews may be problematic because "it is likely" that entries subject to the dumping finding have been incorrectly liquidated. Similarly, Timken notes that the administrative record contains evidence that an importer incorrectly entered certain merchandise as outside the scope of the antidumping orders on TRBs, referring to *U.S. Customs Service, HQ 222367* (December 28, 1990) (*Customs HQ*), originally submitted as Exhibit B of Koyo's October 30, 1991 submission.

Timken acknowledges that identification of the merchandise is complicated by the fact that the subject merchandise was often entered as part of a multi-product shipment and points out that, unless the Department adopts an alternative assessment methodology, the correct amount of duty may not be assessed at liquidation. Timken suggests that before the Department issues final assessment instructions, it should require Customs to report the value of suspended entries during the review periods for each manufacturer subject to review. With this information, Timken argues, the Department could then formulate assessment instructions that would ensure collection of the actual amount of duty determined to be payable by each company.

Koyo believes the Department should reject Timken's claim for the following reasons:

- Timken has provided no evidence to support its claim that entries subject to the dumping finding have been liquidated in error.
- Timken's cite to the CIT decision in *Koyo Seiko* as support for assessment on the basis of entered value is misleading because the use of sampling rendered assessment on entered value necessary in the AFB cases.
- Section 751(a)(2) of the Tariff Act requires that the excess of FMV over USP "shall be the basis for the assessment of antidumping duties on entries of the merchandise included within the determination and for deposits of estimated duties."
- Timken's cite to *Timken III* is not valid because in that case Timken challenged the Department's failure to address adequately Timken's arguments regarding discrepancies between the value of U.S. sales reported by respondents and the value of suspended entries reported by the Customs Service. The CIT concluded that the Department had fulfilled its statutory obligation and that Timken should have brought an action *in mandamus* to compel Customs to perform its duty. Moreover, Koyo argues that the CIT's reference to assessment based on entered value was *obiter dicta*, as the Department had not instructed the Customs Service to assess antidumping duties based on entered value in the review at issue in that appeal.
- Furthermore, Koyo states that the Department cannot legally order the assessment of duties on entries which have already been liquidated. Koyo states that liquidation of entries is final unless the liquidation is properly protested in a timely manner, citing 19 U.S.C. § 1514(a) and *United States* v. *Utex Intern, Inc.*, 857 F.2d 1408, 1410–11 (Fed. Cir. 1988).

NSK argues that assessment of antidumping duties must be imposed on an entry-by-entry basis only on unliquidated entries. NSK asserts that the Department has no statutory authority to assess total antidumping duties (covering liquidated and unliquidated entries) over unliquidated entries.

Department's Position: As outlined in the Department's *Advanced Notice of Proposed Rule Making* (56 FR 63696 (December 5, 1991)), with respect to exporter's sale price (ESP) assessment, the Department has experienced significant difficulties in issuing liquidation instructions to Customs in cases involving large volumes of ESP entries. Several factors contribute to this difficulty: (1) the lag between entry date and sale date in ESP transactions, (2) the fungibility of the product, (3) the volume of transactions reviewed, and (4) the parties' own inability to link entries to sales or to provide the Department with the documentation to do so. Given these difficulties, as noted in the *Advanced Notice of Proposed Rule Making*, the Department has explored various alternative methods of issuing ESP assessment instructions. Such alternatives, and variations, include:

(1) When entry data are available, the Department can derive a per-unit margin by dividing the calculated dumping duties due (based on sales) by the number of units entered and then instruct Customs to apply the per-unit margin against all units entered during the review period. Similarly, the Department can derive a percentage margin by dividing the calculated dumping duties due (based on sales) by the entered value of the merchandise entered during the POR and then instruct Customs to apply this percentage margin against the entered Customs value of merchandise entered during the POR. This proposed methodology simplifies and streamlines assessment and liquidation dramatically, yet still enables Customs to collect the exact amount of dumping duties due on ESP sales that occurred during the review periods (although the lag between entry and sale dates in an

ESP situation will still make assessment problematic).

(2) When entry data are not available, we can derive a percentage margin by dividing the calculated dumping duties due (based on sales) by the net USP (which is our best calculation of the entered value of the merchandise entered during the POR), and then instruct Customs to apply that percentage margin against the Customs value of suspended entries of merchandise entered during the POR.

(3) The Department can derive a per-unit dumping margin by dividing the calculated dumping duties on ESP sales that occurred during the POR by the number of units sold and then apply the per-unit margin against all units entered during the POR.

We have evaluated these options in the context of these reviews covering entries from 1979 through 1986. We have determined that absolute assessment (option 1), as advocated by Timken, is not feasible for these reviews. Collection of the entered value of suspended entries of covered merchandise requires an amount of precision on a country-wide scale that, though possible for current ongoing reviews given today's level of electronic database maintenance, is clearly not feasible for the time periods in question in these reviews. Also, other than a limited number of Yamaha entries and the single instance cited by Timken (*Customs HQ*), we have no evidence that any entries of covered TRBs were incorrectly liquidated. Timken's concern about possible incorrectly liquidated entries is also unfounded conjecture and not based on substantial evidence. We disagree with Timken that these concerns constitute compelling reasons to use the *AFBs III* methodology. As for Timken's concern that TRBs entered as a part of a multi-product shipment may escape coverage of the finding, there is no evidence on the record to support this conclusion. Further, this option is not feasible because we did not ask the respondents for the entered value data necessary to implement this approach, and do not believe it appropriate to do so now, given the age of the reviews.

Since option 1 is not feasible, we have considered options 2 and 3. In order to be consistent with the Department's practice outlined in the second administrative review of the AFB orders (*Antifriction Bearings from the Federal Republic of Germany* (57 FR 28395, June 24, 1992) (*AFBs II*), we will calculate POR-specific appraisement rates using option 2, and we will instruct Customs to assess dumping duties on the entered value of suspended entries of covered TRBs during each POR.

Comment 2: Timken notes that cash deposits were not required for Koyo and NSK until the completion of the first administrative review in June 1990. Timken maintains that the Department, in each of the administrative results of review issued to date in this case, has refused to assess interest on antidumping duties secured by bonds rather than cash deposits. Timken acknowledges that the CIT has upheld the Department's determination not to assess interest and notes that Timken has appealed those decisions to the Court of Appeals for the Federal Circuit (Federal Circuit) (*Timken Company* v. *United States*, 15 CIT 526, 777 F.Supp. 20 (1991), *aff'd after remand*, 819 F.Supp. 1093 (CIT March 4, 1993), *appeal docketed*, Fed. Cir. No. 93–1312 (April 16, 1993)).

Timken asserts that section 778(a) of the Tariff Act contemplates collection of interest on all "underpayments of amounts deposited on merchandise entered" and that the Department's rationale for distinguishing entries secured by bonds, as opposed to cash deposits, distorts the statutory purpose and benefits those respondents that failed to make cash deposits of estimated duties. Timken requests that the Department address this issue once again in these final results.

NSK argues that the Tariff Act, the Department's practice, and judicial precedent hold that no interest is assessable on entries covered by bonds rather than cash deposits.

Koyo counters that Timken raises no new arguments in this review in support of its position and that unless and until the Department's longstanding interpretation of the Tariff Act is rejected by the Federal Circuit, the Department should continue to instruct Customs not to assess interest on antidumping duties secured by bond when liquidating the entries subject to these reviews.

Department's Position: We disagree with Timken. Section 778(a) of the Tariff Act provides that interest shall be payable only on overpayments and underpayments of "amounts deposited." The CIT held in *Timken Co.* v. *United States*, 777 F.Supp. 20 (1991), that the words "amounts deposited" refer only to cash deposits of estimated antidumping duties upon entry, and not to other kinds of security, such as a bond. In considering Timken's appeal, the Federal Circuit held that "the requirement to make cash deposits of estimated duties, under the duty order, triggers the interest provision. Without the duty order, the importer has no obligation to pay interest. The Court of International Trade did not err in upholding ITA's determination that NSK and Koyo Seiko are not liable for interest * * *" (*Timken Co.* v. *United States*, Fed. Cir. No. 93–1312, –1455 (Fed. Cir., September 27, 1994)).

This proceeding concerns a 1976 finding, in which the statute required bonds, not cash deposits. The Trade Agreements Act of 1979 (the 1979 Act) did not allow the collection (or payment) of interest where the entry of merchandise was permitted under bond rather than by the cash deposit of estimated dumping duties. Further, the 1979 Act contained no provision for the conversion from bonds to cash deposits for existing antidumping findings, except through the administrative review process.

Therefore, because we required cash deposits for the first time on entries of merchandise manufactured by Koyo and NSK on June 1, 1990, interest will only be collected or refunded on under- or overpayments of cash deposits on entries after that date.

Comment 3: Timken states that in its submission of October 8, 1991, it requested that the Department convert existing bonds, posted by Koyo and NSK as security for antidumping duties, to cash deposits. Since the Department has never formally responded to its request, Timken is renewing that request in its case brief for these administrative reviews.

Timken maintains that the role of Customs in matters pertaining to antidumping duties is purely "ministerial," requiring Customs to implement the instructions of the Department to the extent those instructions are not inconsistent with Customs regulations, citing *Diversified Products Corp.* v. *United States*, 6 CIT 155, 572 F.Supp. 883 (1983). According to Timken, the Department, therefore, has the authority to require Customs to collect cash deposits at this time, even if such deposits are nominal in amount. Timken argues that the conversion of existing bonds to cash deposits would permit the Department to collect interest on under-deposits of antidumping duties as required by section 778(a) of the Tariff Act. Timken contends that the Department should recognize that this proceeding is *sui generis*, at least with respect to Koyo and NSK, since the Department published a decision that cash deposits would be imposed on entries subject to existing findings as of the date of completion of the first administrative review (45 FR 1084, January 4, 1980). Timken points out that Koyo and NSK posted bonds for all of their entries during each of the PORs.

Moreover, Timken notes that the Department's ruling with respect to interest on Koyo and NSK entries was issued in June 1990 and is still pending before the Federal Circuit. Based on this experience, Timken states that it may take four years or more before assessment occurs. In order to safeguard the revenue during the inevitable appeals of the final results of these reviews, Timken urges the Department to require conversion of bonds to cash deposits.

NSK argues that the Department has consistently followed its policy of not requiring cash deposits on entries covered by pre-1980 findings until the first administrative review has been completed under section 751 of the Tariff Act. NSK contends that Timken has cited no authority to suggest that the Department's practice is contrary to law.

Koyo counters that neither the Department nor the Customs Service possesses any authority to require the posting of cash deposits retroactively. Koyo remarks, citing *U.S. Customs Service, HQ 222367* (December 28, 1990), that the Customs Service has no authority to require posting of cash deposits on entries that have been entered and accepted.

Department's Position: In 1980, the Department of the Treasury published a notice (45 FR 1084, 1980) stating that the 1979 Act contained no provision for the immediate conversion of existing antidumping findings from bonds to cash. Section 106(a) of the 1979 Act merely provides that outstanding antidumping findings would remain in effect and would be subject to review under section 751 of the Tariff Act. Section 751(a)(2) of the Tariff Act provides that the administrative review "shall be the basis for * * * deposits of estimated duties." Thus, the legal basis for requiring cash deposits under the 1979 Act is a review under section 751 of the Tariff Act or an order pursuant to section 736 of the Tariff Act. Because this case is not governed by an order, the Department is without power to require the imposition of a cash deposit until the completion of an administrative review.

Under U.S. law, where an affirmative dumping finding has been made, security must be provided upon entry of the merchandise into the country, and if the form of security is cash deposits, it must be paid no later than 30 days after entry (19 U.S.C. section 1505). Because the merchandise in question has already entered the country, the form of security cannot be changed retroactively. Similarly, since interest is only collectible on cash deposits pursuant to sections 737 and 778 of the Tariff Act, interest would accrue only from the time that the Department required a cash deposit and would not be retroactive to the time of entry under bond. The Department has followed this practice consistently and will continue to follow it for merchandise already entered into the United States.

Comment 4: Timken urges the Department to release detailed computer printouts of the final results of review as the limited information released in the preliminary results is insufficient to permit the parties to identify all errors in the computer printout. Since the Department has consistently refused to release "pre-final" calculations for review by the parties, Timken contends that the final output often provides the only indication of clerical errors in the Department's analysis. Therefore, at a minimum, Timken believes the Department should release a representative sample of major datasets (*i.e.*, 500 observations for each annual period).

NSK agrees with Timken that the Department should release detailed computer printouts of its final analysis. NSK also suggests that the Department consider releasing the printouts in advance of issuance of the final results, in order to expeditiously identify and correct any clerical errors.

Koyo supports Timken's request for pre-disclosure of the final results in this case due to the very complex nature of the preliminary margin analysis and the number of clerical errors identified in the preliminary results computer program.

Department's Position: We disagree with Koyo and NSK. The issuance of pre-final programs and printouts would only serve to delay the final results of these reviews. We believe that Koyo has misinterpreted Timken's comments regarding release of the "pre-final" calculations. In fact, Timken states that the Department's past consistency in refusing to release pre-final results makes a detailed release of the final margin program even more important. We agree with Timken in principle, and intend to provide the parties to this proceeding with a representative sample of the major datasets needed to identify any clerical errors in the computer programs, if they request disclosure after issuance of the final results to identify and comment on any clerical errors.

Comments Regarding Terminations

Comment 5: Mazda states its concern over the Department's refusal to terminate the review of Sumitomo Corp. with respect to Mazda transactions. Mazda notes that in Timken's agreement to withdraw its request to review Mazda, Timken consented to the termination of the review with regard to resale transactions to Mazda's subsidiaries through Sumitomo Corp. Mazda states its interest in this proceeding is to retain its zero margin rate for all U.S. entries of Mazda replacement-part TRBs, without regard to whether such TRBs are imported directly from Mazda or indirectly from Mazda through resales by Sumitomo Corp.

Mazda suggests three alternative proposals: (1) partial termination of the review of those sales through Sumitomo which both originate and end with Mazda; (2) termination of the review with regard to all sales for export to the United States by Mazda, whether directly or indirectly through Sumitomo Corp.; or (3) termination of the review with regard to all sales for export to the United States by Mazda and instructions to Customs to liquidate all TRBs sold by Mazda for export to the United States, whether directly or indirectly through Sumitomo Corp. Mazda contends that any of the three alternatives would leave Sumitomo Corp. in the review while clarifying the Department's intent to have all of Mazda's export sales of TRBs to the United States, whether directly or indirectly through Sumitomo Corp. as a reshipper, treated as exports by Mazda. Mazda maintains that such treatment is consistent with both Mazda's and Timken's request to terminate the review, as well as consistent with current and past treatment by Customs of Mazda's exports to the United States.

Sumitomo Corp. maintains that it is not the importer of record, and therefore has no liability for antidumping duties. Further, by terminating the review of Mazda, the Department will effectively terminate the review of Sumitomo Corp. with respect to Mazda's exports during the POR.

Timken reaffirms its agreement to the termination of the 1985/86 review with respect to Mazda and, of the three alternatives proposed by Mazda, prefers the third, namely, the termination of the review with regard to all sales for export to the United States by Mazda, with a clarification to Customs of the Department's intent that Mazda's exporter rate should be applied to all TRBs sold by Mazda for export to the United States, whether directly or indirectly through Sumitomo Corp.

Department's Position: We agree with Timken that alternative three offers the best solution with regard to termination of the review of Mazda and Mazda transactions through Sumitomo Corp. It satisfies Mazda's request and Timken's affirmation to terminate the review with

regard to all sales for export to the United States by Mazda, while enabling us to appraise exports by Sumitomo Corp. for sale to parties other than Mazda. Accordingly, in these final results, we are terminating the review of Mazda with regard to all sales for export to the United States by Mazda. In our instructions to Customs we will clarify our intent that Mazda's rate should be applied to all TRBs sold by Mazda for export to the United States, whether directly or indirectly through any entity. For an explanation of our treatment of Sumitomo Corp., please see the following comment.

Comment 6: Mazda argues that the Department erroneously treated Sumitomo Corp. (also known as Sumitomo Shoji Kaisha, Ltd.) and Sumitomo Yale Co., Ltd. as one company, when in fact they are two separate, independent firms. Mazda also notes that only Sumitomo Yale was included in the 1980/85 reviews (51 FR 24883) and only Sumitomo Corp. was included in the 1985/86 review (51 FR 32817).

Sumitomo Corp. states that it should not have been included in these reviews and should no longer be considered a party to this proceeding because Sumitomo Corp. does not manufacture, import, or further process TRBs. Sumitomo Corp.'s role, for which it receives a fixed commission, in the sale and shipment of TRBs, has only been to arrange for the transport of the merchandise from Japan to the United States in transactions between related parties.

Because Sumitomo Corp. did not respond to the Department's questionnaire, Timken argues that, for exports by Sumitomo Corp. for sale to parties other than Mazda, the Department should apply BIA to Sumitomo Corp.'s entries both for appraisement and to derive the cash deposit rate for future entries.

Department's Position: Evidence on the record indicates that Sumitomo Yale and Sumitomo Corp. are, in fact, two separate firms. Evidence on the record also indicates, however, that we sent Sumitomo Yale questionnaires for the 1980/85 periods to which the firm declined to respond. Therefore, in accordance with section 776(c) of the Tariff Act and the methodology outlined in the notice of preliminary results, we have used first-tier BIA to determine the margins for Sumitomo Yale.

Although the Department initiated a review of Sumitomo Corp. only for the 1985/86 POR, we inadvertently sent Sumitomo Corp. a questionnaire for several periods preceding that POR. In addition, we cannot confirm that we sent a questionnaire to Sumitomo Corp. for the 1985/86 review. Therefore, it is inappropriate to use BIA, since Sumitomo Corp. did not fail to respond or otherwise impede the proceeding.

We have considered several additional facts: (1) the age of the proceeding does not allow for efficient retrieval from Customs of information on suspended entries; and (2) Timken has withdrawn its request for a review of Sumitomo Corp.'s shipments with respect to Mazda for the 1985/86 POR. Therefore, we have accepted the portion of Sumitomo Corp.'s case brief with comments regarding its activities for the 1985/86 POR which provides evidence that Sumitomo Corp. did not sell TRBs to the United States during the 1985/86 POR.

Therefore, for entries suspended as "Sumitomo Corp." entries for the 1985/86 POR, we will notify Customs to liquidate them at the manufacturer's rate, either based on the final results of this review or as provided for by 19 CFR 353.22(e). Specifically, in accordance with 19 CFR 353.22(e), Mazda entries suspended as "Sumitomo Corp." entries will be liquidated at the amount of cash deposit required at the time of entry. We further note that we are currently conducting a review of Sumitomo Corp. for the 1992/93 POR, and we will determine in that review the role of Sumitomo Corp. in U.S. TRB transactions based on the information on the record for that review.

For entries by all firms for which we are terminating these reviews, in accordance with 19 CFR 353.22, we will instruct Customs to assess antidumping duties in the amount of the cash deposit required at time of entry. Existing cash deposit rates will remain in effect for those firms until the next publication of final results of review.

Comments Regarding Annual Average FMV, Model Match, and Cost Test Methodology

Comment 7: Both NSK and Timken argue that the Department's calculations incorrectly excluded home-market models which lacked physical criteria information from the model-match portion of the analysis. NSK and Timken contend that, where possible, the Department should match such home-market models with U.S. models with identical nomenclature.

Department's Position: We agree. In the preliminary results of review we did not intend to exclude from the model-match analysis any home-market models lacking physical criteria information. We have made the necessary correction to our calculations for these final results of review to ensure that we consider all home-market models in determining whether they are identical to models respondents sold in the United States.

Comment 8: Koyo states that for the final results the Department should follow the CIT's direction in *Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A.* v. *United States*, 834 F.Supp. 431 (CIT 1993). In that case, the CIT concluded that a 10-percent cap was required to limit the permissible deviation of the criteria used to match TRB models and agreed with Koyo that the use of a 10-percent cap on the comparison of each physical criterion is necessary to avoid "comparisons between products which differ so dramatically that they simply cannot be considered commercially similar" (*Koyo Seiko, Co.*, 834 F.Supp. 435).

Timken disagrees with Koyo, stating that the "sum of the deviations" method of determining comparison merchandise, in conjunction with the 20-percent difference-in-merchandise (difmer) limit, implements the intent of section 771(16) of the Tariff Act that the comparison merchandise be "like" the merchandise sold in the United States, and of approximately equal commercial value. Section 771(16) of the Tariff Act, Timken argues, does not require that home-market models be technically substitutable. Therefore, in Timken's opinion, because this issue is currently under judicial review, the Department should decline to modify its methodology, pending a "final" judicial decision on the issue.

Department's Position: We agree with Timken. As we stated in *Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Certain Components Thereof, from Japan* (58 FR 64721, December 9, 1993) (*1990/91 and 1991/92 TRBs*), we are satisfied that use of the original sum of the deviations methodology, without the 10-percent cap but including the 20-percent difmer cap, accurately determines the most similar model sold in the home market. We have, therefore, used the original sum of the deviations methodology for model-match comparisons in these final results of review.

Because we use the original sum of the deviations model-match methodology, rather than the single greatest deviation methodology we used in conjunction with the 10-percent deviation cap in the less-than-fair-value (LTFV) investigation of TRBs over 4 inches, application of a 10-percent deviation cap to each physical criterion would mean that the best overall match could be eliminated simply because a single physical criterion deviated by more than 10 percent. By using the sum

of the deviations methodology, all five matching criteria have equal weight. By contrast, the application of a 10-percent cap to each physical criterion represents a distortion of the model-match methodology, in that it establishes a randomly-selected hierarchy, rather than evaluating each criterion on an equal basis. The 10-percent cap can result in our inability to match some U.S. sales of TRBs which the Department considers most similar overall, but which have a greater than 10-percent deviation in only one criterion. This results in reliance on CV to a much greater degree when the statutory preference is for price comparisons.

Furthermore, if the Department were to apply both the 10-percent cap and the 20-percent difmer cap, the methodology would become too restrictive, since in some cases the only matches passing the 20-percent difmer test may vary by more than 10 percent in one or more physical criteria. Using both tests might eliminate matches of otherwise comparable merchandise. Thus, this methodology would result not in more precise matches but in fewer matches to such or similar merchandise, and an overreliance on CV.

Finally, although the CIT held in *NTN Bearing Corp.* v. *United States*, Slip Op. 94–25 (February 11, 1994), that the Department must apply the 10-percent cap to the sum of the deviations methodology, the Department respectfully disagrees with this decision. Because application of the 10-percent cap in that case does not alter the margins, the Department cannot appeal that case (see *Zenith Electronic Corp.* v. *United States*, 895 F.2d 291 (Fed. Cir. 1989)). However, we have appealed the next case involving this issue (*Koyo Seiko Co., Ltd and Koyo Corporation of U.S.A.* v. *United States*, Slip Op. 93–185). Therefore, for all of these reasons, and for the reasons explained in the notices of prior TRB final results of review, we have not changed our methodology for these reviews.

Comment 9: Koyo objects to the Department's use of set-splitting to create artificial home-market sales of cups and cones for comparison to sales of cups and cones sold separately in the United States. Koyo states that there are sufficient actual sales of cups and cones in the home market to allow the Department to avoid comparison with CV. In addition, the use of annual average FMVs in these reviews permits the Department to match a U.S. sale of a cup or cone to a home-market sale of a such or similar cup or cone made at any time in the home market, rather than within the six-month window the Department uses with monthly weighted-average FMVs. Koyo asserts that this fabrication of artificial sales by set-splitting violates the statute, skews the margins, and creates unnecessary work and expense.

Koyo cites section 773(a)(1) of the Tariff Act as providing that "[i]n the ascertainment of foreign market value, for the purpose of this title, no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account." Koyo contends that there may have been a "sale", but not of the type of product to which it was matched in the U.S. market.

Acknowledging that the CIT upheld the Department's splitting of sets in *NTN Bearing Corp. of America* v. *United States*, 747 F.Supp. 726 (CIT 1990)(*NTN*), Koyo contends that the facts of that LTFV investigation are different from the facts of these reviews. Koyo explains that in the LTFV investigation, to avoid over-reliance on CV, the Department split home-market sales of TRBs into "sales" of cups and cones. Koyo contends, however, that in these reviews there were sufficient actual home-market sales of cups and cones to match with the U.S. sales of cups and cones. In addition, Koyo states that reliance on actual sales would simplify the calculations and lessen the administrative burden. If the Department determines that it is necessary to continue to split TRB sets, Koyo requests that the Department at least combine the sales of cups and cones in order to conduct a fair analysis, citing *Timken Co.* v. *United States*, 673 F.Supp. 495, 505 (CIT 1987) (*Timken II*).

Timken asserts that a TRB set is nothing more than a cup or cone sold together as a unit. The practice of selling cups and cones as individual components in some markets does not render the components distinct articles of commerce. Timken challenges Koyo's contention that cups and cones have different commercial values than complete sets, when, in fact, Koyo points to no evidence in the administrative record to support its contention.

Timken identifies several court cases where the CIT upheld the Department's set-splitting. For example, in *Timken II*, Timken notes that the CIT rejected NTN's argument that the Department was creating pretended sales of cups and cones in the home market. Timken also cites NTN as support for the Department's set-splitting methodology.

Moreover, Timken notes that the CIT has upheld the Department's use of set-splitting in the context of using home-market annual average prices in *NTN Bearing Corp. of America* v. *United States*, 835 F.Supp. 646 (CIT 1993)(*NTN I*). Although this issue was not specifically addressed in this case, Timken notes that the Department's consistent practice has been to split TRB sets, no matter how FMV was determined (*e.g., 1990/91 and 1991/92 TRBs*, 58 FR 64720).

Finally, Timken sees no merit in Koyo's argument that the Department and respondents would be spared the additional work necessary to split home-market set sales into cups and cones.

Timken concludes that Koyo has provided no reason for the Department to modify its present approach, and urges the Department to continue to split home-market TRB sets into individual cup and cone components for the final results of these reviews.

Department's Position: We agree with Timken. In its most recent decision on this matter, the CIT again reaffirmed the Department's practice of set splitting (*NTN I*). In *Timken II* the CIT pointed out that these split sales are not "fictitious" sales, but real sales made to real customers. The CIT upheld the Department's decision to split sales of sets because, otherwise, respondents could have forced the Department to use CV in its analysis by simply selling sets in one market and cups and cones in the other: "the Court declines to read section 1677b(a)(1) to permit such control by foreign manufacturers of the manner in which FMV is determined" (*Timken II*, at 495, 504–505). In addition, the CIT has also stated in *NTN I* that, if NTN's interpretation of the statute were followed, "such interpretations would encourage importers to circumvent the antidumping laws by simply using divergent invoicing methods" (*NTN I*, 726, 741). The Department considers set-splitting to be necessary for these reviews; cups and cones split from sets are potentially the most similar merchandise to the products sold in the United States. Because they may be the most similar products, it is appropriate to include this merchandise in the pool of home-market sales.

Comments Regarding Calculation of FMV

Comment 10: Timken argues that the adjustment to FMV for early-payment discounts as direct selling expenses, which the Department granted NSK in the preliminary results of the 1984/85 and 1985/86 reviews, is unsupported. Timken contends that the discounts were not related to specific merchandise and notes that, under identical

circumstances, the Department has in the past denied a respondent's claim for a direct adjustment.

NSK concedes that, using its present methodology, the Department requires discounts to be reported on a transaction-specific basis. However, NSK argues that in this case the Department's 1986 questionnaire did not require NSK to report early-payment discounts on a transaction-specific basis, reflecting the Department's practice at the time. Furthermore, NSK notes the company was unable to tie its cash discounts to specific merchandise because the same discounts were granted on all merchandise. NSK explains that its allocation of total discounts over total sales was consistent with its record-keeping at the time.

Department's Position: The Department's current practice is indeed to require that discounts be reported on a transaction-specific basis (see *AFBs III*, 39729, 39759). However, in our original questionnaires for these reviews we did not require NSK to report discounts on such a basis, and we did not issue supplementary instructions when our practice changed. Therefore, because NSK's submitted discount information represents the only information on the record, we have continued to rely on these data for these final results of review.

Comment 11: Timken contends that the Department incorrectly treated Koyo's post-sale price adjustments (PSPAs) and rebates as direct selling expenses in the home market when, in fact, Koyo reported these adjustments as aggregate amounts, attributable to all products, and, therefore, did not report them on a transaction-specific basis. Timken states that at verification the Department determined that Koyo calculated (a) a lump-sum discount amount, and (b) a part-number-specific debit/credit PSPA, and then reported a PSPA ratio based on the aggregate of these two values. Timken notes that 19 CFR 353.56(a) requires that billing adjustments bear "a direct relationship to the sales compared" in order to be treated as a direct selling expense. In addition, Timken notes that, according to several court decisions, the burden of proving entitlement to adjustments rests with respondents. Further, Timken cites *Torrington Company* v. *United States*, 818 F.Supp. 1563, 1579 (1993) (*Torrington*), as evidence that the CIT disallowed a methodology which would include PSPAs and rebates on out-of-scope merchandise in calculating an FMV.

Timken, however, believes that the Department should continue to adjust for home-market price increases, by using Koyo's "positive" price adjustments, as these data constitute the best information on the record concerning price increases during the periods of review.

Koyo states that the Department correctly accepted Koyo's home-market billing adjustments as direct selling expenses. Koyo argues that Timken's reliance on *Torrington* is misplaced because, although the CIT stated that the Department should not include billing adjustments for out-of-scope merchandise, the CIT proposed an alternative methodology whereby billing adjustments for in-scope merchandise can be calculated by identifying the ratio of in-scope merchandise to total sales to which these billing adjustments apply, and applying that ratio to total billing adjustments (*Torrington*, 1578–79). Koyo maintains that the Department has verified and accepted Koyo's methodology in previously completed TRB reviews (*1990/91 and 1991/92 TRBs; Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from Japan*, 57 FR 4951 (February 11, 1992))(*TRBs I*).

Koyo concludes that the Department properly treated Koyo's home-market PSPAs as direct selling expenses. Koyo adds that if the Department contemplates rejecting Koyo's billing adjustments, it must, at a minimum, re-open the administrative record to allow Koyo to resubmit information that conforms to any new standard the Department may use in lieu of the standard prevailing in 1991 when Koyo submitted its consolidated response.

Department's Position: We disagree in part with Timken and Koyo. For these review periods, Koyo pooled all debit and credit notes associated with the PSPAs and rebates of each customer and allocated the amounts over the total purchases (*i.e.*, in-scope and out-of-scope merchandise) of each customer. In our supplemental questionnaire we asked Koyo to demonstrate how each price adjustment was linked to each transaction. Koyo only provided a computer printout showing price adjustments by customer code. The price adjustments were divided by the customer's total purchases during each POR. Since Koyo's records during the PORs did not reveal the exact nature of the price adjustments, we have not treated these expenses as direct selling expenses. Nor have we limited the adjustments to only positive values, as Timken suggests, because the use of only positive values would distort the information submitted by Koyo. Therefore, we have classified Koyo's PSPAs and rebates as indirect, rather than direct, expenses.

Comment 12: Koyo states that the CIT held in *Koyo Seiko Co., Ltd.* v. *United States*, 810 F.Supp. 1287, 1292 (CIT 1993) (*Koyo Seiko*), and in numerous other cases that the antidumping statute requires the Department to make a circumstance-of-sale (COS) adjustment to FMV for U.S. direct selling expenses. Koyo cites as examples *NSK Ltd.* v. *United States*, No. 92–03–00158, Slip Op. 93–216 (CIT Nov. 18, 1993), and *NTN Bearing Corp. of America* v. *United States*, No. 91–08–00576, Slip Op. 93–56 (CIT April 21, 1993)). Given such clear and consistent instruction from the CIT, Koyo argues that the Department, for these final results, must adjust for U.S. direct selling expenses by adding these expenses to FMV, rather than by subtracting them from USP.

NSK argues that the Department's treatment of U.S. direct selling expenses as adjustments to USP was contrary to law and judicial precedent. NSK argues that U.S. direct selling expenses are properly treated as upward adjustments to FMV.

Timken counters that the law requires Customs to collect the full amount of the difference between USP and FMV, and if an improper denominator is used in calculating the *ad valorem* appraisement rate, respondents will escape collection of the full amount of duties. Timken asserts that in order for Customs to apply appraisement rates to the entries subject to these reviews, the Department should calculate the percentage rates on the basis of entered value. If this is done, Timken claims there will be no difference in the rates calculated regardless of whether the expenses are subtracted from USP or added to FMV.

Moreover, Timken notes that the Department has declined to follow the decisions cited by NSK and Koyo (*1990/91 and 1991/92 TRBs*), on the grounds that an appeal of the underlying issue is pending in other TRB litigation. Therefore, Timken states that the Department should continue to deduct direct selling expenses from USP rather than add them to FMV.

Department's Position: It is our longstanding practice, pursuant to section 772(e)(2) of the Tariff Act, to deduct all expenses incurred in the United States, including direct selling expenses, in calculating ESP. In calculating purchase price (PP), adjustments for differences in COS pursuant to 19 C.F.R. § 353.56, including direct selling expenses, are made to FMV, and no deduction of direct selling expenses is made from PP. This is necessary to avoid a systematic distortion in the amounts of duty assessed which would result if the value

on which dumping margins were calculated were consistently different than the entered value, to which Customs will apply the margin.

Entered value is most commonly based on the price to the United States between the exporter and the importer. In contrast, the basis of ESP is the resale price in the United States to the first unrelated purchaser, which will approximate the entered value only after all expenses incurred in the United States (including direct selling expenses) are deducted. PP will approximate the entered value without the deduction of any expenses because the direct selling expenses are incurred in the exporting country and included in the price to the United States used for both PP and entered value.

On September 30, 1994, the Federal Circuit reversed the decisions of the CIT in *Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A.* and *Isuzu Motors, Ltd. and American Isuzu Motors, Inc.*, v. *United States* and *The Timken Company* (93–1525, 93–1534), holding that "(n)othing in the plain language * * * of the Antidumping Act precludes Commerce's approach of adjusting exporter's sales price by deducting therefrom certain direct selling expenses incurred in the United States. Indeed, Commerce's stated rationale for its approach is well within the bounds of reasonableness." Therefore, we have maintained our practice for these final results.

Comment 13: Timken maintains that Koyo cannot consolidate its sales to a related distributor and then report the selling expenses of that distributor (*e.g.*, indirect selling expenses, credit), when it reported the sale between Koyo and its related distributor and did not report the distributor's re-sale prices to unrelated parties. In Timken's view, Koyo's *ad hoc* treatment of related distributors' expenses and sales information, which were consolidated for some purposes and not for others, renders the entire indirect selling expense claim invalid.

Koyo states that Timken misinterpreted the verification report, which makes clear that Koyo reported only selling expenses incurred by Koyo at its headquarters and sales offices, and did not include any expenses incurred by related companies.

Department's Position: We disagree with Timken. We have reexamined the documents cited by Koyo, including the home-market verification report, and have concluded that the information on the record regarding Koyo's indirect selling expenses is accurate. Although we have adjusted Koyo's home-market indirect selling expenses as a result of other positions taken by the Department for these final results, we are satisfied that Koyo submitted only those expenses it incurred at its headquarters and sales offices.

Comment 14: Timken maintains that in the preliminary results of review for Yamaha, the Department erroneously deducted an imputed adjustment for home-market credit expense from FMV. Because Yamaha made no claim for this adjustment, Timken asserts that the Department is under no obligation to adjust for this expense, and that for the final results the Department should not make the credit expense adjustment to FMV.

Department's Position: We agree. The CIT has stated that the burden of proving entitlement to adjustments rests with the respondent making the claim (*Timken II*). Therefore, we have not made an adjustment to FMV for Yamaha's imputed credit expenses.

Comments Regarding Calculation of USP

Comment 15: Timken asserts that section 772 of the Tariff Act requires the Department to adjust USP for "all costs, charges, and expenses . . . incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States. . . ." Timken states that this includes pre-sale inland freight. In contrast, Timken observes that there is no similar provision for deduction of such expenses from FMV. Therefore, Timken argues that the statute calls for distinct treatment of pre-sale inland freight, depending upon whether USP or FMV is at issue.

Timken notes that the Federal Circuit's rejection of the Department's practice of treating home-market pre-sale inland freight as a direct deduction from FMV is categorical and not limited to the PP context (*Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement* v. *United States*, Slip Op. 93–1239 (Fed. Cir., January 5, 1994) (*Ad Hoc Committee*)). Timken asserts that the Department's implementation of *Ad Hoc Committee* requires that any adjustment for pre-sale inland freight be made pursuant to the ESP offset (as an indirect selling expense), rather than pursuant to the COS provision of section 773 of the Tariff Act.

Koyo points out that the Department treated pre-sale inland freight as an indirect expense, which is contrary to the Department's established practice in previous reviews of this case of treating pre-sale inland freight as a direct selling expense. Koyo cites *1990/91 and 1991/92 TRBs.*

Koyo states that in *Ad Hoc Committee*, which involved PP sales, the Federal Circuit held that the Department may not make a deduction for pre-sale inland freight in calculating FMV. Koyo notes, moreover, that the Federal Circuit's decision explains that the case before it was a departure from the Department's longstanding practice of deducting pre-sale transportation expenses from FMV in ESP situations.

Therefore, Koyo maintains that the Department should continue its practice of deducting pre-sale inland freight expenses as direct selling expenses from FMV. Koyo also asserts that Timken's reliance on *Ad Hoc Committee* is misplaced because the decision applied only to situations involving PP transactions and does not apply to Koyo's transactions in these reviews where USP is calculated using ESP.

NSK argues that the *Ad Hoc Committee* decision has no bearing on NSK's sales. NSK contends that the Federal Circuit decision involved PP sales, in which foreign inland freight was post-sale freight, whereas NSK's sales are ESP sales, in which all inland freight is pre-sale freight. NSK argues that, in an ESP analysis, the deduction of pre-sale freight from USP but not from home-market price would result in an unequal comparison.

Department's Position: The *Ad Hoc Committee* decision states that the statute does not give the Department the authority to deduct home-market movement expenses from FMV by invoking its inherent power to fill in "gaps" in the antidumping statute (*Ad Hoc Committee*, Slip. Op. 93–1239). Consistent with the rationale of this decision, the Department applies this methodology to both PP and ESP situations. As a result, we must now evaluate a claim for pre-sale inland freight within the context of the COS adjustment provision of the Tariff Act. With respect to Koyo's and NSK's claims of having incurred pre-sale freight expenses, we find that neither claim is directly related to any specific sale and no specific sale is anticipated at the time when respondents incurred the pre-sale inland freight expense. Consistent with our practice regarding non-sales-specific expenses, we have treated pre-sale inland freight for NSK and Koyo as a home-market indirect selling expense (19 CFR 353.56(b)(2)).

Comment 16: Timken notes that in the preliminary results the Department excluded NSK's sales with prices of zero from the margin analysis. Timken contends that these sales are likely sample or promotional sales, and should be included in the margin calculation as

required by both the statute and past Department practice.

NSK argues that transactions showing zero prices are not "sales" because sales require the payment of money, and are thus more properly viewed as selling expenses. NSK notes that, as verified by the Department, sample sales are included in NSK's reported SG&A expenses, and thus should not be included in the Department's analysis of sales.

Department's Position: We agree with Timken. Our general practice has been to include zero-priced sample U.S. sales in margin calculations. In *AFBs II*, where our policy is discussed at length, we stated,

> Sample sales fall outside the scope of the review when the respondent can demonstrate that no transfer of ownership has occurred between the exporter and the unrelated U.S. purchaser . . . the statute and the regulations require the Department to analyze all sales within the period of review. . . . Consequently, all U.S. zero-price sales have been included for the final margin calculation.

In *Granular PTFE from Japan* we excluded certain U.S. sample sales from our analysis. In that case, however, sample goods were provided to customers for testing. Because of the nature of the product, once tested, the sample could not be returned. Although a transfer of ownership had occurred, the product had not been used for commercial consumption, and thus could not be said to have been "sold" (see *Granular Polytetrafluoroethylene Resin from Japan; Final Results of Review*, 58 FR 50345 (September 27, 1993)). In this case NSK states that its sample sales involve transfer of ownership and makes no claim that the samples are destroyed or rendered unusable, as in *Granular PTFE from Japan*. Accordingly, we have included all U.S. sample sales in our analysis for these final results of review.

Comment 17: Timken argues that NSK's selling, general, and administrative expenses (SG&A) for U.S. sales are underreported. Timken notes that NSK excluded SG&A expenses which it claimed to be related to NSK's U.S. subsidiary's manufacturing operations. Timken argues that NSK has not provided evidence to support such a claim, and that the Department, in the 1974/80 reviews, rejected a similar claim. Timken contends that the Department should recalculate NSK's SG&A expenses to include the "manufacturing-related" expenses.

NSK argues that expenses specifically related to U.S. manufacturing should not be included in SG&A expenses. NSK maintains that, in the administrative reviews of the AFB orders, the Department recognized that a portion of NSK's SG&A expenses are properly related to U.S. manufacturing. NSK contends that it would be unreasonable to deny NSK a similar allocation in these reviews.

Department's Position: We agree with Timken. NSK has failed to support its claimed allocation in either these or previous segments of this proceeding. At verification we noted that while total SG&A expenses attributable to manufacturing-related expenses had been verified, "NSK did not provide evidence to substantiate the amounts to be allocated to manufacturing only" (see *Verification Report*, March 27, 1987, p. 10). Therefore, for these final results of review we have recalculated NSK's SG&A expenses to be deducted from USP to include the "manufacturing-related" expenses.

Comment 18: Timken notes that NSK reported an export inspection fee applicable to exports to the United States in 1985/86, and Timken presumes that similar expenses were also incurred for other periods. Timken contends that the Department has not adjusted USP for these expenses in the 1980/85 reviews.

NSK agrees with Timken's contention.

Department's Position: In the preliminary results we did not adjust USP for export inspection fees. We have made the necessary changes to our calculations for these final results of review.

Comment 19: Timken argues that for 1980 through 1982, NSK claims that it had no loans in the United States, and challenges the "average lending rate" methodology NSK used to determine credit expenses and inventory carrying costs. Timken claims that the "average lending rate" used by NSK is the rate charged on intra-company loans. Timken argues that the Department should recalculate the U.S. interest rate based on the formula used by NSK for the other periods (*i.e.*, the U.S. prime lending rate plus a given factor).

NSK argues that its reported "average lending rate" was in fact the average interest received on short-term deposits, and thus reflects NSK's true credit costs. NSK argues that, as verified by the Department, NSK had no loans for the period 1980 through 1982, and, therefore, its cost of credit is properly the opportunity cost of late payment, *i.e.*, unrealized interest from short-term deposits.

Department's Position: We agree with NSK. We verified that NSK had no loans for the period 1980 through 1982 and agree that NSK's credit costs are the opportunity costs of late payment, and therefore, properly captured using the average interest rates on short-term deposits.

Comment 20: Timken maintains that Koyo's conclusion that 50 percent of its inland freight costs are direct and 50 percent are indirect is an unsupported estimate of pre-sale and post-sale inland freight expense and, therefore, should be rejected in its entirety, or, at a minimum, all of Koyo's inland freight expenses should be considered as indirect selling expenses.

Koyo counters that there is no evidence that its reported freight expenses are inaccurate or unreliable. Koyo states that the Department verified the accuracy of its freight expense amount, and that the Department's practice of treating pre-sale and post-sale inland freight as direct selling expenses renders the amount of the allocation between the two types of expenses immaterial.

Department's Position: Although Koyo requested that we deduct pre-sale inland freight as direct selling expenses from FMV, it allocated total freight expenses into direct and indirect categories in its submission. Koyo contends that it did not distinguish post-sale and pre-sale freight expenses in its records at that time and, therefore, allocated half of the expenses to warehouse transfers and half to direct inland freight. We verified the accuracy of Koyo's total freight expenses and accept Koyo's allocation of these expenses as the best estimate possible given the lack of specificity of Koyo's records at the time. Therefore, we have continued to accept Koyo's allocation of direct and indirect home-market freight expenses in these final results, treating 50 percent of total freight expenses as pre-sale freight (an indirect selling expense) and 50 percent as post-sale freight (a direct selling expense deduction from FMV).

Comment 21: Timken contends that the Department should deduct a reasonable profit amount from ESP. Timken concedes that the statute is silent on this question, but states that there is broad international understanding that reseller profits should be deducted in ESP-type situations.

NSK argues that the Department has consistently rejected Timken's argument, and has been sustained by the CIT. Therefore, the Department's treatment of profit is in accordance with the law.

Koyo believes that Timken's argument should be rejected not only because there is no statutory basis for deducting profit from ESP, but Timken's interpretation of the statute would

require a fundamental change in a well-established Department practice. According to Koyo, section 772(e) of the Tariff Act directs that, for purposes of calculating ESP, the price shall be reduced by the amount of "commissions for selling in the United States the particular merchandise under consideration." Koyo asserts that the Department (and, prior to 1980, the Department of the Treasury), interprets this provision literally (*i.e.*, that "commission" does not include "profit"), citing *Timken II* and *Timken Co.* v. *United States*, 630 F.Supp. 1327, 17783–44 (CIT 1986). Koyo concludes that there is no basis upon which to overturn the Department's decision not to deduct profits from ESP.

Department's Position: We agree with Koyo and NSK. Sections 772(d) and (e) of the Tariff Act do not include resale profits among the detailed list of adjustments that the Department is authorized to make to USP in ESP situations. Thus, there is no provision in the statute by which we can make the adjustment that Timken requests.

Comment 22: Timken points out that the Department, in several recent administrative reviews, rejected Koyo's U.S. discount data because they were aggregated, rather than transaction-specific. Timken states that aggregated discounts or price adjustments are unreliable for purposes of antidumping analysis. Timken cites *AFBs III*, wherein the Department rejected Koyo's U.S. discounts and sales allowances because Koyo did not report them on a transaction-specific basis. In that review, Timken asserts that the Department assigned to Koyo, as BIA, the highest percentage discount or sales allowance of any U.S. sale to all sales that received a discount or sales allowance. Timken believes the Department should be consistent with its approach in AFBs III.

Moreover, Timken maintains that the Department should not grant any adjustment for upward PSPAs to USP given that Koyo's claim is based on averages of price adjustments and discounts on in-scope and out-of-scope merchandise rather than transaction-specific price adjustments and discounts on in-scope merchandise.

Koyo contends that the application of BIA for U.S. discounts would be inappropriate for these reviews because BIA is normally reserved for situations in which a respondent fails to comply with an information request from the Department. Koyo cites *Olympic Adhesives* v. *United States*, 899 F.2d 1565, 1572 (Fed. Cir. 1990), in support of its contention.

In this instance, according to Koyo, the Department never informed Koyo that the methodology Koyo used in 1991 for reporting U.S. discounts and sales allowances would no longer satisfy the Department's new standard in the more recent final results of review the Department published for TRBs and AFBs in 1993. Thus, Koyo concludes that it would be extremely unfair for the Department to reject Koyo's claimed U.S. discounts at this late stage of these long-delayed reviews.

Department's Position: We agree with Timken. In these reviews of TRBs it has been the consistent practice of the Department to require that discounts be reported on a transaction-specific basis. As early as June 6, 1991, in our final results of review for the 1987/88 POR (*Tapered Roller Bearings from Japan; Final Results of Review*, 56 FR 26059) (*TRBs*), we stated that Koyo's methodology of calculating one discount factor for all bearing sales and assigning it to a group of customers is not representative of actual TRB sales experience, since it fails to tie the actual discounts granted to the sales to which they apply (56 FR 26059). Thus, we did not allow discounts, rebates, or price adjustments based on broad allocations in that review. Moreover, in our 1993 supplemental questionnaire for these administrative reviews, we requested documentation of the discount rates in effect during each of the PORs. We also asked Koyo to report discounts and sales allowances on a transaction-specific or, if that were not possible, on a customer-specific basis. However, since Koyo did not report its U.S. discounts and sales allowances on a transaction-specific basis for the reviews in question, we assigned, as BIA, the highest percentage discount reported for any U.S. sale to all sales that received a discount during each POR.

Comment 23: Timken contends that Koyo's ESP offset cap is inflated due to the Department's inclusion of freight-out expense and commissions which the Department should re-classify as direct selling expenses, not indirect. Timken points out that Koyo reported its U.S. sales commissions on a transaction-by-transaction basis as direct expenses. Similarly, Timken states that there is no basis for including freight-out in indirect selling expenses since freight, in general, is considered a movement charge when calculating USP.

Koyo agrees that the Department should define the ESP offset cap in the same manner as in its other recent TRB reviews.

Department's Position: We agree with Timken that freight incurred in the United States should be treated as a direct deduction from USP pursuant to 19 CFR 353.41(d) and have done so for these final results. However, the Department rejected Koyo's claim for a deduction for home-market commissions because Koyo was unable to tie the total commission amount to sales of covered merchandise at verification. We have, therefore, included U.S. commissions in the ESP cap, pursuant to 19 CFR 353.56(b).

Comment 24: Timken objects to Koyo's reporting of U.S. freight expenses based on sales value. Timken notes that the Department requested that Koyo report its freight-in expense based on the cost of goods sold, but Koyo indicated that it was unable to comply. Timken cites *TRBs* to assert that the Department's consistent position is that "allocation of freight costs by volume, weight, distance, or a combination of these, is preferable to allocations based on sales value" (TRBs 56 FR, 41508, Comment 17). Timken requests that the Department re-allocate freight expenses based on the weight of the merchandise, since the net weight of individual bearings is available in the administrative record of these reviews.

Koyo claims that its method of allocating freight expenses over the sales value of the subject merchandise remains the most accurate method available to account for these expenses. Koyo asserts that the Department accepted this method as reasonable in prior reviews and should continue to do so for these final results.

Department's Position: We agree with Koyo. While we have stated, as Timken notes, that allocations of freight costs by volume, weight, distance, or a combination of these elements are preferable to allocations based on sales value, we have also recognized that individual bearing firms do not maintain records of freight expenses based on weight (see TRBs). Therefore, we determined that Koyo's allocation of freight expense based on value is a reasonable method and does not produce distorted results.

Comment 25: Timken states that the Department is faced with competing data for export sales expenses reported in May 1991 (revised November 1993) and export department expenses verified in 1987 for the period 1974/85. Since both the March 1987 and November 1993 verification reports indicate that total export expenses were "unsubstantiated" or an aspect of the expense was "not verified," the Department should use the highest figure on the record for determining export selling expenses.

Koyo counters that Timken has misconstrued language in the

Department's verification report that Koyo failed verification regarding its selling expenses. Koyo asserts that the statement that the breakdown of employees into various categories "was not verified" means that the verification team did not address that issue in detail, and not, as Timken has interpreted it, that Koyo failed verification regarding its selling expenses.

Department's Position: We agree with Koyo that Timken misinterpreted the verifiers' explanation of Koyo's home-market indirect selling expenses, specifically selling expenses incurred in Japan with respect to U.S. sales. Since export selling expenses were, indeed, satisfactorily verified in November 1993, we have used the export selling expenses reported in Exhibit C–16 of Koyo's November 10, 1993, submission.

Comment 26: Timken asserts that Koyo, in its calculation of U.S. inventory carrying costs, failed to include the imputed interest expense for time in transit from Japan to its U.S. subsidiary, American Koyo Company (AKC). Timken cites *Silver Reed America, Inc.* v. *United States*, 12 CIT 250, 683 F.Supp. 1393 (1988), as support for its position that such an interest expense can be deducted from ESP. Although Koyo contends that the U.S. inventory period includes time in transit, Timken maintains that there is no support for that claim in the administrative record. Timken cites the Department's U.S. verification report (March 27, 1987), covering the PORs from 1974/85 wherein the Department determined that inventory carrying costs, which were reported on a similar basis as the present period, did not include time in transit from Japan.

Timken urges the Department to increase the reported inventory time by a reasonable time for shipment from Japan to the United States, using data supplied by another producer, or by assuming at least thirty-five days in transit.

Koyo states that Timken is incorrect in its assertion that Koyo's U.S. inventory carrying cost does not include "time on the water". Koyo explains that AKC takes title to merchandise when it leaves Koyo's warehouse in Japan, and it is booked into AKC's inventory at that time. Therefore, Koyo contends that AKC's inventory values used to determine the average time in inventory include the value of the inventory in transit.

Department's Position: We disagree with Timken. Koyo submitted U.S. inventory carrying costs in two separate stages, the expenses incurred in Japan for exported goods and the inventory expenses associated with U.S. sales. Koyo states that these costs include "time on the water". Because its sales were satisfactorily verified, and we have no reason to believe that this expense is inaccurate, we have continued to use Koyo's U.S. inventory carrying costs as reported.

Comments Regarding COP and CV

Comment 27: Timken argues that NSK reported interest expenses for COP net of interest income, but NSK did not demonstrate that this income stemmed solely from short-term deposits or normal operations. Timken contends that the Department should recalculate NSK's COP based on gross interest expenses, or in the alternative, recalculate the interest expense factor to exclude long-term interest income based on a supplementary cost response in which NSK segregated short-term and long-term interest revenue.

NSK agrees with Timken's contention that the submitted COP figures incorrectly included an interest expense net of all interest income. NSK suggests that the Department should recalculate the interest expense factor based on the supplementary cost response figures.

Department's Position: The interest-expense factor should reflect only short-term interest income attributable to the normal production of the merchandise within the scope of the order. We have reviewed NSK's data for this claimed adjustment and are satisfied that the firm attributed the reported interest income only to the production of merchandise within the scope of the order. We did not find evidence on the record to suggest that some portion of the claimed interest income is attributable to the production of other merchandise or associated with long-term deposits.

Therefore, for these final results we have recalculated NSK's interest expenses based on a NSK's supplementary COP response, wherein NSK segregated short-term and long-term interest income.

Comment 28: Timken argues that the Department's deduction from CV for home-market selling expenses is overstated for NSK. Timken contends that the Department calculated selling expenses by applying reported factors to CV to determine the amount of selling expenses to deduct from CV, which already includes selling expenses, rather than applying those factors to COP.

NSK argues that CV is a proxy for price, and that since the selling expense factors reported were calculated as a percentage of total sales, these factors are correctly applied to CV.

Department's Position: We agree with Timken in part. To avoid overstating the home-market selling expense adjustments, and given that we have the home-market unit prices, we have applied the reported selling expense factors, expressed as a percentage of unit price, to obtain a yen amount for the expense. We then deducted the resulting amounts from CV.

Comment 29: According to Timken, the Department should exclude below-cost sales in calculating profit for CV. Timken cites section 773(e) of the Tariff Act to argue that CV includes profit earned on sales "in the ordinary course of trade". Since CV is merely an alternative basis for determining FMV, and the Department disregards below-cost sales when sales form the basis of FMV, Timken asserts that the Department should not include any below-cost sales in its calculation of profit for CV.

Timken notes that the Department recognized the need for this balance in *Timken II* and in *Asociacion Colombiana de Exportadores de Flores* v. *United States*, 13 CIT 25, 704 F.Supp. 1114, 1124, (1989), *aff'd*, 901 F.2d 1089, *cert. denied*, 498 U.S. 848 (1990). Timken points out that in these cases the question was whether CV is properly subject to COS adjustments pursuant to 19 CFR 353.56, which provides for adjustments to home-market price for certain types of selling expenses. Timken notes that the CIT held that adjustments were proper, given the functional equivalent of CV and FMV.

Timken states that in *Certain Stainless Steel Wire Rods from France*, 58 FR 68865 (December 29, 1993), the Department recognized that non-arm's-length sales to related parties should not be included in the profit calculation for CV. Timken concludes that the same reasoning applies to below-cost sales in the home market and that the statute's reference to sales in the ordinary course of trade does not include below-cost sales when those sales are made in substantial quantities over an extended period of time.

Citing section 773(e) of the Tariff Act, NSK argues that the statute does not require that sales below cost be excluded in the calculation of profit of the class or kind of merchandise under consideration.

Koyo asserts that Timken's arguments run contrary to the statute and represent unprecedented and radical departure from the Department's past administrative practice. Koyo notes that the Department has recently rejected substantially identical arguments made by Timken in the most recent TRB reviews and the two most recent AFB reviews (*1990/91 and 1991/92 TRBs*, 58

FR 64728; *AFBs III*, 58 FR 39751; *AFBs II*, 57 FR 28374). Koyo concludes that the Department should reject Timken's arguments and continue its longstanding practice of including all home-market sales in the calculation of profit for CV.

Department's Position: As noted by Koyo, the Department has rejected Timken's arguments that below-cost sales should not be included in the calculation of profit because (a) the statute does not explicitly provide that below-cost sales should be disregarded in the calculation of profit, (b) the definition of "ordinary course of trade" (section 771(15) of the Tariff Act) does not exclude or even mention sales below cost, and (c) the provision requiring the Department to disregard certain sales below COP in the calculation of FMV suggests that below-cost sales are not, *per se*, outside the ordinary course of trade. Therefore, in these reviews we have not excluded below-cost sales in calculating profit for CV (see, *e.g.*, *AFBs III*).

Comment 30: Koyo objects to the Department's initiation of a sales-below-cost investigation on the grounds that the Department has acknowledged, and the CIT has held, that Timken's below-cost allegation in 1983 for the 1974 through 1979 reviews formed an inadequate basis for a below-cost investigation. Because the 1989 allegation for the 1979/86 PORs was based on the 1983 allegation, Koyo asserts that the later allegation is also inadequate. In addition, Koyo maintains that both allegations were untimely.

Koyo points to section 773(b) of the Tariff Act, which states that the Department may initiate a below-cost investigation whenever it has "reasonable grounds" to believe sales of subject merchandise in the home market are being made at prices which represent less than the cost of producing the merchandise. Koyo maintains that Timken's 1983 and 1989 cost allegations were not company-specific and instead relied entirely upon references to public sources and, therefore, should be rejected. Koyo cites *Al Tech Specialty Steel Corp. v. United States*, 575 F.Supp. 1277 (CIT 1983), in support of its position that COP allegations must be company-specific. Koyo states that despite the CIT's decision that Timken's allegations were deficient with respect to the 1974/79 PORs, Timken never attempted to remedy the deficiencies in its cost allegations regarding the periods covered by the 1979/86 administrative reviews.

Koyo states that prior to the promulgation of 19 CFR 353.31, which requires all below-cost allegations to be filed within 120 days of the initiation of the administrative review, the Department examined the span of time between when Timken possessed sufficient information to make the allegation and when the below-cost allegation was actually made. Koyo cites *Color Television Receivers, Except for Video Monitors, from Taiwan* (51 FR 46895, December 29, 1986), which stated that possessing information 4 months prior to making a COP allegation was enough time to make the allegation untimely. Koyo states that the Department relied on these parameters in dismissing two below-cost allegations; one 10 months after the release of cost-of-manufacture data, the other 12 months later, submitted by Timken against NSK in the 1974/80 reviews.

In contrast to the NSK situation, Koyo notes that the Department initiated a below-cost investigation of Koyo for the 1974/79 reviews based on Timken's 1983 allegation despite the fact that it was based on information that was available to Timken nearly two years before it filed the allegation. Koyo notes that Timken's 1989 allegation for the 1979/86 reviews was filed three years after the end of the final period covered by these reviews, and nine years after the end of the first period covered by these reviews.

Koyo concludes that the below-cost allegation on which the Department predicated its cost investigation in the 1979/86 periods of review was both factually deficient and untimely and, accordingly, the Department should not investigate whether Koyo sold such or similar merchandise in the home market at prices below the COP.

Timken disagrees with Koyo's assessment of Timken's 1983 below-cost allegation for the 1974/79 administrative reviews, stating that Koyo's argument contains several key errors and omissions, namely its failure to mention Timken's supplemental COP allegation of April 28, 1992, or its submission of August 19, 1988.

Timken notes that although the Department initiated a sales-below-cost investigation for the 1974/79 periods in September 1983, that investigation was subsequently interpreted to cover only the 1978/79 period, and was to encompass subsequent periods only if the Department found below-cost sales in the 1978/79 POR. Timken states that when the Department found that Koyo made below-cost sales during the 1978/79 POR, it issued a COP questionnaire for the 1979/86 PORs in July 1989.

Timken states that, upon completion of the 1974/79 reviews, Koyo filed a CIT action challenging the Department's decision to conduct a COP investigation of Koyo. Timken elaborates on the history of that litigation: 1) the court ruled that Timken's original 1983 submission did not meet the *Al Tech* standard for initiation of a cost investigation and remanded the case for re-calculation of the margin without a COP analysis (*Koyo Seiko Co., Ltd.* v. *United States*, 796 F.Supp. 517 (CIT 1992); 2) on Timken's motion for rehearing, the CIT modified the remand order, permitting Timken to supplement its COP allegation without recourse to information obtained during the Department's initial COP investigation (*Koyo Seiko Co., Ltd.* v. *United States*, 16 CIT 92–139 at 11 (August 21, 1992)); 3) the Department determined and the CIT affirmed that Timken's supplemental allegation was a sufficient basis for the below-cost sales investigation (*Koyo Seiko Co., Ltd., et al.* v. *United States* v. *United States*, 819 F.Supp. 1093 (CIT 1993)).

With regard to the 1979/86 reviews, Timken asserts that it supplemented its prior allegations for the 1979 through 1986 reviews in April 1992, based on the COP data Koyo submitted in response to the July 1989 questionnaire and the variable cost data that would have been on the administrative record in any event. Timken notes that Koyo failed to address Timken's April 1992 submission.

Department's Position: If we find sales below cost in the immediately preceding segment of a proceeding, we have reasonable grounds to believe or suspect below-cost sales in the subsequent segment of the proceeding pursuant to section 773(b) of the Tariff Act. Therefore, we require a response to a cost questionnaire in an administrative review subsequent to finding sales below cost in a previous segment of the proceeding. We decided to proceed in the 1979/86 reviews with a cost investigation since, upon remand in the 1974/79 litigation, the Department conducted a cost investigation for 1978/79 and found sales below cost. The Department's finding of sales below cost in the 1978/79 review is an adequate foundation to conduct a cost investigation in the subsequent administrative reviews.

Comment 31: Timken maintains that Koyo's COP information should be rejected in its entirety as unreliable because Koyo admitted that its primary records for COP prior to 1984 were destroyed. According to Timken, the information submitted by Koyo is simply an extrapolation of data from the 1985/86 POR. Moreover, the data have never been verified.

Timken points out that the Department rejected Koyo's COP data for the 1978/79 review as inconsistent and unreliable and consequently used BIA. According to Timken, Koyo has not demonstrated that the cost information submitted for these reviews is any more accurate or reliable than the cost data rejected by the Department in the 1978/79 review. Moreover, Timken notes that corporate losses sustained by Koyo in the late 1970's and early 1980's makes it inherently unreasonable to extrapolate 1985/86 costs to this earlier period.

Timken identifies the following specific deficiencies in Koyo's COP submissions:

- From 1980–86 Koyo used three separate and irreconcilable COP systems.
- Post-1983 standards and variances were projected backward to yield costs for the 1979/83 PORs.
- "Actual" and "reconstructed" costs for a limited sample of bearings differed substantially, calling into question the reliability of Koyo's methodology.
- Koyo failed to provide information on transfers of production equipment from related parties, although Koyo is a major manufacturer of bearing-production equipment.
- Koyo failed to provide part-number-specific data regarding material usage and prices during the PORs.
- The responses contain no detailed information on calculation of research and development expenses.

Timken asserts that the Department should reject Koyo's COP data unless it can establish that the newly-submitted data are consistent with previously-verified information on the record. If the Department determines to accept the data as submitted, Timken argues that the Department should make the following modifications:

- Timken states that, under the Department's precedent in *AFBs III and Minivans from Japan* (57 FR 21933, May 26, 1992), interest income must be related to production of the subject merchandise to be allowed as an offset to interest expense. Since Koyo was unable to report separately long- and short-term interest income for the 1979/83 periods, and instead used net interest expense based on its experience during the 1983/86 PORs, Timken urges the Department to use the interest expense contained in Koyo's consolidated financial statements.
- Timken maintains that the Department should ensure that all adjustments to CV are consistent with the price-based adjustments Koyo reported. If it is not possible to adjust the reported expenses in this manner, the Department should decline to make any adjustment to CV for selling expenses.
- Timken claims that the Department misconstrued Koyo's reporting of direct and indirect selling expenses, G&A expenses, and interest expenses as a fixed amount per unit rather than as a percentage of the cost of manufacturing (COM). Timken urges the Department to revise its calculations accordingly.

Koyo reiterates its contention that the Department's initiation of a below-cost investigation in these reviews was improper (see Comment 30). In response to Timken's arguments Koyo makes the following points:

- Timken's assertion that Koyo's costs for the 1979/85 periods are merely an extrapolation of Koyo's 1985/86 costs is incorrect. Koyo submits that the costs for all the periods covered by these reviews can be reconciled to total cost of goods sold as reported in the annual financial statements.
- Contrary to Timken's conclusion that essential records were destroyed, Koyo states that it did retain a complete historical record of total standard costs, or COM, by bearing model and year.
- Koyo argues that it is normal for a firm to change its cost accounting procedures in the ordinary course of business over a ten-year period.
- Koyo maintains that nothing in its submission suggests that the ratio of interest expenses for the later period was applied to the earlier period, as Timken implies.
- Koyo did not project post-1983 standards and variances backwards, but applied standard costs and variances for each review year to obtain the actual costs for that year.
- Contrary to Timken's assertion that Koyo failed to provide information on transfers of production equipment from related parties, Koyo maintains that it fully disclosed all consolidated subsidiaries and subcontractors.

Koyo maintains that differences in how it accounted for various expenses in different years do not, in themselves, suggest that Koyo's system is inaccurate or unreliable. Therefore, Koyo concludes that the Department should continue to use these data if it decides to pursue the below-cost investigation.

Moreover, Koyo contends that Timken fails to produce new evidence of any deficiencies in Koyo's cost data, relying only on references to Koyo's cost submissions in the 1974/79 reviews. Koyo argues that references to those reviews are irrelevant, and Koyo is under no burden to draw comparisons between its current submissions and submissions in previous reviews. Koyo adds that the Department has had Timken's comments for over two and a half years and has not seen fit to request additional or clarifying data from Koyo. For the Department to decide that these data are inadequate would be grossly unfair and prejudicial to Koyo's interests.

Department's Position: We disagree with Timken's assertion that Koyo's cost response should be rejected in its entirety. Timken does not explain why or how Koyo's cost accounting systems are irreconcilable. Moreover, there is no evidence on the record that Koyo extrapolated data from the 1985/86 review period and applied a deflator for previous years included in these reviews. Koyo stated in its responses to our COP questionnaires that all cost data for these reviews can be traced to its financial statements. While we did not verify these specific cost data from the October 1989 and April 1990 submissions, we did verify a significant portion of Koyo's data from these review periods and found the reported information in the vast majority of cases to be accurate.

We agree with Koyo that Timken is incorrect in its assertion that Koyo used net interest expense for the 1979/83 PORs extrapolated from its experience in the 1983/86 PORs. In its 1990 supplemental response Koyo explained that it does not separate long- and short-term interest expense in the normal course of business. However, Koyo stated that it was able to separate these expenses for the periods 1983/1986. For the periods 1979/83 Koyo estimated the short-term element based on the ratio of short-term to long-term liabilities actually paid rather than accrued each year. Koyo deducted short-term interest income to derive a net interest expense ratio which was then applied to each model's basic cost. Therefore, Timken is incorrect in its contention that 1979/83 net interest expenses were based on Koyo's experience in the 1983/86 review periods.

We agree, however, with Timken's contention that not all of the expenses reported by Koyo as direct expenses should be deducted from CV. For these final results we have not used the direct selling expense variable as submitted in the CV database because this variable represented commissions, which we disregarded (see our response to Comment 23), and rebate expenses, which we did not treat as a direct adjustment to Koyo's home-market unit prices (see our response to Comment 11) in these final results. We have used the weighted-average home-market credit expense of all sales reported in each POR as the only direct deduction from CV.

We believe that the cost information submitted by Koyo provides the necessary data to conduct a cost test for each of these periods of review. Therefore, for these final results of review, we have continued to use Koyo's cost data as submitted, with certain changes explained in this notice which we deemed appropriate (see Comments 33, 38, 41, and 46).

As for Koyo's contention that initiation of a below-cost investigation is improper, see our position on Comment 30.

Comments Regarding Use of BIA

Comment 32: Timken asserts that in all instances BIA for missing data should be based on adverse inferences. Timken points out that in *Rhone Poulenc Inc. v. United States* (899 F.2d 1185, 1190 (Fed. Cir. 1990)) the Federal Circuit upheld the Department's use of the highest prior margin as BIA. In this instance, however, Timken notes that for those home-market models lacking variable cost of manufacture (VCOM) information, the Department set the difference in merchandise (difmer) to 20 percent, the maximum difference allowed for matching bearings under the Department's model-match methodology. Timken claims that this approach infers that the match is otherwise valid, and, in practice, provides an incentive for respondents to manipulate the model-match process. Timken concludes that the Department should apply the highest rate in any previous administrative review to any U.S. sales that are missing cost data. In Timken's view, such a choice would reflect "a common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the [respondent], knowing of the rule, would have produced current information showing the margin to be less" (*Rhone Poulenc*).

NSK argues that at the time that the VCOM data were submitted in this case the Department did not use a 20-percent difmer as BIA, and, therefore, respondents had no incentive to selectively report VCOM information.

Department's Position: We disagree with Timken's contention that setting the difmer equal to 20 percent when home-market sales lack VCOM data provides an incentive for respondents to manipulate the model-match process. We have no reason to believe that such manipulation is taking place. As a result, we do not agree with Timken that the highest rate from a previous administrative review should be applied to U.S. sales which match to home-market sales for which respondents did not provide VCOM data. Rather, for these final results we have set the difmer equal to 20 percent. We have used this approach in previous TRB reviews (see *TRBs*, 56 FR 26057 (June 6, 1991), *TRBs I*, 57 FR 4986 (February 11, 1992), *1990/91 and 1991/92 TRBs* 58 FR 64731 (December 9, 1993)).

Comment 33: NSK disagrees with the Department's application of NSK's rate for the April 1, 1978 through July 31, 1978, period as BIA for these reviews. NSK argues that the Department should not have used as BIA a weighted-average rate resulting from a four-month period. NSK contends that the Department has never relied on a rate from a prior administrative review that covered such a brief period of time.

Timken notes that the Department frequently applies as BIA margins from LTFV investigations, which generally cover six-month periods. Timken argues that NSK has not offered any evidence that a BIA rate from a four-month period should be deemed unreliable, particularly where the underlying determination has been through judicial review.

Department's Position: We agree with Timken. As stated in our preliminary results, the Department sought to use, as BIA, the highest rate NSK received in a previous POR, which in this instance was a rate for a four-month POR. In the final results of review covering the 1974 through 1980 period the Department found a rate of 23.43 percent for the period August 1, 1977 through July 31, 1978 (55 FR 369, June 1 1990). NSK challenged those results and the CIT remanded them to the Department with instructions to use Treasury master lists for sales made from August 1, 1977, through March 31, 1978, and to recalculate the margin for the remaining (non-master list) period in accordance with the CIT's instructions. Thus, the margin from the previous review covered four months.

We note that NSK has not cited any instance where the Department deemed a rate from a four-month period to be unsuitable as BIA. Furthermore, NSK has not provided evidence that the rate in question is not representative of the rate that we would have obtained from a longer POR. Therefore, for U.S. sales for which we have relied on BIA, we have applied the margin from the four-month POR, since it is the highest margin for NSK in a previous segment of the proceeding.

Comment 34: Timken states that as a result of Koyo's model-match exercise it became clear that Koyo failed to provide VCOM data for a number of U.S. and home-market part numbers. In these instances the Department applied a 20 percent variable-cost differential as BIA. Timken suggests that splitting the variable costs of the sets would provide VCOMs for those cups and cones which lacked variable costs in the preliminary results.

Koyo acknowledges that there may still be some part numbers for which no VCOM can be found after correction of the VCOM error. However, Koyo submits that the Department's present BIA approach is more efficient and reliable than the alternative of set-splitting advocated by Timken.

Department's Position: In our calculations of FMV we did split the variable costs of the home-market sets. There were four TRB sets sold in the home market with no reported cost data which resulted in four cup and cone models with no reported VCOM after set splitting. For these sales we have continued to calculate a 20-percent VCOM differential as BIA. There were no models of cups and cones sold in the home market for which Koyo did not report a variable cost.

Where the variable cost of models sold in the U.S. was missing, we did not use BIA to calculate a difmer adjustment to FMV. For U.S. sales of those models with no variable cost information, we either matched them to identical home-market models or we have used CV as the basis for FMV pursuant to § 773(a)(1) and § 773(a)(2) of the Tariff Act.

Comment 35: Timken argues that the Department should base NSK's margin on total BIA. Timken contends that NSK failed to submit complete home-market sales data on a sale-by-sale basis, despite a specific request from the Department to do so. Timken notes that NSK reported only home-market sales with quantities equal to five percent or more of the corresponding U.S. sales, and generally utilized its own model-match criteria, which deviated substantially from those currently applied by the Department.

Timken further argues that the Department should determine that NSK was "non-cooperative" and should apply first-tier BIA to NSK for all periods (*i.e.*, use the highest margin calculated for any respondent in either prior or concurrent periods of review).

NSK argues that there are no grounds for the Department to base NSK's margin on total BIA. NSK contends that the Department verified that the home-market sales list reported by NSK was complete. NSK contends that the Department, after verification, did not challenge or further investigate the model-matching method employed by NSK.

NSK further argues that the Department's request for a sale-by-sale listing of home-market sales was made in the context of a cost investigation, and came two years after the submission of the original home-market sales listing.

Finally, NSK argues that to the extent that NSK responses may have been deficient, the omissions were minor and not intended to impede the reviews, and first-tier BIA should not be applied.

Department's Position: We agree with NSK that the Department verified the general completeness of NSK's reported home-market sales listing. We also agree with NSK that the Department's request for a sale-by-sale listing of home-market sales was pursuant to a cost investigation.

However, as NSK has conceded both in its rebuttal brief and at the hearing, NSK never responded to our July 1, 1988, request for a complete home-market sales listing. This failure to report a sale-by-sale listing has major implications with respect to the cost test and the model match. By selectively reporting home-market sales, NSK could have arguably contrived a result where U.S. models would be matched with low-cost, low-price "similar" models. Therefore, while we appreciate NSK's candor in admitting that it never provided the complete sales listing, we cannot ignore the fact that the cost test and model match were compromised.

We note that this conclusion applies only to U.S. models which do not have "identical" matches in the home market. Throughout the TRB reviews, all parties have operated on the premise that bearings with identical nomenclature (*i.e.*, product or identification number) are identical in all physical aspects. Thus, models with identical nomenclature will in every instance be matched to each other, and NSK's incomplete sales listing does not compromise such a comparison.

Therefore, for these final results of review, we have relied on BIA for sales of U.S. models for which NSK did not make sales of identical merchandise in the home market. Where identical bearings were sold in both markets, we have used NSK's reported data.

With respect to the choice of BIA, we note that, throughout the many delays that have arisen in the course of the 1980/86 reviews, NSK has generally been a cooperative respondent. Accordingly, for those U.S. sales where no identical matches are possible, we have relied on a second-tier BIA rate, which is the highest margin for NSK from any preceding review period.

Comment 36: NSK takes issue with the Department's application of BIA for U.S. sales lacking VCOM information. NSK contends that its COM records are tied to the year of production, rather than the year of sale and, therefore, the Department should use cost data from another year within the 1980/86 PORs for any U.S. sale lacking difmer cost data.

NSK further notes that in the 1974/80 segment of this proceeding, the Department used 1980/85 cost data, if available, as BIA when cost data for the 1974/80 period were missing.

Timken argues that while it may be reasonable for the Department to search the annual period immediately prior to the period in which the sale took place, any search beyond one period would be affected by fluctuations in steel prices and changes in labor efficiency over the course of the six-year review period.

Timken further notes that NSK's citation of the 1974/80 results is misleading. In that case, the Department relied on NSK's 1980/85 cost data as BIA because NSK had not retained cost information for the 1976/80 PORs. Timken contends that for the 1980/86 PORs, NSK simply failed to provide complete review-specific VCOM data despite the Department's request for the information.

Timken counters that the Department specifically requested VCOM information in both markets for the entire POR, and NSK failed to provide it. Under these circumstances Timken concludes that application of a BIA rate for sales with missing data is reasonable.

Department's Position: In our preliminary results of review we applied BIA to sales of U.S. models lacking VCOM data which were matched with similar home-market models. For these final results of review, we applied BIA to sales of all U.S. models when we did not find an identical match in the home market. Since we are not attempting to find matches for U.S. models with no identicals in the home market, VCOM data is not relevant to these results. Therefore, the issue of missing VCOM data is moot.

Comment 37: Koyo contends that the Department should not apply BIA to Koyo's U.S. sample sales because the Department did not specifically request this information until September 17, 1993, 13 years after the end of the first period and 7 years after the end of the final period covered by these reviews. Koyo asserts that it was not the Department's practice to require the submission of information regarding such sales during the periods under review (1979/86). Koyo argues that it may have been able to provide information regarding its U.S. sample sales had the Department completed these reviews in a timely manner. In Koyo's view, the application of BIA to these sales, in effect, would punish Koyo for the Department's own delay. In the interest of fairness, Koyo states that the Department should not apply any BIA to these sales.

Timken agrees with the Department's proposal to use BIA for U.S. sample sales, based on the value of sample sales in the home market, as obtained at verification. Timken also states that the Department should guard against increasing the value of U.S. sales (the denominator of the weighted-average margin) and increasing the value of the duties due (the numerator of the weighted-average margin) by a BIA factor which would result in the same amount of duties collected absent the application of BIA.

Department's Position: In its response to our supplemental questionnaire, Koyo failed to comply with our request for a list of U.S. sample sales, stating that "to produce such a sales listing, AKC would have to review manually all of its sales invoices and records for the covered periods" (November 1, 1993 submission, p. 6). In that letter Koyo stated that time restraints were the only obstacles to producing a list of U.S. sample sales. However, in its case brief Koyo stated that "it is unable, at such a removed point in time, to identify its U.S. sample sales, because (it) did not maintain a database of its U.S. sales that identified its sample sales."

Section 776(c) of the Tariff Act requires that BIA be applied when a party does not produce requested information whether the non-compliance is due to refusal or mere inability to produce the desired data (Olympic Adhesives, Inc., v. United States, 899 F.2d 1565, 1574 (1990)). Koyo failed to reply to our request for a list of U.S. sample sales, saying the effort would be too great. In our preliminary analysis memorandum for these reviews we identified the methodology we intended to use as BIA for the missing U.S. sample sales in our final results of review. Therefore, we are applying BIA to these sales. We only have information on Koyo's home market sample sales. Therefore, we used the data for home market sample sales from the 1985/86 period. We used the relationship of home market sample sales to total home market sales to represent the relationship of U.S. sample sales to total U.S. sales. With this information, we determined a value for those U.S. sample sales and applied a BIA margin to that value. We added both the resulting duties due amount

and the calculated value of the sample U.S. sales to our respective margin and value totals in deriving our weighted-average margin.

Comment 38: Timken asserts that Koyo's failure to report home-market sample sales in its original submission, and then, at the Department's request, Koyo's submission of a list rather than a computer tape, should not be countenanced. Timken claims that the printout of home-market sample sales Koyo provided in its supplemental response is clearly from a computer file.

Therefore, Timken concludes that submission of a computer tape of home-market sample sales could not be as difficult as Koyo professes. Moreover, Timken chides the Department for not requesting such data despite Timken's timely protest of Koyo's failure to report home-market sample sales. Absent sample sales, the home-market sales listing is incomplete and unreliable. In Timken's view, the only proper solution, short of rejecting the entire response, is to require immediate submission of a computer tape listing of sample sales.

Timken maintains that Koyo elected not to comply because the Department has only limited options regarding "best information" under these circumstances. Timken states that in *1990/91 and 1991/92 TRBs* the Department addressed Koyo's failure to support its claim that particular home-market sales were samples.

Koyo argues that the Department properly excluded its home-market sample sales because they are *de minimis* in volume and value and have been verified by the Department as sample sales outside the ordinary course of trade. Koyo characterizes Timken's suggestion that Koyo be required to submit an entire new computer tape of the home-market sales, including these sales, as "ridiculous" and contrary to Timken's own stated desire not to "increase the cost of bringing this proceeding to a final conclusion."

Department's Position: In our October 1993 supplemental questionnaire we requested that Koyo submit a listing of its home-market sample sales. In response to our supplemental questionnaire Koyo submitted a hard copy computer printout of its home-market sample sales (November 1, 1993, Exhibit 1). At verification we confirmed the accuracy of the nature of these sales (*i.e.*, samples) and the value and volume reported. We determined that the volume and value of these sales were indeed minuscule and the fact that we did not have them electronically could not have any measurable or significant impact on our ability to conduct these administrative reviews. We are confident that the home-market data base we used for comparison purposes was indeed sufficient and complete. Requiring a computer tape of the home-market sample sales would be, in this instance, superfluous and unnecessarily time-consuming.

Comment 39: Timken notes that the Department relied upon the revised data submitted by Koyo in 1991 for its analysis and did not consider other information contained in the administrative record. In view of Koyo's decision to revise its data, Timken asserts that the Department should draw adverse inferences in any instance where data are deficient or missing. According to Timken, the Department's failure to draw any adverse inference based on the omission of various data (*e.g.*, home-market sample sales, some variable costs) allowed Koyo to control in part the Department's calculation of margins.

Koyo asserts that it is absurd for Timken to suggest that Koyo's co-operation in the resubmission of its data for the 1979 through 1986 PORs should be used against Koyo, when Koyo is in no way responsible for the delays in this proceeding. Koyo states that the CIT made it clear that respondents must not be prejudiced by the government's undue delays in the completion of administrative reviews, and, similarly, respondents cannot be punished for intervening changes in the Department's antidumping methodologies (*Koyo Seiko*).

Koyo also objects to Timken's conclusion that Koyo's cost data should be rejected in their entirety. In Koyo's opinion the Department should not even conduct a below-cost investigation (see Comment 30). However, should the Department do so, Koyo states that the Department has had several years in which to request supplemental cost data or other germane information, and the Department cannot now decide that Koyo's data are inadequate without unduly and illegally prejudicing Koyo's rights in these proceedings.

Department's Position: We disagree with Timken's contention that we should draw the most adverse inferences in applying BIA to Koyo's revised submission where data are deficient or missing. The Department agreed to accept a consolidated response from Koyo to facilitate and expedite the completion of these administrative reviews. We verified Koyo's consolidated response and found that, for the most part, Koyo's data were reasonable and accurate (see *Verification Report*, November 22, 1993, and Comment 31 regarding the adequacy of Koyo's cost data). We used BIA when we did not agree with Koyo's methodology in calculating an expense, or when data were missing from the submission. Therefore, we do not believe that we allowed Koyo to control the calculation of the margins in any way.

Comments Regarding Clerical and Ministerial Errors

Comment 40: Both Timken and Koyo addressed the following clerical errors:

1. The preliminary program erroneously sets the VCOM and other variables equal to zero (see Comment 45).
2. The denominator for recalculating the home-market credit expense in 1979/80 must be added to the program.
3. The ratio of inventory carrying costs to total U.S. sales for the 1980/81 POR should be multiplied by the landed cost, consistent with the other PORs.
4. The Department failed to adjust Koyo's reported home-market unit price for post-sale freight expense in calculating FMV. However, Timken believes that no change is necessary because Koyo failed to report its freight expenses correctly (see Comment 20).
5. The Department should delete certain duplicate observations in the home-market database.
6. Timken maintains and Koyo confirms that Koyo reported direct and indirect selling expenses, G&A expense, and interest expense as a percentage of COM, not fixed amounts per unit as interpreted by the Department.

Department's Position: We agree with Koyo and Timken and have made each of these changes in the calculations for these final results of review.

Comment 41: Timken states that the Department inadvertently reversed signs in its preliminary program for Koyo by applying the 20-percent BIA rate for models with no reported home-market VCOM.

Department's Position: We agree with Timken and have corrected the program for these final results.

Comment 42: Timken asserts that the Department must ensure that selling-expense adjustments to CV are consistent in all respects with price-based adjustments. Timken contends that not all of the expenses, originally reported as direct selling expenses, were ultimately considered direct by the Department (*e.g.*, freight, discounts).

Department's Position: We agree with Timken's assertion that deducting the expenses reported as "direct" selling expenses in Koyo's CV database was incorrect. For these final results we have not used this variable in our CV calculation because it represented

commission and rebate expenses, both of which we did not treat as direct selling expenses for Koyo in these final results (see our responses to Comments 11 and 23, respectively). Therefore, the only valid direct deduction from CV is the weighted-average credit expense for home market sales from the sales database for each POR.

Comment 43: Koyo maintains that the Department's constant practice in its TRB determinations has been to break ties between two equally similar matches by first comparing the sum of the deviations for the two models, then comparing the levels of trade for the two models, then comparing the cost deviations for the two models, and finally by ranking the two models alphanumerically. According to Koyo, the Department inadvertently omitted the level-of-trade (LOT) tie-breaker in conducting the model match for these PORs. Koyo notes that this is not the same issue regarding LOTs that Koyo has raised unsuccessfully in previous reviews—that the Department should not cross levels of trade in comparing identical models before looking for similar models at the same level of trade.

Timken agrees, stating that where two matches with equivalent "sums of the deviations" are found, each at a different LOT, the Department should select the match at the same level of trade.

Department's Position: Koyo's statement that we have consistently selected the best model match based on, in order, "sum of the deviations," LOT, and cost differences in all of its recent TRB determinations, is correct in the context of our computer programs for some previous reviews of this finding and the 1987 order of Koyo's U.S. sales of TRBs. However, in those previously completed reviews, the Department's stated methodology was to rank similar merchandise by minimizing first the "sum of the deviations", second, the difference in the VCOM of the U.S. and similar home-market product, third, the differences in LOT, and lastly, alphanumerically. When the "sum of the deviations" was the same for two or more bearings, the Department ranked them according to the similarity in costs, and, if the costs were the same, according to the similarity in LOT (*TRBs I*, 57 FR 4978 (February 11, 1992)). In our computer programs for these administrative reviews, we have followed this methodology, ranking similar bearings by "sum of the deviations", differences in cost, LOT, and, lastly, alphanumerically.

Comment 44: Koyo states that the load rating for some sales of one model was reported incorrectly on Koyo's submitted computer tape. Although the cup and cone of each model should have the same basic load rating as the assembled model, in this instance a computer input error on Koyo's part resulted in an inconsistency in reporting the load rating of the cup, cone, and set. Koyo requests that the Department correct this error for these final results and cites *AFBs III* as precedent.

Timken contends that the Department should make the requested correction only if the error is discernible based on the evidence of record at the time the error was identified. Timken notes that the documents cited by Koyo that contain corroborating evidence were all submitted in administrative reviews for periods other than 1979/86.

Department's Position: The load rating of individual bearings for the periods under review is available in any Koyo catalogue and, as such, is part of the public domain. Therefore, we have made the appropriate corrections in the load rating of the model designated by Koyo.

Comment 45: Timken points out that the preliminary program erroneously sets certain home-market VCOMs equal to zero. Timken states that for certain set-split bearings only VCOM is zero. For others the VCOM, net unit price, and indirect selling expenses are zero, resulting in erroneous calculations for FMV and the weighted-average home-market indirect selling expenses.

Timken notes that this problem has been discussed with Department personnel and revision of the program instructions will apparently result in assignment of correct values.

Koyo affirms Timken's observation, stating that the Department erred in its calculation of the cup and cone ratios during the set-splitting exercise, resulting in the progressive reduction of the cup and cone ratio variables and, consequently, the VCOM ratio.

Department's Position: We agree with Koyo and Timken. We inappropriately altered VCOM when we merged the home-market sales and cost data files and split the home-market sales of TRB sets into sales of cups and cones. However, Koyo's explanation that the cup and cone ratios are progressively reduced toward zero is wrong, as evidenced from the computation of the home-market net unit prices and indirect selling expenses for sales of split sets. We have determined that the value for the VCOM itself was reduced toward zero, and have corrected the calculations accordingly.

We also found a similar error in the calculations where we split home-market sales of TRB sets with no reported cup or cone ratios using the weighted-average of the reported cup and cone ratios as BIA for each POR. We have also corrected this error.

Comment 46: Timken believes that a discrepancy in the U.S. sales values reported by Koyo and those analyzed by the Department in its preliminary results signifies that the Department either dropped some U.S. sales from the database or it perhaps dropped sales that lacked data.

Koyo claims that Timken is comparing apples to oranges. The U.S. sales numbers from the Department's analysis memorandum appear to represent net USP figures, whereas the figures cited from Koyo's 1991 submission are gross figures. Koyo adds that it has found no discrepancies in the value of U.S. sales used by the Department.

Department's Position: We agree with Koyo. It is impossible to arrive at any definitive conclusion by comparing Koyo's gross sales figures to the net sales figures calculated by the Department. We are satisfied that we used all of Koyo's reported U.S. sales in our analysis.

Comment 47: Timken maintains that in analyzing Koyo's transactions, the Department failed to make any adjustment to USP, FMV, or CV for packing expenses. In addition, Timken states that, if it is not practical to apply packing expenses on a LOT basis, we should apply the higher value to all sales.

Koyo states that the Department deducted home-market packing from FMV, but that the Department failed to adjust FMV for U.S. packing. Both Timken and Koyo urge the Department to adjust for packing in accordance with its normal practice.

Department's Position: We agree with Koyo that we inadvertently failed to add U.S packing expenses to FMV and CV. For these final results we have made this correction pursuant to 19 CFR 353.56 and 353.50.

Comment 48: NSK notes that it inadvertently included in its U.S. sales listing certain U.S. sales of TRBs over four inches in outside diameter (*i.e.*, outside the scope of the finding). NSK contends that it advised the Department of this oversight in a timely manner, and points out that the Department nonetheless included these sales in its analysis.

NSK notes further that a reported 1986 sale of a U.S. bearing which lacked a part number and had an unusually high price in fact corresponded to the sale of a four-row cylindrical roller bearing. NSK claims that cylindrical roller bearings are outside the scope of

the finding and, thus, the Department should exclude this U.S. sale from its analysis.

Timken agrees with NSK that the above-cited models are out-of-scope merchandise and should not be included in the Department's analysis.

Department's Position: We agree. We have excluded all U.S. sales of bearings over four inches in diameter, as well as the one U.S. sale of cylindrical roller bearings, from our analysis.

Comment 49: NSK and Timken point out that the Department incorrectly treated certain U.S. expenses (warehousing, inventory carrying costs, duty, and inland freight) as factors, rather than as actual amounts. Both parties agree that NSK reported these expenses as actual amounts, *e.g.*, an expense of ".25" should be read as twenty-five cents rather than twenty-five percent.

Department's Position: We agree. We inadvertently treated the reported expenses as factors rather than as actual amounts. We have made the appropriate correction to the computer program for these final results of review.

Comment 50: NSK contends it reported certain export expenses (ocean freight, export, insurance, SG&A) as a percentage of C.I.F. price, and that the Department incorrectly treated these expenses as a percentage of reported unit price. NSK argues that the Department should only apply these factors to unit price where NSK has not reported a C.I.F. price.

Timken agrees with NSK's position, and emphasizes that expenses reported by NSK as a percentage of C.I.F. price should be applied to unit price where a C.I.F. price has not been reported.

Department's Position: We agree. We have made the appropriate correction to our calculations for these final results of review. We have applied expenses, which NSK reported as a percentage of C.I.F. price, to unit price where NSK did not report a C.I.F. price.

Comment 51: Timken contends and NSK agrees that in adjusting NSK's CV for direct and indirect selling expenses, the Department reversed the relevant variables in its computer program.

Department's Position: We agree and have made the necessary corrections for these final results.

Comment 52: Timken notes that the CV calculations for NSK do not include export packing expenses. Timken argues that the CV calculation, in accordance with the statute, must include export packing expenses. Timken also contends that "palletizing" expenses should be included as packing expenses.

NSK agrees with Timken's observations.

Department's Position: We agree that CV must include export packing expenses pursuant to section 773(e) of the Tariff Act. We have therefore added NSK's export packing expenses, which were reported as a percentage of "processing cost", as well as palletizing expenses, to CV. In addition, we note that in our preliminary results we did not add NSK's U.S. packing expenses to FMV for price-to-price comparisons, but we have corrected this for these final results.

Toyota Correction

Although no parties submitted comments regarding the preliminary results for Toyota, we discovered a programming error in our preliminary calculations for Toyota that resulted in the exclusion of all PP sales from the preliminary weighted-average margin calculation. For these final results we have corrected this error by incorporating all sales in our final weighted-average margin calculation for Toyota.

Final Results of the Reviews

After analysis of the comments received, we determine that the following weighted-average margins exist for the reviewed periods:

Manufacturer/exporter	Percent margin
April 1, 1979 through July 31, 1980:	
Koyo Seiko	44.60
August 1, 1980 through July 31, 1981:	
Koyo Seiko	35.44
NSK Ltd.	16.55
Mitsubishi	39.60
Sumitomo Yale	39.60
August 1, 1981 through July 31, 1982:	
Koyo Seiko	33.10
NSK Ltd.	14.34
Mitsubishi	39.60
Sumitomo Yale	39.60
August 1, 1982 through July 31, 1983:	
Koyo Seiko	13.30
NSK Ltd	11.93
Mitsubishi	39.60
Sumitomo Yale	39.60
August 1, 1983 through July 31, 1984:	
Koyo Seiko	20.38
NSK Ltd	19.52
Mitsubishi	39.60
Sumitomo Yale	39.60
August 1, 1984 through July 31, 1985:	
Koyo Seiko	8.68
NSK Ltd	8.14
Mitsubishi	39.60
Sumitomo Yale	39.60
August 1, 1985 through July 31, 1986:	
Koyo Seiko	30.94
NSK Ltd.	43.23
Nachi-Fujikoshi	*18.70
Niigata Converter	*0.00
Toyota	28.24
Toyosha	39.60
Yamaha	15.25
Suzuki	39.60
Maekawa	39.60
Sumitomo Corp.	*0.00

*No shipments during the period; rate from the last period in which there were shipments.

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. The Department will issue appraisement instructions on each exporter directly to the Customs Service.

Furthermore, the following deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of these administrative reviews, as provided for by section 751(a)(1) of the Tariff Act:

(1) All exports of subject merchandise by firms covered in these reviews will be subject to cash deposit rates as follows:

a. for Koyo, NSK, and Nachi-Fujikoshi, see the final results of the 1991/92 review (58 FR 64720, December 9, 1993);

b. for Toyota, see the final results of the 1986/87 review (55 FR 38720, September 20, 1990);

c. for those firms that have not been covered in reviews of later periods, the cash deposit rates will be those rates established in the final results of the 1985/86 review, as outlined above;

(2) For previously reviewed or investigated companies not listed in this notice and not reviewed in subsequent periods, the cash deposit rate will continue to be the company-specific rate published for the most recent period;

(3) If the exporter is not a firm covered in this review, a prior review, or the original LTFV investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and

(4) If neither the exporter nor the manufacturer is a firm covered in this or any previous review conducted by the Department, the cash deposit rate will be the "all others" rate. The "all others" rate is the "new shipper" rate established in the first review

conducted by the Department in which a "new shipper" rate was established, as discussed below.

On May 25, 1993, the CIT, in *Floral Trade Council* v. *United States*, 822 F.Supp. 766 (1993), and *Federal-Mogul Corporation and the Torrington Company* v. *United States*, 839 F.Supp. 864 (1993) decided that once an "all others" rate is established for a company, it can only be changed through an administrative review. The Department has determined that in order to implement these decisions, it is appropriate to reinstate the "all others" rate from the LTFV investigation (or that rate as amended for correction of clerical errors or as a result of litigation) in proceedings governed by antidumping duty orders.

In proceedings governed by antidumping findings, unless we are able to ascertain the "all others" rate from the Treasury LTFV investigation, we have determined that it is appropriate to adopt the first "new shipper" rate established in the final results of an administrative review of this finding published by the Department (or that rate as amended for correction of clerical errors as a result of litigation) as the "all others" rate for the purposes of establishing cash deposits in all current and future administrative reviews.

Because this proceeding is governed by an antidumping finding, and we are unable to ascertain the "all others" rate from the Treasury LTFV investigation, the "all others" rate for the purpose of these reviews is 18.07 percent from *Tapered Roller Bearings and Certain Components Thereof from Japan, Final Results of Administrative Review of Antidumping Finding*, 49 FR 8976 (March 9, 1984), the first review conducted by the Department in which a "new shipper" rate was established.

This notice serves as a final reminder to importers of their responsibility under 19 CFR § 353.26 to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during these review periods. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 353.34(d). Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of the APO is a sanctionable violation.

These administrative reviews and this notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and 19 CFR 353.22(c).

Dated: November 2, 1994.

Susan G. Esserman,

Assistant Secretary for Import Administration.

[FR Doc. 94–27783 Filed 11–9–94; 8:45 am]

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[A–588–834]

Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Antidumping Duty Investigation of Stainless Steel Angle From Japan

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: November 10, 1994.

FOR FURTHER INFORMATION CONTACT: Bill Crow, Office of Antidumping Investigations, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, D.C. 20230; telephone (202) 482–0116.

PRELIMINARY DETERMINATION: We preliminarily determine that stainless steel angle (SSA) from Japan is being sold in the United States at less than fair value, as provided in section 733 of the Tariff Act of 1930, as amended (the Act). The estimated margins are shown in the "Suspension of Liquidation" section of this notice.

Case History

Since the initiation of this investigation on April 28, 1994 (59 FR 23052, May 4, 1994), the following events have occurred.

On May 23, 1994, the International Trade Commission (ITC) issued an affirmative preliminary injury determination in this proceeding (see ITC Investigation No. 731–TA–699).

On June 2, 1994, the Department of Commerce (the Department) issued an antidumping questionnaire to Aichi Steel Works, Ltd., (Aichi). Aichi submitted responses to the Department's questionnaire in June and July 1994.

On August 23, 1994, the Department issued a supplemental sales questionnaire to the respondent. Aichi submitted its response to the supplemental questionnaire on September 19, 1994.

On August 17, 1994, the petitioners, Slater Steels Corporation and United Steelworkers of America, requested that the Department postpone the preliminary determination until November 4, 1994, pursuant to 19 CFR 353.15(c)(1994). The Department granted this request on August 24, 1994 (59 FR 44966, August 31, 1994).

On August 10, 1994, the petitioners alleged that Aichi was selling the subject merchandise in the home market at below its cost of production. On August 16, 1994, the respondent submitted comments which questioned the methodology employed in the petitioners' below-cost allegation. On August 22, 1994, the petitioners revised their original cost allegation. After analyzing the petitioners' allegation, we found reasonable grounds to believe or suspect that sales in the home market were being made at less than the cost of production. Consequently, on September 7, 1994, the Department initiated an investigation of sales below cost for Aichi's home market sales, in accordance with section 773(b) of the Act and 19 CFR 353.51. On this date, we presented Aichi with Section D of the antidumping questionnaire concerning cost of production. Aichi submitted its response to Section D of the questionnaire on October 17, 1994.

On November 2, 1994, in accordance with 19 CFR 353.20(b), the respondent requested that, in the event of an affirmative preliminary determination, the Department postpone the final determination due to the complexity of the cost information, and the problems associated with scheduling verification because of the year-end holidays.

Scope of Investigation

For purposes of this investigation, the term "stainless steel angle" includes hot-rolled, whether or not annealed or descaled, stainless steel products angled at 90 degrees, that are not otherwise advanced.

The stainless steel angle subject to this investigation is currently classifiable under subheadings 7222.40.30.20 and 7222.40.30.60 of the Harmonized Tariff Schedules of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and Customs purposes, our written description of the scope of this investigation is dispositive.

Period of Investigation

The period of investigation (POI) is November 1, 1993, through April 30, 1994.

Such or Similar Comparisons

For purposes of the preliminary determination, we have determined that stainless steel angle constitutes a single "such or similar" category of merchandise.

The respondent reported that there were no sales of identical merchandise in the home market during the POI. Because there were no sales of identical merchandise in the home market to compare to U.S. sales, we made similar merchandise comparisons on the basis of: (1) stainless steel grade; (2) leg-length; (3) thickness; (4) spine length; and (5) other characteristics. The Department used Aichi's reported costs to adjust for physical differences in merchandise.

Fair Value Comparisons

To determine whether sales of stainless steel angle from Japan to the United States were made at less than fair value, we compared the United States price (USP) to the foreign market value (FMV), as specified in the "United States Price" and "Foreign Market Value" sections of this notice. When comparing the U.S. sales to sales of similar merchandise in the home market, we made adjustments for differences in physical characteristics, pursuant to 19 CFR 353.57. In accordance with 19 CFR 353.58, we made comparisons at the same level of trade, where possible.

United States Price

We based USP on purchase price, in accordance with section 772(b) of the Act, because the subject merchandise was sold to an unrelated purchaser before importation into the United States and because exporter's sales price methodology was not otherwise indicated.

We made deductions from the U.S. sales price, where appropriate, for foreign brokerage, foreign inland freight, and insurance.

We recalculated U.S. credit expense based on Aichi's lending rate to its customers as opposed to Aichi's investment return rate.

We made an adjustment to U.S. price for a consumption tax levied on comparison sales in Japan in accordance with our practice, pursuant to the decision of the Court of International Trade (CIT) in *Federal-Mogul Corporation and The Torrington Company* v. *United States*, 834 F. Supp. 1391 (CIT 1993). See Preliminary Antidumping Duty Determination: Color Negative Photographic Paper and Chemical Components from Japan (59 FR 16177, 16179, April 6, 1994), for an explanation of this methodology.

Foreign Market Value

We compared the volume of home market sales of SSA to the volume of third-country sales to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating FMV, in accordance with section 773 (a)(1)(B) of the Act. We found that the home market was viable for sales of stainless steel angle, in accordance with 19 CFR 353.48(a).

We excluded from our analysis those sales in the home market database with negative quantities or negative sales prices.

We used the Department's arm's-length test to determine whether sales to related customers were made on an arm's-length basis. Where possible, we compared related and unrelated party sales at the same level of trade. For purposes of the preliminary determination, we considered a party as related to respondent whenever respondent had substantial ownership in the party. See Appendix II to the Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Argentina (58 FR 37077, July 9, 1993) for more information on the Department's arm's-length test.

In the home market, Aichi sells SSAs through several distribution channels. Where Aichi sold SSAs through its subsidiary, that subsidiary's sales to unrelated parties formed the basis of our FMV calculation. Only a minuscule proportion of Aichi's sales were made to related parties, either directly, or through its subsidiary. We only included sales to the related parties that were made at arm's length. We also excluded certain related party sales from our analysis because those products could not be compared to unrelated sales and because these were made in insignificant quantities.

We calculated FMV based on delivered prices. We made deductions for discounts and rebates, where applicable.

In light of the Court of Appeals for the Federal Circuit's (CAFC) decision in *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement* v. *United States*, 13 F.3d 398 (Fed. Cir. 1994), the Department no longer can deduct home market movement charges from FMV pursuant to its inherent power to fill in gaps in the antidumping statute. Instead, we will adjust for those expenses under the circumstance-of-sale provision of 19 CFR 353.56(a), as appropriate. Accordingly, in the present case, we deducted post-sale home market inland freight and insurance from FMV under the circumstance-of-sale provision of 19 CFR 353.56(a).

For one expense claimed as a rebate by Aichi, we preliminarily determined that the expense was, in fact, a transfer of funds from the parent to its subsidiary. This rebate was not passed on to the unrelated purchaser. Consequently, we did not make any adjustments to FMV for this claimed rebate.

We deducted home market packing costs and added U.S. packing costs in accordance with section 773(a)(1) of the Act. We also made circumstance of sale adjustments for home market direct selling expenses, which included credit, in accordance with 19 CFR 353.56(a)(2). We reclassified pre-sale warehousing expenses as indirect selling expenses.

We adjusted for the consumption tax in accordance with our practice (see "United States Price" section of this notice).

Cost of Production (COP)

In order to determine whether home market sales prices were below COP within the meaning of section 773(b) of the Act, we calculated COP based on the sum of the respondent's cost of materials, fabrication, general, and packing expenses, in accordance with 19 CFR 353.51(c). (See e.g., Preliminary Results of Antidumping Duty Administrative Review: Polyethylene Terrephthalate Film, Sheet, and Strip from the Republic of Korea (59 FR 35098, 35099, July 8, 1994). We then compared the COP to the home market selling prices, net of movement charges and discounts and rebates.

In accordance with Section 773(b) of the Act, we followed our standard methodology to determine whether the home market sales of each product were made at prices below their COP in substantial quantities over an extended period of time, and whether such sales were made at prices that would permit recovery of all costs within a reasonable period of time in the normal course of trade.

To satisfy the requirement of 773(b)(1) that below-cost sales be disregarded only if made in substantial quantities, we applied the following methodology. Where we found that over 90 percent of a respondent's sales of a given product were at prices above the COP, we did not disregard any below-cost sales because we determined that respondent's below-cost sales are not made in substantial quantities. If between ten and 90 percent of a respondent's sales of a given product were at prices above the COP, we disregarded only the below-cost sales if made over an extended period of time.

Where we found that more than 90 percent of a respondent's sales of a given product were at prices below the COP and were sold over an extended period of time, we disregarded all sales for that model and calculated FMV based on constructed value (CV), in accordance with section 773(b) of the Act.

In accordance with section 773(b)(1) of the Act, in order to determine whether below-cost sales had been made over an extended period of time, we compared the number of months in which below-cost sales occurred for each product to the number of months in the POI in which that product was sold. If a product was sold in three or more months of the POI, we did not exclude below-cost sales unless there were below-cost sales in at least three months during the POI. When we found that sales of a product only occurred in one or two months, the number of months in which the sales occurred constituted the extended period of time; *i.e.*, where sales of a product were made in only two months, the extended period of time was two months, where sales of a product were made in only one month, the extended period of time was one month. (See, Preliminary Results and Partial Termination of Antidumping Duty Administrative Reviews: Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan (58 FR 69336, 69338, December 10, 1993).

Constructed Value (CV)

We calculated constructed value based on the sum of the cost of materials, fabrication, general expenses, profit, and U.S. packing cost. In accordance with section 773 (e)(1)(B) of the Act, for general expenses, which include selling and financial expenses (SG&A), we used the greater of the reported general expenses or the statutory minimum of ten percent of the cost of production. For profit, we used the statutory minimum of eight percent of the cost of manufacturing and general expenses, because Aichi's reported profit was less than eight percent of the total of cost of manufacturing and general expenses.

Currency Conversion

We have made currency conversions based on the official exchange rates, certified by the Federal Reserve Bank of New York, in effect on the dates of the U.S. sales.

Verification

As provided in section 776(b) of the Act, we will verify the information used in making our final determination.

Suspension of Liquidation

In accordance with section 733(d)(1) of the Act, we are directing the Customs Service to suspend liquidation of all entries of stainless steel angle from Japan, as defined in the "Scope of Investigation" section of this notice, that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**.

The Customs Service shall require a cash deposit or posting of a bond equal to the estimated preliminary dumping margin, as shown below. The suspension of liquidation will remain in effect until further notice.

Producer/manufacturer/exporter	Margin percentage
Aichi Steel Works, LTD.	14.92
All others	14.92

ITC Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our determination.

If our final determination is affirmative, the ITC will determine whether these imports are materially injuring, or threaten material injury to, the U.S. industry before the later of 120 days after the date of this preliminary determination or 45 days after our final determination.

Postponement of Final Determination

On November 1, 1994, in accordance with 19 CFR 353.20(b), respondent requested that, in the event of an affirmative preliminary determination by the Department, the Department postpone the final determination due to the complexity of the cost information and problems associated with scheduling verifications with the year-end holidays. We find no compelling reason to deny the request. Accordingly, we are postponing the date of the final determination until not later than 135 days after the date of publication of this notice.

Public Comment

In accordance with 19 CFR 353.38, case briefs or other written comments in at least ten copies may be submitted by any interested party to the Assistant Secretary for Import Administration no later than February 10, 1995, and rebuttal briefs no later than February 17, 1995. We request that parties in this case provide an executive summary of no more than 2 pages in conjunction with case briefs on the major issues to be addressed. Further, briefs should contain a table of authorities. Citations to Commerce determinations and court decisions should include the page number where cited information appears. In preparing the briefs, please begin each issue on a separate page. In accordance with 19 CFR 353.38(b), we will hold a public hearing, if requested, to give interested parties an opportunity to comment on arguments raised in case or rebuttal briefs. Tentatively, the hearing will be held on February 23, 1995, at 9 a.m. at the U.S. Department of Commerce, Room 3708, 14th Street and Constitution Avenue NW, Washington, D.C. 20230. Parties should confirm the time, date, and place of the hearing 48 hours before the scheduled time.

Interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room B–099, within ten days of the publication of this notice in the **Federal Register**. Requests should contain: (1) the party's name, address, telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. In accordance with 19 CFR 353.38(b), oral presentations will be limited to the issues raised in the briefs.

This determination is published pursuant to section 733(f) of the Act (19 U.S.C. 1673b(f)) and 19 CFR 353.15(a)(4).

Dated: November 4, 1994.

Susan G. Esserman,

Assistant Secretary for Import Administration.

[FR Doc. 94–27917 Filed 11–9–94; 8:45 am]

BILLING CODE 3510–DS–P

University of Michigan, et al.; Notice of Consolidated Decision on Application for Duty-Free Entry of Scientific Instrument

This is a decision consolidated pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR 301). Related records can be viewed between 8:30 AM and 5:00 PM in Room 4211, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, D.C.

DECISION: Denied. Applicants have failed to establish that domestic instruments of equivalent scientific value to the foreign instruments for the intended purposes are not available.

REASONS: Section 301.5(e)(4) of the regulations requires the denial of applications that have been denied without prejudice to resubmission if they are not resubmitted within the

specified time period. This is the case for each of the listed dockets.

Docket Number: 94–041. *Applicant:* The University of Michigan, 1150 W. Medical Center Drive, Ann Arbor, MI 48109-0626. *Instrument:* Rapid Kinetic Spectrofluorimeter, Model SX.17MV. *Manufacturer:* Applied Photophysics Ltd., United Kingdom. *Date of Denial Without Prejudice to Resubmission:* August 19, 1994.

Docket Number: 94–047. *Applicant:* University of South Dakota, 414 E. Clark Street, Vermillion, SD 57069. *Instrument:* Rapid Kinetics Accessory. *Manufacturer:* Hi-Tech Scientific, United Kingdom. *Date of Denial Without Prejudice to Resubmission:* August 19, 1994.

Pamela Woods

Acting Director, Statutory Import Programs Staff

[FR Doc. 94–27785 Filed 11–9–94; 8:45 am]

BILLING CODE 3510–DS–F

[C–423–806, C–469–804 and C–427–810]

Certain Cut-to-Length Carbon Steel Plate From Belgium and Spain and Certain Corrosion-Resistant Steel Flat Products From France: Termination of Countervailing Duty Administrative Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Termination of Countervailing Duty Administrative Reviews.

SUMMARY: The Department of Commerce (the Department) is terminating the countervailing duty administrative reviews of certain cut-to-length carbon steel plate from Belgium and Spain and certain corrosion-resistant steel flat products from France initiated on September 8, 1994.

EFFECTIVE DATE: November 10, 1994.

FOR FURTHER INFORMATION CONTACT: Michael Seiders or Kelly Parkhill, Office of Countervailing Compliance, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC, 20230; telephone: (202) 482–2786.

SUPPLEMENTARY INFORMATION:

Background

On August 31, 1994, AK Corporation, Bethlehem Steel Corporation, Geneva Steel, Gulf States Steel of Alabama, Inland Steel Industries, LTV Steel Company, Laclede Steel Company, Lukens Steel Company, National Steel Corporation, Sharon Steel Corporation, US Steel Corporation and WCI Steel, Inc. (hereinafter "domestic producers") requested administrative reviews of the countervailing duty orders on certain cut-to-length carbon steel plate from Belgium and Spain and on certain corrosion-resistant steel flat products from France for the period December 7, 1992, through December 31, 1993. No other interested party requested a review. On September 8, 1994, the Department published a notice initiating the administrative reviews for that period (59 FR 46391). On September 20 1994, the domestic producers submitted a timely withdrawal of their request for review. As a result, pursuant to 19 CFR § 355.22(a)(3), the Department is terminating the reviews.

This notice is published in accordance with 19 CFR § 355.22(a)(3).

Dated: October 26, 1994.

Joseph A. Spetrini,

Deputy Assistant Secretary for Compliance.

[FR Doc. 94–27787; Filed 11–9–94; 8:45 am]

BILLING CODE 3510–DS–P

University of California, et al.; Notice of Consolidated Decision on Applications for Duty-Free Entry of Scientific Instruments

This is a decision consolidated pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 A.M. and 5:00 P.M. in Room 4211, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, D.C.

Comments: None received. *Decision:* Approved. No instrument of equivalent scientific value to the foreign instruments described below, for such purposes as each is intended to be used, is being manufactured in the United States.

Docket Number: 94–074. *Applicant:* University of California, Livermore, CA 94551. *Instrument:* Mass Spectrometer. *Manufacturer:* Fisons Instruments/VG Isotech, United Kingdom. *Intended Use:* See notice at 59 FR 32418, June 23, 1994. *Reasons:* The foreign instrument provides: (1) an abundance sensitivity of 2 ppm for C or N, (2) an internal precision of 0.005 per mil for 3 bar μl samples of $C0_2$ and (3) 4 Faraday collectors. *Advice Received From:* National Institutes of Health, August 22, 1994.

Docket Number: 94–083. *Applicant:* University of Illinois at Urbana-Champaign, Urbana, IL 61801. *Instrument:* Biological Monitor, Model MOSSELMONITOR. *Manufacturer:* Delta Consult, The Netherlands. *Intended Use:* See notice at 59 FR 38439, July 28, 1994. *Reasons:* The foreign instrument provides capability to use live mussels, clams or other aquatic test organisms as an early warning or monitoring pollutant sensor. *Advice Received From:* National Institutes of Health, September 9, 1994.

Docket Number: 94–087. *Applicant:* University of Maryland, Baltimore, MD 21201. *Instrument:* Robotic Micromanipulator System. *Manufacturer:* Scientific Precision Instruments, Germany. *Intended Use:* See notice at 59 FR 38439, July 28, 1994. *Reasons:* The foreign instrument provides: (1) hardware/software that can remember and repeat exact cell locations and (2) 20 nm spatial resolution. *Advice Received From:* National Institutes of Health, September 9, 1994.

Docket Number: 94–088. *Applicant:* University of Hawaii at Manoa, Honolulu, HI 96822. *Instrument:* Portable Cholorphyll Fluorometer, Model PAM-200. *Manufacturer:* Heinz Walz GmbH, Germany. *Intended Use:* See notice at 59 FR 38585, July 29, 1994. *Reasons:* The foreign instrument provides: (1) measurement and calculation of quantum yield within ± 0.001 units, (2) LED light modulated at 600 and 20 000 Hz and (3) tolerance of high levels of background light. *Advice Received From:* National Institutes of Health, September 9, 1994.

Docket Number: 94–090. *Applicant:* Howard Hughes Medical Institute, New Haven, CT 06536. *Instrument:* Phosphoimager X-ray Diffraction Area Detector. *Manufacturer:* MacScience Co. Ltd., Japan. *Intended Use:* See notice at 59 FR 46963, September 13, 1994. *Reasons:* The foreign instrument provides sensitivity of 1 x-ray proton per level and minimized measurement time using Weissenberg geometry and simultaneous movements of specimen rotation and film translation. *Advice Received From:* The National Institutes of Health, September 9, 1994.

The National Institutes of Health advises that (1) the capabilities of each of the foreign instruments described above are pertinent to each applicant's intended purpose and (2) they know of no domestic instrument or apparatus of equivalent scientific value for the intended use of each instrument.

We know of no other instrument or apparatus being manufactured in the United States which is of equivalent

scientific value to any of the foreign instruments.

Pamela Woods,

Acting Director, Statutory Import Programs Staff.

[FR Doc. 94–27919 Filed 11–9–94; 8:45 am]

BILLING CODE 3510–DS–F

[C–351–406]

Certain Agricultural Tillage Tools From Brazil; Termination of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Termination of Countervailing Duty Administrative Review.

SUMMARY: On November 27, 1992, the Department of Commerce (the Department) initiated an administrative review of the countervailing duty administrative review of certain agricultural tillage tools from Brazil. The Department has now decided to terminate this review.

EFFECTIVE DATE: November 10, 1994.

FOR FURTHER INFORMATION CONTACT: Dawn Carroll or Kelly Parkhill, Office of Countervailing Compliance, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C., 20230; telephone: (202) 482–2786.

Background

On October 9, 1992, the Department received a request for an administrative review of this countervailing duty order from Marchesan Implementos Agricolas, S.A., an importer of the subject merchandise, for the period January 1, 1991, through December 31, 1991. No other interested party requested a review. On November 27, 1992, the Department published in the **Federal Register** (57 FR 56318) a notice of "Initiation of Countervailing Duty Administrative Review" initiating the administrative review for that period. On August 19, 1994, Marchesan Implementos Agricolas, S.A., submitted a withdrawal of its request for review.

Section § 355.22(a)(3) of the Department's regulations stipulates that the Secretary may permit a party that requests a review to withdraw the request not later than 90 days after the date of publication of the notice of initiation of the requested review. This regulation also provides that the Secretary may extend the time limit for withdrawal of a request if it is reasonable to do so.

Because no significant work has been completed on this review, the aforementioned importer's request does not unduly burden the Department. Moreover, we have received no objections to terminating this review from other interested parties. Therefore, under the circumstances presented in this review, we are waiving the 90-day requirement in 19 CFR 355.22(a)(3). Accordingly, we are terminating this review. This notice is published in accordance with 19 CFR 355.22(a)(3).

Dated: November 1, 1994.

Joseph A. Spetrini,

Deputy Assistant Secretary for Compliance.

[FR Doc. 94–27788 Filed 11–9–94; 8:45 am]

BILLING CODE 3510–DS–P

[C–333–402]

Certain Textile Mill Products From Peru; Termination of Company-Specific Administrative Review of Countervailing Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Termination of Company-Specific Administrative Review of Countervailing Duty Order.

SUMMARY: The Department of Commerce (the Department) is terminating the company-specific administrative review of the countervailing duty order on certain textile mill products from Peru, initiated on April 15, 1994.

EFFECTIVE DATE: November 10, 1994.

FOR FURTHER INFORMATION CONTACT: Martina Tkadlec or Kelly Parkhill, Office of Countervailing Compliance, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230, telephone: (202) 482–2786.

SUPPLEMENTARY INFORMATION:

Background

On March 29, 1994, Credisa Division Textil, S.A. (Credisa), a producer and exporter of the subject merchandise, requested a company-specific administrative review of the countervailing duty order on certain textile mill products from Peru for the period May 18, 1992, through December 31, 1993, pursuant to 19 CFR 355.22(a)(2). No other interested party requested a review. On April 15, 1994, the Department published a notice initiating the company-specific administrative review for that period (59 FR 18099). On September 28, 1994, Credisa withdrew its request for review.

Section 355.22(a)(3) of the Department's regulations (19 CFR 355.22(a)(3)) stipulates that the Secretary may permit a party that requests a review to withdraw the request not later than 90 days after the date of publication of the notice of initiation of the requested review. This regulation also provides that the Secretary may extend the time limit for withdrawal of a request if it is reasonable to do so.

Because no significant work has been done on this review, Credisa's request does not unduly burden the Department under the circumstances presented in this review, we are waiving the 90-day requirement in 19 CFR 355.22(a)(3). Accordingly, we are terminating this review.

This notice is published in accordance with 19 CFR 355.22(a)(3).

Dated: November 1, 1994.

Joseph A. Spetrini,

Deputy Assistant Secretary for Compliance.

[FR Doc. 94–27789 Filed 11–9–94; 8:45 am]

BILLING CODE 3510–DS–P

[C–201–003]

Ceramic Tile from Mexico; Preliminary Results of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Preliminary Results of Countervailing Duty Administrative Review.

SUMMARY: The Department of Commerce (the Department) is conducting an administrative review of the countervailing duty order on ceramic tile from Mexico. The review period is January 1, 1992 through December 31, 1992. We preliminarily determine the total bounty or grant to be zero or *de minimis* for 32 companies, and 2.55 percent *ad valorem* for all other companies during this review period. In accordance with 19 CFR 355.7, any rate less than 0.5 percent *ad valorem* is *de minimis*. We invite interested parties to comment on these preliminary results.

EFFECTIVE DATE: November 10, 1994.

FOR FURTHER INFORMATION CONTACT: Gayle Longest or Kelly Parkhill, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482–2786.

SUPPLEMENTARY INFORMATION:

Background

On April 28, 1993, the Department published a notice of "Opportunity to Request Administrative Review" (58 FR 25802) of the countervailing duty order on ceramic tile from Mexico. We received a request for review from Ceramica Regiomontana, S.A., (Ceramica) a Mexican exporter of the subject merchandise. We initiated the review on June 25, 1993 (58 FR 34414). The review period is January 1, 1992 through December 31, 1992. This review involves 33 companies and 10 programs.

On February 7, 1994, the Government of Mexico submitted a request for partial revocation for 14 companies with their questionnaire response. According to 19 CFR 355.25(b)(3), a request for revocation can only be submitted in the fifth and subsequent anniversary months of an order. Since the anniversary month for the review period January 1, 1992 through December 31, 1992 is May 1993, and the request was submitted on February 7, 1994, the request was untimely. Therefore, the Department is unable to consider partial revocation for these 14 companies in this administrative review.

The Department is conducting this review in accordance with section 751 of the Tariff Act of 1930 (the Act), as amended. The final results of the last administrative review of this order were published in the **Federal Register** on January 19, 1994 (59 FR 2823).

Scope of Review

Imports covered by this review are shipments of Mexican ceramic tile, including non-mosaic, glazed, and unglazed ceramic floor and wall tile. During the review period, such merchandise was classifiable under the *Harmonized Tariff Schedule* (HTS) item numbers 6907.10.0000, 6907.90.0000, 6908.10.0000, and 6908.90.0000. The HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

Calculation Methodology for Assessment and Cash Deposit Purposes

In calculating the benefits received during the review period, we followed the methodology described in the preamble to 19 CFR 355.20(d) (53 FR 52306, and 52325; December 27, 1988). We calculated a country-wide rate, weight-averaging the benefits received by the 33 companies subject to review to determine the overall subsidy from all programs benefitting exports of the subject merchandise to the United States. In weight-averaging the benefits, we used each firm's share of exports to the United States as weights.

Because the overall weighted-average country-wide rate was above *de minimis*, as defined by 19 CFR 355.7, we proceeded to the next step in our analysis and examined the *ad valorem* rate we had calculated for each company for all programs combined, to determine whether individual company rates differed significantly from the weighted-average country-wide rate. Thirty-two companies received aggregate benefits which were zero or *de minimis* (significantly different within the meaning of 19 CFR 355.22(d)(3)(ii)). Therefore, these companies were treated separately for assessment and cash deposit purposes.

Ceramica's rate was not significantly different from the weighted-average country-wide rate. Since Ceramica was the only company receiving subsidies greater than *de minimis*, the all other rate was calculated based on the unweighted aggregate benefits that Ceramic received from all countervailing programs.

Analysis of Programs

(1) BANCOMEXT Financing for Exporters

Effective January 1, 1990, the Mexican Treasury Department eliminated the Fondo para el Fomento de las Exportaciones de Productos Manufacturados (FOMEX) loan program and transferred the FOMEX trust to the Banco Nacional de Comercio Exterior, S.N.C. (BANCOMEXT). BANCOMEXT offers short-term financing to producers or trading companies engaged in export activities; any company generating foreign currency through exports is eligible for financing under this program. The BANCOMEXT program operates much like its predecessor, FOMEX. BANCOMEXT provides two types of financing, both in U.S. dollars, to exporters: working capital loans (pre-export loans), and loans for export sales (export loans). In addition, BANCOMEXT may provide financing to foreign buyers of Mexican goods and services.

The Department has previously found this program to confer an export subsidy to the extent that the loans are provided at preferential terms (*See Ceramic Tile From Mexico; Preliminary Results of Countervailing Duty Review* (57 FR 5997; February 19, 1992) and *Ceramic Tile From Mexico; Final Results of Countervailing Duty Review* (57 FR 24247; June 8, 1992)). In this review the Government of Mexico provided no new information or evidence of changed circumstances that would lead the Department to alter that determination.

We found that the annual interest rates that BANCOMEXT charged to borrowers for certain loans on which interest payments were due during the review period were lower than commercial rates. The BANCOMEXT dollar-denominated loans under review were granted at annual interest rates ranging from 7.1 percent to 9.8 percent. As discussed in *Certain Steel Products from Mexico; Final Countervailing Duty Determination* (58 FR 37357; July 9, 1993), because loans are funded by BANCOMEXT through commercial banks in dollars and indexed to dollars for repayment, we used a dollar benchmark. As the benchmark for BANCOMEXT pre-export and export dollar-denominated loans granted in 1992, we used the average of the quarterly weighted-average effective interest rates published in the *Federal Reserve Bulletin*, which resulted in an annual benchmark of 7.18 percent in 1992.

We consider the benefits from short-term loans to occur at the time the interest is paid. Because interest on BANCOMEXT pre-export loans is paid at maturity, we calculated benefits based on loans that matured during the review period; these were obtained between March 1992 and May 1992. Interest on BANCOMEXT export loans is paid in advance; we therefore calculated benefits based on BANCOMEXT loans received during the review period.

Two exporters of ceramic tile products used BANCOMEXT pre-export and export financing. Because we found that the exporters were able to tie their BANCOMEXT loans to specific sales, we measured the benefit only from the BANCOMEXT loans tied to sales of the subject merchandise to the United States. To determine the benefit for each exporter, we multiplied the difference between the interest rate charged to exporters for these loans and the benchmark interest rate by the outstanding principal and then multiplied this amount by the term of the loan divided by 365. Because one company's monthly sales figures are indexed to account for inflation, we adjusted that company's benefit amounts to be on the same terms as the sales figures. On this basis, we preliminarily determine the benefit from this program to be 0.01 percent *ad valorem* for Internacional de Ceramica and zero for all other companies listed in the preliminary results of review section of this notice.

(2) PITEX

The Program for Temporary Importation of Products used in the Production of Exports (PITEX) was established by a decree published in the *Diario Oficial* on May 9, 1985, and amended in the *Diario Oficial* on September 19, 1986, and May 3, 1990. The program is jointly administered by the Ministry of Commerce and Industrial Development (SECOFI) and the Customs Administration. Under PITEX, exporters with a proven export record may receive authorization to temporarily import products to be used in the production of exports for up to five years without having to pay the import duties normally imposed on those imports. PITEX allows for the exemption of import duties for the following categories of merchandise used in export production: raw materials, packing materials, fuels and lubricants, machinery used to manufacture products for export, and spare parts and other machinery. The importer must post a bond or other security to guarantee the reexportation of the temporary imports. Because it is only available to exporters, the Department previously found in *Certain Textile Mill Products From Mexico; Final Results of Countervailing Duty Administrative Review* (56 FR 50859; October 9, 1991) and *Ceramic Tile From Mexico; Final Results of Countervailing Duty Administrative Review* (57 FR 24247; June 8, 1992) that PITEX provides countervailable benefits to the extent that it provides duty exemptions on imports of merchandise not physically incorporated into exported products. The Government of Mexico provided no new information or evidence of changed circumstances that would lead the Department to alter that determination.

During the review period, Ceramica used the PITEX program for imports of machinery and spare parts which are not physically incorporated into exported products. To calculate the benefit from this program, we calculated the duties that should have been paid on the non-physically incorporated items that were imported under the PITEX program during the review period. We then divided that amount by the company's total exports. On this basis, we preliminarily determine the benefit from this program to be zero for the 32 companies listed in the preliminary results of review section of this notice and 2.55 percent *ad valorem* for all other companies.

(3) Other Programs

We also examined the following programs and preliminarily determine that exporters of the subject merchandise did not use them during the review period:

(A) Other BANCOMEXT preferential financing;

(B) Other Dollar-Denominated Financing Programs;

(C) Fiscal Promotion Certificates (CEPROFI);

(D) Import duty reductions and exemptions;

(E) State tax incentives;

(F) Article 15 Loans;

(G) NAFINSA FONEI-type financing; and

(H) NAFINSA FOGAIN-type financing.

Preliminary Results of Review

We preliminarily determine that the following 32 companies received zero or *de minimis* benefits during the 1992 review period. In accordance with 19 CFR 355.7, any rate less than 0.5 percent *ad valorem* is *de minimis*.

(1) Adrian Sifuentes Jimenez.
(2) Agustin Cedillo Ruiz.
(3) Alejandro Estrada Silva.
(4) Apolonio Arias Vasquez.
(5) Arturo Leija Lucio.
(6) Aurelio Cedillo Ruiz.
(7) Azuelejos Decorativos Carrillo, S.A.
(8) Efrain Medina Carrillo.
(9) Emilio Pacheco.
(10) Faustino Nuncio Silva.
(11) Ima Regiomontana, S.A. de C.V.
(12) Industrias Intercontinental, S.A. de C.V.
(13) Internacional de Ceramica, S.A. de C.V.
(14) Javier Leija Lucio.
(15) Jesus Gallegos Olivares.
(16) Jesus Jimenez Lucio.
(17) Jose Arellano Valdez.
(18) Jose Dolores Hernandez.
(19) Jose Silva Romero.
(20) Juan Cortex Coronel.
(21) Leopoldo Montiel Rincon.
(22) Luis Najera Flores.
(23) Luis Paulino Flores.
(24) Norberto Cuellar Zuniga.
(25) O.H. Internacional, S.A. de C.V.
(26) Pedro Lopez Alonso.
(27) Raul Leija.
(28) Recubrimientos Mezquital, S.A. de C.V.
(29) Ricardo Berrones.
(30) Taller de Azuelejos Coloniales.
(31) Vicente Jalomo Reyna.
(32) Zenon Cortez Coronel.

In addition, we preliminarily determine the total bounty or grant to be 2.55 percent *ad valorem* for all other companies during the period January 1, 1992 through December 31, 1992.

If the final results of this review remain the same as these preliminary results, the Department intends to instruct the Customs Service to liquidate, without regard to countervailing duties, shipments of this merchandise from Mexico exported by the 32 companies listed above for the period on or after January 1, 1992, and on or before December 31, 1992, and to assess countervailing duties of 2.55 percent of the f.o.b. invoice price of shipments from all other companies for the same period.

Parties to the proceeding may request disclosure of the calculation methodology and interested parties may request a hearing not later than 10 days after the date of publication of this notice. Pursuant to 19 CFR 355.38(c), interested parties may submit written arguments in case briefs on these preliminary results within 30 days of the date of publication. Rebuttal briefs, limited to arguments raised in case briefs, may be submitted seven days after the time limit for filing the case brief. Any hearing, if requested, will be held seven days after the scheduled date for submission of rebuttal briefs. Copies of case briefs and rebuttal briefs must be served on interested parties in accordance with 19 CFR 355.38(e).

Representatives of parties to the proceeding may request disclosure of proprietary information under administrative protective order no later than 10 days after the representative's client or employer becomes a party to the proceeding, but in no event later than the date the case briefs are due.

The Department will publish the final results of this administrative review, including the results of its analysis of issues raised in any case or rebuttal brief, or at a hearing.

This administrative review and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)) and 19 CFR 355.22.

Dated: November 4, 1994.

Susan G. Esserman,

Assistant Secretary for Import Administration.

[FR Doc. 94–27918 Filed 11–9–94; 8:45 am]

BILLING CODE 3510–DS–P

Minority Business Development Agency

Business Development Center Applications: Alaska

AGENCY: Minority Business Development Agency, Commerce.

ACTION: Cancellation.

SUMMARY: The Minority Business Development Agency is cancelling the announcement to solicit competitive applications under its Minority Business Development Center (MBDC) Program, to operate an MBDC in the Alaska Metropolitan Area. The previous announcement was published in the Friday, August 19, 1994 issue of the **Federal Register.**

11.800 Minority Business Development Center

(Catalog of Federal Domestic Assistance)

Dated: November 4, 1994.

Donald L. Powers,

Federal Register Liaison Officer, Minority Business Development Agency.

[FR Doc. 94–27854 Filed 11–9–94; 8:45 am]

BILLING CODE 3510–21–M

National Oceanic and Atmospheric Administration

[I.D. 102194A]

Endangered Species; Permits

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Issuance of Permit 929 (P163A), the First Modification to Permit 923 (P509A), and the Second Amendment to Permit 802 (P512).

On April 28, 1994, notice was published (59 FR 22824) that an application had been filed by John Musick of the Virginia Institute of Marine Science (P163A) to take listed sea turtles to study population trends, migration, and habitat as authorized by the Endangered Species Act of 1973 (ESA) (16 U.S.C. 1531–1543) and the NMFS regulations governing listed fish and wildlife permits (50 CFR parts 217–222).

Notice is hereby given that on November 2, 1994, as authorized by the provisions of the ESA, NMFS issued Permit Number 929 for the above taking subject to certain conditions set forth therein.

On September 13, 1994, notice was published that an application had been filed by Robert van Dam of Scripps Institute of Oceanography for a modification to Permit 923 (P509A), to take an additional eighty listed hawksbill sea turtles for habitat and population studies as authorized by the Endangered Species Act of 1973 (ESA) (16 U.S.C. 1531–1543) and the NMFS regulations governing listed fish and wildlife permits (50 CFR parts 217–227).

Notice is hereby given that on October 21, 1994, as authorized by the provisions of the ESA, NMFS issued Modification One to Permit 929 for the above taking, subject to certain conditions set forth therein.

Notice is hereby given that on September 23, 1994, NMFS issued a Second Amendment to Permit 802 to Dr. André Landry of Texas A&M University (P512), to take listed species as authorized by the ESA. This Second Amendment to Permit 802 involved buoys, net length and monitoring, and water depth of the research area.

Issuance of these actions, as required by the ESA, were based on findings that such actions: (1) Were applied for in good faith; (2) will not operate to the disadvantage of the listed species which are the subject of these actions; (3) are consistent with the purposes and policies set forth in section 2 of the ESA. These actions were also issued in accordance with and are subject to parts 217–222 of Title 50 CFR, the NMFS regulations governing listed species permits.

The applications, permits, and supporting documentation are available for review by interested persons in the following offices, by appointment:

Office of Protected Resources, NMFS, 1335 East-West Highway, Silver Spring, MD 20910–3226 (301–713–2322); and

Southeast Region, NMFS, NOAA, 9721 Executive Center Drive, St. Petersburg, FL 33702–2432 (813–893–3141); also

Northeast Region, NMFS, NOAA, One Blackburn Drive, Gloucester, MA 01930 (508–281–9250) for Permit 929 only; and

Director, Southwest Region, NMFS, NOAA, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213 (310–980–4016) for Permit 923 only.

Dated: November 2, 1994.

William W. Fox, Jr., Ph.D.,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 94–27892 Filed 11–9–94; 8:45 am]

BILLING CODE 3510–22–F

[I.D. 110194C]

Endangered Species; Permits

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Issuance of Modification 4 to Permit 825 held by the Columbia River Inter-Tribal Fish Commission (P513).

Notice is hereby given that on November 4, 1994, NMFS issued Modification 4 to Permit Number 825 held by the Columbia River Inter-Tribal Fish Commission (P513) to take listed Snake River chinook salmon as authorized by the Endangered Species Act of 1973 (ESA) (16 U.S.C. 1531–1543) and the NMFS regulations governing listed fish and wildlife permits (50 CFR parts 217–222), and subject to certain conditions set forth therein. The modification authorizes an increase in take of juvenile Snake River chinook salmon at two fish counting facilities, due to higher than expected outmigration.

Issuance of this modification, as required by the ESA, was based on a finding that such modification: (1) Was applied for in good faith; (2) will not operate to the disadvantage of the listed species which is the subject of this modification; (3) is consistent with the purposes and policies set forth in section 2 of the ESA. This modification was also issued in accordance with and is subject to parts 217-222 of Title 50 CFR, the NMFS regulations governing listed species permits.

The application, permit, and supporting documentation are available for review by interested persons in the following offices, by appointment:

Office of Protected Resources, NMFS, 1335 East-West Highway, Silver Spring, MD 20910–3226 (301–713–1401); and

Environmental and Technical Services Division, NMFS, NOAA, 911 North East 11th Ave., Room 620, Portland, OR 97232 (503–230–5400).

Dated: November 4, 1994.

Patricia A. Montanio,

Acting Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 94–27893 Filed 11–9–94; 8:45 am]

BILLING CODE 3510–22–F

National Telecommunications and Information Administration

AGENCY: National Telecommunications and Information Administration (NTIA), Department of Commerce.

ACTION: Notice of public meeting on November 16, 1994, regarding the G–7 ministerial level conference on the Information Society on February 25–26, 1995, in Brussels.

SUMMARY: NTIA is convening a public meeting to discuss U.S. government goals and technology demonstration for the up-coming G–7 ministerial level conference on the Information Society. The G–7 conference is scheduled for February 25–26, 1995, in Brussels.

The public meeting will be chaired by Larry Irving, Assistant Secretary of Commerce for Communications and Information and Administrator of NTIA. The purpose of the meeting is to brief

the public and obtain input on U.S. government goals for the meeting in Brussels and to solicit industry interest in participating in technology demonstrations, which will be held in conjunction with the G–7 conference.

DATES: The public meeting will be held from 11:00 a.m. to 12 noon on Wednesday, November 16, 1994, in the main auditorium at the U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC. Members of the public should use the main entrance to the Department of Commerce building, on 14th Street between Pennsylvania Avenue and Constitution Avenue.

FOR FURTHER INFORMATION CONTACT: Dr. Charles M. Rush, Chief Scientist, NTIA; U.S. Department of Commerce, Room 4701; 14th Street and Constitution Avenue, NW., Washington, DC 20230. Telephone: (202) 482–1866; Fax: (202) 482–1865; E-mail: crush@ntia.doc.gov.

SUPPLEMENTARY INFORMATION: At the Naples G–7 Summit in July 1994, the G–7 leaders emphasized the necessity of encouraging the development of a worldwide information society and they agreed that the relevant ministers should meet in Brussels. The European Commission extended an invitation to the G–7 to convene a ministerial level conference on the Information Society on February 25–26, 1995. The Information Society Conference will include ministerial level discussions on: (1) Regulatory and competitive frameworks; (2) the development of the infrastructure and access to it; and, (3) essential applications as well as the social, societal, and cultural aspects of the information society.

Each G–7 Country, plus the European Union, will send Ministers responsible for telecommunications and information matters. The conference will include a session with private sector representatives, both users and producers of telecommunications and information equipment and services from each of the Member states participating in the G–7 conference. Technology demonstrations will be given by governments and industry during the conference to showcase the benefits and capabilities of information technology. The United States delegation will be led by Ronald H. Brown, the Secretary of Commerce.

Dated: November 7, 1994.

Larry Irving,

Assistant Secretary of Commerce for Communications and Information.

[FR Doc. 94–27923 Filed 11–9–94; 8:45 am]

BILLING CODE 3510–60–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Addition

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Addition to the Procurement List.

SUMMARY: This action adds to the Procurement List a service to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

EFFECTIVE DATE: December 12, 1994.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Crystal Square 3, Suite 403, 1735 Jefferson Davis Highway, Arlington, Virginia 22202–3461.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 603–7740

SUPPLEMENTARY INFORMATION: On September 30, 1994, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (59 FR 49913) of proposed addition to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the service, fair market price, and impact of the addition on the current or most recent contractors, the Committee has determined that the service listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the service to the Government.

2. The action does not appear to have a severe economic impact on current contractors for the service.

3. The action will result in authorizing small entities to furnish the service to the Government.

4. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the service proposed for addition to the Procurement List.

Accordingly, the following service is hereby added to the Procurement List:

Order Processing Service
General Services Administration
Customer Supply and Industrial Products Center
Springfield, Virginia
(40% of the Government's requirement)

This action does not affect current contracts awarded prior to the effective date of this addition or options exercised under those contracts.

Beverly L. Milkman,

Executive Director.

[FR Doc. 94–27889 Filed 11–9–94; 8:45 am]

BILLING CODE 6820–33–P

DEPARTMENT OF DEFENSE

Office of the Secretary of the Army

Notice of Intent To Prepare a Draft Environmental Impact Statement (DEIS) for the Installation Operations and Master Plan Update, U.S. Army Aviation Center (USAAC) and Fort Rucker, Fort Rucker, Alabama

AGENCY: Department of Army, DoD.

ACTION: Notice of Intent.

SUMMARY: The United States Army proposes to prepare a Draft Environmental Impact Statement (DEIS) for changes to the operation and ongoing mission of the U.S. Army Aviation Center and Fort Rucker, Alabama. The DEIS will identify and evaluate the environmental, social, and economic aspects of the installation operation, master planned component plans and their alternatives for the proposed changes to the ongoing mission and training activities of the USAAC and Fort Rucker. Alternatives to be evaluated include:

a. No action. Installation ongoing operations, development and training would continue at current levels.

b. Master plan and component plans would be implemented and current operations, development and training levels would be maintained. Construction listed in the master plan would be implemented.

c. Master plan and component plans would be revised and expanded to support new and changing missions. Operations, development and training programs may be expanded. Construction above the level outlined in the master plan would be implemented as necessary to meet total requirements.

The U.S. Army will conduct scoping meetings on or near Fort Rucker. As soon as dates and locations of the scoping meetings have been established, they will be published in local newspapers. The purpose of the meetings will be to gather information from the public about the issue they would like to see addressed in the DEIS.

Comments may be made orally or in writing at the meetings.

FOR FURTHER INFORMATION: Questions regarding this action may be directed to Mr. Larry Neal at (803) 234–3000 or at the following address: RUST Environment and Infrastructure Inc., ATTN: Mr. Larry Neal, Post Office Box 24000, Greenville, SC 29616.

Dated: October 28, 1994.

Lewis D. Walker,

Deputy Assistant Secretary of the Army, Environment, Safety and Occupational Health, OASA(I,L&E).

[FR Doc. 94–27784 Filed 11–9–94; 8:45 am]

BILLING CODE 3710–08–M

Department of the Army

Notice of Availability of the Final Environmental Impact Statement (FEIS) for Closure and Disposal of Sacramento Army Depot, CA

AGENCY: Department of the Army, DOD.

ACTION: Notice of availability.

SUMMARY: In accordance with Public Law 101–510, the Defense Base Closure and Realignment Act of 1990, the 1991 Defense Base Closure and Realignment Commission recommended the closure of Sacramento Army Depot and transfer of depot missions to other installations/agencies. Maintenance missions would be competed to determine location of transfer. In accordance with the Act, the Secretary of Defense must implement all recommendations for closure or realignment. The FEIS focuses on the environmental and socioeconomic impacts and mitigations associated with the disposal and reuse of Sacramento Army Depot.

No long-term adverse ecological or environmental health effects are expected due to this action. The increase in population anticipated by the reuse and disposal activities is expected to have a net positive impact on the local economy. The preferred alternative, prepared with the cooperation of the local community, is not expected to significantly impact environmental resources.

DATES: Written public comments and suggestions can be submitted within 30 days of this Notice of Availability (December 12, 1994) to the address shown below.

ADDRESSES: Copies of the FEIS can be obtained by writing to the United States Army Corps of Engineers, Sacramento District, ATTN: CESPK–ED–M (ISS), 1325 J Street, Sacramento, California 95814–2922.

FOR FURTHER INFORMATION CONTACT: Mr. Wandell Carlton (916) 557–7424.

Dated: November 4, 1994.

Lewis D. Walker,

Deputy Assistant Secretary of the Army, (Environment, Safety and Occupational Health) OASA (IL&E).

[FR Doc. 94–27883 Filed 11–9–94; 8:45 am]

BILLING CODE 3710–08–M

Department of the Navy

Notice of Public Hearing for the Draft Environmental Impact Statement for Disposal and Redevelopment of Naval Base Charleston, North Charleston, South Carolina

Pursuant to Council on Environmental Quality regulations (40 CFR Parts 1500–1508), implementing procedural provisions of the National Environmental Policy Act, the Department of the Navy has prepared and filed with the U.S. Environmental Protection Agency the Draft Environmental Impact Statement (DEIS) for the disposal and subsequent redevelopment of the Naval Base Charleston, North Charleston, South Carolina.

In response to the recommendations of the 1993 Defense Base Closure and Realignment Commission and to legislative requirements in the 1990 Base Closure and Realignment Act (BCRA) (Pub. L. 101–510), Naval Base Charleston is to be closed. Activities included in the closure are the Naval Station, the Naval Shipyard, the Fleet Industrial Support Center, the Fleet and Mine Warfare Training Center, the Submarine Training Facility, and the Naval Reserve Center.

Naval Base Charleston is located in the City of North Charleston approximately five miles north of the City of Charleston. The Base encompasses approximately 1,575 acres of land along the Cooper River and includes about 2.3 million square feet of industrial space, 1.8 million square feet of warehouse space, 2.2 million square feet of administrative space, 86 residences, 19 barracks, 152 marina slips, 23 piers, 5 dry-dock facilities, and a wide range of recreational facilities.

The proposed action addressed in the DEIS is the disposal and subsequent redevelopment of lands/facilities determined surplus to the needs of the federal government. A Charleston Naval Complex Reuse Plan was prepared by the Building Economic Solutions Together (BEST) Committee, which included representation of over 40 local groups and organizations from throughout the region. This plan, which identifies a preferred development plan, was approved by both the BEST Committee and the recently created Charleston Naval Base Redevelopment Authority. The DEIS has been prepared to address the environmental consequences of the implementation of this comprehensive reuse plan.

In the preparation of the Redevelopment Plan, consideration was given to the possible reuse of the Base by other federal, state, and local agencies, homeless support organizations, business interests (i.e., privatization of the Shipyard), and recreational users. Various reuse scenarios were developed by BEST, and a preferred reuse plan was identified and approved following public review and evaluation. The Preferred Alternative evaluated in the DEIS is the Preferred Development Plan as approved by BEST and the Redevelopment Authority.

The Preferred Redevelopment Plan identifies areas of the Naval Base for use as a Cargo Terminal, Intermodal Rail Yard, Marine Industrial Park, recreational areas, cultural park warehouse space and open space/stormwater management. The Shipyard is to be privatized for continued use as a shipyard. The preferred plan also provides facilities for local/regional homeless service agencies including residential, training, and administrative uses. The plan also provides for use of lands/facilities for the National Oceanic and Atmospheric Agency (NOAA), the Defense Finance Accounting Service (DFAS), and interim use of facilities by the Navy.

In response to environmental concerns and the current unavailability of information from ongoing Installation Restoration efforts, a Contingent Redevelopment Plan is being considered as part of the Preferred Alternative. The Contingent Redevelopment Plan includes all the same components as the Preferred Development Plan and will result in similar beneficial economic impacts, but will avoid restoration sites if necessary. The DEIS also addresses potential impacts to community services, traffic, air quality, water quality, vegetation and wildlife, cultural resources, noise and land use.

The DEIS has been distributed to various federal, state, and local government agencies and elected officials, special interest groups, libraries and the media. A limited number of single copies are available at the address listed at the end of this notice.

The Department of the Navy will hold two public hearings to inform the public of the DEIS findings and to solicit comments. One hearing will be held from 7:30 p.m. to 10:00 p.m. on

Monday, November 28, 1994, at the Chicora Neighborhood Center, North Charleston. The second hearing will be held from 7:00 PM to 10:00 PM on Tuesday, November 29, 1994, at the North Charleston City Hall. Public hearing times will be as scheduled or until the conclusion of public comments. The hearings will be conducted by the Navy. Federal, state, and local agencies and interested parties are invited and urged to attend or be represented at the hearings. Oral statements will be heard and transcribed by a stenographer, however, to assure the accuracy of the record, all statements should be submitted in writing. All statements, both oral and written, will become part of the public record. Equal weight will be given to both oral and written comments.

In the interest of available time, each speaker will be asked to limit remarks to five minutes. Longer statements should be summarized at the public hearing and submitted in writing either at the hearing or mailed to the address listed at the end of this announcement. All written statements must be postmarked by Monday, December 12, 1994 to become part of the official record.

Additional information concerning this notice may be obtained by contacting Mr. William Sloger, PE (Code 203WS), Southern Division, Naval Facilities Engineering Command, 2155 Eagle Drive, North Charleston, South Carolina, 29419–9010, telephone (803) 743–0797.

Dated November 8, 1994.

L.R. McNees,

LCDR, JAGC, USN, Federal Register Liason Officer.

[FR Doc. 94–28002 Filed 11–9–94; 8:45 am]

BILLING CODE 3810–AE–P

U.S. Court of Appeals for the Armed Forces Code Committee Meeting

ACTION: Notice of public hearing.

SUMMARY: This notice announces the forthcoming public meeting of the Code Committee established by Article 146(a), Uniform Code of Military Justice, 10 U.S.C. § 946(a), to be held at 2:00 p.m. on December 12, 1994 in the Court Conference Room, United States Court of Appeals for the Armed Forces, 450 E Street, Northwest, Washington, DC 20442–0001. The agenda for this meeting will include consideration of proposed changes to the Rules of Practice and Procedure, United States Court of Appeals for the Armed Forces, as well as other matters relating to the operation of the Uniform Code of Military Justice throughout the Armed Forces.

DATES: December 12, 1994.

FOR FURTHER INFORMATION CONTACT: Thomas F. Granahan, Clerk of Court, United States Court of Appeals for the Armed Forces, 450 E Street, Northwest, Washington, DC 20442–001, telephone (202) 272–1448.

Dated: November 4, 1994.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 94–27795 Filed 11–9–94; 8:45 am]

BILLING CODE 5000–04–M

Office of the Secretary

Meeting of the Commission on Roles and Missions of the Armed Forces

AGENCY: Commission on Roles and Missions of the Armed Forces, Department of Defense.

ACTION: Notice.

SUMMARY: Notice is hereby given of a forthcoming meeting of the Commission on Roles and Missions of the Armed Forces. The Commission will meet in open session from 10:00 a.m. until 1:30 p.m., and in closed session from 1:30 p.m. until 6:00 p.m. The purpose of the meeting will be to present and discuss alternative strategies and force postures. In addition, the Commission will solicit the opinions and perspectives of recent commanders and other authorities on roles and missions issues, future national security requirements, and warfighting in a joint force environment. During the closed portion of the meeting, the Commission will consider issues that will include the disclosure and discussion of classified information. In accordance with section 10(d) of the Federal Advisory Committee Act, Public Law 92–453, as amended (5 U.S.C. App II), it has been determined that these portions of the Commission on Roles and Missions meeting concerns matters listed in 5 U.S.C. 552b(c)(1), and that, accordingly, the meeting will be closed to the public during these times.

DATES: November 16, 1994, 10:00 a.m. until 6:00 p.m.

ADDRESSES: Hyatt Regency Arlington, Ravensworth Ballroom—West 1325 Wilson Blvd, Arlington, Virginia.

FOR FURTHER INFORMATION CONTACT: Commander Gregg Hartung, Director for Public Affairs, Commission on Roles and Missions, 1100 Wilson Boulevard, Suite 1200F, Arlington, Virginia 22209; telephone (703) 696–4250.

SUPPLEMENTARY INFORMATION: Seating will be available on a first-come, first-served basis. Members of the press who wish to reserve seating should contact Commander Gregg Hartung, Director for Public Affairs, in advance at (703) 696–4250.

Extraordinary circumstances created by coordination difficulties compel notice of this meeting to be posted in less than the 15-day requirement.

Dated: November 4, 1994.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 94–27794 Filed 11–9–94; 8:45 am]

BILLING CODE 5000–04–M

DEPARTMENT OF ENERGY

Nevada Solar Enterprise Zone Task Force to the Advisory Committee on Demonstration and Commercial Applications of Renewable Energy and Energy Efficiency Technologies

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Public Law 92–463, 86 Stat. 770), notice is hereby given of the following meeting:

DATES: Tuesday, December 6, 1994: 9:00 a.m.–4:00 p.m.

ADDRESSES: Las Vegas Convention and Visitor Authority Board Room, 3150 Paradise Road, Las Vegas, NV 89109.

FOR FURTHER INFORMATION CONTACT: Lisa DiNunzio, Office of Solar Energy Conversion, EE–13, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–1720.

SUPPLEMENTARY INFORMATION: The Nevada Solar Enterprise Zone Task Force to the Advisory Committee on Demonstration and Commercial Application of Renewable Energy and Energy Efficiency Technologies advises the Department of Energy on making the best use of the solar resource in southern Nevada. The Task Force will seek public input and focus attention on significant issues, develop solutions to problems, organize public and private support for implementing a solar enterprise zone, and incorporate appropriate Task Force findings and results into a final report and recommendations for implementing a solar enterprise zone.

Tentative Agenda

Tuesday, December 6, 1994
9:00 am
Call to Order
Review of September 30th Meeting Minutes

Presentation of Recommendations (Robert Annan)
Task Force Questions for Support Staff
Public Comment
Task Force Vote on Recommendations
Set Date for Task Force Review of Implementation
Adjourn

Public Participation: The meeting is open to the public. Written statements may be filed with the Subcommittee either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact Lisa DiNunzio at the address or telephone number listed above. Requests must be received five (5) days prior to the meeting and reasonable provision will be made to include the presentation on the agenda. Depending on the number of requests, comments may be limited to five minutes. The Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business.

Minutes: Minutes of this meeting will be available for public review and copying at the Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C. 20585 between 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays. Copies of the minutes will also be available by request.

Issued at Washington, DC, on November 7, 1994.

Rachel M. Samuel,

Acting Advisory Committee Management Officer.

[FR Doc. 94–27901 Filed 11–9–94; 8:45 am]

BILLING CODE 6450–01–P

Environmental Management Site Specific Advisory Board, Savannah River Site

AGENCY: Department of Energy.

ACTION: Notice of Open Meeting.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Public Law 92–463, 86 Stat. 770) notice is hereby given of the following Advisory Committee meeting: Environmental Management Site Specific Advisory Board (EM SSAB), Savannah River Site.

DATES AND TIMES: Monday, November 28, 1994: 6 p.m.–7 p.m. (public comment session); Tuesday, November 29, 1994: 8:30 a.m. to 4:00 p.m.

ADDRESSES: The public comment session will be held at: The Winton Inn, 1003 Marlboro Avenue, Barnwell, South Carolina. The board meeting (Tuesday, November 29) will be held at: Barnwell County Museum, Marlboro Avenue, Barnwell, South Carolina.

FOR FURTHER INFORMATION CONTACT: Tom Heenan, Manager, Environmental Restoration and Solid Waste, Department of Energy Savannah River Operations Office, P.O. Box A, Aiken, S.C. 29802 (803) 725–8074.

SUPPLEMENTARY INFORMATION: Purpose of the Board: The purpose of the Board is to make recommendations to DOE and its regulators in the areas of environmental restoration, waste management and related activities.

Tentative Agenda:

Monday, November 28, 1994

6:00 p.m. Public Comment Session (5-minute rule)

7:00 p.m. Adjourn

Tuesday, November 29, 1994

8:00 a.m. Coffee

8:30 a.m. Board organizational issues

3:30 p.m. Public Comment Session (5-minute rule)

4:00 p.m. Adjourn

If needed, time will be allotted after public comments for items added to the agenda, and administrative details.

A final agenda will be available at the meeting Monday, November 28, 1994. Public Participation The meeting is open to the public. Written statements may be filed with the Committee either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Tom Heenan's office at the address or telephone number listed above. Requests must be received 5 days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Designated Federal Official is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Each individual wishing to make public comment will be provided a maximum of 5 minutes to present their comments.

Minutes: The minutes of this meeting will be available for public review and copying at the Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585 between 9:00 a.m. and 4 p.m., Monday–Friday except Federal holidays. Minutes will also be available by writing to Tom Heenan, Department of Energy Savannah River Operations Office, P.O. Box A, Aiken, S.C. 29802, or by calling him at (803)–725–8074.

Issued at Washington, DC, on November 7, 1994.

Rachel M. Samuel,

Acting Advisory Committee Management Officer.

[FR Doc. 94–27902 Filed 11–9–94; 8:45 am]

BILLING CODE 6450–01–P

Office of Energy Efficiency and Renewable Energy

Energy Conservation Program for Consumer Products; Granting of the Application for Interim Waiver and Publishing of the Petition for Waiver of DOE Furnace Test Procedures From York International; Case No. F–077

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice.

SUMMARY: Today's notice publishes a letter granting an Interim Waiver to York International (York) from the existing Department of Energy (DOE) test procedure regarding blower time delay for the company's P2LN, and PBNL lines of condensing furnaces.

Today's notice also publishes a "Petition for Waiver" from York. York's Petition for Waiver requests DOE to grant relief from the DOE furnace test procedure relating to the blower time delay specification. York seeks to test using a blower delay time of 30 seconds for its P2LN, and PBNL lines of condensing furnaces instead of the specified 1.5-minute delay between burner on-time and blower on-time. The Department is soliciting comments, data, and information respecting the Petition for Waiver.

DATES: DOE will accept comments, data, and information not later than December 12, 1994.

ADDRESSES: Written comments and statements shall be sent to: Department of Energy, Office of Energy Efficiency and Renewable Energy, Case No. F–077, Mail Stop EE–43, Room 5E–066, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–7574.

FOR FURTHER INFORMATION CONTACT:

Cyrus H. Nasseri, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Mail Station EE–431, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–9138

Eugene Margolis, Esq., U.S. Department of Energy, Office of General Counsel, Mail Station GC–72, Forrestal Building, 1000 Independence Avenue,

SW., Washington, DC 20585, (202) 586–9507.

SUPPLEMENTARY INFORMATION: The Energy Conservation Program for Consumer Products (other than automobiles) was established pursuant to the Energy Policy and Conservation Act (EPCA), Public Law 94–163, 89 Stat. 917, as amended by the National Energy Conservation Policy Act (NECPA), Public Law 95–619, 92 Stat. 3266, the National Appliance Energy Conservation Act of 1987 (NAECA), Public Law 100–12, the National Appliance Energy Conservation Amendments of 1988 (NAECA 1988), Public Law 100–357, and the Energy Policy Act of 1992 (EPAct), Public Law 102 486, 106 Stat. 2776, which requires DOE to prescribe standardized test procedures to measure the energy consumption of certain consumer products, including furnaces. The intent of the test procedures is to provide a comparable measure of energy consumption that will assist consumers in making purchasing decisions. These test procedures appear at 10 CFR Part 430, Subpart B.

The Department amended the prescribed test procedures by adding 10 CFR 430.27 on September 26, 1980, creating the waiver process. 45 FR 64108. Thereafter, DOE further amended the appliance test procedure waiver process to allow the Assistant Secretary for Energy Efficiency and Renewable Energy (Assistant Secretary) to grant an Interim Waiver from test procedure requirements to manufacturers that have petitioned DOE for a waiver of such prescribed test procedures. 51 FR 42823, November 26, 1986.

The waiver process allows the Assistant Secretary to waive temporarily, test procedures for a particular basic model when a petitioner shows that the basic model contains one or more design characteristics which prevent testing according to the prescribed test procedures, or when the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption as to provide materially inaccurate comparative data. Waivers generally remain in effect until final test procedure amendments become effective, resolving the problem that is the subject of the waiver.

The Interim Waiver provisions added by the 1986 amendment allow the Secretary to grant an Interim Waiver when it is determined that the applicant will experience economic hardship if the Application for Interim Waiver is denied, if it appears likely that the Petition for Waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the Petition for Waiver. An Interim Waiver remains in effect for a period of 180 days or until DOE issues its determination on the Petition for Waiver, whichever is sooner, and may be extended for an additional 180 days, if necessary.

On September 22, 1994, York filed an Application for Interim Waiver regarding blower time delay. York's Application seeks an Interim Waiver from the DOE test provisions that require a 1.5-minute time delay between the ignition of the burner and starting of the circulating air blower. Instead, York requests the allowance to test using a 30-second blower time delay when testing its P2LN, and PBNL lines of condensing furnaces. York states that the 30-second delay is indicative of how these furnaces actually operate. Such a delay results in an overall furnace AFUE improvement of approximately 1.5 percent points. Since current DOE test procedures do not address this variable blower time delay, York asks that the Interim Waiver be granted.

The Department has published a Notice of Proposed Rulemaking on August 23, 1993, (58 FR 44583) to amend the furnace test procedure, which addresses the above issue.

Previous waivers for this type of time blower delay control have been granted by DOE to Coleman Company, 50 FR 2710, January 18, 1985; Magic Chef Company, 50 FR 41553, October 11, 1985; Rheem Manufacturing Company, 53 FR 48574, December 1, 1988, 56 FR 2920, January 25, 1991, 57 FR 10166, March 24, 1992, 57 FR 34560, August 5, 1992, and 59 FR 30577, June 14, 1994; Trane Company, 54 FR 19226, May 4, 1989, 56 FR 6021, February 14, 1991, 57 FR 10167, March 24, 1992, 57 FR 22222, May 27, 1992, and 58 FR 68138, December 23, 1993; Lennox Industries, 55 FR 50224, December 5, 1990, 57 FR 49700, November 3, 1992, 58 FR 68136, December 23, 1993, and 58 FR 68137, December 23, 1993; Inter-City Products Corporation, 55 FR 51487, December 14, 1990, and 56 FR 63945, December 6, 1991; DMO Industries, 56 FR 4622, February 5, 1991, and 59 FR 30579, June 14, 1994; Heil-Quaker Corporation, 56 FR 6019, February 14, 1991; Carrier Corporation, 56 FR 6018, February 14, 1991, 57 FR 38830, August 27, 1992, 58 FR 68131, December 23, 1993, 58 FR 68133, December 23, 1993 and 59 FR 14394, March 28, 1994; Amana Refrigeration Inc., 56 FR 27958, June 18, 1991, 56 FR 63940, December 6, 1991, 57 FR 23392, June 3, 1992, and 58 FR 68130, December 23, 1993; Snyder General Corporation, 56 FR 54960, September 9, 1991; Goodman Manufacturing Corporation, 56 FR 51713, October 15, 1991, 57 FR 27970, June 23, 1992 and 59 FR 12586, March 17, 1994; The Ducane Company Inc., 56 FR 63943, December 6, 1991, 57 FR 10163, March 24, 1992, and 58 FR 68134, December 23, 1993; Armstrong Air Conditioning, Inc., 57 FR 899, January 9, 1992, 57 FR 10160, March 24, 1992, 57 FR 10161, March 24, 1992, 57 FR 39193, August 28, 1992, 57 FR 54230, November 17, 1992, and 59 FR 30575, June 14, 1994; Thermo Products, Inc., 57 FR 903, January 9, 1992; Consolidated Industries Corporation, 57 FR 22220, May 27, 1992; Evcon Industries, Inc., 57 FR 47847, October 20, 1992, and 59 FR 46968, September 13, 1994; Bard Manufacturing Company, 57 FR 53733, November 12, 1992, and 59 FR 30578, June 14, 1994; and York International Corporation, 59 FR 46969, September 13, 1994. Thus, it appears likely that the Petition for Waiver will be granted for blower time delay.

In those instances where the likely success of the Petition for Waiver has been demonstrated based upon DOE having granted a waiver for a similar product design, it is in the public interest to have similar products tested and rated for energy consumption on a comparable basis.

Therefore, based on the above, DOE is granting York an Interim Waiver for its P2LN, and PBNL lines of condensing furnaces. Pursuant to paragraph (e) of Section 430.27 of the Code of Federal Regulations Part 430, the following letter granting the Application for Interim Waiver to York was issued.

Pursuant to paragraph (b) of 10 CFR Part 430.27, DOE is hereby publishing the "Petition for Waiver" in its entirety. The petition contains no confidential information. The Department solicits comments, data, and information respecting the petition.

Issued in Washington, DC, November 2, 1994.

Christine A. Ervin,

Assistant Secretary, Energy Efficiency and Renewable Energy.

September 22, 1994.

Assistant Secretary, Conservation & Renewable Energy, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585

Subject: Petition for Waiver and Application for Interim Waiver.

Gentlemen: This is a Petition for Waiver and Application for Interim Waiver submitted pursuant to Title 10 CFR 430.27, as amended 14 November 1986. Waiver is requested from the test procedures for measuring the Energy Consumption of Furnaces found in Appendix N of Subpart B

to Part 430, specifically the section requiring a 1.5 minute delay between burner ignition and start-up of the circulating air blower.

York International requests a waiver from the specified 1.5 minute delay, and seeks authorization in its furnace efficiency test procedures and calculations to utilize a fixed timing control that will energize the circulating air blower 30 seconds after the gas valve opens. A control of this type with a fixed 30 second blower on-time will be utilized in our P2LN and PBNL lines of condensing furnaces.

The current test procedure does not credit York for additional energy savings that occur when a shorter blower on-time is utilized. Test data for these furnaces with a 30 second delay indicate that the overall furnace AFUE will increase approximately 1.5 percentage points compared to the same furnace when tested with the 1.5 minute delay. Copies of the confidential test data conforming these energy savings will be forwarded to you upon request.

York International is confident that this waiver will be granted, as similar waivers have been granted in the past to Coleman Company, Magic Chef Company, Rheem Manufacturing, the Trane Company, Carrier Corporation, Lennox Industries, Amana Refrigeration, Goodman Manufacturing Company and others.

Manufacturers that domestically market similar products are being sent a copy of this Petition for Waiver and Application for Interim Waiver.

Sincerely,

Michael B. Eberlein, P.E.,

Engineering Manager—Furnace Products, Unitary Products Group, York® Central Environmental Systems, York International.

Mr. Michael B. Eberlein, P.E., Engineering Manager—Furnace Products, Unitary Products Group, York International, P.O. Box 4022, Elyria, OH 44036

Dear Mr. Eberlein: This is in response to your September 22, 1994, Application for Interim Waiver and Petition for Waiver from the Department of Energy (DOE) test procedure regarding blower time delay for York International (York) P2LN, and PBNL lines of condensing furnaces.

Previous waivers for this type of timed blower delay control have been granted by DOE to Coleman Company, 50 FR 2710, January 18, 1985; Magic Chef Company, 50 FR 41553, October 11, 1985; Rheem Manufacturing Company, 53 FR 48574, December 1, 1988, 56 FR 2920, January 25, 1991, 57 FR 10166, March 24, 1992, 57 FR 34560, August 5, 1992, and 59 FR 30577, June 14, 1994; Trane Company, 54 FR 19226, May 4, 1989, 56 FR 6021, February 14, 1991, 57 FR 10167, March 24, 1992, 57 FR 22222, May 27, 1992, and 58 FR 68138, December 23, 1993; Lennox Industries, 55 FR 50224, December 5, 1990, 57 FR 49700, November 3, 1992, 58 FR 68136, December 23, 1993, and 58 FR 68137, December 23, 1993; Inter-City Products Corporation, 55 FR 51487, December 14, 1990, and 56 FR 63945, December 6, 1991; DMO Industries, 56 FR 4622, February 5, 1991, and 59 FR 30579, June 14, 1994; Heil-Quaker Corporation, 56 FR 6019, February 14, 1991; Carrier Corporation, 56 FR 6018, February 14, 1991, 57 FR 38830, August 27, 1992, 58 FR 68131, December 23, 1993, 58 FR 68133, December 23, 1993 and 59 FR 14394, March 28, 1994; Amana Refrigeration Inc., 56 FR 27958, June 18, 1991, 56 FR 63940, December 6, 1991, 57 FR 23392, June 3, 1992, and 58 FR 68130, December 23, 1993; Snyder General Corporation, 56 FR 54960, September 9, 1991; Goodman Manufacturing Corporation, 56 FR 51713, October 15, 1991, 57 FR 27970, June 23, 1992 and 59 FR 12586, March 17, 1994; The Ducane Company Inc., 56 FR 63943, December 6, 1991, 57 FR 10163, March 24, 1992, and 58 FR 68134, December 23, 1993; Armstrong Air Conditioning, Inc., 57 FR 899, January 9, 1992, 57 FR 10160, March 24, 1992, 57 FR 10161, March 24, 1992, 57 FR 39193, August 28, 1992, 57 FR 54230, November 17, 1992, and 59 FR 30575, June 14, 1994; Thermo Products, Inc., 57 FR 903, January 9, 1992; Consolidated Industries Corporation, 57 FR 22220, May 27, 1992; Evcon Industries, Inc., 57 FR 47847, October 20, 1992, and 59 FR 46968, September 13, 1994; Bard Manufacturing Company, 57 FR 53733, November 12, 1992, and 59 FR 30578, June 14, 1994; and York International Corporation, 59 FR 46969, September 13, 1994. Thus, it appears likely that the Petition for Waiver will be granted for blower time delay.

York's Application for Interim Waiver does not provide sufficient information to evaluate what, if any, economic impact or competitive disadvantage York will likely experience absent a favorable determination on its application.

However, in those instances where the likely success of the Petition for Waiver has been demonstrated, based upon DOE having granted a waiver for a similar product design, it is in the public interest to have similar products tested and rated for energy consumption on a comparable basis.

Therefore, York's Application for an Interim Waiver from the DOE test procedure for its P2LN, and PBNL lines of condensing furnaces regarding blower time delay is granted.

York shall be permitted to test its P2LN, and PBNL lines of condensing furnaces on the basis of the test procedures specified in 10 CFR Part 430, Subpart B, Appendix N, with the modification set forth below:

(i) Section 3.0 in Appendix N is deleted and replaced with the following paragraph:

3.0 Test Procedure. Testing and measurements shall be as specified in Section 9 in ANSI/ASHRAE 103–82 with the exception of Sections 9.2.2, 9.3.1, and 9.3.2, and the inclusion of the following additional procedures:

(ii) Add a new paragraph 3.10 in Appendix N as follows:

3.10 Gas- and Oil-Fueled Central Furnaces. After equilibrium conditions are achieved following the cool-down test and the required measurements performed, turn on the furnace and measure the flue gas temperature, using the thermocouple grid described above, at 0.5 and 2.5 minutes after the main burner(s) comes on. After the burner start-up, delay the blower start-up by 1.5 minutes (t−) unless: (1) the furnace employs a single motor to drive the power burner and the indoor air circulation blower, in which case the burner and blower shall be started together; or (2) the furnace is designed to operate using an unvarying delay time that is other than 1.5 minutes, in which case the fan control shall be permitted to start the blower; or (3) the delay time results in the activation of a temperature safety device which shuts off the burner, in which case the fan control shall be permitted to start the blower. In the latter case, if the fan control is adjustable, set it to start the blower at the highest temperature. If the fan control is permitted to start the blower, measure time delay (t−) using a stop watch. Record the measured temperatures. During the heat-up test for oil-fueled furnaces, maintain the draft in the flue pipe within ±0.01 inch of water column of the manufacturer's recommended on-period draft.

This Interim Waiver is based upon the presumed validity of statements and all allegations submitted by the company. This Interim Waiver may be removed or modified at any time upon a determination that the factual basis underlying the application is incorrect.

The Interim Waiver shall remain in effect for a period of 180 days or until DOE acts on the Petition for Waiver, whichever is sooner, and may be extended for an additional 180-day period, if necessary.

Sincerely,

Christine A. Ervin,

Assistant Secretary, Energy Efficiency and Renewable Energy.

[FR Doc. 94–27782; Filed 11–9–94; 8:45 am]

BILLING CODE 6450–01–P

Energy Information Administration

Inventory of Current DOE Reporting and Recordkeeping Requirements

AGENCY: Energy Information Administration.

ACTION: Department of Energy's inventory of energy information collections, including reporting and recordkeeping requirements.

SUMMARY: The Energy Information Administration (EIA) of the Department of Energy (DOE) herein publishes an inventory of energy information collections (including reporting and recordkeeping requirements) which had Office of Management and Budget (OMB) approval on October 1, 1994, the first day of Fiscal Year (FY) 1995. The inventory is published for the use of respondents and other interested parties. DOE's management and procurement collections are the responsibility of DOE's Assistant Secretary for Human Resources and Administration and are not included in these notices.

The listing that is attached, hereto, includes DOE energy information collections that had OMB approval as of October 1, 1994. For each information

collection utilizing a structured form, Part I lists the current DOE control or form number, the title of the requirement, the OMB control number, and the OMB approval expiration date. Part II lists those information collections which do not utilize structured forms and the corresponding citations from the Code of Federal Regulations.

FOR FURTHER INFORMATION CONTACT: Herbert Miller, Energy Information Administration (EI–73), 1000 Independence Avenue, SW., Washington, DC 20585, (202) 254–5346. Information on the availability of single, blank copies of those information collections utilizing structured forms can be obtained by contacting the National Energy Information Center (EI–231), 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–8800.

SUPPLEMENTARY INFORMATION: As DOE's energy information collections are submitted for review and approval to OMB during FY 1995 (October 1, 1994 through September 30, 1995), **Federal Register** notices will be published informing the public. Such notices not only provide an opportunity for the public to review and comment on the collections, but also notify the public of proposed changes to the inventory. Questions concerning the inventory or the changes that take place during FY 1995 may be directed to Mr. Miller at the address above.

STATUTORY AUTHORITY: Section 2(a) of the Paperwork Reduction Act of 1980, (Pub. L. No. 96–511), which amended Chapter 35 of Title 44 United States Code (See 44 U.S.C. 3506 (a) and (c)(1).

Issued in Washington, DC, November 3, 1994.

Yvonne M. Bishop,

Director, Office of Statistical Standards, Energy Information Administration.

PART I.—DOE ACTIVE INFORMATION COLLECTIONS, OCTOBER 1, 1994 INVENTORY

DOE No.	Title	OMB control No.	Expiration date
Civilian Radioactive Waste Management:			
NWPA–830R–A–G ..	Standard Contract for Disposal of Spent Nuclear Fuel and/or High Level Waste	19010260	05/31/97
RW–859	Nuclear Fuel Data	19010287	12/31/94
Conservation and Renewable Energy:			
CE–63A/B	Annual Solar Thermal Collector Manufacturers Survey and Annual Photovoltaic Module/Cell Manufacturers Survey.	19010292	08/31/95
Emergency Planning and Operations:			
OE–411	Coordinated Regional Bulk Power Supply Program Report	19010286	10/31/96
OE–417R	Power System Emergency Reporting Procedures	19010288	10/31/95
Energy Information Administration:			
EIA–1	Weekly Coal Monitoring Report—General Industries and Blast Furnaces (Standby Form).	19050167	03/31/96
EIA–3	Quarterly Coal Consumption Report—Manufacturing Plants	19050167	03/31/96
EIA–3A	Annual Coal Quality Report—Manufacturing Plants	19050167	03/31/96
EIA–4	Weekly Coal Monitoring Report—Coke Plants (Standby Form)	19050167	03/31/96
EIA–5	Coke Plant Report—Quarterly	19050167	03/31/96
EIA–5A	Annual Coal Quality Report—Coke Plants	19050167	03/31/96
EIA–6	Coal Distribution Report	19050167	03/31/96
EIA–7A	Coal Production Report	19050167	03/31/96
EIA–14	Refiners' Monthly Cost Report	19050174	09/30/96
EIA–20	Weekly Telephone Survey of Coal Burning Utilities (Standby Form)	19050167	03/31/96
EIA–23	Annual Survey of Domestic Oil and Gas Reserves	19050057	12/31/94
EIA–23P	Oil and Gas Well Operator List Update Report	19050057	12/31/94
EIA–28	Financial Reporting System	19050149	12/31/96
EIA–64A	Annual Report of the Origin of Natural Gas Liquids Production	19050057	12/31/94
EIA–176	Annual Report of Natural and Supplemental Gas Supply and Disposition	19050175	12/31/96
EIA–182	Domestic Crude Oil First Purchase Report	19050174	09/30/96
EIA–191	Underground Gas Storage Report	19050175	12/31/96
EIA–191S	Weekly Underground Gas Storage Report (Standby Form)	19050175	12/31/96
EIA–254	Semiannual Report on Status of Reactor Construction	19050160	01/31/97
EIA–412	Annual Report of Public Electric Utilities	19050129	12/31/95
EIA–457A/H	Residential Energy Consumption Survey	19050092	06/30/96
EIA–627	Annual Quantity and Value of Natural Gas Report	19050175	12/31/96
EIA–759	Monthly Power Plant Report	19050129	12/31/95
EIA–782A	Refiners'/Gas Plant Operators' Monthly Petroleum Product Sales Report	19050174	09/30/96
EIA–782B	Resellers'/Retailers' Monthly Petroleum Product Sales Report	19050174	09/30/96
EIA–782C	Monthly Report of Prime Supplier Sales of Petroleum Products Sold for Local Consumption.	19050174	09/30/96
EIA–800	Weekly Refinery Report	19050165	01/31/96
EIA–801	Weekly Bulk Terminal Report	19050165	01/31/96
EIA–802	Weekly Product Pipeline Report	19050165	01/31/96
EIA–803	Weekly Crude Oil Stocks Report	19050165	01/31/96
EIA–804	Weekly Imports Report	19050165	01/31/96
EIA–807	Propane Telephone Survey	19050165	01/31/96
EIA–810	Monthly Refinery Report	19050165	01/31/96
EIA–811	Monthly Bulk Terminal Report	19050165	01/31/96
EIA–812	Monthly Product Pipeline Report	19050165	01/31/96
EIA–813	Monthly Crude Oil Report	19050165	01/31/96

PART I.—DOE ACTIVE INFORMATION COLLECTIONS, OCTOBER 1, 1994 INVENTORY—Continued

DOE No.	Title	OMB control No.	Expiration date
EIA–814	Monthly Imports Report	19050165	01/31/96
EIA–816	Monthly Natural Gas Liquids Report	19050165	01/31/96
EIA–817	Monthly Tanker and Barge Movement Report	19050165	01/31/96
EIA–819A	Annual Oxygenate Capacity Report	19050165	01/31/96
EIA–819M	Monthly Oxygenate Telephone Report	19050165	01/31/96
EIA–820	Annual Refinery Report	19050165	01/31/96
EIA–821	Annual Fuel Oil and Kerosene Sales Report	19050174	09/30/96
EIA–825	Petroleum Facility Operator Identification Survey	19050165	01/31/96
EIA–826	Monthly Electric Utility Sales and Revenue Report with State Distributions	19050129	12/31/95
EIA–846A/D	Manufacturing Energy Consumption Survey	19050169	11/30/94
EIA–851	Domestic Uranium Mining Production Report	19050160	12/31/97
EIA–856	Monthly Foreign Crude Oil Acquisition Report	19050174	09/30/96
EIA–857	Monthly Report of Natural Gas Purchases and Deliveries to Consumers	19050175	12/31/96
EIA–857S	Weekly Report of Natural Gas Supplies and Deliveries to Consumers (Standby Form)	19050175	12/31/96
EIA–858	Uranium Industry Annual Survey	19050160	01/31/97
EIA–860	Annual Electric Generator Report	19050129	12/31/95
EIA–861	Annual Electric Utility Report	19050129	12/31/95
EIA–863	Petroleum Product Sales Identification Survey	19050174	09/30/96
EIA–867	Annual Nonutility Power Producer Report	19050129	12/31/95
EIA–871A/F	Commercial Buildings Energy Consumption Survey	19050145	12/31/94
EIA–876A/E	Residential Transportation Energy Consumption Survey	19050068	01/31/97
EIA–877	Winter Heating Fuels Telephone Survey	19050174	09/30/96
EIA–878	Motor Gasoline Price Survey	19050174	09/30/96
EIA–882T	Generic Clearance for Questionnaire Testing, Evaluation, and Research	19050186	06/30/96
EIA–885	Propane Provider Fleet Survey	19050187	04/30/97
EIA–887	DOE Customer Surveys	19050188	05/31/97
EIA–888	On-Highway Diesel Fuel Price Survey	19050174	09/30/96
EIA–890	Atlanta Clean City Vehicle Fleet Survey	19050189	06/30/97
Federal Energy Regulatory Commission:			
FERC–1	Annual Report of Major Electric Utilities, Licensees and Others	19020021	07/31/95
FERC–1–F	Annual Report of Nonmajor Public Utilities and Licensees	19020029	07/31/95
FERC–2	Annual Report of Major Natural Gas Companies	19020028	07/31/96
FERC–2A	Annual Report of Nonmajor Natural Gas Companies	19020030	07/31/96
FERC–6	Annual Report of Oil Pipeline Companies	19020022	06/30/96
FERC–8	Underground Gas Storage Report	19020026	08/31/95
FERC–11	Natural Gas Pipeline Company Monthly Statement	19020032	06/30/96
FERC–73	Oil Pipeline Service Life Data	19020019	08/31/95
FERC–80	Licensed Hydropower Development Recreation Report	19020106	10/31/95
FERC–423	Monthly Report of Cost and Quality of Fuels for Electric Plants	19020024	12/31/96
FERC–556	Cogeneration and Small Power Production	19020075	11/30/94
FERC–561	Annual Report of Interlocking Positions	19020099	10/31/95
FERC–580	Fuel Purchase Practices	19020137	06/30/97
FERC–592	Marketing Affiliates of Interstate Pipelines	19020157	12/31/96
FERC–597	Customer Satisfaction Survey	19020163	11/30/96
FERC–714	Annual Electric Power System Report	19020140	01/31/97
FERC–715	Annual Transmission Planning and Evaluation Report	19020171	01/31/97
FPC–14	Annual Report for Importers and Exporters of Natural Gas	19020027	08/31/95
Fossil Energy:			
EIA–767(3)	Steam Electric Plant Operation and Design Report	19010298	05/31/97
FE–748	Enhanced Oil Recovery Annual Report	19010291	12/31/95
Policy, Safety, and Environment:			
EIA–767(2)	Steam Electric Plant Operation and Design Report	19010267	05/31/97

PART II.—DOE ACTIVE INFORMATION COLLECTIONS, NOT UTILIZING STRUCTURED FORMS, OCTOBER 1, 1994 INVENTORY

DOE No.	Title	OMB control No:	Expiration date	CFR citation
Economic Regulatory Administration:				
ERA–766R	Recordkeeping Requirements of DOE's General Allocation and Price Rules.	19030073	10/31/96	10 CFR 210.1
Federal Energy Regulatory Commission:				
FERC–16A	Monitoring (Omnibus) Report(stand-by authority)	19020105	10/31/95	18 CFR 375.307
FERC–16AT	Interstate Pipeline Curtailment (Telephone) Survey	19020139	11/30/96	By FERC Order
FERC–500	Application For License for Hydropower Projects Greater Than 5MW.	19020058	11/30/94	18 CFR 4.38, 4.39, 4.40, 4.41, 4.50, 4.51, 4.200–.202, 16.1, 16.14–16

PART II.—DOE ACTIVE INFORMATION COLLECTIONS, NOT UTILIZING STRUCTURED FORMS, OCTOBER 1, 1994 INVENTORY—Continued

DOE No.	Title	OMB control No.	Expiration date	CFR citation
FERC–505	Application for License for Water Projects 5MW or Less.	19020115	11/30/94	18 CFR 4.61, 4.71, 4.92, 4.93, 4.107, 4.108, 4.112, 4.113, 4.201–.202
FERC–510	Application for Surrender of Electric License	19020068	05/31/96	18 CFR 6.1, 6.3
FERC–511	Application for Transfer of Electric License	19020069	11/30/94	18 CFR 9.1, 9.2, 9.10
FERC–512	Application for Preliminary Permit	19020073	11/30/94	18 CFR 4.31, 4.32, 4.33, 4.81, 4.82
FERC–515	Hydropower License—Declaration of Intention	19020079	12/31/94	18 CFR 24.1
FERC–516	Electric Rate Schedule Filings	19020096	05/31/95	18 CFR 35, Subpart A, 35.12–.16, 35.26, 35.30, 35.31, 292, 301
FERC–519	Disposition of Facilities, Mergers, and Acquisitions of Securities.	19020082	03/31/96	18 CFR 33
FERC–520	Application for Authority to Hold Interlocking Directorate Positions.	19020083	02/28/96	18 CFR 45
FERC–521	Headwater Benefits	19020087	08/31/95	18 CFR 11.16
FERC–523	Application for Authorization of The Issuance of Securities or the Assumption of Liabilities.	19020043	09/30/95	18 CFR 20, 34, 131.43, 131.50
FERC–525	Financial Audits	19020092	02/28/95	18 CFR 41, 101, 116, 125, 141.1, 158, 216, 225, 260, 351,
FERC–537	Gas Pipeline Certificates: Construction, Acquisition & Abandonment.	19020060	04/30/95	18 CFR 2.79, 157.5–.21, .100, .201–.218, 159.1, 284.107, .127, .221
FERC–538	Gas Pipeline Certificate: Initial Service	19020061	04/30/97	18 CFR 156.3, 156.4, 156.5
FERC–539	Gas Pipeline Certificate: Import/Export Related	19020062	05/31/97	18 CFR 153
FERC–541	Gas Pipeline Certificate: Curtailment Plan	19020066	05/31/97	18 CFR 2.78, 281
FERC–542	Gas Pipeline Rates: Initial Rates, Rate Change, and PGA Tracking.	19020070	05/31/97	18 CFR 154.38, 154.61–154.67
FERC–542A	Tracking and Recovery of Alaska Natural Gas Transportation System.	19020129	02/28/97	18 CFR 154.201–154.213
FERC–543	Gas Pipeline Rates: Purchased Gas Adjustment Tracking.	19020152	05/31/97	18 CFR 154.38
FERC–544	Gas Pipeline Rates: Rate Change (Formal)	19020153	05/31/97	18 CFR 154.63–154.67
FERC–545	Gas Pipeline Rates: Rate Change (Non-Formal)	19020154	06/30/96	18 CFR 154.63–154.67
FERC–546	Gas Pipeline Rates: Certificated Rate Filings	19020155	05/31/97	18 CFR 154.62–154.67
FERC–547	Gas Pipeline Rates: Refund Obligations	19020084	05/31/97	18 CFR 154.38(5)(V)(H), 270.101, 273.301, 273.302
FERC–549	Gas Pipeline Rates: Natural Gas Policy Act Title III Transactions.	19020086	11/30/94	18 CFR 284 Sub. A/D/E/H, 284.7–.11, .102, .105, .106, .122, and others
FERC–549B	Gas Pipeline Rates: Capacity Release Information	19020169	12/31/96	18 CFR 284(b)(5)
FERC–550	Oil Pipeline Rates: Tariff Filings	19020089	08/31/95	18 CFR 340–345, 347
FERC–555	Records Retention Requirements	19020098	04/30/95	18 CFR 125, 150, 160.1, 225, 276.108, 277.210, 356
FERC–566	Report of Utility's Twenty Largest Purchasers	19020114	02/28/95	18 CFR 46.3
FERC–567	Gas Pipeline Certificates: Annual Reports of System Flow Diagrams and System Capacity.	19020005	08/31/96	18 CFR 260.8, 284.12
FERC–574	Gas Pipeline Certificates—Hinshaw Exemption	19020116	08/31/95	18 CFR 152
FERC–576	Report by Certain Natural Gas Companies on Service Interruptions.	19020004	05/31/95	18 CFR 260.9
FERC–577	Gas Pipeline Certificates: Environmental Impact Statement.	19020128	12/31/94	18 CFR 157.14
FERC–577(A)	Gas Pipeline Certificates: Environmental Impact Statement (Interim Rule).	19020161	10/31/96	18 CFR 2.80, 2.82, 157.14
FERC–581	Management and Procurement Reporting and Recordkeeping Requirements.	19020130	11/30/96	48 CFR 30 Subtitle A, Chapter 9
FERC–582	Oil, Gas, and Electric Fees and Annual Charges	19020132	10/31/96	18 CFR 381.106, 382.105(A), 382.201(B)(4)
FERC–583	Hydroelectric Fees and Annual Charges	19020136	10/31/96	18 CFR 11.1, 11.3, 11.4, 11.6
FERC–585	Reports on Electric Energy Shortages & Contingency Plans Under PURPA 206.	19020138	12/31/96	18 CFR 294.202
FERC–588	Emergency Natural Gas Sale, Transportation and Exchange Transactions.	19020144	05/31/97	18 CFR 284, Subpart I
FERC–598	Certification of Entities Seeking Exempt Wholesale Generator Status.	19020166	04/30/96	18 CFR 365
FERC–716	Good Faith Request for Transmission Services and Response by Transmitting Utility.	19020170	11/30/96	18 CFR 2.20
FERC–716A	Application for Transmission Services Under Section 211 of the Federal Power Act.	19020168	10/31/96	18 CFR 36

PART II.—DOE ACTIVE INFORMATION COLLECTIONS, NOT UTILIZING STRUCTURED FORMS, OCTOBER 1, 1994 INVENTORY—Continued

DOE No.	Title	OMB control No.	Expiration date	CFR citation
Fossil Energy				
FE–329R	Regulatory Reporting and Recordkeeping Requirements Pursuant to 10 CFR 500, 501, 503, and 504.	19010297	06/30/95	10 CFR 500, 501, 503, 504, 505, 508, 515
FE–746R	Import and Export of Natural Gas	19010294	01/31/96	10 CFR 205, 590

[FR Doc. 94–27779; Filed 11–9–94; 8:45 am]
BILLING CODE 6450–01–P

Federal Energy Regulatory Commission

[Docket No. GT95–3–000]

Algonquin Gas Transmission Co.; Notice of Proposed Changes in FERC Gas Tariff

November 4, 1994.

Take notice that on November 1, 1994, Algonquin Gas Transmission Company (Algonquin), tendered for filing as part of its FERC Gas Tariff, Fourth Revised Volume No. 1, the following tariff sheets:

Third Revised Sheet No. 1100
Third Revised Sheet No. 1101
Third Revised Sheet No. 1102
Third Revised Sheet No. 1103
Third Revised Sheet No. 1104
Third Revised Sheet No. 1105
Third Revised Sheet No. 1106
Third Revised Sheet No. 1107
Third Revised Sheet No. 1108
Second Revised Sheet No. 1109

The proposed effective date of the tariff sheets is December 1, 1994.

Algonquin states that the purpose of this filing is to revise Algonquin's index of purchasers.

Algonquin states that copies of this filing were served upon each affected party and interested state commissions.

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 Sections 385.214 and 385.211 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before November 14, 1994. 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 in the Public Reference Room.

Linwood A. Watson, Jr.,
Acting Secretary.

[FR Doc. 94–27803 Filed 11–9–94; 8:45 am]
BILLING CODE 6717–01–M

[Docket No. ID–2857–000]

Jean Allard; Notice of Filing

November 3, 1994.

Take notice that on October 26, 1994, Jean Allard (Applicant) tendered for filing a supplemental application under Section 305(b) of the Federal Power Act to hold the following positions:

Director: Commonwealth Edison Company [1]
Director: LaSalle National Bank [2]
Director: LaSalle National Corporation [2]
Director: LaSalle National Trust, N.A.[2]
Director: LaSalle Cragin Bank, F.S.B.[2]
Director: LaSalle Talman Bank, F.S.B.[2]

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, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before November 17, 1994. 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.

Linwood A. Watson, Jr.,
Acting Secretary.

[FR Doc. 94–27804 Filed 11–9–94; 8:45 am]
BILLING CODE 6717–01–M

[1] On July 15, 1994, the Commission approved the holding company reorganization (the Reorganization) of Edison whereby initially 100% of the common stock of Edison will be owned by a newly formed holding company (initially referred to as CECo Holding Company but renamed Unicom (Unicom)). *Commonwealth Edison Company* (Docket No. EC94–10–000), 68 FERC ¶ 62,049, (July 15, 1994). The holding company reorganization described in that docket became effective on September 1, 1994, and Applicant became a director of Unicom which controls Edison as a subsidiary. To the extent required, this application seeks approval of such interlocking position together with the other positions described herein.

[2] Applicant seeks authority to hold interlocking positions with Edison, a public utility, and five other companies which are affiliates of certain companies which are authorized by law to underwrite or participate in the marketing of securities. Authority to hold a position with each LaSalle Entity is sought because the LaSalle Entities are such wholly owned indirect subsidiaries of ABN AMRO Bank N.V., a foreign corporation, and (i) ABN AMRO Securities (USA) Inc., a registered broker-dealer under the Securities Exchange Act of 1934, is another wholly owned indirect subsidiary of ABN AMRO Bank N.V. and is authorized to underwrite certain securities as more fully described herein and (ii) ABN AMRO Bank N.V. and certain foreign subsidiaries it owns or controls are authorized by law to underwrite or participate in the marketing of securities, including securities issued by public utilities.

[Docket No. RP94–221–001]

ANR Pipeline Co.; Notice of Proposed Changes in FERC Gas Tariff

November 4, 1994.

Take notice that on November 1, 1994, ANR Pipeline Company (ANR), tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheets:

Third Revised Sheet No. 8
Second Revised Sheet No. 177
Second Revised Sheet No. 181
Second Revised Sheet No. 183
Second Revised Sheet No. 184

ANR states that the above-referenced tariff sheets are being filed pursuant to Ordering Paragraph (A) of the Commission's "Order Terminating Technical Conference Subject to Conditions" in this proceeding. Such order required ANR to adjust its Rate Schedule FTS–2 overrun rates to include the GSR incremental cost component associated with ITS service, and to use known and measurable Rate Schedule FTS–2 overrun volumes in the derivation of rates associated with the allocation of 10% of GSR costs to interruptible service.

ANR states that all parties and interested State Commissions have been mailed a copy of this filing.

Any person desiring to protest said filing should file a protest with the Commission, 825 North Capitol Street, NE., Washington, DC 20426 in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). All such protests should be filed on or before November 14, 1994. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this application are on file with the Commission and are available for public inspection.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 94–27805 Filed 11–9–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP95–35–000]

K N Interstate Gas Transmission Co.; Notice of Tariff Filing

November 4, 1994.

Take notice that on November 2, 1994, K N Interstate Gas Transmission Co. (KNI) tendered for filing an application and proposed First Revised Volume Nos. 1–C and 1–D. KNI states that the proposed First Revised Volume Nos. 1–C and 1–D are to apply solely to its Buffalo Wallow System and will enable KNI to implement the following market center services, at cost-based rates, on that system: (1) firm and interruptible transportation (Rate Schedules FT–BW and IT–BW); and (2) an optional Aggregation Pooling Service available as a component of Rate Schedules FT–BW and IT–BW.

KNI also requests that the tendered volumes be accepted for filing and permitted to become effective on December 2, 1994, without suspension.

Finally, KNI requests that the Commission waive all other regulations that may otherwise be applicable so as to permit proposed First Revised Volume Nos. 1–C and 1–D to become effective as of December 2, 1994.

KNI states that copies of the filing were served upon KNI's customers and interested public bodies.

Any person desiring to be heard or to protest said application 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 sections 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before November 14, 1994. 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 application are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 94–27806 Filed 11–9–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. GT95–4–000]

Natural Gas Pipeline Co. of America; Notice of Proposed Changes in FERC Gas Tariff

November 4, 1994.

Take notice that on November 2, 1994, Natural Gas Pipeline Company of America (Natural) tendered for filing as part of its FERC Gas Tariff, Sixth Revised Volume No. 1, the below listed tariff sheets to be effective December 2, 1994:

Third Revised Sheet No. 601
Fifth Revised Sheet Nos. 602, 603, 604, and 605
First Revised Sheet No. 609
Fifth Revised Sheet No. 611
Second Revised Sheet Nos. 612 and 614

Natural states that the purpose of the filing is to update the Index of Purchasers contained in Natural's Tariff.

Natural requested waiver of the Commission's Regulations to the extent necessary to permit the tariff sheets to become effective December 2, 1994.

Natural states that copies of the filing are being mailed to Natural's jurisdictional customers and interested state regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 and 385.211 of the Commission's Rules and Regulations. All such protests should be filed on or before November 14, 1994. 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 in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 94–27807 Filed 11–9–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. ID–2858–000]

Cordell Reed; Notice of Filing

November 3, 1994.

Take notice that on October 26, 1994, Cordell Reed (Applicant) tendered for filing a supplemental application under Section 305(b) of the Federal Power Act to hold the following positions:

Senior Vice President: Commonwealth Edison Company
Director: LaSalle National Bank [1]
Director: LaSalle National Corporation [1]
Director: LaSalle National Trust, N.A.[1]
Director: LaSalle Cragin Bank, F.S.B.[1]
Director: LaSalle Talman Bank, F.S.B.[1]

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 and 385.214). All such motions or protests should be filed on or before November 17, 1994. 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.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 94–27808 Filed 11–9–94; 8:45 am]

BILLING CODE 6717–01–M

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[1] Applicant seeks authority to hold interlocking positions with Edison, a public utility, and five other companies which are affiliates of certain companies which are authorized by law to underwrite or participate in the marketing of securities. Authority to hold a position with each LaSalle Entity is sought because the LaSalle Entities are each wholly owned indirect subsidiaries of ABN AMRO Bank N.V., a foreign corporation, and (i) ABN AMRO Securities (USA) Inc., a registered broker-dealer under the Securities Exchange Act of 1914, is another wholly owned indirect subsidiary of ABN AMRO Bank N.V. and is authorized to underwrite certain securities as more fully described herein and (ii) ABN AMRO Bank N.V. and certain foreign subsidiaries it owns or controls are authorized by law to underwrite or participate in the marketing of securities, including securities issued by public utilities.

[Docket Nos. RP94–119–000, et al.]

Texas Gas Transmission Corp.; Notice of Informal Settlement Conference

November 4, 1994.

Take notice that an informal settlement conference will be convened in the above-captioned proceeding on November 16, 1994, at the offices of the Federal Energy Regulatory Commission, 810 First Street, NE, Washington, D.C., for the purpose of exploring the possible settlement of the above-referenced dockets. The conference will immediately follow the prehearing conference scheduled for 10:00 a.m. on that date in Texas Gas' new rate filing in Docket No. RP94–423–000.

Any party, as defined by 18 CFR 385.102(c), or any participant as defined in 18 CFR 385.102(b), is invited to attend. Persons wishing to become a party must move to intervene and receive intervenor status pursuant to the Commission's regulations (18 CFR 385.214).

For additional information please contact Michael D. Cotleur, (202) 208–1076, or Russell B. Mamone (202) 208–0744.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 94–27809 Filed 11–9–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. ER95–5–000, et al.]

Commonwealth Edison Company, et al.; Electric Rate and Corporate Regulation Filings

November 3, 1994.

Take notice that the following filings have been made with the Commission:

1. Commonwealth Edison Company

Docket No. ER95–5–000

Take notice that on October 25, 1994, Commonwealth Edison Company (ComEd) submitted an amendment to its October 3, 1994, filing for a revision to its Power Sales Tariff (PS–1 Tariff). The amendment seeks to reduce ComEd's proposed rates for third party transmission service in its Power Sales Schedule 4, Negotiated Capacity.

ComEd continues to request an effective date of December 3, 1994. Copies of this filing were served upon current customers, ECI, Heartland, MidCon, NSP and the Illinois Commerce Commission.

Comment date: November 17, 1994, in accordance with Standard Paragraph E at the end of this notice.

2. The Northeast Utilities Service Company

Docket No. ER95–41–000

Take notice that on October 17, 1994, The Northeast Utilities Service Company (NUSCO), tendered for filing on behalf of The Connecticut Light and Power Company (CL&P) a Letter Agreement dated September 28, 1994, to change the delivery point for a portion of service being taken under an existing Capacity Sales Agreement between CL&P and New England Power Company (NEP).

NUSCO requests that the Commission waive its standard notice and filing requirements to the extent necessary to permit the change in delivery point to become effective November 1, 1994, until otherwise instructed by NEP.

NUSCO states that a copy of the rate schedule has been mailed to NEP.

USCO further states that the filing is in accordance with Section 35 of the Commission's Regulations.

Comment date: November 17, 1994, in accordance with Standard Paragraph E at the end of this notice.

3. Oklahoma Gas and Electric Company

Docket No. ER95–69–000

Take notice that on October 21, 1994, Oklahoma Gas and Electric Company (OG&E), tendered for filing a proposed extension to a Letter Agreement dated April 18, 1994, with AES Power, Inc. (AESPI) for the sale of capacity and energy (Extension Agreement). Such Extension Agreement extends the termination of the Letter Agreement from October 31, 1994 to December 31, 1994. OG&E has also provided a notice of termination of the Letter Agreement to become effective as of December 31, 1994.

Copies of this filing have been sent to AESPI, the Oklahoma Corporation Commission, and the Arkansas Public Service Commission.

Comment date: November 17, 1994, in accordance with Standard Paragraph E at the end of this notice.

4. Power Exchange Corporation

Docket No. ER95–72–000

Take notice that on October 26, 1994, Power Exchange Corporation (Petitioner), tendered for filing pursuant to Rule 207 of the Commission's Rules of Practice and Procedure, 18 CFR 385.207 (1993), a petition for waivers and blanket approvals under various regulations of the Commission, and an order accepting its Rate Schedule FERC No. 1, to be effective on or prior to December 26, 1994.

Petitioner intends to engage in electric power and energy transactions as a marketer and a broker. In transactions were Petitioner purchases power, including capacity and related services from electric utilities, exempt wholesale generators, qualifying facilities, and independent power producers, and resells such power to other purchasers, Petitioner will be functioning as a marketer. In Petitioner's marketing transactions, Petitioner proposes to charge rates mutually agreed upon by the parties. In transactions where Petitioner does not take title to electric power and/or energy, Petitioner will be limited to the role of a broker and charge a fee for its services. Petitioner is not in the business of producing or transmitting electric power. Petitioner does not currently have or contemplate acquiring title to any electric power transmission facilities.

Comment date: November 17, 1994, in accordance with Standard Paragraph E at the end of this notice.

5. Maine Public Service Company

Docket No. ER95–73–000

Take notice that on October 25, 1994, Maine Public Service Company (Maine Public), tendered for filing an agreement providing for short-term interim transmission for Central Maine Power Company.

Comment date: November 17, 1994, in accordance with Standard Paragraph E at the end of this notice.

6. Mesquite Energy Services, Inc.

Docket No. ER95–74–000

Take notice that on October 26, 1994, Mesquite Energy Services, Inc. (Mesquite), tendered for filing its initial FERC electric service tariff, Rate Schedule No. 1, under which Mesquite Energy Services, Inc., will engage in wholesale power and energy transactions as a marketer, and for blanket approvals and waivers of certain regulations of the Commission.

Mesquite's power marketing activities will include purchases of capacity, energy, and/or transmission services from electric utilities, qualifying facilities, independent power producers, or other power marketers and reselling such power to other purchasers. From time to time, it may act as a broker. Mesquite is not currently in the business of generating, transmitting, or distributing electric power.

Comment date: November 17, 1994, in accordance with Standard Paragraph E at the end of this notice.

7. Vermont Yankee Nuclear Power Corporation

Docket No. ER95–87–000

Take notice that on October 28, 1994, Vermont Yankee Nuclear Power

Corporation (Vermont Yankee), tendered for filing proposed changes in its FPC Electric Service Tariff No. 1. Vermont Yankee states that the rate change proposed would result in a decrease in Vermont Yankee's revenues requirement of approximately $175,636 during 1994 and an increase of $54,688 during 1995 based on the 12 months ending December 31, 1993.

Vermont Yankee is making a limited Section 205 filing solely for amounts to fund post-retirement benefits other than pensions (PROPs) pursuant to the requirement of SFAS 106.

Vermont Yankee states that copies of its filing have been provided to its customers and to state regulatory authorities in Vermont, New Hampshire, Maine, Massachusetts, Connecticut and Rhode Island.

Comment date: November 17, 1994, in accordance with Standard Paragraph E at the end of this notice.

8. LG&E-Westmoreland Rensselaer

Docket Nos. QF91-138-002 and EL95-7-000

Take notice that on October 20, 1994, LG&E-Westmoreland Rensselaer (LG&E-Westmoreland), tendered for filing a request for limited waiver of the Commission's Regulations under the Public Utility Regulatory Policies Act of 1978 (PURPA). LG&E-Westmoreland requests the Commission to temporarily waive the operating and efficiency standards for qualifying cogeneration facilities as set forth in Section 292.205 of the Commission's Regulations, implementing Section 201 of PURPA, as amended, 18 C.F.R. § 292.205, with respect to its 79 MW cogeneration facility located in Rensselaer, New York. Specifically, LG&E-Westmoreland requests waiver of the operating and efficiency standards for calendar year 1993, and waiver of the efficiency standard for 1994.

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, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 94-27799; Filed 11-9-94; 8:45 am]

BILLING CODE 6717-01-P

[Docket No. ER95-22-000, et al.]

Wisconsin Power & Light Company, et al.; Electric Rate and Corporate Regulation Filings

November 2, 1994.

Take notice that the following filings have been made with the Commission:

1. Wisconsin Power and Light Co.

[Docket No. ER95-22-000]

Take notice that on October 28, 1994, Wisconsin Power and Light Company (WP&L), tendered for filing an amendment in the above designated docket. WP&L respectfully requests waiver of the Commission's notice requirements, and an effective date of October 1, 1994.

Comment date: November 16, 1994, in accordance with Standard Paragraph E at the end of this notice.

2. Commonwealth Edison Co. v. American Electric Power Service Corp.

[Docket No. EL95-4-000]

Take notice that on October 18, 1994, as amended on October 20, 1994, Commonwealth Edison Company (ComEd) filed a complaint against American Power Service Corporation (AEP). ComEd alleges that the rate AEP or its operating subsidiaries charge for hourly and daily purchase and resale service rendered during off-peak hours or weekend days or holidays are unjust, unreasonable, unduly discriminatory and preferential in violation of section 205(b) of the Federal Power Act.

Comment date: December 2, 1994, in accordance with Standard Paragraph E at the end of this notice.

3. Wisconsin Power and Light Co.

[Docket No. ER95-24-000]

Take notice that on October 28, 1994, Wisconsin Power and Light Company (WP&L) tendered for filing an amendment in the above designated docket. WP&L respectfully requests a waiver of the Commission's notice requirements, and an effective date of October 1, 1994.

Comment date: November 16, 1994, in accordance with Standard Paragraph E at the end of this notice.

4. Rochester Gas and Electric Corp.

[Docket No. ER95-48-000]

Take notice that on October 19, 1994, Rochester Gas and Electric Corporation (RG&E), tendered for filing a Service Agreement for acceptance by the Federal Energy Regulatory Commission (Commission) between RG&E and Enron Power Marketing, Inc. The terms and conditions of service under this Agreement are made pursuant to RG&E's FERC Electric Rate Schedule, Original Volume 1 (Power Sales Tariff) accepted by the Commission in Docket No. ER94-1279. RG&E also has requested waiver of the 60-day notice provision pursuant to 18 CFR 35.11.

A copy of this filing has been served on the Public Service Commission of the State of New York.

Comment date: November 16, 1994, in accordance with Standard Paragraph E at the end of this notice.

5. Illinois Power Co.

[Docket No. ER95-70-000]

Take notice that on October 25, 1994, Illinois Power Company (Illinois), tendered for filing an Interchange Agreement between Illinois and AES Power, Inc. (AESPI). Illinois states that the purpose of this agreement is to provide for the buying and selling of capacity and energy between Illinois and AESPI.

Comment date: November 16, 1994, in accordance with Standard Paragraph E at the end of this notice.

6. Great Bay Power Corp.

[Docket No. ER95-75-000]

Take notice that on October 26, 1994, Great Bay Power Corporation (Great Bay), tendered for filing an executed service agreement between Enron Power Marketing Inc. and Great Bay for service under Great Bay's Tariff for Short Term Sales. This Tariff was accepted for filing by the Commission on November 11, 1993, in Docket No. ER93-924-000. The service agreement is proposed to be effective November 1, 1994.

Comment date: November 16, 1994, in accordance with Standard Paragraph E at the end of this notice.

7. Mid-American Resources, Inc.

[Docket No. ER95-78-000]

Take notice that on October 27, 1994, Mid-American Resources, Inc., tendered for filing the Application of Mid-American Resources, Inc. for Waivers, Blanket Approvals and Order Approving Rate Schedule. The Application seeks certain waivers and blanket approvals under the Federal Power Act. Mid-American further seeks

approval of an initial rate schedule to be effective December 27, 1994.

Comment date: November 16, 1994, in accordance with Standard Paragraph E at the end of this notice.

8. PacifiCorp

[Docket No. ER95–79–000]

Take notice that on October 27, 1994, PacifiCorp, tendered for filing in accordance with 18 CFR Part 35 of the Commission's Rules and Regulations, revisions to Exhibit B, Table 1 and Exhibit D of the General Transfer Agreement between PacifiCorp and Bonneville Power Administration, PacifiCorp Rate Schedule FERC No. 237.

PacifiCorp requests a waiver of prior notice and that an effective date of November 1, 1994 be assigned to the revised Exhibits.

Copies of this filing were supplied to Bonneville, the Washington Utilities and Transportation Commission and the Public Utility Commission of Oregon.

Comment date: November 16, 1994, in accordance with Standard Paragraph E at the end of this notice.

9. Northeast Utilities Service Co.

[Docket No. ER95–80–000]

Take notice that on October 27, 1994, Northeast Utilities Service Company (NUSCO), tendered for filing a Service Agreement to provide non-firm transmission service to Enron Power Marketing Inc. (Enron) under the NU System Companies' Transmission Service Tariff No. 2.

NUSCO states that a copy of this filing has been mailed to Enron.

NUSCO requests that the Service Agreement become effective sixty (60) days after receipt of this filing by the Commission.

Comment date: November 16, 1994, in accordance with Standard Paragraph E at the end of this notice.

10. Illinois Power Co.

[Docket No. ER95–81–000]

Take notice that on October 27, 1994, Illinois Power Company (Illinois) tendered for filing an Interchange Agreement between Illinois and Enron Power Marketing, Inc. (EPMI). Illinois states that the purpose of this agreement is to provide for the buying and selling of capacity and energy between Illinois and EPMI.

Comment date: November 16, 1994, in accordance with Standard Paragraph E at the end of this notice.

11. Entergy Services, Inc.

[Docket No. ER95–86–000]

Take notice that on October 28, 1994, Entergy Services, Inc. (Entergy Services), filed the Transmission Service Agreement (TSA), dated as of October 1, 1994, between South Mississippi Electric Power Association (SMEPA) and Arkansas Power & Light Company, Gulf States Utilities Company, Louisiana Power & Light Company, Mississippi Power & Light Company, and New Orleans Public Service Inc. (collectively, Entergy Operating Companies). The TSA provides for the firm transmission of SMEPA's purchase of power and energy from Cajun Electric Power Cooperative, Inc. Entergy Services requests that the TSA be made effective as of October 1, 1994.

Comment date: November 16, 1994, in accordance with Standard Paragraph E at the end of this notice.

12. Kentucky Utilities Co.

[Docket Nos. ES95–7–000 and ES95–7–001]

Take notice that on October 27, 1994, Kentucky Utilities Company filed an application and on October 28, 1994, filed an amendment to its application under § 204 of the Federal Power Act seeking authorization to issue up to $100 million of unsecured promissory notes and commercial paper to be issued from December 1, 1994 through November 30, 1996, with a final maturity date no later than December 31, 1996.

Comment date: November 21, 1994, in accordance with Standard Paragraph E at the end of this notice.

13. Central Louisiana Electric Co., Inc.

[Docket No. ES95–8–000]

Take notice that on October 28, 1994, Central Louisiana Electric Company, Inc., filed an application under § 204 of the Federal Power Act seeking authorization to issue not more than $123 million of short-term indebtedness through December 31, 1996, due within one year from the respective dates of their issuance.

Comment date: November 28, 1994, in accordance with Standard Paragraph E at the end of this notice.

14. Goal Line, L.P.

[Docket Nos. QF92–179–002 and EL95–6–000]

On October 28, 1994, Goal Line, L.P. tendered for filing an amendment to its October 18, 1994, filing, and additional information in support of its request for waiver of the technical standards relating to its cogeneration facility.

Comment date: November 23, 1994, 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, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 94–27800 Filed 11–9–94; 8:45 am]

BILLING CODE 6717–01–P

[Docket No. CP95–36–000, et al.]

Texas Gas Transmission Corp., et al.; Natural Gas Certificate Filings

November 2, 1994.

Take notice that the following filings have been made with the Commission:

1. Texas Gas Transmission Corporation

[Docket No. CP95–36–000]

Take notice that on October 26, 1994, Texas Gas Transmission Corporation (Texas Gas), P.O. Box 1160, Owensboro, Kentucky, 42302, filed in Docket No. CP95–36–000, an application pursuant to Section 7(b) of the Natural Gas Act (NGA), requesting authority to abandon in place a purchase meter station and related pipeline located in Panola County, Texas, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

Texas Gas asserts that the facilities proposed to be abandoned consist of a dual 12-inch purchase meter station known as the Union Pacific PMS ("old" Union Pacific PMS) and approximately 1,298 feet of related 20-inch pipeline, as well as approximately 20 feet of 20-inch line installed in conjunction with the installation of a "new" Union Pacific PMS, with all appurtenances, located at the Union Pacific Resources Company's East Texas Plant (East Texas Plant) in Panola County, Texas.

It is stated that Texas Gas proposes to transfer ownership to Union Pacific Resources Company (UPRC) the "old" Union Pacific PMS, approximately

1,248 feet of the "old" 20-inch pipeline, and approximately 20 feet of "new" 20-inch pipeline installed in conjunction with the construction of the "new" Union Pacific PMS. The remaining approximately 50 feet of "old" 20-inch pipeline located downstream of the "new" Union Pacific PMS will be abandoned in place, but not transferred to UPRC.

It is also stated that the facilities for which Texas Gas seeks abandonment approval are utilized to receive natural gas purchased by Texas Gas or transported by Texas Gas from various producers located in the Carthage Area in Texas. However, because the "old" Union Pacific PMS is located *inside* the East Texas Plant yard, Texas Gas states that operation of the facilities has become increasingly difficult. Therefore, UPRC and Texas Gas agreed to "relocate" the Union Pacific PMS to an area outside the plant property downstream of the "old" Union Pacific PMS. (The "new" Union Pacific PMS was constructed and installed pursuant to Section 157.208 of the Commission's regulations.) In the instant application, Texas Gas is requesting authority to: (1) Abandon by transfer to UPRC the "old" Union Pacific PMS and all the related 20-inch pipeline located upstream of the "new" Union Pacific PMS, as well as a small portion of "new" 20-inch pipeline installed in conjunction with the "new" meter station; and (2) abandon in place a portion of the "old" 20-inch pipeline located downstream of the "New" Union Pacific PMS. Texas gas states that the relocation of these facilities will eliminate the operational problems now existing at the location of the "old" Union Pacific PMS while continuing to allow Texas Gas to receive gas into its system from the East Texas Plant.

Comment date: November 23, 1994, in accordance with Standard Paragraph F at the end of this notice.

2. Columbia Gas Transmission Corporation

[Docket No. CP95–37–000]

Take notice that on October 26, 1994, pursuant to Section 7(c) and Section 7(b) of the Natural Gas Act, as amended (NGA) and the Federal Energy Regulatory Commission's (Commission) Regulations (18 CFR Section 157.7), Columbia Gas Transmission Corporation (Applicant), 1700 MacCorkle Avenue, SE., P.O. Box 1273, Charleston, West Virginia 25325–1273, filed an application for: (1) A certificate of public convenience and necessity authorizing construction and operation of certain natural gas facilities to provide firm transportation service under Rate Schedule FTS pursuant to Part 284 of the Commission's regulation for Panda-Brandywine, L.P. (Panda), a new firm service customer; and (2) an order granting permission and approval to abandon an existing segment of natural gas transmission facilities to be replaced to aid in providing the service to Panda; all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Specifically, Applicant states that Panda has requested up to 24,240 Dth/d of firm service under Rate Schedule FTS, which will be used to supply natural gas to its Brandywine, Maryland cogeneration plant. Applicant states that the proposed construction will consist of three segments: (a) The first segment's construction will be approximately 4.1 miles of 36-inch pipeline loop on Line WB in Hardy County, West Virginia; (b) the second segment's construction will be approximately 1.6 miles of 36-inch pipeline designated as Line WB–5, which will replace by abandonment approximately 1.5 miles of 26-inch pipeline in three sections designated as Line WB, Braxton County, West Virginia; and (c) the third segment's construction will be approximately 0.6 miles of 36-inch pipeline loop on Line WB–5 in Clay County, West Virginia.

Applicant estimates that the proposed facilities total cost will be $11,448,000. Applicant states that Panda has agreed to make a contribution-in-aid of construction of up to $8,772,590, toward the actual cost of construction of the proposed facilities, plus any gross-up for income taxes. Applicant claims that the remaining balance for construction will be financed through funds generated from internal sources. Applicant states that the net book value of the 1.5 mile segment of Line WB, to be abandoned by replacement, is $727,000. Applicant estimates that the revenues associated with its proposal are greater than the cost of service which results in a net benefit to Applicant and its customers. Finally, Applicant states that the proposed construction will aid in the development of a natural gas-fired electric power generation in Washington, DC and a major portion of Montgomery and Prince George's Counties, Maryland.

Comment date: November 23, 1994, in accordance with Standard Paragraph F at the end of this notice.

3. National Fuel Gas Supply Corporation

[Docket No. CP95–41–000]

Take notice that on October 28, 1994, National Fuel Gas Supply Corporation (National), 10 Lafayette Square, Buffalo, New York, 14203, filed in Docket No. CP95–41–000 a request pursuant to Section 157.205 of the Commission's Regulations to construct and operate a new sales tap to serve a new residential customer of National Fuel Gas Distribution Corporation (Distribution), a local distribution company, in Clarion County, Pennsylvania under National's blanket certificate issued in Docket No. CP83–4–000, 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.

National proposes to construct and operate one new sales tap on its K–2 line in Millcreek Township, Clarion County, Pennsylvania to provide service to a new residential customer of Distribution pursuant to National's Rate Schedule EFT. National states that the estimated deliveries for this sales tap is 150 Mcf of natural gas per year. National states that the estimated cost to install these facilities is $1,500, for which National would be reimbursed by Distribution. National states that the volumes to be delivered to Distribution at this sales tap would have a minimal impact on National's peak day and annual deliveries. National states that the addition of new sales taps are not prohibited by National's existing tariff and National has sufficient capacity to accomplish deliveries at this new sales tap without detriment or disadvantage to National's other customers.

Comment date: December 19, 1994, in accordance with Standard Paragraph G at the end of this notice.

4. Kern River Gas Transmission Company

[Docket No. CP95–44–000]

Take notice that on October 31, 1994, Kern River Gas Transmission Company (Kern River), P.O. Box 2511, Houston, Texas 77252, filed in Docket No. CP95–44–000 a request pursuant to Sections 157.205 and 157.212 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 157.212) for authorization to construct, own and operate facilities located in the City of Bakersfield, Kern County, California, to permit the delivery of gas to Bear Mountain Limited, a Texas limited partnership, under the blanket certificate issued in Docket No. CP89–2048–000, pursuant to Section 7(c) of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Kern River proposes to construct and operate a 6-inch tap, a meter station with two 4-inch meter tubes and appurtenant facilities and a 150-foot

section of 6-inch lateral pipeline located immediately downstream of the meter station. Kern River states that the delivery point would have a nominal design capacity of approximately 12,500 Mcf per day. It is indicated that, upon completion of the facility, it would provide transportation service at the new delivery point for any of its shippers under the terms and conditions of its Part 284, Subpart G blanket certificate. Kern River states that the gas delivered at the delivery point would be used in connection with the proposed Bear Mountain Cogeneration Facility, which, it is indicated, is scheduled to commence service on March 1, 1995. Kern River states that deliveries to Kern River at the proposed delivery point would have no impact upon Kern River's peak day and annual deliveries.

Kern River states that the facilities would be located adjacent to the East Side Lateral of the Common Facilities owned jointly by Kern River and Mojave Pipeline Company (Mojave) as tenants-in-common and would be operated and maintained on behalf of Kern River by Mojave Pipeline Operating Company (MPOC) as operator of the Common Facilities pursuant to a construction, operation, and maintenance agreement between Kern River, Mojave, and MPOC.

Comment date: December 19, 1994, in accordance with Standard Paragraph G at the end of this notice.

Standard Paragraphs

F. Any person desiring to be heard or to make any protest with reference to said application should on or before the comment date, file with the Federal Energy Regulatory Commission, 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 385.214 or 385.211) 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 the jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no 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 and/or permission and approval for the proposed abandonment are 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 applicant to appear or be represented at the hearing.

G. Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 94–27801; Filed 11–9–94; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–5104–3]

Agency Information Collection Activities Under OMB Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 et seq.), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected cost and burden.

DATES: Comments must be submitted on or before December 12, 1994.

FOR FURTHER INFORMATION CONTACT: For further information or to obtain a copy of this ICR, contact Sandy Farmer at EPA, (202) 260–2740.

SUPPLEMENTARY INFORMATION:

Office of Administration and Resources Management

Title: Cooperative Agreements and Superfund State Contracts for Superfund Response Actions (OMB Control No. 2010–0020; EPA ICR No. 1487.05).

Abstract: This is an extension of an existing collection of information to support the administrative requirements set forth for cooperative agreements funded under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as "Superfund". CERCLA, as implemented at 40 CFR Part 35 Subpart O, sets forth the pre-award, post-award, and after-the-grant requirements for receiving and managing a Superfund State contract or Superfund cooperative agreement. The information is necessary to qualify grant/cooperative agreement applicants for funding, monitor compliance of grant/cooperative agreement recipients with statutory and regulatory requirements, perform cost recovery, and close-out awards.

Recipients must perform activities that include preparing and submitting: (1) standardized applications for funding; (2) certifications; (3) technical performance, property inventory, procurement and financial reports; and (4) other information necessary to support cost recovery and provide EPA with the status of activities under the grant/cooperative agreement. Recipients must also develop and maintain records related to: (1) accounting and finances; (2) cost comparison and user rate analysis, (3) property disposition and (4) health and safety plans, community relations plans, and quality assurance plans.

The information is used by EPA project officers, grant specialists, and finance officials to manage/oversee clean-up activities at Superfund sites. The information is also used to update the CERCLA information system (CERCLIS) which tracks progress made at Superfund sites.

Burden Statement: Public reporting burden for this collection of information is estimated to average 9 hour per response annually, including time for gathering information, completing and reviewing the collection of information, and submitting the information to the EPA. Public recordkeeping is estimated to average 1 hour per recordkeeper annually, including the time for

preparing and maintaining records, plans and other information.

Respondents: Local, State and Indian tribe applicants for, and recipients of, Superfund grant/cooperative awards.

Estimated Number of Respondents: 1110.

Estimated Number of Responses Per Respondent: 1.

Frequency of Collection: Quarterly and annually.

Estimated Total Annual Burden on Respondents: 9,990 hours.

Send comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, to:

Sandy Farmer, U.S. Environmental Protection Agency, Information Policy Branch (2136), 401 M Street, SW., Washington, DC 20460,

and

Timothy Hunt, Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th St., NW., Washington, D.C. 20503.

Dated: November 4, 1994.

David Schwarz,

Acting Director for Regulatory Management Division.

[FR Doc. 94–27877 Filed 11–9–94; 8:45 am]

BILLING CODE 6560–50–M

[FRL–5104–4]

Agency Information Collection Activities Under OMB Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 et seq.), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected cost and burden.

DATES: Comments must be submitted on or before December 12, 1994.

FOR FURTHER INFORMATION CONTACT: For further information or to obtain a copy of this ICR, contact Sandy Farmer at EPA, (202) 260–2740.

SUPPLEMENTARY INFORMATION: .

Office of Water

Title: National Pollutant Discharge Elimination System (NPDES) and Sewage Sludge Monitoring and Reporting Requirements (OMB Control No. 2040–0004; EPA ICR No. 0229.09).

Abstract: This ICR extends the collection of information for the current monitoring, reporting and recordkeeping requirements associated with Discharge Monitoring Reports (DMRs), and other monitoring reports EPA's National Pollutant Discharge System (NPDES) program. This ICR has incorporated the ICR for the "Standards for the Use and Disposal of Sewage Sludge at 40 CFR Part 503" (OMB control no. 2040–0157) and recent OMB-approved amendments for "Storm Water Implementation" (EPA ICR 229.07) and the "State Sludge Management for NPDES/State Sludge Monitoring" (EPA ICR 229.08). The information collected in support of these programs is authorized under Clean Water Act (CWA) Section 308, 402 and 405, as promulgated at 40 CFR Parts 122 through 125, 40 CFR Part 501, and 40 CFR Part 503. The information is necessary to ensure that permit holders comply with CWA mandates by fulfilling the terms and conditions of their NPDES permits.

Respondents must perform activities that include (1) monitoring, sample collection and analysis of water samples; and (2) reporting of monitoring results (DMRs, stormwater and sewage sludge monitoring reports, as appropriate) to the permitting authority. In general, with the exception of certain sludge records that must be kept indefinitely, respondents must maintain records for five years.

Reporting information received by the permitting authority is entered into the Permit Compliance System (PCS) national computer database. The permitting authority will use the reporting information stored on PCS to assess permittee compliance, modifying/and new permit requirements and revise effluent guidelines.

Burden Statement: Public reporting burden for this collection of information is estimated to average 17 hours per response, including time for reviewing the institutions, searching existing data sources, gathering the data needed, and completing and reviewing the information. Public recordkeeping burden is estimated to average 19 hours per recordkeeper, including time for gathering and maintaining monitoring data and other records, as appropriate.

Repondents: State NPDES permitting authorities, NPDES permittees (including local governments and businesses), and domestic sewage treatment works and domestic septic haulers.

Estimated Number of Respondents: 123,277 respondents, 11,914 recordkeepers.

Estimated Number of Respondents Per Respondent: 9.

Frequency of Collection: Varies with respondent (Monthly, quarterly, semi-annually, annually).

Estimated Total Annual Burden on Respondents: 17,947,910 reporting hours, 225,235 recordkeeping hours.

Send comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, to:

Sandy Farmer, U.S. Environmental Protection Agency, Information Policy Branch (2136), 401 M Street, SW., Washington, DC 20460,

and

Matt Mitchell, Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th St., NW., Washington, DC 20503.

Dated: November 4, 1994

David Schwarz,

Acting Director for Regulatory Management Division.

[FR Doc. 94–27878 Filed 11–9–94; 8:45 am]

BILLING CODE 6560–50–M

[ER–FRL–4717–2]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared October 24, 1994 through October 28, 1994 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) 260–5076.

An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 08, 1994 (59 FR 16807).

Draft EISs

ERP No. D–FHW–K40207–CA Rating LO, CA–41 Route Adoption of Alignment Project, between El Paso Avenue and CA–145, Funding, Right-of-Way Acquisition and COE Section 404 Permit, Fresno and Madera Counties, CA.

Summary: EPA expressed a lack of objections with the draft EIS, it noted that the rating does not preclude EPA from having future comments on site-specific environmental impacts and mitigation that may be identified or required during the Tier II NEPA review.

ERP No. DR–COE–K35035–CA Rating EO2, San Gabriel Canyon Sediment Management Plan, Dredging and Disposal of Sediments, Revised

Information, COE Section 404 Permit, Special Use Permit and Right-of-Entry Issuance, Angeles National Forest, San Gabriel River, Los Angeles County, CA.

Summary: EPA expressed environmental objections due to potential adverse impacts to riparian habitat, aquatic biota, biodiversity and water quality. EPA recommended that upstream sediment management techniques and reservoir operation be included to help avoid potential adverse impacts.

Final EISs

ERP No. F–COE–G30013–LA West Bank of the Mississippi River Hurricane Protection Plan, Implementation, east of the Harvey Canal, New Orleans, LA.

Summary: EPA had no objection to the proposed action. ERP No. F–FHW–G40129–AR US 67 Construction, US 67/167 to I–40 West/I–430 Interchange around the North Little Rock Metropolitan Area, Funding, Pulaski County, AR.

Summary: EPA concurs with the selection of Alternative 1 as the preferred alternative. Based upon our review of the information presented, we find that all areas of EPA responsibilities and concerns have been adequately addressed in the final EIS.

ERP No. F–NRC–G06008–LA Claiborne Uranium Enrichment Center, Construction and Operation, (NUREG–1482), NPDES Permit and Licensing, Homer, Claiborne Parish, LA.

Summary: EPA expressed environmental concern that the analysis did not provide assurance that the facility siting and operation would not result in significant disproportionate adverse impact upon the local communities.

Dated: November 7, 1994.

William D. Dickerson,

Director, FALD, Office of Federal Activities.

[FR Doc. 94–27899; Filed 11–9–94; 8:45 am]

BILLING CODE 6560–50–U

[ER–FRL–4717–1]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 260–5076 OR (202) 260–5075.

Weekly receipt of Environmental Impact Statements Filed October 31, 1994 Through November 4, 1994 Pursuant to 40 CFR 1506.9.

EIS No. 940448, DRAFT EIS, BLM, CO, White River Resource Area, Land and Resource Management Plan, Implementation, Craig District, Meeker, CO, Due: February 10, 1995, Contact: B. Curtis Smith (303) 878–3601.

EIS No. 940449, DRAFT EIS, COE, CA, Montezuma Wetlands Project, Use of Cover and Non-cover Dredged Materials to restore Wetland, Implementation, Conditional-Use-Permit, NPDES and COE Section 10 and 404 Permit, Suisum Marsh, Collinsville, Solano County, CA, Due: December 27, 1994, Contact: Dr. Peter Baye (415) 744–3322.

EIS No. 940450, FINAL EIS, BLM, CA, Oro Cruz Operation of the American Girl Canyon Project, Surface and Underground Mining, Plan of Operations Approval, Imperial County, CA, Due: December 12, 1994, Contact: Thomas Zale (619) 353–1060.

EIS No. 940451, DRAFT SUPPLEMENT, GSA, WA, Seattle Federal Courthouse Building (Project #ZWA 81061), Implementation, Site Selection, Construction and Operation, King County, WA, Due: December 27, 1994, Contact: Donna M. Meyer (206) 931–7675.

EIS No. 940452, FINAL EIS, NOA, Deep Seabed Hard Mining Exploration Project, License Issuance for the former Kennecott Mining Site (USA–4) to Ocean Minerals Mining, Pacific Ocean, Central America to HI, Due: December 27, 1994, Contact: W. Stanley Wilson (301) 713–3074.

Dated: November 7, 1994.

William D. Dickerson,

Director, FALD, Office of Federal Activities.

[FR Doc. 94–27898; Filed 11–9–94; 8:45 am]

BILLING CODE 6560–50–U

[FRL–5104–7]

Underground Injection Control Program Hazardous Waste Disposal Injection Restrictions; Petition for Exemption—Class I Hazardous Waste Injection; Chemical Waste Management, Inc.

AGENCY: Environmental Protection Agency.

ACTION: Notice of Final Decision on Exemption Reissuance.

SUMMARY: Notice is hereby given that a request for reissuance of an exemption to the land disposal restrictions under the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act has been granted to Chemical Waste Management, Inc., for the Class I injection well located at Corpus Christi, Texas. As required by 40 CFR Part 148, the company has adequately demonstrated to the satisfaction of the Environmental Protection Agency by petition and supporting documentation that, to a reasonable degree of certainty, there will be no migration of hazardous constituents from the injection zone for as long as the waste remains hazardous. This final decision allows the underground injection by Chemical Waste Management, Inc., of the specific restricted hazardous waste identified in the reissued petition, into the Class I hazardous waste injection well at the Corpus Christi, Texas facility specifically identified in the petition for as long as the basis for granting an approval of this petition remains valid, under provisions of 40 CFR 148.24. As required by 40 CFR 124.10, a public notice was issued on September 2, 1994. The public comment period ended on October 17, 1994. EPA received no comments. This decision constitutes final Agency action and there is no Administrative appeal.

DATES: This action is effective as of October 27, 1994.

ADDRESSES: Copies of the petition for reissuance and all pertinent information relating thereto are on file at the following location: Environmental Protection Agency, Region 6, Water Management Division, Water Supply Branch (6W-SU), 1445 Ross Avenue, Dallas, Texas 75202–2733.

FOR FURTHER INFORMATION CONTACT: Phil Dellinger, Unit Leader, UIC State Programs/Land Ban, EPA - Region 6, telephone (214) 665–7142.

Oscar Cabra,

Acting Director, Water Management Division (6W).

[FR Doc. 94–27879 Filed 11–9–94; 8:45 am]

BILLING CODE 6565–50–P

[FRL–5104–6]

Sustainable Economics Committee of the National Advisory Council for Environmental Policy and Technology; Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public meeting.

SUMMARY: Under the Federal Advisory Committee Act, PL 92463, EPA gives notice of a one-day meeting of the Sustainable Economies Committee of the National Advisory Council for Environmental Policy and Technology (NACEPT). NACEPT provides advice and recommendations to the Administrator of EPA on a broad range of environmental policy issues, and the Sustainable Economies Committee was

formed to identify opportunities for harmonizing environmental policy, economic activity, and ecosystem management.

The meeting is being held to discuss initial recommendations the Committee plans to submit to the Agency in January, 1995. Scheduling constraints preclude oral comments from the public during the meeting. Written comments can be submitted by mail, and will be transmitted to Committee members for consideration.

DATES: The public meeting will be held on Tuesday, December 6, 1994, from 9 a.m. to 5 p.m. in Room 383 at the National Governors' Association Hall of the States, 444 North Capitol Street, Washington, D.C.

ADDRESSES: Written comments should be sent to: Mark Joyce, Office of Cooperative Environmental Management, U.S. EPA (1601F), 401 M Street SW., Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT: Mark Joyce, Designated Federal Official, Direct line (202) 260–6889, Secretary's line (202) 260–9744.

Dated: November 3, 1994.

Mark Joyce,

Designated Federal Official.

[FR Doc. 94–27880 Filed 11–9–94; 8:45 am]

BILLING CODE 6560–50–M

[OPP–00392; FRL–4915–6]

Reregistration Eligibility Decision Documents for Mevinphos, et. al.; Notice of Availability; Opportunity to Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability of Reregistration Eligibility Decision documents; opportunity to comment.

SUMMARY: This Notice announces the availability of the Reregistration Eligibility Decision (RED) documents for the active ingredients Mevinphos (List A, case 0250), N6-Benzyladenine (List B, case 2040), and Periplanone B (List D, case 4115). This notice also announces a 60-day public comment period. The REDs for the chemicals listed above are the Agency's formal regulatory assessments of the health and environmental data base of the subject chemicals and present the Agency's determination regarding which pesticidal uses are eligible for reregistration.

DATES: Written comments on the REDs must be submitted by January 9, 1994.

ADDRESSES: Three copies of comments identified with the docket number "OPP–00392" and the case number (noted above), should be submitted to: By mail: OPP Pesticide Docket, Public Response and Program Resources Branch, Field Operations Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, deliver comments to: OPP Pesticide Docket, Rm. 1132, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA. Copies of the REDs may be obtained from the Docket Office listed above or by calling 703–305–5805.

Information submitted as a comment in response to this Notice may be claimed confidential by marking any part or all of that information as "Confidential Business Information (CBI)." Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public docket. Information not marked confidential will be included in the public docket without prior notice. The public docket and docket index will be available for public inspection in Rm. 1132 at the Virginia address listed above, from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: Technical questions on the above listed RED documents should be directed to the appropriate Chemical Review Managers: Mevinphos—Joshua First (703) 308–8032; N6-Benzyladenine—Ruby Whiters (703) 308–8079; and Periplanone B—William Wooge (703) 308–8794.

SUPPLEMENTARY INFORMATION: The Agency has issued Reregistration Eligibility Decision (RED) documents for the pesticidal active ingredients listed above. Under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended in 1988, EPA is conducting an accelerated reregistration program to reevaluate existing pesticides to make sure they meet current scientific and regulatory standards. The data base to support the reregistration of each of the chemicals listed above is substantially complete. EPA has determined that all currently registered products subject to reregistration containing these active ingredients are eligible for reregistration.

All registrants of products containing one or more of the above listed active ingredients have been sent the appropriate RED documents and must respond to labeling requirements and product-specific data requirements (if applicable) within 8 months of receipt. Products containing other active ingredients will not be reregistered until those other active ingredients are determined to be eligible for reregistration.

The reregistration program is being conducted under Congressionally mandated time frames, and EPA recognizes both the need to make timely reregistration decisions and to involve the public. Therefore, EPA is issuing these REDs as final documents with a 60-day comment period. Although the 60-day public comment period does not affect the registrant's response due date, it is intended to provide an opportunity for public input and a mechanism for initiating any necessary amendments to the RED. All comments will be carefully considered by the Agency. If any comment significantly affects a RED, EPA will amend the RED by publishing the amendment in the **Federal Register**.

Dated: October 31, 1994.

Louis True,

Acting Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. 94–27844 Filed 11–9–94; 8:45 am]

BILLING CODE 6560–50–F

FEDERAL MARITIME COMMISSION

Ocean Freight Forwarder License Revocations

Notice is hereby given that the following ocean freight forwarder licenses have been revoked by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718) and the regulations of the Commission pertaining to the licensing of ocean freight forwarders, 46 CFR 510.

License Number: 3797
Name: Advanced International Freight Services Inc.
Address: 1722 Nokia Way, Eagan, MN 55121
Date Revoked: September 26, 1994
Reason: Surrendered license voluntarily.

License Number: 1231
Name: Fermin R. Morales, Inc.
Address: P.O. Box 2050, Recinto Sur 259, San Juan, P.R. 00902
Date Revoked: October 7, 1994
Reason: Surrendered license voluntarily.

License Number: 3577
Name: Spartan Worldwide Delivery, Inc.
Address: 55 Commerce Street, New York, NY 11231
Date Revoked: October 8, 1994
Reason: Failed to furnish a valid surety bond.

License Number: 1150
Name: American International Forwarder Corp.
Address: 2044 Edison Ave., San Leandro, CA 94577
Date Revoked: October 12, 1994
Reason: Failed to furnish a valid surety bond.

License Number: 986
Name: Frank B. Kennedy dba Albatross Shipping Company
Address: 214 Peckham Place, Encinitas, CA 92024
Date Revoked: October 12, 1994
Reason: Failed to furnish a valid surety bond.

Bryant L. VanBrakle,

Director, Bureau of Tariffs, Certification and Licensing.

[FR Doc. 94–27797 Filed 11–9–94; 8:45 am]

BILLING CODE 6730–01–M

Ocean Freight Forwarder License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission applications for licenses as ocean freight forwarders pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718 and 46 CFR 510).

Persons knowing of any reason why any of the following applicants should not receive a license are requested to contact the Office of Freight Forwarders, Federal Maritime Commission, Washington, DC 20573.

Pactrans (USA) Inc., 167–55 148th Ave., #288, Jamaica, NY 11434, Officers: Henry Lau, President, Anna To, Vice President

C & Y International, Inc., 22,157 68th Ave., South, Kent, WA 98032, Officers: Glendy Chiu, President, Shu-Chiu Wang, Vice President, Gordon J. Yeh, Vice President

Alice Sharon Welsch, 4872 SW 74th Court, Miami, FL 33155, Sole Proprietor

I.C. Assemblies, Inc., 6815 NW 84th Ave., Miami, FL 33166, Officers: Abelardo Gomez, President, Lucila Gomez, Vice President

International Transportation Experts Limited, 1801 H Crossbeam Drive, Charlotte, NC 28217, Officers: Klaus Hesse, President, Doris Larkin, Vice President

Mohawk Customs & Shipping Corp., 3 Northern Concourse, North Syracuse, NY 13212, Officers: Michael Bronowich, President, Anthony B. Borowiecki, Secretary, Robert Lynch, Treasurer

Mona Forwarding Co., 2118 Collingsfield, Sugar Land, TX 77478, Ameera Yassir, Sole Proprietor

Ocean Trade International, Inc., 9600 NW 25th Street, Suite 2–D, Miami, FL 33172, Officers: Jaime Blanco, President, Ana Blanco, Vice President

General Construction & Industrial Equipment, Inc., dba Gencie, 3900 NW 79th Ave., Suite 211, Miami, FL 33166, Officers: Fred Nordenson, President, Bryn Nordenson, Secretary

By the Federal Maritime Commission.

Dated: November 4, 1994.

Joseph C. Polking,

Secretary.

[FR Doc. 94–27798 Filed 11–9–94; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL RESERVE SYSTEM

Cho Hung Bank, 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 December 5, 1994.

A. Federal Reserve Bank of New York (William L. Rutledge, Senior Vice President) 33 Liberty Street, New York, New York 10045:

1. Cho Hung Bank, Seoul, Korea; to acquire 100 percent of the voting shares of Seoul Bank of California, Los Angeles, California.

B. Federal Reserve Bank of Chicago (James A. Bluemle, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. Citizens Banking Corporation, Flint, Michigan; to acquire 100 percent of the voting shares of Bank One Fenton, NA, Fenton, Michigan; Bank One Ypsilanti, Ypsilanti, Michigan; Bank One East Lansing, East Lansing, Michigan; and Bank One, Sturgis, Sturgis, Michigan.

Board of Governors of the Federal Reserve System, November 4, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94–27871; Filed 11–9–94; 8:45 am]

BILLING CODE 6210–01–F

Community First Bankshares, Inc.; Notice of 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.

Comments regarding the application must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than November 25, 1994.

A. Federal Reserve Bank of Minneapolis (James M. Lyon, Vice President) 250 Marquette Avenue, Minneapolis, Minnesota 55480:

1. Community First Bankshares, Inc., Fargo, North Dakota; to engage *de novo* through its nonbank subsidiary,

Community First Service Corporation, Inc., Fargo, North Dakota, in providing management consulting to nonaffiliated depository institutions, pursuant to § 225.25(b)(11) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, November 4, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94–27872; Filed 11–9–94; 8:45 am]

BILLING CODE 6210–01–F

Fred C. Lewis; Change in Bank Control Notice

Acquisition of Shares of Banks or Bank Holding Companies

The notificant listed below has applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notice is available for immediate inspection at the Federal Reserve Bank indicated. Once the notice 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 indicated for the notice or to the offices of the Board of Governors. Comments must be received not later than November 25, 1994.

A. Federal Reserve Bank of Minneapolis (James M. Lyon, Vice President) 250 Marquette Avenue, Minneapolis, Minnesota 55480:

1. Fred C. Lewis, Twig, Minnesota; to acquire 23.17 percent of the voting shares of North Shore Financial Corporation, Duluth, Minnesota, and thereby indirectly acquire North Shore Bank of Commerce, Duluth, Minnesota.

Board of Governors of the Federal Reserve System, November 4, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94–27873; Filed 11–9–94; 8:45 am]

BILLING CODE 6210–01–F

PAB Bankshares, Inc., et al.; Acquisitions of Companies Engaged in Permissible Nonbanking Activities

The organizations listed in this notice have 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.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated for the application or the offices of the Board of Governors not later than November 25, 1994.

A. Federal Reserve Bank of Atlanta (Zane R. Kelley, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303:

1. PAB Bankshares, Inc., Valdosta, Georgia; to acquire First Federal Savings Bank of Bainbridge, Brainbridge, Georgia, and thereby indirectly acquire First Service and Development Corporation, and Empire Financial Services, Inc., both of Bainbridge, Georgia, and thereby engage in operating a savings association, pursuant to § 225.25(b)(9) of the Board's Regulation Y, and making and servicing loans, pursuant to § 225.25(b)(1) of the Board's Regulation Y. The proposed activity will be conducted throughout the state of Georgia.

B. Federal Reserve Bank of Chicago (James A. Bluemle, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. Republic Bancorp, Inc., Owosso, Michigan; to acquire through its majority owned subsidiary, CUB Funding, Calabasas, California, a one-third equity interest, in Premier Partners (a California Joint Venture), Northridge, California, and thereby engage in the nonbanking activity of originating, funding, and servicing residential mortgage loans on a retail basis, pursuant to § 225.25(b)(1) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, November 4, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94–27874; Filed 11–9–94; 8:45 am]

BILLING CODE 6210–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Notice of Meeting of the Advisory Committee to the Director, NIH

Pursuant to Pub. L. 92–463, notice is hereby given of the meeting of the Advisory Committee to the Director, NIH, December 1–2, 1994, Conference Room 10, Building 31, National Institutes of Health, Bethesda, Maryland 20892.

The entire meeting will be open to the public from 1:30 p.m. on December 1, to recess and on December 2 from 8:30 a.m. to adjournment. The topics proposed for discussion include (1) Report of the Human Embryo Panel; (2) Implementation of External Advisors Report on the Intramural Program; (3) Clinical Research Plans for the Future; (4) Reinvention of Extramural Research Administration; and (5) Report of Meetings on Cooperative Research and Development Agreements (CRADAs). Attendance by the public will be limited to space available.

Ms. Janice Ramsden, Program Assistant, Office of the Deputy Director, National Institutes of Health, 1 Center Drive MSC 0159, Bethesda, Maryland 20892–0159, telephone (301) 496–0959, fax (301) 402–1229, will furnish the meeting agenda, roster of committee members, and substantive program information upon request. Any individual who requires special assistance, such as sign language interpretation or other reasonable accommodations, should contact Ms. Ramsden no later than November 18, 1994.

Dated: November 4, 1994.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 94–27813 Filed 11–9–94; 8:45 am]

BILLING CODE 4140–01–M

National Heart, Lung, and Blood Institute; Notice of Closed Meetings

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following Heart, Lung, and Blood Special Emphasis Panel (SEP) meetings:

Name of SEP: Intervention to Improve Asthma Management and Prevention at School.
Date: November 29–30, 1994.
Time: 7:00 p.m.
Place: Holiday Inn, Bethesda, Maryland.
Contact Person: Anthony M. Coelho, Jr., Ph.D., 5333 Westbard Avenue, Room 548, Bethesda, Maryland 20892, (301) 594–7452.
Purpose/Agenda: To review and evaluate contract proposals.

Name of SEP: Genetic Determinants of High Blood Pressure.
Date: December 11–13, 1994.
Time: 7:00 p.m.
Place: Hyatt Regency, Bethesda, Maryland.
Contact Person: Lynn Amende, Ph.D., 5333 Westbard Avenue, Room 5A10, Bethesda, Maryland 20892, (301) 594–7480.
Purpose/Agenda: To review and evaluate grant applications.

Name of SEP: Review of NHLBI Minority Training Applications.
Date: December 15–16, 1994.
Time: 8:00 a.m.
Place: Holiday Inn, Bethesda, Maryland
Contact Person: Kathryn W. Ballard, Ph.D., 5333 Westbard Avenue, Room 550, Bethesda, Maryland 20892, (301) 594–7450.
Purpose/Agenda: To review and evaluate grant applications.

These meetings will be closed in accordance with the provisions set forth in sec. 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. Applications and/or proposals and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications and/or proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalog of Federal Domestic Assistance Programs Nos. 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; and 93.839, Blood Diseases and Resources Research, National Institutes of Health)

Dated: November 4, 1994.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 94–27814 Filed 11–9–94; 8:45 am]

BILLING CODE 4140–01–M

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following Initial Review Group (IRG) meeting:

Name of IRG: Heart, Lung, and Blood Program Project Review Committee.
Date: December 1, 1994.
Time: 8:00 a.m.
Place: Holiday Inn Chevy Chase, Chevy Chase, Maryland
Contact Person: Dr. Jeffrey Hurst, 5333 Westbard Avenue, Room 555, Bethesda, Maryland 20892, (301) 594–7418.
Purpose/Agenda: To review and evaluate grant applications.
The meeting will be closed in accordance with the provisions set forth in sec. 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. 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.

(Catalog of Federal Domestic Assistance Programs Nos. 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; and 93.839, Blood Diseases and Resources Research, National Institutes of Health)

Dated: November 4, 1994.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 94–27815 Filed 11–9–94; 8:45 am]

BILLING CODE 4140–01–M

Division of Research Grants; Notice of Closed Meetings

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following Division of Research Grants Special Emphasis Panels (SEPs) meetings:

Purpose/Agenda: To review individual grant applications.
Name of SEP: Microbiological and Immunological Sciences.
Date: November 28, 1994.
Time: 2:00 p.m.
Place: NIH, Westwood Building, room 226, Telephone Conference.
Contact Person: Dr. Gerald Liddel, Scientific Review Administrator, 5333 Westbard Ave., room 226, Bethesda, MD 20892, (301) 594–7167.

Name of SEP: Microbiological and Immunological Sciences.
Date: November 30, 1994.
Time: 2:00 p.m.
Place: NIH, Westwood Building, room 226, Telephone Conference.
Contact Person: Dr. Gerald Liddel, Scientific Review Administrator, 5333 Westbard Ave., room 226, Bethesda, MD 20892 (301) 594–7167.

Name of SEP: Microbiological and Immunological Sciences.
Date: December 1, 1994.
Time: 2:00 p.m.
Place: NIH, Westwood Building, room A23, Telephone Conference.
Contact Person: Dr Anita Weinblatt, Scientific Review Admin. 5333 Westbard Ave., room A23, Bethesda, MD 20892, (301) 594–7175.

Name of SEP: Chemistry and Related Sciences.
Date: December 6, 1994.
Time: 1:30 p.m.
Place: NIH, Westwood Building, room 349, Telephone Conference.
Contact Person: Dr. Gopa Rakhit, Scientific Review Administrator, 5333 Westbard Ave., room 349, Bethesda, MD 20892, (301) 594–7166.

Name of SEP: Chemistry and Related Sciences.
Date: December 7, 1994.
Time: 2:00 p.m.
Place: NIH, Westwood Building, room 334A, Telephone Conference.
Contact Person: Dr. John Beisler, Scientific Review Administrator, 5333 Westbard Ave., room 334A, Bethesda, MD 20892, (301) 594–7149.

Name of SEP: Chemistry and Related Sciences.
Date: December 13, 1994.
Time: 1:00 p.m.
Place: NIH, Westwood Building, room 334, Telephone Conference.
Contact Person: Dr. Ronald Dubois, Scientific Review Administrator, 5333 Westbard Ave., room 334, Bethesda, MD 20892, (301) 594–7163.

Purpose/Agenda: To review Small Business Innovation Research Program grant applications.
Name of SEP: Behavioral and Neurosciences.
Date: December 2, 1994.
Time: 9:00 a.m.
Place: Holiday Inn, Chevy Chase, MD.
Contact Person: Dr. Keith Murray, Scientific Review Administrator, 5333 Westbard Ave., room 325, Bethesda, MD 20892, (301) 594–7145.

Name of SEP: Microbiological and Immunological Sciences.
Date: December 7–8, 1994.
Time: 8:30 a.m.
Place: Holiday Inn, Bethesda, MD.
Contact Person: Dr. Gerald Liddel, Scientific Review Administrator, 5333 Westbard Ave., room 226, Bethesda, MD 20892, (301) 594–7167.
The meetings will be closed in accordance with the provisions set forth in sec 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. Applications and/or proposals and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications and/or proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalog of Federal Domestic Assistance Program Nos. 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 4, 1994.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 94–27816 Filed 11–9–94; 8:45 am]

BILLING CODE 4140–01–M

Public Health Service

Agency Forms Submitted to the Office of Management and Budget for Clearance

The following request has been submitted to the Office of Management and Budget (OMB) for clearance in compliance with the Paperwork Reduction Act (44 USC Chapter 35). Expedited review by OMB has been requested as described below.

Call PHS Reports Clearance Officer on 202–690–7100 for a copy of the submission.

Cosmetics Adverse Reaction Hotline Reports Guide—New—In support of the Food and Drug Administration's (FDA) Women's Health Initiatives Program, the agency is undertaking a consumer cosmetics adverse reaction program to enable the public to report directly to FDA any adverse reactions they encounter with cosmetic product usage. Both men and women will be able to report adverse rections encountered.

Under the Food, Drug and Cosmetic Act, cosmetics are defined as "articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance." Cosmetic products and ingredients are regulated after, not before, they are marketed and thus are not subject to premarket approval for safety or effectiveness for their intended use. They can only be removed from the market place when it can be demonstrated that they are adulterated or misbranded under sections 601 and 602 of the Act.

Almost everyone uses some cosmetic products, and many people use a great many. The number of cosmetic products grows daily and there is great diversity of intended uses and a potential for consumer harm. In addition, product formulation technology has advanced to the point where manufacturers can put together highly sophisticated products that were unknown even a few years ago. With this vigorous activity in the cosmetic market place, there is considerable uncertainty about the prevalence and intensity of product problems being experienced by the public and there is limited capability to detect emerging problems due to new types of products or changing consumer usages.

The agency currently has two monitoring systems in place, the Cosmetic Adverse Reaction Monitoring Program and the Voluntary Cosmetic Product Experience Program. However, both of these systems are passive in nature and each has limitations in terms of timeliness or completeness of reporting.

The toll-free hotline program will allow consumers to report to the agency detailed information on the nature and severity of cosmetic adverse reactions that they experience. Direct entry of information reported into an on-line computer database will minimize possible errors and expedite the timeliness of data processing.

Such information will enable the agency to know the magnitude of a problem in real time. The agency also intends to provide the cosmetic industry with a listing of their products which have adverse reaction rates greater than the norm for similar products. This will enable cosmetic companies to compare their products to the rest of the industry and to correct quickly a problem with a cosmetic product.

The cosmetic adverse reaction reports received through the hotline will be used in conjunction with the cosmetic product ingredient registration program information received in accordance with 21 CFR 720. Correlation of hotline data with ingredient data from over 28,000 cosmetic product formulations will give FDA scientists a valuable insight into potentially unsafe ingredients in cosmetic products.

OMB has been requested to review and approved the hotline reports guide on an expedited basis by Friday, December 2. This approval date is necessary in order to implement the national toll-free hotline service on December 7. This date is crucial because of the outreach program needed to promote consumer awareness of cosmetic adverse reactions and have the hotline available for the holiday season. In keeping with the requirements for expedited review, we are publishing the interview guide and associated instructions. It should be noted that the information will actually be collected using a computer assisted telephone interview program which presents to the interviewer screens containing the data items and associated instructions.

Respondents: Individuals or households; Number of Respondents: 30,000; Number of Responses per Respondent; 1; Average Burden per Response: .25 hour; Estimated Annual Burden: 7,500 hours.

OMB Desk Officer: Steve Semenuk.

Because of the time frame in which OMB has been asked to act on this submission, any comments and recommendations for the proposed information collection should be provided directly to the OMB Desk Officer designated above by telephone at (202) 395–7316 or by express mail at the following address: Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, D.C. 20503.

Dated: November 7, 1994.

James Scanlon,

Director, Division of Data Policy, Office of Health Planning and Evaluation.

BILLING CODE 4160–11–M

INSTRUCTIONS
for
Guide for Collection of Consumer
Cosmetics Adverse Reaction and Injury Complaints

Preliminary Information: Enter caller's source of information of HOTLINE

Determine whether the consumer has an Adverse Reaction or an Injury to report and the date/dates the incident occurred

Determine if Medical Attention was sought and received Responses could be "Unknown" "No", or "Yes" If "Yes" is the response insert the first three letters of the medical provider in the field Doctor would be D O C tor . Hospital would be H O S | pital

Description of Adverse Reaction/Injury Event:

Verbatim Description of Incident

Allow Reporter to give a detailed description of their adverse reaction or injury Attempt to keep Reporter on the subject and event

Adverse Reaction:

Ascertain "Area of Body" to which product was applied and on which reaction occurred Code may be entered now or later by reviewer as time permits

Reaction Confined to area of Application:

Was the adverse reaction confined to the area of application or did it spread to other parts of the body?

Ascertain "Type of Adverse Reaction" Code may be entered now or later by reviewer as time permits

Reaction Appeared — At what time interval did the adverse reaction first appear? Code may be entered now or later by reviewer as time permits

Injury:

Ascertain type of injury and object or ignitor

Product opened by — If the product contained a foreign body or substance determine who originally open the product

Product/Manufacturer Information:

Brand Name: Ascertain the brand name of the product as it appears on the product label The Product Category Code (PCC) may be entered now or later by reviewer as time permits

Packaging Information — Determine is product was part of a kit or group of products Does the label have a Batch Code Lot Number or Expiration Date? What was the approximate date of purchase and what was the date or dates the product was used?

Manufacturer's Name and Address — Ascertain the manufacturer's name and address as it appears on the product label

Complaint reported to Manufacturer — Was the complaint reported to the manufacturer?

Where was product purchased — Ascertain the name/type of store at which the product was purchased.

Reporter/Complainant Information: **REQUIRED STATEMENT: MUST BE READ EXACTLY AS WRITTEN!**

"Prior to requesting the name, address and telephone number of the reporter and/or complainant for the Hotline, I am required to read the following passage to you: 'Under Section 21.10, Title 21, Code of Federal Regulations, Entitled, Policy Concerning Records About Individuals, which states information about the individuals in Food and Drug Records shall be collected, maintained, used, and disseminated so as to protect the right to privacy of the individual to the fullest possible extent consistent with the laws related to disclosure of information to the general public, the law enforcement responsibilities of the agency, and administrative and program management needs.'"

"The giving of this information is voluntary, but is extremely helpful in providing us with meaningful data. It will be used to send you an acknowledgement and thank you for your participation in this program, and if necessary to contact you for additional information."

Reporter s Name Relationship to Complainant and Address

Ascertain the Reporter's name and relationship to the individual experiencing the adverse reaction or injury Relationship would be entered as S E L f Husband would be H U S band

(Determine Reporter s address and home and/or work telephone numbers Determine Reporter s mailing address is different from their residential address

Complainant Information

If Reporter s Relationship to Complainant is other than SELF determine address and telephone information

Ascertain Complainant s sex skin type any special skin conditions, or related health problems Examples of skin type special skin conditions and related health problems can be found on code sheet

OMB No: _____
Expiration Date: _____

Public Reporting burden for the hotline calls is estimated to average 15 minutes per call. You may send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Reports Clearance Officer, PHS, Hubert H. Humphrey Building, Room 721-B, 200 Independence Avenue, S.W., Washington, DC 20201, Attn: PRA.

Guide for Collection of Consumer Cosmetics Adverse Reaction and Injury Complaints
Version 10/94

Preliminary Information: Where did you learn of the HOTLINE?: _ _ _ | _____

Adverse Reaction or Injury: A I Date/Dates of Incident: _____

Medical Attention Sought: Unk No Yes: (From) _ _ _ | _____

Description of Adverse Reaction/Injury Event:

Verbatim Description of Incident:

Adverse Reaction:

Area of Body - to which product was applied: _____ Code: _____
- on which reaction occurred: _____ Code: _____

Reaction Confined to area of Application: Y N Spread: Y N

Type of Adverse Reaction: _____ Code: _____

Reaction Appeared: _____ Code: _____

Injury:

Type of Injury: Cut: _____ Object: _____
Ignition: _____ Glass: _____
Inhalation: _____ Ingestion: _____ Other: _____

Product opened by: _____

Product/Manufacturer Information:

Brand Name: _____ PCC: ___

Packaging/Application Type: _____ Code/Lot Number: _____ Exp Date: _____

Approximate Date of Purchase: _____ Date or Dates Used: _____

Manufacturer's Name: _____

Address:

Complaint reported to Manufacturer Y N

Where was product purchased: _____

INTERVIEWER: "READ REQUIRED STATEMENT TO REPORTER/COMPLAINANT BEFORE COMPLETING THIS SECTION"

Reporter/Complainant Information:

Reporter's Name _____ Relationship to Complainant _ _ _ ___

Address Mailing Address

Home Ph ( ) _____ _____ Work Ph: (_____ _____

Complainant's Name. _____ Age _____ Sex M F

Address Mailing Address

Home Ph ( ) _____ _____ Work Ph (_____ _____

Skin Type _____ Special Skin Conditions _____

Health Problems _____

Complaint No: _____ Operator ID _____ Date _____ Reviewer _____ Date _____

[FR Doc. 94–27888 Filed 11–9–94; 8:45 am]
BILLING CODE 4160–11–C

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Community Planning and Development

[Docket No. N–94–1917; FR–3778–N–10]

Federal Property Suitable as Facilities to Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

EFFECTIVE DATES: [Insert date of publication.]

ADDRESS: For further information, contact William Molster, Department of Housing and Urban Development, room 7262, 451 Seventh Street SW, Washington, DC 20410; telephone (202) 708–1226; TDD number for the hearing- and speech-impaired (202) 708–2565, (these telephone numbers are not toll-free), or call the toll-free Title V information line at 1–800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration*, No. 88–2503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: November 4, 1994.

Jacquie M. Lawing,

Deputy Assistant Secretary for Economic Development.

[FR Doc. 94–27750 Filed 11–9–94; 8:45 am]
BILLING CODE 4210–29–M

Office of the Assistant Secretary for Fair Housing and Equal Opportunity

[Docket No. N–94–3640; FR 3348–N–09]

Certification of Substantially Equivalent Agencies; and Interim Referral Agencies; Annual Notice

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Notice.

SUMMARY: As required by 24 CFR 115.6(f), this Notice announces: (1) An updated consolidated list of all certified agencies; (2) a list of all agencies whose certification has been withdrawn since publication of the previous notice on July 23, 1993 (58 FR 39561); (3) a list of agencies for which notice of denial of certification has been published, in accordance with 24 CFR 115.7(c) since publication of the July 23, 1993 notice; (4) a list of agencies for which a notice of comment has been published in accordance with 24 CFR 115.6(b), and whose status remains pending; (5) a list of agencies for which notice of proposed withdrawal of certification has been published in accordance with 24 CFR 115.8(c), and whose withdrawal remains pending; and (6) a list of agencies with which an agreement for interim referrals or other utilization of services has been entered into under 24 CFR 115.11 and remains in effect. These announcements are applicable for calendar year 1993.

FOR FURTHER INFORMATION CONTACT: Marcella Brown, Chief, Fair Housing Assistance Programs Division, Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 Seventh Street, SW, Room 5234, Washington, DC 20410–2000, telephone number (202) 708–0455 (voice/TDD).

SUPPLEMENTARY INFORMATION:

Background

Under the Fair Housing Act (42 U.S.C. 3600–3619), the Department is authorized to investigate complaints alleging discrimination in housing. Section 810(f) of the Fair Housing Act requires the Department to refer complaints to agencies that have "substantially equivalent" fair housing standards, as determined and certified by the Department. The certification standards are codified at 24 CFR part 115.

Announcements

This notice announces, among other things, the 1993 list of agencies certified under 24 CFR 115.6(f), and the agencies with which the Department has entered into an agreement for interim referrals of complaints in accordance with 24 CFR 115.11.

In accordance with the requirements of 24 CFR 115.6(f), the Department makes the announcements set forth below. These announcements are applicable for the calendar year 1993.

Updated Consolidated List of Certified Agencies

The agencies administering the fair housing laws of the following States and localities were certified under section 810(f) of the Fair Housing Act and 24 CFR Part 115.6(d).

States (2)

North Carolina
Texas

Localities (0)

Withdrawal of Certification; Denial of Certification; and Pending Requests for Certification

The Department announces that for calendar year 1993 no certification has been withdrawn since publication of the July 23, 1993 notice; no notice of denial of certification has been published since the July 23, 1993 notice; and no agencies for which a notice of comment was published under 24 CFR 115.6(b) have pending requests for certification.

Interim Certification

The Department also announces that the agencies administering the fair housing laws of the following States and localities entered into an agreement for interim referrals subsequent to September 12, 1988. These agencies were also considered to have interim certification in accordance with section 810(f)(4) of the Act. The agencies and the dates of their agreements are as follows:

States (24)

Arizona—May 4, 1992
Colorado—September 13, 1992
Connecticut—November 25, 1992
Florida—December 12, 1991
Georgia—November 19, 1992
Hawaii—May 14, 1993
Illinois—September 11, 1992
Indiana—August 9, 1991
Iowa—December 3, 1992
Kansas—September 11, 1992
Kentucky—April 6, 1993
Louisiana—April 29, 1993
Massachusetts—September 11, 1992
Missouri—December 3, 1992
Montana—September 24, 1992
Nebraska—April 20, 1992
Ohio—November 16, 1992
Oklahoma—October 7, 1992
Pennsylvania—October 19, 1992
South Carolina—December 31, 1990

Tennessee—March 29, 1993
Utah—December 16, 1993
Virginia—February 5, 1993
West Virginia—October 19, 1992

Localities (32)

Phoenix, AZ—March 29, 1993
Clearwater, FL—August 12, 1993
Orlando, FL—November 19, 1992
Pinellas County, FL—October 29, 1992
St. Petersburg, FL—March 10, 1993
Tampa, FL—December 3, 1992
Springfield, IL—October 7, 1992
Olathe, KS—November 16, 1993
Salina, KS—October 20, 1992
Louisville-Jefferson County, KY—May 5, 1993
Lexington-Fayette Urban County, KY—November 15, 1993
Elgin, IL—June 1, 1993
Evanston, IL—September 13, 1993
Springfield, IL—October 7, 1992
Gary, IN—July 19, 1993
South Bend, IN—December 21, 1993
Dubuque, IO—January 12, 1993
Cambridge, MA—December 3, 1992
Kansas City, MO—June 14, 1993
Asheville-Buncombe County, NC—May 18, 1992
Charlotte, NC—August 11, 1992
Charlotte-Mecklenburg County—August 11, 1992
Greensboro, NC—October 7, 1992
New Hanover, NC—July 3, 1993
Winston-Salem, NC—August 11, 1992
Omaha, NE—June 18, 1993
Dayton, OH—June 18, 1993
Shaker Heights, OH—September 24, 1992
Dallas, TX—June 12, 1992
Knoxville, TN—July 27, 1993
Charleston, WV—September 11, 1992
King County, WA—October 19, 1992

Dated: September 15, 1994.

Roberta Achtenberg,

Assistant Secretary for Fair Housing and Equal Opportunity.

[FR Doc. 94–27896 Filed 11–9–94; 8:45 am]

BILLING CODE 4210–28–P

[Docket No. N–94–3691; FR–3348–N–11]

State and Local Fair Housing Laws: Notice of Initial Determination Concerning Substantial Equivalency of the Fair Housing Laws of the States of Connecticut, Ohio, South Carolina, and the City of Cambridge, Massachusetts

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Notice and request for comments.

SUMMARY: In accordance with 24 CFR 115.6(c), this notice announces the Department's initial determination that the fair housing laws of the States of Connecticut, Ohio and South Carolina, and the city of Cambridge, Massachusetts, are substantially equivalent, on their face, to the Fair Housing Act. This notice solicits comments from the public on the initial determinations made with respect to these three States and this locality. This notice also solicits comments on the Department's proposed determinations that the present practices and past performance of the agency enforcing the fair housing law of the three States and the locality demonstrate that, in operation, the fair housing laws of the States and the locality provide rights and remedies that are substantially equivalent to those available under the Fair Housing Act.

DATES: Comment Due Date: December 12, 1994.

ADDRESSES: Interested persons are invited to submit comments regarding this notice to the Office of General Counsel, Rules Docket Clerk, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410. Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection and copying on weekdays between 7:30 a.m. and 5:30 p.m. at the above address.

FOR FURTHER INFORMATION CONTACT: Marcella O. Brown, Chief, Fair Housing Assistance Programs Division, Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 Seventh Street, SW, Room 5234, Washington, DC 20410, telephone (202) 708–0455 (voice/TDD). (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION:

Background

Under the Fair Housing Act (42 U.S.C. 3600–3619), the Department is authorized to investigate complaints alleging discrimination in housing. (Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988, is cited as the "Fair Housing Act.") Section 810(f) of the Fair Housing Act requires the Department to refer complaints to State and local agencies that have "substantially equivalent" fair housing standards, as determined and certified by the Department.

Part 115 of the Department's regulations (24 CFR part 115) contains the certification standards and the procedures for certifying State and local fair housing laws that provide substantive rights and remedies for alleged discriminatory housing practices that are substantially equivalent to those provided in the Fair Housing Act.

Announcement of Initial Determinations and Solicitation of Comments

In accordance with 24 CFR 115.6(c)(1), this notice announces that the fair housing laws of the States of Connecticut, Ohio, South Carolina and the city of Cambridge, MA, have been determined by the Assistant Secretary for Fair Housing and Equal Opportunity to be substantially equivalent, on their face, to the Fair Housing Act. The Assistant Secretary has determined, after application of the criteria set forth in 24 CFR 115.3 and 115.4, that the fair housing laws for these three States and this locality provide, on their face, substantive rights and remedies for alleged discriminatory housing practices that are substantially equivalent to those provided in the Fair Housing Act.

Following a review of performance standards and other materials pertaining to the fair housing laws of these three States and this locality, the Department expects to make final determinations that the law of each of the three States and the locality, in operation, provides rights and remedies that are substantially equivalent to those available under the Fair Housing Act. The Department intends to execute a Memorandum of Understanding with the agency charged with enforcement of the fair housing law of each State and locality in accordance with 24 CFR 115.6(c).

In accordance with 24 CFR 115.6(b), the public is invited to submit written comments on this notice. Specifically, the Department requests written comments on the proposed determinations that the current practices and past performance of the agencies charged with administration and enforcement of the fair housing laws of the three States and the locality demonstrate that, in operation, these laws provide substantive rights and remedies that are substantially equivalent to the Fair Housing Act. This notice also invites comments from the public on the Department's determination that the fair housing laws of these three States and the locality are, on their face, substantially equivalent to the Fair Housing Act.

In commenting on this notice, the Department requests that commenters clearly identify the State or the locality for which comments are submitted.

Dated: September 15, 1994.

Roberta Achtenberg,

Assistant Secretary for Fair Housing and Equal Opportunity.

[FR Doc. 94–27894 Filed 11–9–94; 8:45 am]

BILLING CODE 4210–28–P

[Docket No. N–94–3691; FR–3348–N–10]

State and Local Fair Housing Laws: Notice of Initial Determination Concerning Substantial Equivalency of the Fair Housing Laws of Various States and Localities

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Notice and request for comments.

SUMMARY: In accordance with 24 CFR 115.6(c), this notice announces the Department's initial determination that the fair housing laws of certain States and localities are substantially equivalent, on their face, to the Fair Housing Act. The States and localities are listed in the Supplementary Information section of this notice. This notice solicits comments from the public on the initial determinations made with respect to each State and locality. This notice also solicits comments on the Department's proposed determinations that the present practices and past performance of the agency enforcing the fair housing law of the States and localities demonstrate that, in operation, the fair housing laws of these States and localities provide rights and remedies that are substantially equivalent to those available under the Fair Housing Act.

DATES: Comment Due Date: December 12, 1994.

ADDRESSES: Interested persons are invited to submit comments regarding this notice to the Office of General Counsel, Rules Docket Clerk, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410. Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection and copying on weekdays between 7:30 a.m. and 5:30 p.m. at the above address.

FOR FURTHER INFORMATION CONTACT: Marcella O. Brown, Chief, Fair Housing Assistance Programs Division, Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 Seventh Street, SW, Room 5234, Washington, DC 20410, telephone (202) 708–0455 (voice/TDD). (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION:

Background

Under the Fair Housing Act (42 U.S.C. 3600–3619), the Department is authorized to investigate complaints alleging discrimination in housing. (Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988, is cited as the "Fair Housing Act.") Section 810(f) of the Fair Housing Act requires the Department to refer complaints to State and local agencies that have "substantially equivalent" fair housing standards, as determined and certified by the Department.

Part 115 of the Department's regulations (24 CFR part 115) contains the certification standards and the procedures for certifying State and local fair housing laws that provide substantive rights and remedies for alleged discriminatory housing practices that are substantially equivalent to those provided in the Fair Housing Act.

Announcement of Initial Determinations and Solicitation of Comments

In accordance with 24 CFR 115.6(c)(1), this notice announces that the fair housing laws of the following States and localities have been determined by the Assistant Secretary for Fair Housing and Equal Opportunity to be substantially equivalent, on their face, to the Fair Housing Act. The Assistant Secretary has determined, after application of the criteria set forth in 24 CFR 115.3, that the fair housing laws for these States and localities provide, on their face, substantive rights and remedies for alleged discriminatory housing practices that are substantially equivalent to those provided in the Fair Housing Act.

The States and localities are as follows:

States (23)

California
Colorado
Delaware
Florida
Georgia
Hawaii
Illinois
Indiana
Iowa
Kansas
Kentucky
Louisiana
Maryland
Missouri
Montana
Oklahoma
Pennsylvania
Rhode Island
Tennessee
Utah
Virginia
Washington
West Virginia

Localities (35)

Phoenix, AZ
Clearwater, FL
Hillsborough County, FL
Orlando, FL
Pinellas County, FL
St. Petersburg, FL
Tampa, FL
Des Moines, IA
Springfield, IL
Hammond, IN
Olathe, KS
Salina, KS
Louisville-Jefferson County, KY
Lexington-Fayette Urban County, KY
Elgin, IL
Evanston, IL
Springfield, IL
Gary, IN
South Bend, IN
Dubuque, IO
Kansas City, MO
Asheville-Buncombe County, NC
Charlotte-Mecklenburg County, NC
Greensboro, NC
New Hanover, NC
Winston-Salem, NC
Omaha, NE
Dayton, OH
Shaker Heights, OH
Dallas, TX
Fort Worth, TX
Knoxville, TN
Charleston, WV
Huntington, WV
King County, WA

Following a review of performance standards and other materials pertaining to the fair housing laws of the above-listed States and localities, the Department expects to make final determinations that the law of each State and locality, in operation, provides rights and remedies that are substantially equivalent to those available under the Fair Housing Act. The Department intends to execute a Memorandum of Understanding with the agency charged with enforcement of the fair housing law of each State and locality in accordance with 24 CFR 115.6(c).

In accordance with 24 CFR 115.6(b), the public is invited to submit written comments on this notice. Specifically, the Department requests written comments on the proposed determinations that the current practices and past performance of the State and local agencies charged with administration and enforcement of the fair housing laws of the above-listed States and localities demonstrate that, in operation, these laws provide substantive rights and remedies that are substantially equivalent to the Fair Housing Act. This notice also invites comments from the public on the

Department's determination that the fair housing laws of the above-listed States and localities are, on their face, substantially equivalent to the Fair Housing Act.

In commenting on this notice, the Department requests that commenters clearly identify the State or locality for which comments are submitted.

Dated: September 23, 1994.

Roberta Achtenberg,

Assistant Secretary for Fair Housing and Equal Opportunity.

[FR Doc. 94-27895 Filed 11-9-94; 8:45 am]

BILLING CODE 4210-28-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Receipt of Application(s) for Permit

The following applicant has applied for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531, *et seq.*)

PRT-676811

APPLICANT: Regional Director, Region 2, U.S. Fish and Wildlife Service, Albuquerque, New Mexico.

The applicant requests an amendment to the Regional Director's Blanket Endangered Species Permit to include take activities for the Louisiana black bear *(Ursus americanus luteolus)* for the purpose of scientific research and enhancement of propagation and survival of the species as prescribed by Service recovery documents.

ADDRESSES: Written data or comments should be submitted to the Assistant Regional Director, Ecological Services, U.S. Fish and Wildlife Service, P.O. Box 1306, Albuquerque, New Mexico 87103, and must be received by the Assistant Regional Director within 30 days for the date of this publication.

Documents and other information submitted with this application are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to the above office within 30 days of the date of publication of this notice. (See **ADDRESSES** above.)

Lynn B. Starnes,

Acting Regional Director.

[FR Doc. 94-27847 Filed 11-9-94; 8:45 am]

BILLING CODE 4310-55-M

INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 32549]

Burlington Northern Inc. and Burlington Northern Railroad Company—Control and Merger—Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company

AGENCY: Interstate Commerce Commission.

ACTION: Decision No. 5; Notice of Acceptance of Application.

SUMMARY: The Commission is accepting for consideration the application filed October 13, 1994, by Burlington Northern Inc. (BNI), Burlington Northern Railroad Company (BN), Santa Fe Pacific Corporation (SFP), and The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) (collectively applicants), seeking Commission approval and authorization under 49 U.S.C. 11343–45 for: (1) BNI's acquisition of, control of, and merger with SFP; (2) the resulting common control of BN and Santa Fe by the merged company; and (3) the merger of the two railroad entities. Applicants are directed to provide certain additional information.

DATES: The effective date of this decision is November 10, 1994. Written comments on the primary application, including initial lists of protective conditions, must be filed with the Commission no later than December 27, 1994, and second lists of protective conditions must be filed by January 24, 1995. Responsive applications must be filed by February 8, 1995. For further information, see the attached procedural schedule.[1]

ADDRESSES: An original and 20 copies of all documents must refer to Finance Docket No. 32549 and be sent to Office of the Secretary, Case Control Branch, Attn: Finance Docket No. 32549, Interstate Commerce Commission, 1201 Constitution Avenue, NW, Washington, DC 20423.

In addition, one copy of all documents in this proceeding must be sent to each of applicants' representatives: (1) Betty Jo Christian, Esq., Steptoe & Johnson, 1330 Connecticut Avenue, N.W., Washington, DC 20036–1795; and (2) Erika Z. Jones, Esq., Mayer, Brown & Platt, 2000 Pennsylvania Avenue, N.W., Suite 6500, Washington, DC 20006.

[1] The procedural schedule set forth below was adopted in Decision No. 4 in this proceeding, served October 5, 1994.

FOR FURTHER INFORMATION CONTACT: Beryl Gordon or Chris Oehrle (202) 927–5610. [TDD for the hearing impaired: (202) 927–5721.]

SUPPLEMENTARY INFORMATION: On October 13, 1994, pursuant to 49 U.S.C. 11343–45 and our rules at 49 CFR 1180.4, applicants filed an application for approval of BNI's acquisition of, control of, and merger with SFP, the resulting common control of BN and Santa Fe by the merged company, the consolidation of BN and Santa Fe railroad operations and the merger of BN and Santa Fe. Applicants are also seeking exemption from regulation under 49 U.S.C. 10505 for the merged holding company and merged railroad to control The Wichita Union Terminal Railway Company (WUTR) [Finance Docket No. 32549 (Sub-No. 1)] and for eleven construction projects related to the primary application [Finance Docket No. 32549 (Sub-No. 2 through Sub-No. 12)].[2] We are accepting for consideration

[2] Under 49 CFR 1180.4(c)(2)(vi), all directly related applications, petitions, and notices of exemption must be filed concurrently with the primary control and merger application. We note that there are two pending proceedings that may be related to the proposed merger. The question is whether these proceedings are directly related to the merger within the meaning of 49 CFR 1180.4(c)(2)(vi).

The first proceeding is Docket No. AB–423 (Sub-No. 1X), which involves a petition for exemption to discontinue the lease and operation of a rail yard in Houston filed by the Houston Belt & Terminal Railway Company (HBT). Although HBT is not an applicant carrier in the merger proceeding, BN has a 24% interest and Santa Fe has a 25% interest in HBT. *See* the waiver decision in Finance Docket No. 32549, Decision No. 3, served Oct. 4, 1994. The petition in Docket No. AB–423 (Sub-No. 1X) was filed on July 8, 1994, which was the same day that applicants filed their notice of intent to file the merger application in Finance Docket No. 32549. A separate decision is being issued in Docket No. AB–423 (Sub-No. 1X) directing petitioner to clarify the relationship, if any, between the subject matter of the petition for exemption and the merger transaction in Finance Docket No. 32549.

The second proceeding is Finance Docket No. 32593, which is a notice of a corporate family reorganization filed by Santa Fe under the class exemption procedures at 49 CFR 1180.2(d)(3). The reorganization involves the purchase by Santa Fe of all of the real estate and improvements now owned by four of its subsidiary railroads. According to the notice filed by Santa Fe, the purpose of the reorganization is to concentrate Santa Fe's railroad real estate holdings in a single corporation and to reduce administrative expenses. There is no mention of the proposed merger application which was filed 10 days after the filing of the notice in Finance Docket No. 32593. Notice of the transaction in Finance Docket No. 32593 will be published separately in the **Federal Register**. Santa Fe is directed in that proceeding to explain the relationship, if any, between the corporate family reorganization in Finance Docket No. 32593 and the proposed merger in Finance Docket No. 32549. Comments from other parties on Santa Fe's corporate family reorganization (including any comments alleging that the reorganization is directly related to the application in Finance Docket

Continued

the control and merger application filed in this proceeding.

Upon receipt of Commission approval and authorization and satisfaction of other conditions to closing under an Agreement and Plan of Merger dated June 29, 1994, SFP will merge with and into BNI, which will change its name to Burlington Northern Santa Fe Corporation. Each share of SFP common stock will be exchanged for 0.34 shares of newly issued BNI common stock. Upon the BNI-SFP merger, BNI will acquire and exercise control of Santa Fe in common with its existing control of BN.[3] The operations of BN and Santa Fe will be consolidated and fully integrated following the holding company merger. Applicants also seek Commission approval to merge the BN and Santa Fe legal entities, although the timing of the railroad merger will depend on tax, legal and other considerations.

As a result of the proposed transaction, the merged company will also acquire control of WUTR, in which BN and Santa Fe each own a one-third stock interest. A petition for exemption under 49 U.S.C. 10505 from the prior approval requirements of 49 U.S.C. 11343–47 for the acquisition and exercise of control of WUTR was filed concurrently with the primary application [Finance Docket No. 32549 (Sub-No. 1)].

No new securities will be issued by any company subject to Commission regulation under 49 U.S.C. 11301 to effect the merger of BNI and SFP or the common control of BN and Santa Fe. To the extent BN's succession to then-outstanding debt obligations of Santa Fe in the merger of the railroad entities may be deemed to require Commission authorization under 49 U.S.C. 11301, applicants seek such authorization, and provide the relevant information in accordance with 49 CFR 1180.6(a)(1)(iv).

In connection with the transaction, applicants propose to construct new railroad lines that are or may be subject to the jurisdiction of the Commission under 49 U.S.C. 10901. Petitions for exemption under 49 U.S.C. 10505 from the prior approval requirements of 49 U.S.C. 10901 for the construction of those railroad lines were filed concurrently with the primary application [Finance Docket No. 32549 (Sub-No. 2 through Sub-No. 12)].

BN operates approximately 25,000 miles of road and second main track in the United States and Canada. BN's principal routes are as follows: a route that extends from the Pacific Northwest (Washington, Oregon, Idaho, and southern British Columbia) across Montana, North Dakota, Minnesota, and the western edge of Wisconsin to Chicago; a route extending from the Powder River Basin in Wyoming in a southeasterly direction through Lincoln to Chicago and Kansas City; a second route extending from the Powder River Basin in Wyoming south to Denver and Fort Worth; a route extending from the Powder River Basin in Montana to Bismarck and Minneapolis/St. Paul, with an auxiliary line to the Head of the Lakes; a route from Denver to Chicago with a junction at Lincoln; a route from Avard, Oklahoma east to Memphis and Birmingham; and a route from Chicago to Houston through Kansas City and Dallas, with an auxiliary line from St. Louis to a junction point east of Tulsa. BN's principal termini are at Seattle, Tacoma, and Spokane, Washington; Portland, Oregon; Bieber, California; Vancouver, British Columbia; Winnipeg, Manitoba; Billings, Montana; Cheyenne, Wyoming; Denver, Colorado; Duluth, Minnesota/Superior, Wisconsin; Fargo, North Dakota/Moorhead, Minnesota; Minneapolis/St. Paul, Minnesota; Chicago, Illinois; Omaha and Lincoln, Nebraska; Des Moines, Iowa; Wichita and Kansas City, Kansas; Kansas City, Springfield, and St. Louis, Missouri; Tulsa, Oklahoma; Fort Worth, Dallas, Houston, and Galveston, Texas; Memphis, Tennessee; Birmingham and Mobile, Alabama; and Pensacola, Florida. BN's principal points of interchange are at those termini and at Avard, Oklahoma.

As of December 31, 1993, BN operated approximately 22,506 miles of road track, 2,134 miles of second main track and 39 miles of other main tracks in the United States and Canada.

Santa Fe operates approximately 10,400 miles of road and secondary main tracks, creating a system of 8,500 route miles. Santa Fe's principal routes are as follows: a route from Chicago across Illinois, Iowa, Missouri, Kansas, Oklahoma, Texas, New Mexico, and Arizona to California; a second route from Kansas City to Colorado and New Mexico with an auxiliary line to Superior, Nebraska; and a route from Chicago to Dallas/Fort Worth and Houston with an auxiliary line to East Texas and Louisiana. Santa Fe's principal termini are at San Francisco/Oakland, Los Angeles, San Diego, and Barstow, California; Phoenix, Arizona; Albuquerque and Clovis, New Mexico; Denver, Colorado; El Paso, Dallas, and Houston, Texas; Kansas City, Kansas; and Chicago, Illinois.

As of December 31, 1993, Santa Fe operated approximately 8,536 miles of road track, 1,812 miles of second main track and 45 miles of other main tracks, including the lines of its wholly owned subsidiaries and leased lines.

According to applicants, the consolidation of BN and Santa Fe would be almost entirely an end-to-end transaction, which would create new single-line routes and increase, not reduce, competition. In terms of both geographic configuration and commodities handled, applicants indicate that their existing rail operations are essentially complementary to one another. BN's routes are concentrated in the Upper Midwest, the Northern Plains and the Pacific Northwest. From this defining core, BN's lines extend into the south central region of the country, but with much less market coverage than in the North. Santa Fe serves the area from California through the Southwest, reaching up through the Midwest to Chicago. The principal commodities handled by BN are coal and grain. A primary focus of Santa Fe's business is intermodal traffic.

According to applicants, both BN and Santa Fe operate in a highly competitive environment and face pervasive competition from other rail carriers as well as from trucks and barges in many markets. Applicants contend that, with only a few limited exceptions, the proposed transaction does not threaten any reduction in the vigor of intramodal competition. Applicants contend that the bulk of the BN and Santa Fe systems do not overlap in horizontal competition. Applicants also indicate that no horizontal overlap exists in the three major corridors from the mid-continent to the west coast. BN operates in the Northern Corridor; Santa Fe operates in the Southern Corridor.

No. 32549) should be addressed in Finance Docket No. 32593.

[3] Santa Fe and its majority-owned railroad subsidiaries—The Dodge City and Cimarron Valley Railway Company, The Gulf and Inter-State Railway Company of Texas, Los Angeles Junction Railway Company, Oklahoma City Junction Railway Company, Rio Grande, El Paso and Santa Fe Railway Company and Star Lake Railroad Company—are an integrated single system railroad. Santa Fe Pacific Railroad Company, a non-operating rail carrier entity, likewise is part of Santa Fe's single system. As such, the acquisition of control of Santa Fe by BNI involves the control of a single carrier within the meaning of 49 U.S.C. 11343. *See Robert W. Bethge & Raymond K. Wilson—Control Exemption—Canal Cartage Co.*, Finance Docket No. MC-F-19525 (served Nov. 29, 1989); *Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Ry.*, 366 I.C.C. 862, 865, *aff'd sub nom. Brotherhood of Ry. & Airline Clerks v. Burlington Northern Inc.*, 722 F.2d 380 (8th Cir. 1983); *Katy Indus., Inc.—Control—Missouri-Kansas-Texas R.R.*, 331 I.C.C. 405, 410–411 (1967); *Kansas City Southern Indus. Inc.—Control—Kansas City S. Ry.*, 317 I.C.C. 1, 4 (1962); *Woods Indus., Inc.—Control—United Transports, Inc.*, 85 M.C.C. 672, 675 (1960); *Louisville & Jeffersonville B. & R. Co. Merger*, 295 I.C.C. 11, 17–18 (1955), *aff'd sub nom. Alleghany Corp. v. Breswick & Co.*, 353 U.S. 151 (1957).

Where overlap is present, applicants indicate that it almost always occurs in the presence of extensive competition with other providers of freight transportation services. Applicants' analyses, however, indicate the possibility for some limited reduction in competition in the areas of Amarillo and Lubbock, Texas. Concerning this area, applicants say that they are prepared to negotiate ameliorative arrangements to address any such reductions in competition.

Applicants state that there will be few basic changes in the existing route structure. Applicants find that the Avard, OK gateway route will experience the most pronounced change. Applicants also project that California-Southeast traffic will increase significantly and that traffic on the route east of Avard to Tulsa will approximately double due to a combination of growth and internal reroutes. Applicants' traffic projections also involve increases in intermodal, merchandise, and grain traffic.

BN and Santa Fe routes between Denver and Texas and between Chicago and Texas also possess some parallel characteristics. Applicants, however, find that each route is generally far removed from its counterpart and each serves other different, but important, traffic lanes and, therefore, no major change in overall uses and traffic density is planned.

We are accepting the application for consideration because it complies with the applicable regulations, waivers, and requirements. *See* 49 U.S.C. 11343–45; 49 CFR Part 1180. We reserve the right, however, to require the filing of supplemental information from applicants or any other party or individual, as necessary to complete the record in this matter.

Although applicants have provided sufficient market analysis under 49 CFR 1180.7 for us to accept their application for consideration, we find that additional information will be necessary for us to analyze the effect of this transaction on certain other railroads. Specifically, we are concerned about railroads which have interests in either WUTR or HBT.

In our decision served October 3, 1994 [Decision No. 3], we waived our regulations at 49 CFR 1180.3(b) pertaining to WUTR and HBT by not considering either of them an "applicant carrier." Consequently, we are lacking certain information that we believe is necessary to conduct our market analysis. Therefore, applicants are directed to provide us with additional information concerning WUTR and HBT

In Finance Docket No. 32549 (Sub-No. 1), applicants seek an exemption for their control of WUTR. In their petition, applicants indicate that the Missouri Pacific Railroad Company (MP) owns the other one-third stock interest in WUTR. Applicants state in the petition that they expect MP will continue to participate in WUTR's management and that applicants' control will not impair MP's ability to obtain service from WUTR. Applicants are directed to provide copies of any agreement concerning use of that property.

Although BN and Santa Fe currently own only 24% and 25% of HBT, respectively, in the event of consolidation, their combined interests may constitute control of HBT. Therefore, we will direct applicants to provide us with the following information:

1. Identify the owners of HBT and their respective ownership percentages.

2. Identify any railroads dependent on HBT in order to interchange with other carriers (specify which carriers) or to connect their own lines through the city. Explain each dependent circumstance.

3. Explain whether the agreement or agreements governing the use of the property held or owned by HBT protect any other owners of HBT from adverse effects in the event of consolidation. Provide copies of any agreement concerning use of that property.

Because of the expedited procedural schedule, additional information will be necessary to assist us in preparing prompt and complete analysis of the transaction. Therefore, applicants are directed to provide us with a current complete set of employee operating timetables for both BN and Santa Fe.

In our Decision No. 4, served October 5, 1994, we adopted an expedited procedural schedule, and we have attached it here to give notice to all interested persons. All of the filing deadlines are in accordance with the statute and governing regulations, as modified by the expedited procedural schedule. We advise applicants and all other parties to this proceeding that, particularly because of the accelerated schedule we have adopted, they must strictly comply with all requirements.[4]

If questions arise concerning an interpretation of a requirement, they may contact the Commission's Office of Proceedings at 202–927–5610 for assistance. *See* 49 CFR 1180.4(c)(6)(iii).

The application and accompanying exhibits are available for inspection in the Public Docket Room, room 1221, at the offices of the Interstate Commerce Commission in Washington, DC.

Any interested persons, including government parties, may participate in this proceeding by submitting written comments regarding the application. Comments must be filed no later than December 27, 1994. An original and 20 copies must be filed with the Secretary, Interstate Commerce Commission, Washington, DC 20423.

Written comments must be concurrently served by first class mail on the United States Secretary of Transportation (DOT), the Attorney General of the United States (DOJ), and applicants' representatives. Written comments must also be served upon all parties of record within 10 days of service of the service list by the Commission. We plan to issue the service list shortly after comments have been received. Any person who files timely written comments shall be considered a party of record if he, she, or it so indicates in their comments. In this event, no petition for leave to intervene need be filed. Written comments shall include:

1. The docket number and title of the proceeding;

2. The name, address, and telephone number of the commenting party and its representative upon whom service shall be made;

3. The commenting party's position, *i.e.*, whether it supports or opposes the proposed transaction;

4. A statement on whether the commenting party intends to participate formally in the proceeding or merely comment upon the proposal;

5. A list of all information sought to be discovered from applicant carriers;

6. An initial list of specific protective conditions sought;

7. An analysis of the issues the Commission must consider in this proceeding. Particular attention should be given to our general policy statement for the merger or control of at least two class I railroads, 49 CFR 1180.1, the statutory criteria, and antitrust policy.

Because we have determined that this proceeding constitutes a major transaction within the meaning of our

[4] By petition filed October 28, 1994, The National Industrial Transportation League (NITL) requests that the procedural schedule adopted in and attached to our decision served October 5, 1994, Decision No. 4, be extended by adding 30 days to each of the time periods specified. NITL's primary concern is the possibility that the application will be modified or withdrawn as a result of the actions of SFP's shareholders at their meeting scheduled for November 18, 1994.

Under 49 CFR 1180.4(b)(7)(i), our decision to accept the application cannot be extended . Further, comments by parties and interested persons are not due until December 27, 1994. We see no reason to extend the procedural schedule at this time. Accordingly petitioner's request is denied.

rail consolidation rules, 49 CFR Part 1180, railroads filing written comments must also submit at that time a statement of whether the commenting railroad intends to file inconsistent applications, petitions for inclusion, trackage rights, or any other affirmative relief requiring an application to be filed with the Commission and a general statement of what that application is expected to include. THIS WILL BE CONSIDERED A PREFILING NOTICE WITHOUT WHICH THE COMMISSION WILL NOT ENTERTAIN APPLICATIONS FOR THIS TYPE OF RELIEF.

Comments from the Secretary of Transportation and Attorney General must be filed by January 11, 1995. Parties seeking to modify any protective conditions specified in their initial comments must file a second list of protective conditions no later than January 24, 1995. Parties shall not be permitted to seek any protective conditions other than those requested in their final list.

Parties seeking to file responsive applications must do so no later than February 8, 1995. Responsive applications include inconsistent applications, petitions for inclusion, or any other affirmative relief that requires an application to be filed with the Commission (such as trackage rights, purchase, purchase of a portion, acquisition, extension, construction, operation, pooling, terminal operations, abandonment, etc.). Parties should contact Chris Oehrle (202) 927–6288 to obtain docket numbers for their responsive applications.

Petitions for waiver or clarification by responsive applicants shall be filed no later than December 27, 1994. Each responsive application filed and accepted will be consolidated with the primary application in this proceeding.[5]

Discovery may begin immediately. The Commission will not tolerate dilatory tactics in response to discovery requests designed to elicit relevant evidence. A refusal voluntarily to supply information will be treated as an objection to the request for discovery. Responses must be served upon all parties of record, and five copies of those responses must be concurrently filed with the Commission.

We plan to conclude the evidentiary phase of this proceeding by January 2, 1996. The initial decision will be waived, and the determination of the merits of the application(s) will be made in the first instance by the entire Commission under 49 U.S.C. 11345.

Any traffic studies and data submitted in opposition to the primary application must use calendar year 1993 data and, where relevant, use depreciation accounting, in order to be comparable with the evidence submitted by applicants. Evidence supporting protestants' responsive applications must use 1993 as the base year and the depreciation accounting system, and applicants' evidence in opposition to the responsive applications must use 1993 and depreciation accounting.

We advise protestants that, if they seek to have the primary application denied, or seek conditions if approved, because they contend their ability to provide essential service and/or competition will be harmed, they must present substantial evidence in support of their positions. *See Lamoille Valley R.R. Co. v. ICC*, 711 F.2d 295 (D.C. Cir. 1983).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The application in Finance Docket No. 32549 is accepted for consideration.

2. The parties shall comply with all provisions as stated above.

3. Applicants are directed to provide the Commission's Office of Compliance and Enforcement with a current complete set of employee operating timetables for both BN and Santa Fe within 30 days of the effective date of this decision.

4. Applicants are directed to provide copies of any agreement concerning use of property operated by WUTR within 10 days of the effective date of this decision.

5. Applicants are directed to provide the following information within 10 days of the effective date of this decision:

a. Identify the owners of HBT and their respective ownership percentages.

b. Identify any railroads dependent on HBT in order to interchange with other carriers (specify which carriers) or to connect their own lines through the city. Explain each dependent circumstance.

c. Explain whether the agreement or agreements governing the use of the property held or owned by HBT could adversely affect any other owners of HBT in the event of consolidation. Provide copies of any agreement concerning use of that property.

6. This decision is effective on November 10, 1994.

Decided: November 3, 1994.

By the Commission, Chairman McDonald, Vice Chairman Phillips, and Commissioners Simmons, Morgan, and Owen. Vice Chairman Phillips recused herself in this proceeding.

Vernon A. Williams,

Secretary.

Procedural Schedule

October 13, 1994—Primary application filed.

November 10, 1994—Commission notice of acceptance of primary application published.

December 27, 1994—Comments on primary application (except DOJ, DOT) due, including initial list of protective conditions; petitions for waiver or clarification by responsive applicants due.

January 11, 1995—DOJ, DOT comments on primary application due.

January 24, 1995—Second lists of protective conditions due.

February 8, 1995—Responsive applications due; opposition to primary application due.

March 10, 1995—Commission notice of acceptance of responsive applications published.

June 8, 1995—Government parties' evidence due; opposition to responsive applications due; rebuttal in support of primary application due.

July 24, 1995—Responses to government parties' evidence due; rebuttal in support of responsive applications due.

August 14, 1995–August 18, 1995—Hearing on all evidence; witnesses to be to cross-examined only to the extent specific need is shown in order to resolve material issues of disputed fact.

October 2, 1995—Opening briefs due.

November 16, 1995—Reply briefs due.

January 2, 1996 Oral argument.

February 16, 1996 Voting Conference.

April 1, 1996 Final decision.

Notes: Immediately upon each evidentiary filing, the filing party will place all documents relevant to the filing (other than documents that are privileged or otherwise protected from discovery) in a depository open to all parties, and will make its witnesses available for discovery depositions. Access to documents subject to protective order will be appropriately restricted. Parties seeking discovery depositions may proceed by agreement.

[5] In addition to submitting an original and 20 copies of all documents filed with the Commission, the parties are encouraged to submit all pleadings and attachments as computer data contained on a 3.5-inch floppy diskette which is formatted for WordPerfect 5.1 (or formatted so that it can be converted by WordPerfect 5.1). The computer data contained on the computer diskettes submitted are subject to the protective order attached to the Commission's decision served July 15, 1994, and are for the exclusive use of Commission employees working directly with review of substantive matters in this proceeding. The flexibility provided by such computer file data will facilitate expedited review by the Commission and its staff.

Relevant excerpts of transcripts will be received in lieu of cross-examination at the hearing, unless cross-examination is needed to resolve material issues of disputed fact. Discovery on responsive applications will begin immediately upon their filing. The Administrative Law Judge assigned to this proceeding will have the authority initially to resolve any discovery disputes. The dates for filing post-hearing briefs and for oral argument before the Commission will be set upon completion of oral hearings.

[FR Doc. 94–27903 Filed 11–9–94; 8:45 am]
BILLING CODE 7035–01–P

[Docket No. AB–167; Sub-No. 1141]

Consolidated Rail Corporation—Abandonment—Between Kenton and Alger, OH

The Commission has issued a certificate authorizing the Consolidated Rail Corporation (Conrail) to abandon its 14.34-mile Alger Industrial Track between Kenton (milepost 25.16) and Alger (milepost 39.50 in Hardin, County, OH. The abandonment was granted subject to standard employee protective conditions and the condition that Conrail must not salvage or dispose of 9 bridges on the line until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.

The abandonment certificate will become effective 30 days after this publication unless the Commission finds that: (1) a financially responsible person has offered financial assistance (through subsidy or purchase) to enable rail service to be continued and (2) it is likely that the financial assistance will fully compensate Conrail.

Requests for public use conditions must be filed with the Commission and Conrail within 10 days after publication.

Any offers of financial assistance must be filed with the Commission and Conrail no later than 10 days from the publication date of this Notice. The following notation must be typed in bold face on the lower left-hand corner of the envelope containing the offer: "Office of Proceedings, AB-OFA". Any offer previously made must be remade within this 10-day period.

Information and procedures regarding financial assistance for continued rail service are contained in 49 U.S.C. 10905 and 49 CFR 1152.27. Requests for public use conditions must conform with 49 CFR 1152.28(a)(2).

Decided: November 4, 1994.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 94–27886 Filed 11–9–94; 8:45 am]
BILLING CODE 7035–01–P

[Docket No. AB–290 (Sub-No. 150X)]

Norfolk and Western Railway Company—Abandonment Exemption—in Mercer County, WV

Norfolk and Western Railway Company (NW) has filed a notice of exemption under 49 CFR Part 1152 Subpart F—Exempt Abandonments to abandon a 6.22-mile line of railroad: (1) between milepost BE–8.59 at Montcalm and milepost BE–13.9 at McComas;[1] and (2) between milepost WF–12.69 and milepost WF–13.6 at McComas, in Mercer County, WV.

NW has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) there is no overhead traffic on the line; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or with any U.S. District Court or has been decided in favor of the complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (service of environmental report on agencies), 49 CFR 1105.8 (service of historic report on State Historic Preservation Officer), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (service of verified notice on governmental agencies) have been met.

As a condition to use of this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10505(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on December 10, 1994, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[2] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[3] and trail use/rail banking requests under 49 CFR 1152.29[4] must be filed by November 21, 1994. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by November 30, 1994, with: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

A copy of any petition filed with the Commission should be sent to applicant's representative: James R. Paschall, Norfolk Southern Corporation, Three Commercial Place, Norfolk, VA 23510–2191.

If the notice of exemption contains false or misleading information, the exemption is void *ab initio*.

Applicant has filed an environmental report which addresses the abandonment's effects, if any, on the environment and historic resources. The Section of Environmental Analysis (SEA) will issue an environmental assessment (EA) by November 15, 1994. Interested persons may obtain a copy of the EA by writing to SEA (Room 3219, Interstate Commerce Commission, Washington, DC 20423) or by calling Elaine Kaiser, Chief of SEA, at (202) 927–6248. Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Decided: November 4, 1994.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 94–27887 Filed 11–9–94; 8:45 am]
BILLING CODE 7035–01–P

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[1] NW was authorized to discontinue operations between milepost BE–8.6 at Montcalm and milepost BE–13.9 at McComas in *Norfolk and Western Railway Company—Discontinuance Exemption—In Mercer County, WV*, Docket No. AB–290 (Sub-No. 83X) (ICC served May 17, 1990).

[2] A stay will be issued routinely by the Commission in those proceedings where an informed decision on environmental issues (whether raised by a party or by the Commission's Section of Environmental Analysis in its independent investigation) cannot be made prior to the effective date of the notice of exemption. See Exemption of Out-of-Service Rail Lines, 5 I.C.C.2d 377 (1989). Any entity seeking a stay on environmental concerns is encouraged to file its request as soon as possible in order to permit the Commission to review and act on the request before the effective date of this exemption.

[3] See Exempt. of Rail Abandonment—Offers of Finan. Assist., 4 I.C.C.2d 164 (1987).

[4] The Commission will accept a late-filed trail use request as long as it retains jurisdiction to do so.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Controlled Substances: Established Revised 1994 Aggregate Production Quota

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Notice of a final revised aggregate production quota for 1994.

SUMMARY: The interim notice (59 FR 49256, September 27, 1994) which established a revised 1994 aggregate production quota for methylphenidate, a Schedule II controlled substance, as required under the Controlled Substances Act (CSA) (21 USC 826), is adopted without change.

EFFECTIVE DATE: This order is effective upon November 10, 1994.

FOR FURTHER INFORMATION CONTACT: Howard McClain, Jr., Chief, Drug & Chemical Evaluation Section, Drug Enforcement Administration, Washington, DC 20537, Telephone: (202) 307–7183.

SUPPLEMENTARY INFORMATION: Section 306 of the Controlled Substances Act (21 U.S.C. 826) requires the Attorney General to establish aggregate production quotas for controlled substances in Schedules I and II each year. This responsibility has been delegated to the Administrator of the DEA pursuant to Section 0.100 of Title 28 of the Code of Federal Regulations. The Administrator, in turn, has redelegated this function to the Deputy Administrator pursuant to 59 FR 23637 (May 6, 1994).

On September 27, 1994, an interim notice establishing a revised 1994 aggregate production quota for methylphenidate was published in the **Federal Register** (59 FR 49256). All interested persons were invited to comment on or object to this proposed aggregate production quota on or before October 27, 1994. No comments or objections were received. The interim notice is adopted without change.

The Office of Management and Budget has determined that notices of aggregate production quotas are not subject to centralized review under Executive Order 12866. This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that this matter does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The Deputy Administrator hereby certifies that this action will have no significant impact upon small entities whose interests must be considered under the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The establishment of annual aggregate production quotas for Schedules I and II controlled substances is mandated by law and by international treaty obligations. While aggregate production quotas are of primary importance to large manufacturers, their impact upon small entities is neither negative nor beneficial. Accordingly, the Deputy Administrator has determined that this action does not require a regulatory flexibility analysis.

Therefore, under the authority vested in the Attorney General by Section 306 of the Controlled Substance Act of 1970 (21 U.S.C. 826), delegated to the Administrator of the DEA by Section 0.100 of Title 28 of the Code of Federal Regulations, and redelegated to the Deputy Administrator, pursuant to 59 FR 23637 (May 6, 1994), the Deputy Administrator hereby orders that the 1994 revised aggregate production quota for methylphenidate, expressed in grams of anhydrous base, be established as follows:

Basic class	Established revised 1994 quotas (in grams)
Methylphenidate	8,189,000

Dated: November 3, 1994.

[FR Doc. 94–27812 Filed 11–9–94; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF LABOR

Office of the Secretary

Bureau of International Labor Affairs; U.S. National Administrative Office; North American Agreement on Labor Cooperation; Notice of Determination Regarding Review of Submission #940004

AGENCY: Office of the Secretary, Labor.

ACTION: Notice.

SUMMARY: The U.S. National Administrative Office (NAO) gives notice that on November 4, 1994, Submission #940004 was accepted for review. The submission was filed with the NAO on September 12, 1994 by the United Electrical, Radio and Machine Workers of America (UE) and concerns the operations of an employer in Ciudad Juarez, State of Chihuahua, Mexico. The allegations of the submission relate principally to the right of freedom of association and the right to organize.

Article 16(3) of the North American Agreement on Labor Cooperation (NAALC) provides for the review of labor law matters in Canada and Mexico by the NAO. The objective of the review of the submission will be to gather information to assist the NAO to better understand and publicly report on the Government of Mexico's promotion of compliance with, and effective enforcement of, its labor law through appropriate government action, the availability of enforcement procedures, and procedural guarantees, as set out in Articles 3, 4, and 5 of the NAALC.

EFFECTIVE DATE: November 4, 1994.

FOR FURTHER INFORMATION CONTACT: Irasema T. Garza, Secretary, U.S. National Administrative Office, Department of Labor, 200 Constitution Avenue NW., Room C–4327, Washington, DC 20210. Telephone: (202) 501–6653 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: On September 12, 1994 the UE filed a submission with the NAO concerning allegations involving the operations of an employer in Ciudad Juarez, State of Chihuahua, Mexico. The allegations of the submission relate principally to the right of freedom of association and the right to organize.

Article 16(3) of the NAALC provides for the review of labor law matters in Canada and Mexico by the NAO. "Labor law" is defined in Article 49 of the NAALC to include freedom of association and the right to organize.

The procedural guidelines for the NAO, published in the **Federal Register** on April 7, 1994, specify that, in general, the Secretary of the NAO shall accept a submission for review if it raises issues relevant to labor law matters in Canada or Mexico and if a review would further the objectives of the NAALC.

Submission #940004 relates to labor law matters in Mexico. A review would also appear to further the objectives of the NAALC, as set out in Article 1, which include improving working conditions and living standards in each Party's territory; promoting, to the maximum extent possible, the labor principles set out in Annex 1 of the NAALC, among them freedom of association and the right to organize; promoting compliance with, and effective enforcement by each Party of, its labor law; and fostering transparency in the administration of labor law. Accordingly, the submission has been accepted for review. However, acceptance for review is not intended to indicate any determination as to the validity or accuracy of the allegations contained in the submission.

The objective of the review will be to gather information to assist the NAO to better understand and publicly report on the Government of Mexico's promotion of compliance with, and effective enforcement of, its labor law through appropriate government action, the availability of enforcement procedures, and procedural guarantees, as set out in Articles 3, 4, and 5 of the NAALC. The review will focus on labor laws that guarantee the right of association and the right to organize freely and prohibit interference with the efforts of workers to exercise those rights. The review will be completed, and a public report issued, within 120 days, or 180 days if circumstances require an extension of time, as set out in the procedural guidelines of the NAO.

Signed at Washington, DC, on November 4, 1994.

Irasema T. Garza,

Secretary, U.S. National Administrative Office.

[FR Doc. 94–27885 Filed 11–9–94; 8:45 am]

BILLING CODE 4510–28–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–237]

Commonwealth Edison Co.; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of a schedular exemption from the requirement of 10 CFR Part 50, Appendix J, to Facility Operating License No. DPR–19, issued to Commonwealth Edison Company, (ComEd the licensee), for operation of the Dresden Nuclear Power Station, Unit 2, located in Grundy County, Illinois.

Environmental Assessment

Identification of Proposed Action

The proposed action would grant a schedular exemption from the requirements of Section III.A.6.(b) (Type A test) of Appendix J to 10 CFR Part 50 relating to the primary reactor containment leakage testing for water cooled reactors. The purpose of the test is to assure that leakage through the primary reactor containment shall not exceed allowable leakage rate values as specified in the Technical Specifications (TS) and that periodic surveillance is performed.

The proposed action is in accordance with the licensee's request for an exemption dated October 28, 1994.

Need for the Proposed Action

The licensee requested, pursuant to 10 CFR 50.12(a), a one-time schedular exemption for Dresden, Unit 2, from the integrated leak rate test (ILRT) intervals for the Type A leak rate test required by 10 CFR Part 50, Appendix J. Section III.A.6.(b). The exemption is requested to avoid the potential for a reactor shutdown. If a forced outage is imposed to perform testing, it would present undue hardship and cost in the form of increased radiological exposure. Furthermore, if a forced outage is imposed to perform the required testing, an additional plant shutdown and startup will be required. ComEd has had to reschedule the Dresden, Unit 2, refueling outage from September 1994 to July 1995, because of two forced maintenance outages. Increasing the interval between refueling outages will cause Dresden, Unit 2, to exceed the Type A leak rate testing surveillance interval required for the Type A leak rate test which can not be performed during reactor operation.

Environmental Impacts of the Proposed Action

The proposed action includes an exemption from performing the Type A test for a maximum period of 242 days beyond the required Appendix J test interval. As stated in 10 CFR Part 50, Appendix J, the purpose of the primary containment leak rate testing requirements is to ensure that leakage rates are maintained within the TS requirements and to assure that proper maintenance and repairs are performed throughout the service life of the containment boundary components. The requested exemption is consistent with the intent of 10 CFR 50.12(a), in that it represents a one-time only schedular extension of short duration. The required leak tests will still be performed to assess compliance with TS requirements, albeit later, and to assure that any required maintenance or repair is performed. As noted in Section III.A.6.(b) of Appendix J, it was intended that the testing be performed during refueling outages or other convenient intervals. Extending the Appendix J interval by a small amount to reach the next refueling outage will not significantly impact the integrity of the containment boundary and, therefore, will not significantly impact the consequences of an accident or transient in the unlikely event of occurrence during the 242 day extended period. In order to provide an added margin of safety and to account for possible increases in the leakage rates of untested volumes during the relatively short period of the exemption, Dresden Unit 2 will impose an administrative limit for minimum pathway leakage of 85 percent of 0.75La for the remaining Unit 2 fuel cycle. Past Unit 2 local leak rate test data have, in general, demonstrated good leak rate test results. The two consecutive Type A ILRT failures that have placed Unit 2 on the accelerated test schedule were the result of the addition of Type B and C test results to the Type A leakage and not problems with the Type A test boundaries. The containment leakage rate minus the Type B and C leakages for the last two Type A test failures during D2R12 and D2R13 were 285.50 standard cubic feet per hour (scfh) and 302.62 scfh, respectively. These values are 47 percent and 50 percent of the Type A ILRT acceptance criteria of 610.56 scfh (.75La). The above data, along with the station imposed limit for minimum pathway leakage, provide a basis for showing that the probability of exceeding the off site dose rates established in 10 CFR Part 100, will not be increased by extending the current Type A testing interval for a maximum of 242 days. The proposed exemption does not affect plant nonradiological effluents and has no other environmental impact. Therefore, the Commission concludes there are no measurable environmental impacts associated with the proposed exemption.

Alternatives to the Proposed Action

Since the Commission has concluded there is no measurable environmental impact associated with the proposed exemption, any alternatives with equal or greater environmental impact need not be evaluated. The principal alternative to the exemption would be to require rigid compliance with the requirements of Section III.A.6.(b) of Appendix J to 10 CFR Part 50. Such action would not enhance the protection of the environment and would result in unjustified costs for the licensee.

Alternate Use of Resources

This action does not involve the use of any resources not considered previously in the Final Environmental Statements for Dresden, Units 2 and 3, dated November 1973.

Agencies and Persons Consulted

The staff consulted with the Illinois State official regarding the environmental impact of the proposed action. The State official had no comments.

Finding of No Significant Impact

Based upon the foregoing environmental assessment, the Commission concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the Commission has determined not to prepare an environmental impact statement for the proposed exemption.

For further details with respect to this action, see the licensee's request for exemption dated October 28, 1994, which is available for public inspection at the Commission's Public Document Room, The Gelman Building, 2120 L Street, NW., Washington, D.C., and at the local public document room located at the Morris Public Library, 604 Liberty Street, Morris, Illinois 60451.

Dated at Rockville, Maryland, this 4th day of November, 1994.

For the Nuclear Regulatory Commission.

Robert A. Capra,

Director, Project Directorate III/2, Division of Reactor Projects—III/IV, Office of Nuclear Reactor Regulation.

[FR Doc. 94–27860 Filed 11–9–94; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–309]

Maine Yankee Atomic Power Co.; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an exemption from Facility Operating License No. DPR–36, issued to Maine Yankee Atomic Power Company, (the licensee), for operation of the Maine Yankee Atomic Power Station, located in Wiscasset, Maine.

Environmental Assessment

Identification of the Proposed Action

The proposed action is in accordance with the licensee's application dated August 5, 1994, for an exemption from certain requirements of 10 CFR Part 73, Appendix B, "General Criteria for Security Personnel." The requested exemption would relieve two security officers from meeting the distant visual acuity requirements in one eye, which was not discovered at the time of their initial employment screening in 1989 and 1990.

The Need for the Proposed Action

Pursuant to 10 CFR Part 73, Appendix B, security personnel who are responsible for the protection of special nuclear material on site or in transit should, like other elements of the physical security system, be required to meet minimum criteria to ensure that they will effectively perform their assigned security-related job duties.

The Code of Federal Regulations at 10 CFR Part 73, Appendix B, Section I.B.b.(1)(a), "Vision," specifies, in part that: For each individual (security officer), distant visual acuity in each eye shall be correctable to 20/30 (Snellen or equivalent) in the better eye and 20/40 in the other eye with eyeglasses or contact lenses.

At the time of their employment in 1989 and 1990, the two subject security officers were screened using a licensee-generated form that was based on the requirements of Appendix B to 10 CFR Part 73. However, the form did not properly reflect the correct distant visual acuity requirements of the "other eye." On July 28, 1994, the discrepancy between the licensee's form and the requirements of 10 CFR Part 73, Appendix B, Section I.B.b.(1)(a) was noted for the first officer. A review of the visual examination records for all security officers found a second instance in which the distant visual acuity requirement was not met for another security officer.

The licensee has provided expert professional medical opinions asserting that each officer has normal peripheral vision, normal peripheral depth perception, and normal binocular acuity. Further, each security officer uses the right eye for firearms siting and each currently tests 20/20 in the right eye. Finally, the licensee has committed to have each security officer's vision tested by its optometrist every 6 months to ensure no significant visual deterioration occurs. The criteria to establish that no significant visual deterioration has occurred will be:

1. Vision in the better eye will be at least 20/30 corrected or uncorrected.
2. Vision in the other eye will be monitored. If eyesight in the other eye should worsen, immediate testing will be performed to demonstrate that the individual is physically capable of meeting all the requirements of the Maine Yankee Security Training and Qualification Plan prior to being reassigned duties of an armed security officer. (This testing will include the complete firearms qualification course.)
3. The remaining vision criteria of 10 CFR Part 73, Appendix B, will be met or exceeded.

Environmental Impacts of the Proposed Action

The Commission has completed its evaluation of the proposed action, including the expert professional medical opinions, vision screening results, firearms qualifications, and the proposed alternate qualification criteria the licensee has documented. The expert professional medical opinions assert that the diminished central visual acuity for each officer's left eye has existed since birth for one, and since about the age of four, for the other. Thus, the early age of onset and the nature of both conditions contribute to relative functional normality for each officer. Further, each officer has normal peripheral vision, normal peripheral depth perception, and normal binocular acuity.

The underlying purpose for requiring vision criteria for security officers is to ensure that they can effectively perform their assigned security-related job duties. Expert professional opinions assert that each officer has relative functional normality and that an exception could thus be made because of the longevity of their vision loss (they have adapted and effectively compensate for diminished central visual acuity in their left eye).

Accordingly, the Commission concludes that an exemption to allow continued service of the two subject employees as security officers at Maine Yankee Atomic Power Station would not result in a reduction in the physical protection capabilities for the protection of special nuclear material—either on site or in transit—or of Maine Yankee Atomic Power Station. Consequently, the Commission concludes that there are no significant radiological impacts associated with the proposed action.

Alternatives to the Proposed Action

Since the Commission has concluded there is no measurable environmental impact associated with the proposed action, any alternatives with equal or greater environmental impact need not be evaluated. The principal alternative to the action would be to deny the request. Denial of the requested action would not significantly enhance the environment in that the proposed action will result in visual capabilities for two security officers that are substantially equivalent to the existing requirements.

Alternative Use of Resources

This action does not involve the use of any resources not previously considered in the Final Environmental Statement Related to Operation of Maine Yankee Atomic Power Station.

Agencies and Persons Consulted

The NRC staff reviewed the licensee's request and did not consult other agencies or persons.

Finding of No Significant Impact

Based upon the environmental assessment, the Commission concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the Commission has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter dated August 5, 1994, which is available for public inspection at the Commission's Public Document Room, The Gelman Building, 2120 L Street NW., Washington, DC 20555, at the local public document room located at the Wiscasset Public Library, High Street, P.O. Box 367, Wiscasset, Maine 04578.

Dated at Rockville, Maryland, this 3rd day of November, 1994.

For the Nuclear Regulatory Commission.

Walter R. Butler,

Director, Project Directorate I–3, Division of Reactor Projects—I/II, Office of Nuclear Reator Regulation.

[FR Doc. 94–27861 Filed 11–9–94; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–286]

Power Authority of the State of New York; Notice of Withdrawal of Application for Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (the Commission) has granted the request of the Power Authority of the State of New York (the licensee) to withdraw its September 29, 1994, application for proposed amendment to Facility Operating License No. DPR–64 for Indian Point Nuclear Generating Unit No. 3, located in Westchester County, New York.

The proposed amendment would have revised the facility technical specifications to allow a one-time extension to the 30-month interval requirement for the leak rate testing of Residual Heat Removal containment isolation valves AC–732, AC–741, AC–MOV–743, AC–MOV–744, and AC–MOV–1870.

The Commission had previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on October 5, 1994 (59 FR 50777). However, by letter dated November 2, 1994, the licensee withdrew the proposed amendment.

For further details with respect to this action, see the application for amendment dated September 29, 1994, and the licensee's letter dated November 2, 1994, which withdrew the application for license amendment. The above documents are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street NW., Washington, DC and at the White Plains Public Library, 100 Martine Avenue, White Plains, New York 10610.

Dated at Rockville, Maryland, this 3rd day of November 1994.

For the Nuclear Regulatory Commission.

John E. Menning,

Acting Project Manager, Project Directorate I–I, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 94–27862 Filed 11–9–94; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–286]

Power Authority of the State of New York; Indian Point Nuclear Generating Unit No. 3; Exemption

I

The Power Authority of the State of New York (the licensee) is the holder of Facility Operating License No. DPR–64, which authorizes operation of the Indian Point Nuclear Generating Unit No. 3 (IP3). The license provides, among other things, that the licensee, is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (the Commission) now or hereafter in effect.

The facility consists of a pressurized water reactor at the licensee's site located in Westchester County, New York.

II

By letter dated September 29, 1994, the licensee requested an amendment to the Technical Specifications (TSs) that would allow Residual Heat Removal (RHR) containment isolation valves AC–732, AC–741, AC–MOV–743, AC–MOV–744, and AC–MOV–1870 Type C local leak rate tests (LLRTs) to be performed during refueling outage (RFO) 9/10, scheduled for spring of 1996. In addition, the licensee's letter requested an exemption from the requirements of the Code of Federal Regulations (CFR) since 10 CFR Part 50, Appendix J, Paragraph III.D.3, requires that licensees perform Type C tests during each reactor shutdown for refueling but in no case at intervals greater than 2 years. Type C tests are LLRTs of containment isolation valves.

The licensee commenced operating on 24-month fuel cycles in August 1992, instead of the previous 18-month fuel cycles, starting with fuel cycle 9. The requirements of 10 CFR Part 50, Appendix J, Paragraph III.D.3, indicate that Type C LLRTs must be performed during each reactor shutdown for refueling at intervals no greater than 2 years (24 months). On January 12, 1993, the NRC staff issued an exemption that allowed Type C LLRTs to be performed at intervals up to 30 months, thus, permitting operating on a 24-month fuel cycle.

Approximately 6 months after startup from RFO 8/9, IP3 began an extended unplanned nonrefueling outage. In November and December of 1994, RHR containment isolation valves AC–732, AC–741, AC–MOV–743, AC–MOV–744, and AC–MOV–1870 are due for their Type C LLRT. Currently, the interval for Type C testing of these valves is 30 months. Therefore, the licensee requested a one-time schedular exemption to allow Type C LLRTs of the above listed valves to be deferred until the 9/10 RFO, which is currently scheduled for the spring of 1996.

By letter dated November 2, 1994, the licensee requested withdrawal of the proposed changes to the TSs and modified the exemption request. Specifically, the licensee requested that the exemption extend until the return to power following the current outage, which is defined as prior to T_{avg} exceeding 350° F. The NRC staff granted the request for withdrawal of the proposed changes to the TSs in a letter dated November 3, 1994.

III

Pursuant to 10 CFR 50.12, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR part 50 when (1) the exemptions are authorized by law, will not present an undue risk to public health and safety, and are consistent with the common defense and security and (2) when special circumstances are present. According to 10 CFR 50.12(a)(2)(ii), special circumstances are present whenever application of the regulation in the particular circumstances is not necessary to achieve the underlying purpose of the rule.

The CFR at 10 CFR part 50, Appendix J, Paragraphs III.D.3, states: "Type C tests shall be performed during each reactor shutdown for refueling but in no case at intervals greater than 2 years * * *." The underlying purpose of the requirement to perform Type C containment leak rate tests at intervals not to exceed 2 years is to ensure that any potential leakage pathways through the containment boundary are identified within a time span that prevents significant degradation from continuing or being unknown, and long enough to

allow the test to be conducted during scheduled refueling outages. The requirements to perform Type C LLRTs at intervals no greater than 2 years presumed the 2-year time interval was adequate to accommodate the 12-month fuel cycles which were common when Appendix J to 10 CFR part 50 was published in 1973. However, IP3, along with several other facilities, are utilizing core designs which allow operation on a 24-month cycle. In January 12, 1993, the NRC staff issued an exemption that allowed Types B and C LLRTs to be performed at intervals up to 30 months, thus, permitting operation on a 24-month fuel cycle.

The licensee commenced operating on 24-month fuel cycles, instead of the previous 18-month fuel cycles, starting with fuel cycle 9. Fuel cycle 9 started in August 1992. Approximately 6 months after startup from 8/9 RFO, IP3 began an extended unplanned nonrefueling outage. Startup from the outage is currently expected for early 1995. After startup from the current outage, the plant expects to run until its next FRO 9/10 which is scheduled to begin in spring of 1996. In November and December of 1994, RHR containment isolation valves AC–732, AC–741, AC–MOV–743, AC–MOV–744, and AC–MOV–1870 are due for their Type C LLRT.

Currently, the interval for Type C testing of these valves is 30 months. These LLRTs are normally performed during a refueling outage when the reactor is defueled and the RHR system is not providing a source of cooling water. The current outage is a nonrefueling outage; therefore, the reactor is not defueled and RHR system is providing core cooling water. The licensee's procedure and the system design require the RHR system to be out of service in order to perform the LLRTs. The licensee has requested a one-time schedular exemption to allow Type C LLRTs of the above listed valves to be deferred to provide additional time to finalize plans to accomplish this testing.

The NRC staff has reviewed the LLRT data provided by the licensee as well as methodology used by the licensee to extrapolate LLRT data to a 30-month test interval and the staff concludes that there is reasonable assurance that the containment leakage rate would be maintained within acceptable limits with a one-time LLRT interval increase until the return to power following the current outage, which is defined as prior T_{avg} exceeding 350 °F. As a result, the application of the regulation in the particular circumstances is not necessary to achieve the underlying purpose of the rule. Thus, there are special circumstances present which satisfy the requirements of 10 CFR 50.12(a)(2)(ii).

IV

Accordingly, the Commission has determined, pursuant to 10 CFR 50.12, that (1) the exemption as described in Section III are authorized by law, will not endanger life or property, and are otherwise in the public interest and (2) special circumstances exist pursuant to 10 CFR 50.12(a)(2)(ii). Therefore, the Commission hereby grants the following exemption:

The Power Authority of the State of New York is exempt from the requirement of 10 CFR part 50, Appendix J, Paragraph III.D.3, in that the interval for Type C tests of RHR containment isolation valves AC–732, AC–741, AC–MOV–743, AC–MOV–744, and AC–MOV–1870 may be extended until the return to power following the current outage at Indian Point Nuclear Generating Unit No. 3, which is defined as prior to T_{avg} exceeding 350 °F.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this Exemption will have no significant impact on the quality of the human environment (59 FR 54478).

This exemption is effective upon issuance.

Dated at Rockeville, Maryland, this 4th day of November, 1994.

For the Nuclear Regulatory Commission.

Frederick J. Hebdon,

Acting Director, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 94–27863 Filed 11–9–94; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 030–06309; License No. 37–13129–01; EA 94–114]

Radiation Management Consultants; Philadelphia, Pennsylvania; Order Imposing Civil Monetary Penalty

I

Radiation Management Consultants (Licensee) is the holder of Byproduct Materials License No. 37–13129–01 (License) issued by the Nuclear Regulatory Commission (NRC or Commission) on April 13, 1992. The license authorizes the Licensee to possess and use certain byproduct materials in accordance with the conditions specified therein. The license is due to expire on April 30, 1997. In addition, on December 13, 1993, the Licensee requested termination of the license.

II

An inspection of the Licensee's activities was conducted on December 9–10, 1993. The results of this inspection indicated that the Licensee had not conducted its activities in full compliance with NRC requirements. A written Notice of Violation and Proposed Imposition of Civil Penalty (Notice) was served upon the Licensee by letter dated July 11, 1994. The Notice states the nature of the violations, the provision of the NRC's requirements that the Licensee had violated, and the amount of the civil penalty proposed for the violations.

The Licensee responded to the Notice in letters dated August 10, and August 19, 1994. In its response, the Licensee denies two of the violations (F and G), and either admits or partially admits the other six violations. In addition, the licensee requests remission of the civil penalty.

III

After consideration of the Licensee's response and the statements of fact, explanation, and argument for mitigation contained therein, the NRC staff has determined, as set forth in the Appendix to this Order, that Violation F should be withdrawn and that Violations A–E, G, and H, occurred as stated in the Notice and that the penalty proposed for the violations designated in the Notice should be imposed.

IV

In view of the foregoing and pursuant to Section 234 of the Atomic Energy Act of 1954, as amended (Act), 42 U.S.C. 2282, and 10 CFR 2.205, It is Hereby Ordered That:

The Licensee pay a civil penalty in the amount of $1,500 within 30 days of the date of this Order, by check, draft, money order, or electronic transfer, payable to the Treasurer of the United States and mailed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, Washington, D.C. 20555.

The Licensee may request a hearing within 30 days of the date of this Order. A request for a hearing should be clearly marked as a "Request for an Enforcement Hearing" and shall be addressed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission Washington, D.C. 20555, with a copy to the Commission's Document Control Desk, Washington, D.C. 20555. Copies also shall be sent to the Assistant General Counsel for Hearings and Enforcement at the same address and to the Regional Administrator, NRC Region I, 475 Allendale Road, King of Prussia, PA 19406.

If a hearing is requested, the Commission will issue an Order

designating the time and place of the hearing. If the Licensee fails to request a hearing within 30 days of the date of this Order, the provisions of this Order shall be effective without further proceedings. If payment has not been made by that time, the matter may be referred to the Attorney General for collection.

In the event the Licensee requests a hearing as provided above, the issues to be considered at such hearing shall be:

(a) Whether the Licensee was in violation of the Commission's requirements as set forth in the Notice referenced in Section II above, and

(b) Whether, on the basis of such violations, this Order should be sustained.

Dated at Rockville, Maryland this 3rd day of November, 1994.

James Lieberman,

Director, Office of Enforcement.

[FR Doc. 94–27864 Filed 11–9–94; 8:45 am]

BILLING CODE 7590–01–M

OFFICE OF SPECIAL COUNSEL

Appointment of Members to the Performance Review Board

AGENCY: U.S. Office of Special Counsel.

ACTION: Notice of appointment of members to the Performance Review Board.

SUMMARY: This notice publishes the names of three Performance Review Board members as required by 5 U.S.C. 4314(c)(4).

The following persons have been appointed to and will serve on the Performance Review Board for Senior Executives in the U.S. Office of Special Counsel: Susan D. McCluskey, Chief Counsel to the Chair, Federal Labor Relations Authority; Michael W. Doheny, Regional Director, Washington Regional Office, Federal Labor Relations Authority; and Mark K. Stephens, Associate General Counsel, Office of SBIC Liquidation/Litigation, Small Business Administration.

FOR FURTHER INFORMATION CONTACT: M. Marie Glover, Personnel Officer, Management Division, U.S. Office of Special Counsel, 1730 M Street NW., Suite 300, Washington, D.C. 20036–4505, (202) 653–8964.

Signed on this 4th day of November 1994.

Kathleen Day Koch,

Special Counsel.

[FR Doc. 94–27796 Filed 11–9–94; 8:45 am]

BILLING CODE 7405–01–M

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. 301–93]

Extension of Comment Period for Section 302 Investigation of Barriers to Access to the Auto Parts Replacement Market in Japan

AGENCY: Office of the United States Trade Representative.

ACTION: Extension of comment period for investigation under section 302(b)(1)(A) of the Trade Act of 1974, as amended (19 U.S.C. 2412(b)(1)(A), of the replacement market for auto parts in Japan.

SUMMARY: On October 1, 1994, the United States Trade Representative (USTR) initiated (59 FR 52034) an investigation under section 302(b)(1)(A) of the Trade Act of 1974, as amended (the Trade Act), with respect to certain acts, policies and practices of the Government of Japan that restrict or deny U.S. auto parts suppliers' access to the auto parts replacement and accessories market in Japan. Parties with a significant interest in the Japanese auto parts replacement and accessories market have requested that USTR extend the period for comments. In response to this request, USTR has decided to extend the closing date for the comment period from November 10, 1994 until December 1, 1994.

ADDRESSES: Office of the United States Trade Representative, 600 17th Street NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: David Burns, Director, Japan Affairs, (202) 395–5050, or James Southwick, Assistant General Counsel, (202) 395–7203. For further information regarding filing procedures, contact Sybia Harrison, Special Assistant to the Section 301 Committee, (202) 395–3432.

SUPPLEMENTARY INFORMATION: Comments must be filed in accordance with the requirements set forth in 15 CFR 2006.8(b) (55 FR 20593) and are due no later than noon on December 1, 1994. Comments must be in English and provided in twenty copies to: Chairman, Section 301 Committee, Room 223, USTR, 600 17th Street, NW., Washington, DC 20506.

Comments will be placed in a file (Docket 301–93) open to public inspection pursuant to 15 CFR 2006.13, except confidential business information exempt from public inspection in accordance with 15 CFR 2006.15. Confidential business information submitted in accordance with 15 CFR 2006.15 must be clearly marked "Business Confidential" in a contrasting color ink at the top of each page on each of 20 copies, and must be accompanied by a nonconfidential summary of a confidential information. The nonconfidential summary will be placed in the file that is open to public inspection.

Irving A. Williamson,

Chairman, Section 301 Committee.

[FR Doc. 94–27908 Filed 11–9–94; 8:45 am]

BILLING CODE 3190–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–34939; File No. SR–DGOC–94–05]

Self-Regulatory Organizations; Delta Government Options Corp.; Notice of Filing of Proposed Rule Change Relating to the Over-the-Counter Options Trading System Procedures for Emergency Contingencies and Disaster Recovery

November 3, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on September 9, 1994, the Delta Government Options Corp. ("Delta") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which items have been primarily prepared by the self-regulatory organization. On September 23, 1994, Delta filed an amendment to the proposed rule change.[2] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change will modify Delta's Over-The-Counter Options Trading System Procedures ("Procedures") relating to emergency contingencies and disaster recovery. In particular, Delta is adopting provisions governing (1) the waiver or suspension of Delta's procedures; (2) action by Delta's management on behalf of Delta; and (3) interpretation of Delta's rules.

[1] 15 U.S.C. § 78s(b)(1) (1988).

[2] The amendment modified certain sections of the proposed rule change to correct typographical errors and to specify which members of Delta's senior management will have authority under the proposed rule change. Letter from Barry E. Silverman, President, Delta, to Jerry W. Carpenter, Assistant Director, Securities Processing Regulation, Division of Market Regulation, Commission (September 22, 1994).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Delta 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. Delta has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) The proposed rule change will add a new Article XIX to Delta's Procedures. Article XIX contains Section 1901, "Waiver or Suspension of Procedures," Section 1902, "Action by Delta," and Section 1903, "Interpretation of Rules." These new provisions codify Delta's existing policies regarding emergency contingencies and disaster recovery.

Section 1901 will permit Delta's Board of Directors, Chairman of the Board, President, Vice President, Chief Financial Officer, Secretary, or Controller (1) to extend the time fixed by any provision of Delta's Procedures or any regulations issued by Delta for the doing of any act or acts or (2) to waive or to suspend any provision of Delta's Procedures or any regulations issued by Delta if they judge such extension, waiver, or suspension to be necessary or expedient. The extension, waiver, or suspension may remain in effect only for sixty days unless approved by Delta's Board of Directors.

Section 1901 will require that a written report of the extension, waiver, or suspension be filed with Delta and shall be available for inspection by any participant. The written report will set forth the pertinent facts, the identity of the person who authorized the extension, waiver, or suspension, and the reason the extension, waiver, or suspension was deemed necessary or expedient. No written report will be required for extensions of time of less than eight hours.

Section 1902 will permit Delta's Board of Directors, Chairman of the Board, President, Vice President, Chief Financial Officer, Secretary, Controller, or other persons designated by Delta's Board of Directors to act on behalf of Delta except where Delta's Procedures require action by the Board of Directors. Section 1903 will authorize Delta's Board of Directors, Chairman of the Board, President, any committee of the Board of Directors, or any designee of the Board of Directors to interpret Delta's Procedures.

(b) The proposed rule change will enable Delta to establish contingency planning and disaster recovery procedures that can be used in the event of an emergency, market disruption, or other unanticipated event and will permit Delta to maintain continuous operations while safeguarding the assets under its custodianship. Delta believes that the proposed rule change is consistent with the requirements of Section 17A of the Act and the rules and regulations thereunder and in particular with Section 17A(b)(3)(F) of the Act which requires that a clearing agency be organized and its rules be designed to promote the prompt and accurate clearance and settlement of securities transactions and to remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions. Delta believes the proposed rule change will greatly reduce the possibility of market disruption and insure the prompt and accurate clearance and settlement of transactions in Delta's system in the event of an emergency or other unanticipated event.

B. Self-Regulatory Organization's Statement on Burden on Competition

Delta does not believe that the proposed rule change will have an impact or impose a burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Comments have neither been solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five 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 ninety 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 submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., 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 provisions of 5 U.S.C. § 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, Washington, D.C. 20549. 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 File No SR–DGOC–94–5 and should be submitted by December 1, 1994.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–27810 Filed 11–9–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–34935; File No. SR–GSCC–94–04]

Self-Regulatory Organizations; Government Securities Clearing Corporation; Order Approving Proposed Rule Change Establishing New Categories of Netting System Membership for Futures Commission Merchants

November 3, 1994.

On July 5, 1994, the Government Securities Clearing Corporation ("GSCC") filed with the Securities and Exchange Commission ("Commission") a proposed rule change (File No. SR–GSCC–94–04) pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").[1] The proposed rule change establishes new categories of netting system membership for futures commission merchants ("FCMs"). The Commission published notice of the proposed rule change in the **Federal Register** on August 23, 1994.[2] No

[1] 15 U.S.C. § 78s(b)(1) (1988).

[2] Securities Exchange Act Release No. 34529 (August 12, 1994) 59 FR 43365.

comments were received. For the reasons discussed below, the Commission is approving the proposed rule change.

I. Description

Background

GSCC was established primarily to provide the government securities marketplace with risk protections and a means of ensuring orderly settlement of member trading activity in U.S. Treasury securities. Initially, membership criteria were specified for large dealers, interdealer brokers, and clearing banks that might benefit from GSCC's services. Following expressions of interest in netting system membership by several FCMs, GSCC is establishing a Category 1 and a Category 2 FCM netting system membership class.

An FCM is generally an entity that solicits orders, accepts orders, and/or accepts funds for the purchase or sale of exchange traded futures or options on futures. In effect, an FCM is the equivalent in the futures industry of a securities broker.[3] The determination of whether an applicant is considered a Category 1 FCM or a Category 2 FCM will be based on the determination by GSCC as to which minimum financial admission criteria such FCM satisfies.[4]

Proposed Minimum Financial Standards

The term "net capital" as used in GSCC's rules and the Commission's uniform net capital rule is the approximate accounting equivalent of the term "adjusted net capital" as that term is used in the CFTC financial requirement rule.[5] In addition, the term "net worth" as used in GSCC's rules is comparable to the concept of "net capital" in the CFTC's financial requirement rule.[6]

Given these similarities, GSCC established categories of FCM netting membership with minimum financial standards and margin requirements that are equivalent to those for Category 1 and Category 2 dealer netting members. Specifically, if an applicant is applying to become a Category 1 FCM, it must have, as of the end of the calendar month prior to the effective date of its membership, $50 million in net worth and $10 million in excess adjusted net capital[7] and must meet the same clearing fund requirements as a Category 1 dealer netting member. If an applicant is applying to become a Category 2 FCM, it must have, as of the end of the calendar month prior to the effective date of its membership, $25 million in net worth and $10 million in excess adjusted net capital and must meet the same clearing fund requirements as a Category 2 dealer netting member.[8] The minimum financial admission criteria are continuing membership standards, and a member must promptly inform GSCC any time it is not in compliance with any of the financial standards.

GSCC's rules require dealers to submit to GSCC certain financial reports that the dealers are required to file with their regulatory authorities. Because the CFTC requires all FCMs as of the close of business each month only to make and to keep a record of their computation of adjusted net capital and does not require FCMs to file such computations with their regulatory authorities, GSCC specifically will require every FCM netting member to submit to GSCC each month a copy of the computation of adjusted net capital required by the CFTC. GSCC also will require FCMs to submit to GSCC a copy of the CFTC's regulatory financial report at the time that the form is filed with the CFTC each quarter.

II. Discussion

The Commission believes that GSCC's proposed rule change is consistent with Section 17A of the Act[9] and in particular with Section 17A(b)(3)(F) of the Act.[10] Section 17A(b)(3)(F) requires, among other things, that the rules of a clearing agency be designed to assure the safeguarding of securities and funds within its possession or control or for which it is responsible and to remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions. The Commission believes that GSCC's proposal to establish new categories of netting system membership for FCMs is consistent with these obligations.

In their trading of futures on government securities, FCMs may be required to deliver or to accept delivery of Treasury securities but under certain circumstances may not be required to register as broker-dealers.[11] By permitting FCMs to become GSCC members, the proposed rule change allows GSCC to extend the services and benefits it offers as a registered clearing agency to a greater number of market participants and thereby should promote the establishment of a national system for the prompt clearance and settlement of securities transactions.

The minimum financial requirements implemented by GSCC for Category 1 and Category 2 FCMs mirror those for Category 1 and Category 2 dealer netting members. The Commission believes that given the similarities between the concepts of net capital and net worth in GSCC, CFTC, and Commission rules, there is a basis for establishing categories of FCM netting membership with net capital, net worth, clearing fund, and margin requirements that are equivalent to those for Category 1 and

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[3] Under GSCC's rules, the term FCM is defined as having the meaning set forth in Section 2(a)(1)(A) of the Commodity Exchange Act ("CEA") except that no entity will be considered an FCM for purposes of GSCC's rules unless it is registered as such with the Commodity Futures Trading Commission ("CFTC"). Section 2(a)(1)(A) of the CEA defines an FCM to include individuals, associations, partnerships, corporations, and trusts engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market and that, in or in connection with such solicitation or acceptance of orders, accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom. GSCC Rule 1, "Definitions."

[4] In addition, because many participants are both broker-dealers and FCMs, GSCC is amending its rules to expressly provide that if an applicant qualifies for more than one category of netting system membership, GSCC will determine in its sole discretion the proper category of netting system membership for which the FCM will be considered. This determination will be made at the time of admission as a netting system member.

[5] Under GSCC's rules, the term "net capital" is defined as the amount equal to the net capital of a broker or dealer as defined in Commission Rule 15c3-1(c)(2) or any successor rule or regulation thereto. GSCC Rule 1, "Definitions."

[6] Under GSCC's rules, for purposes of Category 1 and Category 2 FCMs, the term "net worth" is defined as the amount equal to the excess of the assets of the FCM over the liabilities of the FCM computed in accordance with generally accepted accounting principles, including liabilities that are subordinated to the claims of creditors pursuant to a satisfactory subordination agreement as defined in 17 CFR 1.17(h) for an FCM that is not a registered broker-dealer. GSCC Rule 1, "Definitions."

[7] Under GSCC's rules, for purposes of Category 1 and Category 2 FCMs, the term "excess adjusted net capital" is defined as the amount equal to the difference between the adjusted net capital of an FCM and the minimum adjusted net capital that such FCM must have to comply with the requirements of 17 CFR 1.17 (a)(1) or (a)(2) or any successor regulations. GSCC Rule 1, "Definitions."

[8] If an applicant satisfies the minimum financial standards required to become a Category 1 FCM, they will be subject to lower margin requirements than those imposed on a Category 2 FCM.

[9] 15 U.S.C. § 78q-1 (1988).

[10] 15 U.S.C. § 78q-1(b)(3)(F) (1988).

[11] In connection with the proposed rule change, GSCC will require each FCM who is not registered with the Commission as a broker-dealer or government securities broker-dealer and who applies to become a Category 1 or Category 2 FCM netting system member to send a representation to the Commission that the FCM is in compliance with Commission Rules 3a43-1 and 3a44-1 (17 CFR 240.3a43-1 and 240.3a44-1 [1994]) and will remain in compliance with Commission Rules 3a43-1 and 3a44-1. Telephone conversation between Jeff Ingber, General Counsel, GSCC, and Jerry Carpenter, Assistant Director, Division of Market Regulation, Commission, and Ari Burstein, Attorney, Division of Market Regulation, Commission (November 2, 1994).

Category 2 dealer netting members. The Commission therefore believes that the financial and reporting requirements established by GSCC for Category 1 and Category 2 FCMs along with GSCC's regular risk management procedures should allow GSCC to provide membership to FCMs consistent with GSCC's safeguarding obligations.

III. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the Act, particularly with Section 17A of the Act, and with the rules and regulations thereunder.

It is therefore ordered, Pursuant to section 19(b)(2) of the Act,[12] that the proposed rule change (File No. SR–GSCC–94–04) be, and hereby is, approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[13]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–27811 Filed 11–9–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–34941; International Series Release No. 744; File No. SR–NASD–94–51]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Amendments to Parts VI and X of Schedule C of the NASD By-Laws Relating to Foreign Finders and Foreign Associates

November 4, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on September 27, 1994, the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NASD is proposing to amend Parts VI and X of Schedule C of the NASD By-Laws relating to foreign finders and foreign associates. Below is the text of the proposed rule change. Proposed new language is italicized and proposed deletions are bracketed.

PART VI

PERSONS EXEMPT FROM REGISTRATION

* * * * *

(2) Member firms, and persons associated with a member, may pay to nonregistered foreign persons transaction-related compensation based upon the business of customers they direct to member firms if the following conditions are met:

(a) the member firm has assured itself that the nonregistered foreign person who will receive the compensation (the "finder") is not required to register in the U.S. as a broker/dealer nor is subject to a disqualification as defined in Article II, Section 4 of the NASD By-Laws, and has further assured itself that the compensation arrangement does not violate applicable foreign law;

(b) the finders are foreign nationals (not U.S. citizens) or foreign entities domiciled abroad;

(c) the customers are foreign nationals (not U.S. citizens) or foreign entities domiciled abroad transacting business in either foreign or U.S. securities;

(d) customers receive a descriptive document, similar to that required by Rule 206(4)–3(b) of the Investment Advisers Act of 1940, that discloses what compensation is being paid to finders;

(e) customers provide written acknowledgement to the member firm of the existence of the compensation arrangement and that such acknowledgement is retained and made available for inspection by the Association;

(f) records reflecting payments to finder are maintained on the member firm's books and actual agreements between the member firm and persons compensated are available for inspection by the Association; and

(g) the confirmation of each transaction indicates that a referral or finder's fee is being paid pursuant to an agreement.

PART X

FOREIGN ASSOCIATES

All persons associated with a member who are designated as Foreign Associates shall [not] be required to be registered [and] *but* shall be exempt from the requirement to pass a Qualification Examination.

* * * * *

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 NASD 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 NASD has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

At its January 1994 meeting, the NASD Board of Governors approved the issuance of a Notice to Members soliciting comments on amendments to the foreign associate provisions in Part X of Schedule C to the NASD By-Laws. These proposed amendments would substantially conform NASD requirements for "foreign finders" to certain interpretations under New York Stock Exchange (NYSE) Rule 345 recently approved by the Commission in SEC Rel. No. 34–32431; File No. SR–NYSE–92–33. These amendments would permit the payment of transaction-related compensation to non-registered foreign finders who are not subject to the jurisdiction of U.S. securities laws, subject to certain disclosure and recordkeeping requirements by the U.S. broker-dealer.

The proposed amendment to Part VI of Schedule C of the NASD By-Laws is limited in application only to compensation arrangements that involve foreign (i.e., non-U.S. citizens) finders who are domiciled abroad and customers who are not U.S. citizens or U.S. institutions that are also domiciled abroad. Additionally, as one of the conditions under the proposed interpretation, customers must acknowledge receipt of information, in the form of a descriptive document, regarding the compensation arrangement. If all the specified conditions of the proposed interpretation are met, members may pay transaction-related compensation to nonregistered foreign finders based on the business of non-U.S. customers that the finders refer to the member. The proposed amendment would also require member firms to verify that these foreign finders are not subject to a disqualification as defined in Article II, Section 4 of the NASD By-Laws.

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[12] 15 U.S.C. 78s(b)(2) (1988).

[13] 17 CFR 200.30–3(a)(12) (1994).

While the foreign finders' sole involvement would be the initial referral to a member or a member organization, compensation could be made on an ongoing basis and tied to such variables as the level of business generated or assets under control. All accounts referred by such foreign finders would be carried on the books of the member.

The proposed amendment will allow member organizations the opportunity to enhance their competitive position in foreign countries where new accounts are routinely opened on a referral basis with ongoing compensation.

The proposed amendment to Part X of Schedule C of the By-Laws would allow members to continue to use Part X to register Foreign Associates with the NASD but would require members to file Form U–4 to register such persons.

The NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act in that the proposed changes to Parts VI and X of Schedule C of the By-Laws will impose substantial regulatory requirements on the relationship between members and foreign finders while at the same time allowing members to use foreign finders to expand the members' business opportunities overseas.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Association received 7 letters commenting on Notice to Members 94–6, the proposed amendments to the Interpretation. The commenters include the Securities Industry Association (SIA), two law firms, and four broker-dealers. Below is a summary of the more significant and/or recurring issues raised in the letters and the NASD's position in connection with the same.

One letter dealt with the narrow issue of whether the drafting of the foreign associate provisions inadvertently conflicted with the provisions of SEC Rule 15a–6. The NASD does not believe the amended proposal conflicts with Rule 15a–6.

Of the remaining six letters, one was from the SIA and another from counsel representing five large, full service member firms. All of these comment letters supported the NASD's attempt to comport its requirements to the disclosure provisions of the interpretation to NYSE Rule 345, but opposed both the requirement to include foreign finders under the definition of foreign associates and the provision subjecting such persons to full U–4 registration. The commenters argued that foreign finders are not associated persons of a member. The commenters noted that, if NASD rules required such persons to file U–4 registration documents, the foreign finders would likely refuse to do so and would redirect their business to foreign broker-dealers and banks. Such a result would contradict the purpose of the NYSE interpretation which was designed to permit U.S. broker-dealers to be more competitive in global markets where finding arrangements are common practice. The commenters also noted that it would be very difficult, if not impossible, for NASD members to exert meaningful supervision over foreign finders even if they did file U–4 registration documents, because these individuals and firms view themselves as independent contractors not otherwise subject to supervision of the broker-dealer. Furthermore, the filing of such documents through a firm may raise regulatory, tax and other issues in the country of domicile for the foreign finders and increase the overall burden of regulation of member firms.

The NASD Board of Governors ("Board") found the commenters' arguments persuasive and developed a different approach to the foreign finder issue. In keeping with a recommendation from counsel for the five large member firms, the Board determined to include foreign finders under the portion of Schedule C that identifies persons exempt from registration and to incorporate the information disclosure requirements of the interpretation to NYSE Rule 345 into the section. The Board also added a provision requiring firms to take reasonable steps to assure that foreign finders are not subject to the disqualification provisions of Article II, Section 4 of the NASD By-Laws. The Board also decided it is important to coordinate its activities with the NYSE to ensure consistency in the NASD's requirements with those of the NYSE.

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 submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., 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 Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to file number SR–NASD–94–51 and should be submitted by December 1, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[1]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–27890 Filed 11–9–94; 8:45 am]

BILLING CODE 8010–01–M

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster Loan Area #2749 Amdt. 1]

Georgia; Declaration of Disaster Loan Area Amendment #1

The above-numbered Declaration is hereby amended, in accordance with notices from the Federal Emergency Management Agency dated October 25 and 28, 1994, to include Brooks Bulloch, Clinch, Colquitt, Effingham, Thomas, and Worth Counties in the State of Georgia as a disaster area as a result of damages caused by severe weather, heavy rains, flooding, high winds, and tornadoes beginning on October 1, 1994, and continuing.

[1] 17 CFR 200.30–3(a)(12).

In addition, applications for economic injury loans from small businesses located in the following contiguous counties may be filed until the specified date at the previously designated location: Atkinson, Candler, Crisp, Dougherty, Echols, Emmanuel, Jenkins, Lanier, Lee, Lowndes, Screven, and Ware Counties in Georgia; Baker, Columbia, Jefferson, and Madison Counties in Florida; and Hampton County in South Carolina.

Any counties contiguous to the above-named primary counties and not listed herein have been previously declared.

All other information remains the same, i.e., the termination date for filing applications for physical damage is December 17, 1994 and for economic injury the deadline is July 19, 1995.

The economic injury numbers are 838000 for Georgia; 838100 for South Carolina; and 838200 for Florida.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008.)

Dated: October 31, 1994.

James E. Rivera,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 94–27865 Filed 11–9–94; 8:45 am]

BILLING CODE 8025–01–M

[Declaration of Disaster Loan Area #2750]

Wisconsin; Declaration of Disaster Loan Area

Adams County and the contiguous Counties of Columbia, Juneau, Marquette, Portage, Sauk, Waushara, and Wood in the State of Wisconsin constitute a disaster area as a result of damages caused by severe storms and tornadoes which occurred on August 27, 1994. Applications for loans for physical damage may be filed until the close of business on December 27, 1994 and for economic injury until the close of business on July 26, 1995 at the address listed below:

U.S. Small Business Administration, Disaster Area 2 Office, One Baltimore Place, Suite 300, Atlanta, GA 30308

or other locally announced locations.

The interest rates are:

	Percent
For physical damage:	
Homeowners with credit available elsewhere	8.000
Homeowners without credit available elsewhere	4.000
Businesses with credit available elsewhere	8.000
Businesses and non-profit organizations without credit available elsewhere	4.000
Others (Including non-profit organizations) with credit available elsewhere	7.125
For economic injury: businesses and small agricultural cooperatives without credit available elsewhere	4.000

The number assigned to this disaster for physical damage is 275012 and for economic injury the number is 838300.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: October 26, 1994.

Richard Hernandez,

Acting Administrator.

[FR Doc. 94–27866 Filed 11–9–94; 8:45 am]

BILLING CODE 8025–01–M

Honolulu District Advisory Council; Public Meeting

The U.S. Small Business Administration Honolulu District Advisory Council will hold a public meeting on Tuesday, November 15, 1994 at 11:30 a.m. at the Prince Kuhio Federal Building, 300 Ala Moana Boulevard, Conference Room 4113A, Honolulu, Hawaii 96850, to discuss such matter as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Mr. Andrew K. Poepoe, District Director, U.S. Small Business Administration, 300 Ala Moana Boulevard, Room 2314, Honolulu, Hawaii 96850 (808) 541–2965.

Dated: November 3, 1994.

Dorothy A. Overal,

Acting Assistant Administrator, Office of Advisory Councils.

[FR Doc. 94–27867 Filed 11–9–94; 8:45 am]

BILLING CODE 8025–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Aviation Rulemaking Advisory Committee Meeting on Rotorcraft Issues

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of public meeting.

SUMMARY: This notice announces a public meeting of the FAA's Aviation Rulemaking Advisory Committee on rotorcraft issues to discuss current rulemaking actions and future activities and plans.

DATES: The meeting will be held on November 29, 1994, at 9 a.m. CST. Arrange for oral presentations by November 15, 1994.

ADDRESSES: The meeting will be held at the FAA Southwest Regional Office, Rotorcraft Directorate, 2601 Meacham Blvd., Fort Worth, TX 76137–0110.

FOR FURTHER INFORMATION CONTACT: Ms. Barbara Herber, Office of Rulemaking, Aircraft & Airport Rules Division, AIR–200, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267–3498.

SUPPLEMENTARY INFORMATION: The referenced meeting is announced pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463; 5 U.S.C. App. II). The agenda will include:

- Review of up-dated AARC Operating Procedures.
- Report from the External Load Working Group.
- Discussion of relationship of the rotorcraft interests in the ARAC "Single-Engine IMC with Passengers" issue.
- Discussion of future activities and plans.
- Develop meeting schedule for 1995.

Attendance is open to the interested public but will be limited to the space available. The public must make arrangements by November 15, 1994, to present oral statements at the meeting. Written statements may be presented to the committee at any time by providing 16 copies to the Assistant Executive Director or by providing the copies to him at the meeting. In addition, sign and oral interpretation, as well as a listening device, can be made available at the meeting if requested 10 calendar days before the meeting. Arrangements may be made by contacting the person listed under the heading **FOR FURTHER INFORMATION CONTACT.**

Issued in Forth Worth, Texas, on November 7, 1994

Eric Bries,

Assistant Executive Director for Rotorcraft Issues, Aviation Rulemaking advisory Committee.

[FR Doc. 94–27914 Filed 11–9–94; 8:45 am]

BILLING CODE 4910–13–M

[Docket No. 27954]

Report to Congress on Quiet Aircraft Technology for Propeller and Rotor Driven Aircraft

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice, request for comment.

SUMMARY: This notice requests comment and information to help fulfill a

requirement from the Federal Aviation Administration Authorization Act of 1994 that requires the Federal Aviation Administration (FAA) and the National Aeronautics and Space Administration (NASA) to conduct a joint study to identify the technologies for noise reduction in propeller-driven airplanes and rotorcraft. This notice solicits information and comment on specific issues; the FAA will consider all responses in preparing its report to Congress on the Quiet Aircraft Technology for Propeller and Rotor Driven Aircraft.

DATES: Comments must be received on or before December 27, 1994.

ADDRESSES: Comments on this notice should be mailed, in triplicate, to the Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket, Docket No. 27954, 800 Independence Avenue, SW., Room 915G, Washington, DC 20591.

Comments may be inspected in Room 915G between 8:30 a.m. and 5:00 p.m., weekdays, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Dr. Mehmet Marsan, Research and Engineering Branch (AEE–110), Office of Environment and Energy, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; phone (202) 7703; fax (202) 267–5594.

SUPPLEMENTARY INFORMATION:

Background

Section 308 of the Federal Aviation Administration Authorization Act of 1994 requires the FAA and NASA to jointly conduct a noise study and report the results to Congress. This study shall identify technologies for noise reduction of propeller-driven airplanes and rotorcraft. The goal of the study is to determine the status of research and development now underway in the area of noise reduction technology for propeller-driven airplanes and rotorcraft, and to determine whether a research program to supplement existing research activities is necessary.

The FAA and NASA have developed a plan for conducting the required study and completing the report to Congress. The plan's major elements include an assessment of current noise reduction technology for propeller driven airplanes and rotorcraft, a review of the study findings with appropriate groups, and preparation of the report to Congress.

The FAA and NASA are in the process of determining the status of research and development now underway within NASA in the area of noise reduction technology for propeller-driven airplanes and rotorcraft.

Participation of federal agencies will be invited through the Federal Interagency Committee on Aviation Noise (FICAN).

Request for Information

In supplementing the study findings, the FAA is seeking comment and information regarding the following 6 questions. A discussion of each will be incorporated into the FAA/NASA report to Congress. Additional comments regarding any of the issues raised by Congress under Section 308 of the Authorization Act are also invited. The FAA and NASA will review and consider all responses in preparing its report to Congress.

1. What are the existing and emerging propeller driven airplane and rotorcraft noise reduction technologies?
2. Which noise reduction technologies can be retrofitted to the current propeller driven airplanes and rotorcraft and what are the economic impacts?
3. To what extent do existing noise reduction technologies succeed in reducing noise exposure?
4. To what extent is noise from propeller driven airplane and rotorcraft considered a problem requiring further research efforts?
5. What aspects of propeller driven airplane and rotorcraft noise create impact?
6. What are the areas of propeller driven airplane and rotorcraft noise reduction technology that require further research?

The FAA encourages public participation in this opportunity to comment to comply with the requirements of the Federal Aviation Administration Authorization Act of 1994. The data received for this request will be considered in preparing the report to Congress. Comments responding to these questions should be mailed to the office designated in the **ADDRESSES** heading and include docket number. Commenters who wish the FAA to acknowledge the receipt of their comments must submit with their comments a pre-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 27954." The postcard will be date-stamped by the FAA and returned to the commenter.

Issued in Washington, DC, on November 4, 1994.

Louise E. Maillett,

Director, Office of Environment and Energy.

[FR Doc. 94–27913 Filed 11–9–94; 8:45 am]

BILLING CODE 4910–13–M

National Highway Traffic Safety Administration

Rulemaking, Research and Enforcement Programs Meetings

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice of NHTSA Industry Meetings.

SUMMARY: This notice announces a public meeting at which NHTSA will answer questions from the public and the automobile industry regarding the agency's rulemaking, enforcement and other programs. In addition, NHTSA will hold a separate public meeting to describe and discuss specific research and development projects.

DATES: The Agency's regular, quarterly public meeting relating to the agency's rulemaking, enforcement and other programs will be held on December 21, 1994, beginning at 9:30 a.m. and ending at approximately 12:30 p.m. Questions relating to the agency's rulemaking, enforcement and other programs must be submitted in writing by December 12, 1994, to the address shown below. If sufficient time is available, questions received after the December 12th date may be answered at the meeting. The individual, group or company submitting a question(s) does not have to be present for the question(s) to be answered. A consolidated list of the questions submitted by December 12th 1994, and the issues to be discussed will be mailed to interested persons by December 16, 1994, and will be available at the meeting.

Also, the agency will hold a second public meeting on December 20, devoted exclusively to a presentation of research and development programs. The meeting will being at 1:00 p.m. and end at approximately 4:30 p.m. This meeting is described more fully in a separate announcement.

ADDRESSES: Questions for the December 21, NHTSA Technical Industry Meeting, to be held from 9:30 a.m. to 12:30 p.m., relating to the agency's rulemaking and enforcement programs should be submitted to Barry Felrice, Associate Administrator for Rulemaking, NRM–01, National Highway Traffic Safety Administration, Room 5401, 400 Seventh Street, SW., Washington, DC 20590. Questions for the Research and Development Program Meeting to be held on December 20, from 1:00 p.m. to 4:30 p.m. should be submitted to George L. Parker, Associate Administrator for Research and Development, NRD–01, National Highway Traffic Safety Administration, Room 6206, 400 Seventh Street, SW, Washington, DC

20590. Both meetings will be held at the Department of Transportation, 400 7th Street SW, Washington, DC in Room 4436–40.

SUPPLEMENTARY INFORMATION: NHTSA will hold its regular, quarterly meeting from 9:30 a.m. to 12:30 p.m., to answer questions from the public and the regulated industries regarding the agency's rulemaking, enforcement and other programs, on December 21, 1994. Since the agency is holding a separate meeting on its research and development programs, any questions on those issues will only be answered at the afternoon meeting to be held on December 20, 1994 from 1:00 p.m. to 4:30 p.m. and should be submitted to the Research and Development Office. However, questions on aspects of the agency's research and development activities that relate to ongoing rulemaking procedures should be submitted, as in the past, to the agency's Rulemaking Office. The December 20th and the December 21st meeting will be held at the Department of Transportation (DOT), 400 7th Street, SW, Washington, DC in Room 2230. The purpose of the meetings is to focus on those phases of NHTSA activities which are technical, interpretative or procedural in nature. Transcripts of the meetings will be available for public inspection in the NHTSA Technical Reference Section in Washington, DC, within four weeks after the meeting. Copies of the transcript will then be available at ten cents a page, (length has varied from 100 to 150 pages) upon request to NHTSA Technical Reference Section, Room 5108, 400 Seventh Street, SW., Washington DC 20590. The Technical Reference Section is open to the public from 9:30 a.m. to 4:00 p.m.

NHTSA will provide auxiliary aids to participants as necessary, during the NHTSA Technical Industry Meeting and the NHTSA Industry Research and Development Meeting. Thus, any person desiring assistance of "auxiliary aids" (e.g., sign-language interpreter, telecommunications devices for deaf person (TDDs), readers, taped texts, Brailled materials, or large print materials and/or a magnifying device), please contact Barbara Carnes on (202) 366–1810, by COB December 12, 1994, for the 9:30 a.m. to 12:30 p.m. portion of the meeting or Barbara Coleman (202) 366–1537 by COB December 12, 1994 for the 1:00 p.m. to 4:30 p.m. portion.

Barry Felrice,

Associate Administrator for Rulemaking.

[FR Doc. 94–27817 Filed 11–9–94; 8:45 am]

BILLING CODE 4910–59–M

DEPARTMENT OF THE TREASURY

Fiscal Service

[Dept. Circ. 570, 1994 Rev., Supp. No. 2]

Surety Companies Acceptable on Federal Bonds; Frontier Pacific Insurance Company

A Certificate of Authority as an acceptable surety on Federal Bonds is hereby issued to the following company under Sections 9304 to 9308, Title 31, of the United States Code. Federal bond-approving officers should annotate their reference copies of the Treasury Circular 570, 1994 Revision, on page 34156 to reflect this addition:

Frontier Pacific Insurance Company. BUSINESS ADDRESS: 6404 Wilshire Blvd. #850, Los Angeles, California, 90048–5510. PHONE: (213) 653–4058. UNDERWRITING LIMITATION *b/*: $1,511,000. SURETY LICENSES *c/*: CA, NV. INCORPORATED IN: California

Certificates of Authority expire on June 30 each year, unless revoked prior to that date. The Certificates are subject to subsequent annual renewal as long as the companies remain qualified (31 CFR, Part 223). A list of qualified companies is published annually as of July 1 in Treasury Department Circular 570, with details as to underwriting limitations, areas in which licensed to transact surety business and other information.

Copies of the Circular may be obtained from the Surety Bond Branch, Funds Management Division, Financial Management Service, Department of the Treasury, Washington, DC 20227, telephone (202) 874–6850.

Dated: November 4, 1994.

Charles F. Schwan III,

Director, Funds Management Division, Financial Management Service.

[FR Doc. 94–27868 Filed 11–9–94; 8:45 am]

BILLING CODE 4810–35–M

Office of Thrift Supervision

Carteret Federal Savings Bank of Florida Pompano Beach, Florida; Notice of Replacement of Conservator With a Receiver

Notice is hereby given that, pursuant to the authority contained in Subdivision (C) of § 5 (d)(2) of the Home Owners' Loan Act, the Office of Thrift Supervision has duly replaced the Resolution Trust Corporation as Conservator Carteret Federal Savings Bank of Florida, Pompano Beach, Florida ("Association"), with the Resolution Trust Corporation as sole Receiver for the Association on September 28, 1994.

Dated: November 4, 1994.

By the Office of Thrift Supervision.

Kimberly M. White,

Corporate Technician.

[FR Doc. 94–27819 Filed 11–9–94; 8:45 am]

BILLING CODE 6720–01–M

Cherokee Valley Federal Savings Association, Cleveland, Ohio; Notice of Replacement of Conservation With a Receiver

Notice is hereby given that, pursuant to the authority contained in Subdivision (C) of § 5(d)(2) of the Home Owners' Loan Act, the Office of Thrift Supervision has duly replaced the Resolution Trust Corporation as Conservator Cherokee Valley Federal Savings Association, Cleveland, Ohio ("Association"), with the Resolution Trust Corporation as sole Receiver for the Association on September 23, 1994.

Dated: November 4, 1994.

By the Office of Thrift Supervision.

Kimberly M. White,

Corporate Technician.

[FR Doc. 94–27820 Filed 11–9–94; 8:45 am]

BILLING CODE 6720–01–M

Home Federal Savings Bank, Norfolk, VA; Notice of Replacement of Conservator With a Receiver

Notice is hereby given that, pursuant to the authority contained in Subdivision (C) of § 5(d)(2) of the Home Owners' Loan Act, the Office of Thrift Supervision has duly replaced the Resolution Trust Corporation as Conservator Home Federal Savings Bank, Norfolk, Virginia ("Association"), with the Resolution Trust Corporation as sole Receiver for the Association on September 30, 1994.

Dated: November 4, 1994.

By the Office of Thrift Supervision.

Kimberly M. White,

Corporate Technician.

[FR Doc. 94–27821 Filed 11–9–94; 8:45 am]

BILLING CODE 6720–01–M

Second National Federal Savings Association, Salisbury, MD; Notice of Replacement of Conservator With a Receiver

Notice is hereby given that, pursuant to the authority contained in Subdivision (C) of § 5(d)(2) of the Home Owners' Loan Act, the Office of Thrift Supervision has duly replaced the Resolution Trust Corporation as

Conservator Second National Federal Savings Association, Salisbury, Maryland ("Association"), with the Resolution Trust Corporation as sole Receiver for the Association on September 16, 1994.

Dated: November 4, 1994.

By the Office of Thrift Supervision.

Kimberly M. White,

Corporate Technician.

[FR Doc. 94–27822 Filed 11–9–94; 8:45 am]

BILLING CODE 6720–01–M

TransOhio Federal Savings Bank, Cleveland, OH; Notice of Replacement of Conservator With a Receiver

Notice is hereby given that, pursuant to the authority contained in Subdivision (C) of § 5(d)(2) of the Home Owners' Loan Act, the Office of Thrift Supervision has duly replaced the Resolution Trust Corporation as Conservator TransOhio Federal Savings Bank, Cleveland, Ohio ("Association"), with the Resolution Trust Corporation as sole Receiver for the Association on September 16, 1994.

Dated: November 4, 1994.

By the Office of Thrift Supervision.

Kimberly M. White,

Corporate Technician.

[FR Doc. 94–27823 Filed 11–9–94; 8:45 am]

BILLING CODE 6720–01–M

[AC–71; OTS No. 03690]

Catlettsburg Federal Savings and Loan Association, Catlettsburg, KY; Approval of Conversion Application

Notice is hereby given that on November 2, 1994, the Deputy Assistant Director, Corporate Activities Division, Office of Thrift Supervision, or her designee, acting pursuant to delegated authority, approved the application of Catlettsburg Federal Savings and Loan Association, Catlettsburg, Kentucky, to convert to the stock form of organization. Copies of the application are available for inspection at the Information Services Division, Office of Thrift Supervision, 1700 G Street, N.W., Washington, D.C. 20552, and the Central Regional Office, Office of Thrift Supervision, 111 Wacker Drive, Suite 800, Chicago, Illinois 60601–4360.

Dated: November 4, 1994.

By the Office of Thrift Supervision.

Kimberly M. White,

Corporate Technician.

[FR Doc. 94–27824 Filed 11–9–94; 8:45 am]

BILLING CODE 6720–01–M

[AC–60; OTS No. 06466]

Central Kentucky Federal Savings and Loan Association, Danville, KY; Approval of Conversion Application

Notice is hereby given that on October 3, 1994, the Deputy Assistant Director, Corporate Activities Division, Office of Thrift Supervision, or her designee, acting pursuant to delegated authority, approved the application of Central Kentucky Federal Savings and Loan Association, Danville, Kentucky, to convert to the stock form of organization. Copies of the application are available for inspection at the Information Services Division, Office of Thrift Supervision, 1700 G Street, N.W., Washington, D.C. 20552, and the Central Regional Office, Office of Thrift Supervision, 111 Wacker Drive, Suite 800, Chicago, Illinois 60601–4360.

Dated: November 4, 1994.

By the Office of Thrift Supervision.

Kimberly M. White,

Corporate Technician.

[FR Doc. 94–27825 Filed 11–9–94; 8:45 am]

BILLING CODE 6720–01–M

[AC–68; OTS Nos. H–2064 and 02855]

Fed One Bank, M.H.C., Wheeling, WV; Approval of Conversion Application

Notice is hereby given that on October 28, 1994, the Deputy Assistant Director, Corporate Activities Division, Office of Thrift Supervision, or her designee, acting pursuant to delegated authority, approved the application of Fed One Bank, M.H.C., Wheeling, West Virginia, to convert to the stock form of organization. Copies of the application are available for inspection at the Information Services Division, Office of Thrift Supervision, 1700 G Street, N.W., Washington, D.C. 20552, and the Northeast Regional Office, Office of Thrift Supervision, 10 Exchange Place, 18th Floor, Jersey City, New Jersey 07302.

Dated: November 4, 1994.

By the Office of Thrift Supervision.

Kimberly M. White,

Corporate Technician.

[FR Doc. 94–27826 Filed 11–9–94; 8:45 am]

BILLING CODE 6720–01–M

[AC–75; OTS No. 03920]

First Federal Savings and Loan Association, Bucyrus, OH; Approval of Conversion Application

Notice is hereby given that on November 3, 1994, the Deputy Assistant Director, Corporate Activities Division, Office of Thrift Supervision, or her designee, acting pursuant to delegated authority, approved the application of First Federal Savings and Loan Association, Bucyrus, Ohio, to convert to the stock form of organization. Copies of the application are available for inspection at the Information Services Division, Office of Thrift Supervision, 1700 G Street, N.W., Washington, D.C. 20552, and the Central Regional Office, Office of Thrift Supervision, 111 Wacker Drive, Suite 800, Chicago, Illinois 60601–4360.

Dated: November 4, 1994.

By the Office of Thrift Supervision.

Kimberly M. White,

Corporate Technician.

[FR Doc. 94–27827 Filed 11–9–94; 8:45 am]

BILLING CODE 6720–01–M

[AC–70; OTS No. 04381]

First Federal Savings Bank of Frankfort, Frankfort, KY; Approval of Conversion Application

Notice is hereby given that on November 1, 1994, the Deputy Assistant Director, Corporate Activities Division, Office of Thrift Supervision, or her designee, acting pursuant to delegated authority, approved the application of First Federal Savings Bank of Frankfort, Frankfort, Kentucky, to convert to the stock form of organization. Copies of the application are available for inspection at the Information Services Division, Office of Thrift Supervision, 1700 G Street, N.W., Washington, DC 20552, and the Central Regional Office, Office of Thrift Supervision, 111 Wacker Drive, Suite 800, Chicago, Illinois 60601–4360.

Dated: November 4, 1994.

By the Office of Thrift Supervision.

Kimberly M. White,

Corporate Technician.

[FR Doc. 94–27828 Filed 11–9–94; 8:45 am]

BILLING CODE 6720–01–M

[AC–73; OTS No. 03346]

First Keystone Federal Savings Bank, Media, PA; Approval of Conversion Application

Notice is hereby given that on November 3, 1994, the Deputy Assistant Director, Corporate Activities Division, Office of Thrift Supervision, or her designee, acting pursuant to delegated authority, approved the application of First Keystone Federal Savings Bank,

Media, Pennsylvania, to convert to the stock form of organization. Copies of the application are available for inspection at the Information Services Division, Office of Thrift Supervision, 1700 G Street, NW, Washington, DC 20552, and the Northeast Regional Office, Office of Thrift Supervision, 10 Exchange Place, 18th Floor, Jersey City, New Jersey 07302.

Dated: November 4, 1994.

By the Office of Thrift Supervision.

Kimberly M. White,

Corporate Technician.

[FR Doc. 94–27829 Filed 11–9–94; 8:45 am]

BILLING CODE 6720–01–M

[AC–61; OTS No. 04834]

Gilmer Savings Bank FSB, Gilmer, TX; Approval of Conversion Application

Notice is hereby given that on October 20, 1994, the Deputy Assistant Director, Corporate Activities Division, Office of Thrift Supervision, or her designee, acting pursuant to delegated authority, approved the application of Gilmer Savings Bank FSB, Gilmer, Texas, to convert to the stock form of organization. Copies of the application are available for inspection at the Information Services Division, Office of Thrift Supervision, 1700 G Street, N.W., Washington, D.C. 20552, and the Midwest Regional Office, Office of Thrift Supervision, 122 W. John Carpenter Freeway, Suite 600, Irving, Texas 75039.

Dated: November 4, 1994.

By the Office of Thrift Supervision.

Kimberly M. White,

Corporate Technician.

[FR Doc. 94–27830 Filed 11–9–94; 8:45 am]

BILLING CODE 6720–01–M

[AC–62; OTS No. 00076]

Home Building Savings Bank, FSB, Washington, Indiana; Approval of Conversion Application

Notice is hereby given that on October 27, 1994, the Deputy Assistant Director, Corporate Activities Division, Office of Thrift Supervision, or her designee, acting pursuant to delegated authority, approved the application of Home Building Savings Bank, FSB, Washington, Indiana, to convert to the stock form of organization. Copies of the application are available for inspection at the Information Services Division, Office of Thrift Supervision, 1700 G Street, N.W., Washington, D.C. 20552, and the Central Regional Office, Office of Thrift Supervision, 111 Wacker Drive, Suite 800, Chicago, Illinois 60601–4360.

Dated: November 4, 1994.

By the Office of Thrift Supervision,

Kimberly M. White,

Corporate Technician.

[FR Doc. 94–27831 Filed 11–9–94; 8:45 am]

BILLING CODE 6720–01–M

[AC–65; OTS No. 00470]

Huntington Federal Savings and Loan Association, Huntington, West Virginia; Approval of Conversion Application

Notice is hereby given that on October 28, 1994, the Deputy Assistant Director, Corporate Activities Division, Office of Thrift Supervision, or her designee, acting pursuant to delegated authority, approved the application of Huntington Federal Savings and Loan Association, Huntington, West Virginia, to convert to the stock form of organization. Copies of the application are available for inspection at the Information Services Division, Office of Thrift Supervision, 1700 G Street, N.W., Washington, D.C. 20552, and the Northeast Regional Office, Office of Thrift Supervision, 10 Exchange Place, 18th Floor, Jersey City, New Jersey 07302.

Dated: November 4, 1994.

By the Office of Thrift Supervision.

Kimberly M. White,

Corporate Technician.

[FR Doc. 94–27832 Filed 11–9–94; 8:45 am]

BILLING CODE 6720–01–M

[AC–64; OTS No. 00813]

Investors Federal Savings, Kensley, Kansas; Approval of Conversion Application

Notice is hereby given that on October 27, 1994, the Deputy Assistant Director, Corporate Activities Division, Office of Thrift Supervision, or her designee, acting pursuant to delegated authority, approved the application of Investors Federal Savings, Kensley, Kansas, to convert to the stock form of organization. Copies of the application are available for inspection at the Information Services Division, Office of Thrift Supervision, 1700 G Street, N.W., Washington, D.C. 20552, and the Midwest Regional Office, Office of Thrift Supervision, 122 W. John Carpenter Freeway, Suite 600, Irving, Texas 75039.

Dated: November 4, 1994.

By the Office of Thrift Supervision.

Kimberly M. White,

Corporate Technican.

[FR Doc. 94–27833 Filed 11–9–94; 8:45 am]

BILLING CODE 6720–01–M

[AC–74; OTS No. 08050]

Lafayette Savings Bank, F.S.B., Lafayette, Indiana; Approval of Conversion Application

Notice is hereby given that on November 3, 1994, the Deputy Assistant Director, Corporate Activities Division, Office of Thrift Supervision, or her designee, acting pursuant to delegated authority, approved the application of Lafayette Savings Bank, F.S.B., Lafayette, Indiana, to convert to the stock form of organization. Copies of the application are available for inspection at the Information Services Division, Office of Thrift Supervision, 1700 G Street, N.W., Washington, D.C. 20552, and the Central Regional Office, Office of Thrift Supervision, 111 Wacker Drive, Suite 800, Chicago, Illinois 60601–4360.

Dated: November 4, 1994.

By the Office of Thrift Supervision.

Kimberly M. White,

Corporate Technician.

[FR Doc. 94–27834 Filed 11–9–94; 8:45 am]

BILLING CODE 6720–01–M

[AC–72; OTS No. 02295]

Mutual Savings Bank, f.s.b., Jefferson City, Missouri; Approval of Conversion Application

Notice is hereby given that on November 2, 1994, the Deputy Assistant Director, Corporate Activities Division, Office of Thrift Supervision, or her designee, acting pursuant to delegated authority, approved the application of Mutual Savings Bank, f.s.b., Jefferson City, Missouri, to convert to the stock form of organization. Copies of the application are available for inspection at the Information Services Division, Office of Thrift Supervision, 1700 G Street, N.W., Washington, D.C. 20552, and the Midwest Regional Office, Office of Thrift Supervision, 122 W. John Carpenter Freeway, Suite 600, Irving, Texas 75039.

Dated: November 4, 1994.

By the Office of Thrift Supervision.

Kimberly M. White,

Corporate Technician.

[FR Doc. 94–27835 Filed 11–9–94; 8:45 am]

BILLING CODE 6720–01–M

[AC–67; OTS No. 04844]

Perry County Savings Bank, FSB, Perryville, Missouri; Approval of Conversion Application

Notice is hereby given that on October 28, 1994, the Deputy Assistant Director, Corporate Activities Division, Office of Thrift Supervision, or her designee, acting pursuant to delegated authority, approved the application of Perry County Savings Bank, FSB, Perryville, Missouri, to convert to the stock form of organization. Copies of the application are available for inspection at the Information Services Division, Office of Thrift Supervision, 1700 G Street, N.W., Washington, D.C. 20552, and the Midwest Regional Office, Office of Thrift Supervision, 122 W. John Carpenter Freeway, Suite 600, Irving, Texas 75039.

Dated: November 4, 1994.

By the Office of Thrift Supervision.

Kimberly M. White,

Corporate Technician.

[FR Doc. 94–27836 Filed 11–9–94; 8:45 am]

BILLING CODE 6720–01–M

[AC–63; OTS No. 06300]

Twin City Federal Savings Bank, Bristol, Tennessee; Approval of Conversion Application

Notice is hereby given that on October 27, 1994, the Deputy Assistant Director, Corporate Activities Division, Office of Thrift Supervision, or her designee, acting pursuant to delegated authority, approved the application of Twin City Federal Savings Bank, Bristol, Tennessee, to convert to the stock form of organization. Copies of the application are available for inspection at the Information Services Division, Office of Thrift Supervision, 1700 G Street, N.W., Washington, D.C. 20552, and the Central Regional Office, Office of Thrift Supervision, 111 Wacker Drive, Suite 800, Chicago, Illinois 60601–4360.

Dated: November 4, 1994.

By the Office of Thrift Supervision.

Kimberly M. White,

Corporate Technician.

[FR Doc. 94–27837 Filed 11–9–94; 8:45 am]

BILLING CODE 6720–01–M

[AC–69; OTS No. 12269]

Washington Federal Bank for Savings, Chicago, Illinois; Approval of Conversion Application

Notice is hereby given that on November 1, 1994, the Deputy Assistant Director, Corporate Activities Division, Office of Thrift Supervision, or her designee, acting pursuant to delegated authority, approved the application of Washington Federal Bank for Savings, Chicago, Illinois, to convert to the stock form of organization. Copies of the application are available for inspection at the Information Services Division, Office of Thrift Supervision, 1700 G Street, N.W., Washington, D.C. 20552, and the Central Regional Office, Office of Thrift Supervision, 111 Wacker Drive, Suite 800, Chicago, Illinois 60601–4360.

Dated: November 4, 1994.

By the Office of Thrift Supervision.

Kimberly M. White,

Corporate Technician.

[FR Doc. 94–27838 Filed 11–9–94; 8:45 am]

BILLING CODE 6720–01–M

[AC–66; OTS No. 01273]

Watsonville Federal Savings and Loan Association, Watsonville, California; Approval of Conversion Application

Notice is hereby given that on October 28, 1994, the Deputy Assistant Director, Corporate Activities Division, Office of Thrift Supervision, or her designee, acting pursuant to delegated authority, approved the application of Watsonville Federal Savings and Loan Association, Watsonville, California, to convert to the stock form of organization. Copies of the application are available for inspection at the Information Services Division, Office of Thrift Supervision, 1700 G Street, N.W., Washington, D.C. 20552, and the West Regional Office, Office of Thrift Supervision, 1 Montgomery Street, Suite 400, San Francisco, California 94104.

Dated: November 4, 1994.

By the Office of Thrift Supervision.

Kimberly M. White,

Corporate Technician.

[FR Doc. 94–27839 Filed 11–9–94; 8:45 am]

BILLING CODE 6720–01–M

UNITED STATES INFORMATION AGENCY

Freedom Support Act Secondary School Initiative—U.S./NIS Academic Studies Inbound/Outbound Program

ACTION: Notice—Request for Proposals.

SUMMARY: The NIS Secondary School Initiative Division, Office of Citizen Exchanges of the United States Information Agency's Bureau of Educational and Cultural Affairs announces an open competition for an assistance award to facilitate academic exchanges between American high school students and students from the 12 Newly Independent States (NIS) of the former Soviet Union. Public or private non-profit organizations and educational institutions meeting the provisions described in IRS regulation 501(c)(3) may apply to develop projects that promote the purposes of this program, which are to: (a) Build the capacity of organizations to conduct academic exchanges at the secondary school level between the U.S. and the NIS; (b) promote study abroad opportunities in the NIS for Americans; and (c) sponsor study opportunities in the U.S. for NIS high school-aged students. Applicants may apply for grants of up to two years duration. Full-year exchanges are permitted only in the second year of the grant. Exchanges of three to five months duration may take place during the 1996 spring semester, the 1996 fall semester, the 1997 spring semester, and the 1997 fall semester. Full year exchanges for both inbound and outbound students may take place during the 1996–97 academic year.

Overall grant making authority for this program is contained in the Secondary School Exchange Initiative, as originally authorized in the Freedom Support Act of 1992 (Pub. L. 102–391). It is anticipated that $5 million will be allotted to this program. However, grants are subject to the availability of funds in Fiscal Year 1995.

Programs and projects must conform with Agency requirements and guidelines as outlined in the Solicitation Package.

ANNOUNCEMENT NAME AND NUMBER: All communications with USIA concerning this announcement should refer to the above title and reference number E/P–95–24. This is a request for proposals only for the program models described above. Requests for proposals in support of other youth exchange programs with the NIS are being published separately.

DATES: Deadline for proposals: All copies must be received at the U.S. Information Agency by 5 p.m. Washington, DC time on Friday, January 20, 1995. Faxed documents will not be accepted, nor will documents postmarked on January 20, 1995 but received at a later date. It is the responsibility of each applicant to ensure that proposals are received by the above deadline. Notification of awards will be announced on or after March 24, 1995. Grant funds should be available by June 1, 1995.

FOR FURTHER INFORMATION CONTACT: David Dallas, Division for the Secondary School Initiative, E/PY, room 314, U.S. Information Agency, 301 4th Street, SW., Washington, DC 20547, telephone:

(202)619–6299; Fax (202) 619–5311, to request a Solicitation Package. This package includes all application forms; more detailed award criteria; and guidelines for preparing proposals, including specific criteria for preparation of the proposal budget. Interested applicants should read the complete **Federal Register** announcement before addressing inquiries to the Division of the Secondary School Initiative. Once the RFP deadline has passed, Agency representatives may not discuss this competition in any way with applicants until after the Bureau's proposal review process has been completed.

ADDRESSES: Applicants must follow all instructions given in the Solicitation Package and send only complete applications to: U.S. Information Agency, Ref.: E/P–95–24, Office of Grants Management, E/XE, Room 336, 301 4th Street, SW., Washington, DC 20547.

SUPPLEMENTARY INFORMATION: Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social, and cultural life. "Diversity" should be interpreted in the broadest sense and encompass differences including but not limited to race, gender, religion, geographic location, socio-economic status, and physical challenges. Applicants are strongly encouraged to adhere to the advancement of this principle.

Overview

The purpose of this program is to provide the opportunity for American students to study at a school and experience life with a host family and its community in one of the 12 Newly Independent States of the former Soviet Union, and, to sponsor students from countries of the former Soviet Union to study at an American school and experience life with a host family and its community in the U.S. Grant funding is also intended to provide avenues that will enhance the students' understanding of each country's political, social, and cultural and ethnic diversity; to promote the exchange of ideas; and to foster long-term friendships. The countries of the NIS are: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrogyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.

Guidelines

This program has four components. Please note that each component is independent of the other and is not subject to reciprocity. However, applicants may opt to apply for any component or a combination of any or all four.

A. Outbound Semester

This component will give American high-school students a chance to live with a host family and study at the secondary school level in an NIS country for a period of no less than three months.

B. Inbound Semester

This component provides opportunities for NIS high school students to live with a host family and study at secondary level institutions for one academic semester in the U.S.

C. Academic Year Outbound

This component provides opportunities for American high school students to study for a full year in one of the countries of the former Soviet Union, and to more fully experience the life and culture of a host family and its community.

D. Academic Year Inbound

This component provides the opportunity for students from the former Soviet Union to study for a full year at an American high school, and to more fully experience the life and culture of a host family and its community.

There is no prescribed formula for either component of the program. However, organizations should encourage students to participate in extracurricular activities as well as provide students with community based activities. Also, organizations have the option to disperse students widely or concentrate groups of students in regional clusters. The purpose of clustering is to facilitate periodic gatherings for ongoing orientation, excursions and cultural programming, as well as supervision and feedback. Organizations should identify in their proposals the target regions, states and/or communities in which placements will be sought. Regardless of the placement plan, organizations may propose periodic gatherings of students locally, regionally or nationally.

Grantee organizations working with their offices overseas and/or NIS partners will: Recruit and select students based on merit using their own criteria; arrange for their placement in schools; select and orient host families; make all travel and logistical arrangements; conduct orientation sessions; conduct re-entry and debriefing sessions; supervise students, solve problems, and provide counseling as needed; develop a mechanism for the transfer of academic credit and/or the certification of school attendance; interact with the schools on an ongoing basis; and evaluate the program's success. Proposals should succinctly describe how these elements will be handled, with special attention to the following factors:

—Organizations must demonstrate the capacity to secure quality homestays and school placements for the number of students on which they are bidding in conformance with the regulations governing J visas for inbound secondary school students.

—The proposal should include a description of the process the organization uses to identify and screen potential host families, as well as its system for making school placements.

—Proposals using the cluster method should: Specify the cluster size and likely locations; and include a description of how clustering will affect the program, such as scheduling periodic gatherings of the students. A sample schedule of gatherings and topics or themes to be addressed should be included.

—An organization using the dispersal method should include a justification for not using the cluster model and explain its placement philosophy; and if planning period gatherings the proposal should include a tentative itinerary for a sample meeting.

—Inbound students should be sufficiently proficient in English upon arrival in the U.S. to function in a high-school environment. No USIA grant funding will be provided for English training under this program. Preference will be given to proposals that include language skills as a selection criterion for American students going to the NIS. Applicant organizations with alternative approaches to language qualifications should discuss them in the proposal.

—Programs must comply with J–1 visa regulations. Please refer to program specific guidelines in the Solicitation Package for further details.

Eligibility

Both private not-for-profit organizations and public educational institutions including secondary schools, school districts and state education agencies are eligible. Organizational and educational consortiums are invited to participate.

Proposed Budget

Applicants must submit a comprehensive line-item budget for the entire program. There must be a

summary budget as well as a brake-down reflecting both the administrative budget and the program budget. For better understanding or further clarification, applicants may provide separate sub-budgets for each program component, phase, location, or activity in order to facilitate USIA decisions on funding. Cost-sharing is encouraged and may be in the form of allowable direct or indirect costs. Please refer to the Solicitation Package and Guidelines for complete budget and formatting instructions.

Grants awarded to eligible organizations with less than four years of experience in conducting international exchange programs will be limited to $60,000.

Review Process

USIA will acknowledge receipt of all proposals and will review them for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines stated herein and in the Solicitation Package. Eligible proposals will be forwarded to panels of USIA officers for advisory review. All eligible proposals will also be reviewed by the Agency contracts office, as well as the Agency's Area Office and the USIA post overseas, where appropriate. Proposals may also be reviewed by the Office of the General Counsel or by other Agency elements. Funding decisions are at the discretion of the USIA Associate Director for Educational and Cultural Affairs. Final technical authority for grant awards resides with the USIA grants officer.

Review Criteria

Technically eligible applications will be competitively reviewed according to the criteria stated below. These criteria are not rank ordered and all carry equal weight in the proposal evaluation:

1. *Quality of the program idea:* Proposals should exhibit originality, substance, precision, and relevance to Agency's mission and the program idea as described above.

2. *Program planning:* Detailed agenda and relevant work plan should demonstrate substantive undertakings and logistical capacity. Agenda and plan should adhere to the program overview and guidelines described above. Proposals should also clearly demonstrate how students will be selected on the basis of merit and the qualifications needed for a successful program.

3. *Ability to achieve program objectives:* Objectives should be reasonable, feasible, and flexible. Proposals should clearly demonstrate how the institution will meet the program's objectives and plan.

4. *Multiplier effect/impact:* Proposed programs should strengthen long-term mutual understanding, including maximum sharing of information and establishment of long-term institutional and individual linkages.

5. *Support of diversity:* Proposals should demonstrate the recipient's commitment to promoting the awareness and understanding of diversity throughout the program. This can be accomplished through documentation (such as a written statement or account) summarizing past and/or ongoing activities and efforts that further the principle of diversity within both the organization and the program activities.

6. *Institutional capacity:* Proposed personnel and institutional resources should be adequate and appropriate to achieve the program or project's goals.

7. *Institution's record/ability:* Proposals should demonstrate an institutional record of successful exchange programs, including responsible fiscal management and full compliance with all reporting requirements for past Agency grants as determined by USIA's Office of Contracts. The Agency will consider the past performance of prior recipients and the demonstrated potential of new applicants.

8. *Follow-on activities:* Proposals should provide a plan for continued follow-on activity (without USIA support) which ensures that USIA supported programs are not isolated events.

9. *Project evaluation:* Proposals should include a plan to evaluate the success of the program, both as the activities unfold and at its conclusion. USIA recommends that the proposal include a draft survey questionnaire or other technique, plus a description of a methodology to use to link outcomes to original project objectives. Grantee organizations/institutions will be expected to submit intermediate reports after each project component is concluded or quarterly reports, whichever is less frequent.

10. *Cost-effectiveness:* The overhead and administrative components of the proposal, including salaries and honoraria, should be kept as low as possible. All other items should be necessary and appropriate.

11. *Cost-sharing:* Proposals should maximize cost-sharing through other private sector support as well as institutional direct funding contributions.

12. *Value to U.S.-partner country relations:* Proposed projects should receive positive assessments by USIA's geographic area desk and overseas officers of program need, potential impact, and significance in the partner country(ies).

Notice

The terms and conditions published in this RFP are binding and may not be modified by any USIA representative. Explanatory information provided by the Agency that contradicts published language will not be binding. Issuance of the RFP does not constitute an award commitment on the part of the Government. The needs of the program may require the award to be reduced, revised, or increased. Final awards cannot be made until funds have been appropriated by Congress, allocated and committed through internal USIA procedures.

Notification

All applicants will be notified of the results of the review process on or about March 24, 1995. Awards made will be subject to periodic reporting and evaluation requirements.

Dated: November 1, 1994.

John P. Loiello,

Associate Director, Educational and Cultural Affairs.

[FR Doc. 94-27502 Filed 11-9-94; 8:45 am]

BILLING CODE 8230-01-M

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Cemeteries and Memorials; Notice of Availability of Annual Report

Under section 10(d) of Public Law 92-462 (Federal Advisory Committee Act) notice is hereby given that the Annual Report of the Department of Veterans Affairs' Advisory Committee on Cemeteries and Memorials for Fiscal Year 1993 has been issued. The Report summarizes activities of the Committee on matters relative to programs, policies and accomplishments which have been made, and the identification of areas where further study and improvements are required. It is available for public inspection at two locations:

Federal Documents Section, Exchange and Gift Division, LM 632, Library of Congress, Washington, D.C. 20540,

and

Department of Veterans Affairs, National Cemetery System, 810 Vermont Ave., NW., Washington, D.C. 20420.

Dated: October 19, 1994.

Heyward Bannister,

Committee Management Officer.

[FR Doc. 94–27869 Filed 11–9–94; 8:45 am]

BILLING CODE 8320–01–M

Sunshine Act Meetings

Federal Register
Vol. 59, No. 217
Thursday, November 10, 1994

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).

FEDERAL ELECTION COMMISSION

DATE AND TIME: Tuesday, November 15, 1994 at 10:00 a.m.

PLACE: 999 E Street, NW, Washington, DC.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. § 437g.
Audits conducted pursuant to 2 U.S.C. § 437g, § 438(b), and Title 26, U.S.C.
Matters concerning participation in civil actions or proceedings or arbitration
Internal personnel rules and procedures or matters affecting a particular employee.

PERSON TO CONTACT FOR INFORMATION: Mr. Ron Harris, Press Officer, Telephone: (202) 219–4155.

Delores Hardy,
Administrative Assistant.
[FR Doc. 94–28076 Filed 11–8–94; 3:07 pm]
BILLING CODE 6715–01–M

COMMITTEE ON EMPLOYEE BENEFITS OF THE FEDERAL RESERVE SYSTEM

TIME AND DATE: 3:00 p.m., Tuesday, November 15, 1994.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, N.W., Washington, D.C. 20551.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Review of the 1995 budget for the Office of Employee Benefits.
2. Proposed changes to actuarial assumptions and related delegation to the Committee on Employee Benefits.
3. Any items carried forward from a previously announced meeting.

Note: This meeting will be recorded for the benefit of those unable to attend. Cassettes will be available for listening in the Board's Freedom of Information Office, and copies may be ordered for $5 per cassette by calling (202) 452–3684 or by writing to:
Freedom of Information Office, Board of Governors of the Federal Reserve System, Washington, D.C. 20551

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204.

Dated: November 8, 1994.
Jennifer J. Johnson,
Deputy Secretary of the Board.
[FR Doc. 94–27983 Filed 11–8–94; 10:56 am]
BILLING CODE 6210–01–P

COMMITTEE ON EMPLOYEE BENEFITS OF THE FEDERAL RESERVE SYSTEM

TIME AND DATE: Approximately 3:30 p.m., Tuesday, November 15, 1994, following a recess at the conclusion of the open meeting.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, N.W., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. The Committee's agenda will consist of matters relating to (a) the general administrative policies and procedures of the Retirement Plan, Thrift Plan, Long-Term Disability Income Plan, and Insurance Plan for Employees of the Federal Reserve System; (b) general supervision of the operations of the Plans; (c) the maintenance of proper accounts and accounting procedures in respect to the Plans; (d) the preparation and submission of an annual report on the operations of each of such Plans; and (e) the maintenance and staffing of the Office of the Federal Reserve Employee Benefits System; and (f) the arrangement for such legal, actuarial, accounting, administrative, and other services as the Committee deems necessary to carry out the provisions of the Plans. Specific items include: (A) A proposed 1995 Retiree Pension Supplement; (B) retirement benefits; and (C) proposed changes to the Thrift Plan Investment Options.
2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204.

Dated: November 8, 1994.
Jennifer J. Johnson,
Deputy Secretary of the Board.
[FR Doc. 94–27984 Filed 11–8–94; 10:56 am]
BILLING CODE 6210–01–P

LEGAL SERVICES CORPORATION

Operations and Regulations Committee Meeting; Changes

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 59 FR 52861, October 19, 1994.

PREVIOUSLY ANNOUNCED TIME AND DATE: A meeting of the Legal Services Corporation Board of Directors Operations and Regulations Committee will be held on October 27-28, 1994. The meetings began at 10:00 a.m., on October 27, 1994, and at 9:00 a.m., on October 28, 1994.

PREVIOUSLY ANNOUNCED LOCATION OF MEETING: The Marriott at Metro Center, 775 12th Street, N.W., Salon "A", Washington, D.C., (202) 737–2200.

CHANGES IN THE MEETINGS:

MATTERS TO BE CONSIDERED: The Committee also considered proposed changes to 45 C.F.R. Part 1611.

CONTACT PERSON FOR INFORMATION: Patricia D. Batie, Executive Office, (202) 336–8800.

Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments.

Individuals who have a disability and need an accommodation to attend the meeting may notify Patricia Batie at (202) 336–8800.

Date Issued: November 7, 1994.
Patricia D. Batie,
Corporate Secretary.
[FR Doc. 94–27939 Filed 11–8–94; 9:30 am]
BILLING CODE 7050–01–M

Corrections

Federal Register
Vol. 59, No. 217
Thursday, November 10, 1994

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket No. 940816-4216]

RIN 0693-AA70

Approval of Federal Information Processing Standards Publication 189, Portable Operating System Interface (POSIX); Part 2: Shell and Utilities

Correction

In the correction to notice document 94-25049 appearing on page 55531 in the issue of Monday, November 7, 1994, correction 2. is corrected to read as follows:

2. On the same page, in the third column, in the third and fourth lines, "c-1" should read "c¦1".

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 272

[FRL—5090—3]

Utah; Final Authorization of State Hazardous Waste Management Program

Correction

In rule document 94-25386 beginning on page 52084 in the issue of Friday, October 14, 1994, make the following change:

On page 52085, in the first column, in the second paragraph, in the 11th line, the parenthetical phrase should not have appeared. Insert in its place "November 13, 1994."

BILLING CODE 1505-01-D

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-34779; File No. SR-DTC-94-13]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing and Order Granting Accelerated Approval on a Temporary Basis of Proposed Rule Change Implementing the Prime Broker Option in the Institutional Delivery System

Correction

In notice document 94-25002 beginning on page 51465 in the issue of Tuesday, October 11, 1994, make the following correction:

On page 51467, in the first column, the signature and title lines preceding the file line were omitted and should have appeared as follows:

Margaret H. McFarland,

Deputy Secretary.

BILLING CODE 1505-01-D

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-34780; File Nos. SR-MCC-93-07 and SR-MSTC-93-14]

Self-Regulatory Organizations; Midwest Clearing Corporation and Midwest Securties Trust Company; Notice of Amendments and Order Approving on an Accelerated Basis Proposed Rule Changes Establishing a Risk Assessment Committee and Making Various Other Changes to MCC's and MSTC's BY-Laws and Rules

Correction

In notice document 94-25040 beginning on page 51462 in the issue of Tuesday, October 11, 1994, make the following change:

On page 51462, following the subject heading, the date was omitted and should have appeared as follows:

"October 3, 1994."

BILLING CODE 1505-01-D

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-34875; File Nos. SR-MCC-94-13 and SCCP-94-06]

Self-Regulatory Organizations; Midwest Clearing Corporation and Stock Clearing Corporation of Philadelphia; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Changes Expanding the Interfaces With the National Securities Clearing Corporation's Fixed Income Transaction System

Correction

In notice document 94-26766 beginning on page 54228 in the issue of Friday, October 28, 1994 make the following correction:

On page 54229, in the second column, above the FR Doc. line, the signature was omitted and should read as set forth below.

Jonathan G. Katz,

Secretary.

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 94-NM-78-AD; Amendment 39-9052; AD 94-22-03]

Airworthiness Directives; McDonnell Douglas Model DC–9–80 Series Airplanes and Model MD–88 Airplanes

Correction

In rule document 94-26366, beginning on page 54123, in the issue of Friday, October 28, 1994, in the first column, the first line under **DATES**, the effective date should read "November 28, 1994".

BILLING CODE 1505-01-D

federal register

Thursday
November 10, 1994

Part II

Department of Health and Human Services

Health Care Financing Administration

42 CFR Part 401, et al.

Medicare and Medicaid Programs; Survey, Certification and Enforcement of Skilled Nursing Facilities and Nursing Facilities; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Parts 401, 431, 435, 440, 441, 442, 447, 483, 488, 489, and 498

[HSQ–156–F]

RIN 0938–AD94

Medicare and Medicaid Programs; Survey, Certification and Enforcement of Skilled Nursing Facilities and Nursing Facilities

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final rule.

SUMMARY: This final rule implements certain provisions of the Omnibus Budget Reconciliation Act of 1987, as further amended by subsequent 1988, 1989, and 1990 legislation. These provisions make significant changes in the process of surveying skilled nursing facilities under Medicare and nursing facilities under Medicaid and in the process for certifying that these facilities meet the Federal requirements for participation in the Medicare and Medicaid programs. They also set forth a number of alternative remedies which may be imposed on facilities that do not comply with the Federal participation requirements (instead of or in addition to termination), and specify remedies for State survey agencies that do not meet surveying requirements.

DATES: These regulations are effective July 1, 1995.

ADDRESSES: Copies: To order copies of the **Federal Register** containing this document, send your request to: New Orders, Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250–7954. Specify the date of the issue requested and enclose a check or money order payable to the Superintendent of Documents, or enclose your Visa or Master Card number and expiration date. Credit card orders can also be placed by calling the order desk at (202) 512–1800 or by faxing to (202) 512–2250. The cost for each copy is $8.00. As an alternative, you can view and photocopy the **Federal Register** document at most libraries designated as Federal Depository Libraries and at many other public and academic libraries throughout the country that receive the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Deborah Kaplan Schoenemann, (410) 966–6771.

SUPPLEMENTARY INFORMATION:

I. Background

To participate in the Medicare or Medicaid programs, long-term care facilities must be certified as meeting Federal participation requirements. Long-term care facilities include skilled nursing facilities (SNFs) for Medicare and nursing facilities (NFs) for Medicaid. The Federal participation requirements for these facilities are specified in HCFA regulations at 42 CFR part 483, subparts A through C.

Section 1864(a) of the Social Security Act (the Act) authorizes the Secretary to enter into agreements with State survey agencies to determine whether SNFs meet the Federal participation requirements for Medicare. Section 1902(a)(33)(B) of the Act provides for State survey agencies to perform the same survey tasks for facilities participating or seeking to participate in the Medicaid program. The results of Medicare and Medicaid related surveys are used by HCFA and the Medicaid State agency, respectively, as the basis for a decision to enter into, deny, or terminate a provider agreement with the facility.

To assess compliance with Federal participation requirements, surveyors conduct onsite inspections (surveys) of facilities. In the survey process surveyors directly observe the actual provision of care and services to residents and the effect or possible effects of that care to assess whether the care provided meets the assessed needs of individual residents.

SNFs that are approved for participation in the Medicare program also meet the participation requirements for the Medicaid program. However, the Medicaid State agency is not obligated to enter into a Medicaid provider agreement with a facility just because the Secretary has entered into a Medicare provider agreement with the facility. Additionally, if a State imposes Medicaid requirements that exceed those of Medicare, section 1863 of the Act provides that the higher requirements must be met by the Medicare SNFs in that State.

Before the 1987 legislation, the only adverse actions available to HCFA and the States against facilities that were determined to be out of compliance with Federal participation requirements included termination, nonrenewal, or automatic cancellation of provider agreements; denial of participation for prospective facilities; and denial of payment for new admissions in lieu of termination when the facilities had deficiencies that did not pose an immediate and serious threat to the health and safety of residents. (The denial of payment action has been considered an "alternative" sanction because it is an alternative to termination.)

The Omnibus Budget Reconciliation Act of 1987 (OBRA '87), Public Law 100–203, enacted on December 22, 1987, amended the Act to incorporate specific provisions for nursing home reform. These provisions included specific revised requirements for the survey and certification process (section 4202 for Medicare and section 4212 for Medicaid) and for the enforcement process (sections 4203 and 4213). Sections 4202 and 4212 of OBRA '87 added new sections 1819(g) and 1919(g) to the Act to revise and expand Medicare and Medicaid provisions, respectively, on State and Federal responsibilities for survey and certification, types of and requirements for surveys, survey team composition and responsibilities, requirements for validation surveys, procedures for investigating complaints and monitoring compliance, disclosure of results of inspections and activities, and provisions for penalties imposed on the States for failure to comply with survey process requirements. Sections 4203 and 4213 of OBRA '87 added sections 1819(h) and 1919(h) to the Act to specify the Medicare and Medicaid enforcement process, respectively, and specified remedies for noncompliance to be used in lieu of or in addition to termination of facilities' participation in the programs. Section 411 of the Medicare Catastrophic Coverage Act of 1988 (MCCA), Public Law 100–360, enacted on July 1, 1988, also included a number of technical and correcting amendments affecting these OBRA '87 provisions. These changes will be discussed in detail later in this preamble.

On August 28, 1992, we published a proposed rule in the **Federal Register** (57 FR 39278) setting forth our proposal for altering the requirements for surveying facilities and expanding the choice of alternative remedies for HCFA and the Medicaid State agency to apply in lieu of or in addition to termination of facilities that do not comply with participation requirements. In the proposed rule we said that our goal is to promote facility compliance by ensuring that all deficient providers are appropriately sanctioned. Termination is still possible any time a facility is identified as having deficiencies, and if a facility continues to have deficiencies after a specified period of time, the law requires that Federal payments for services in that facility cease at that time.

In the proposed rule we indicated that we are implementing the Congress' mandate, as indicated in OBRA '87, to abandon our traditional hierarchical requirement system and develop a system capable of detecting and responding to noncompliance with any requirement. The system we proposed was built on the assumption that all requirements must be met and enforced and that requirements take on greater or lesser significance as a function of the circumstances and resident outcomes in a particular facility at the time of survey. The surveyors will determine the existence or nonexistence of immediate and serious threat to residents as well as the severity and scope of a deficiency to arrive at a conclusion as to the seriousness of that deficiency in that facility. The proposed regulations incorporated scope and severity surveyor guides for determining the remedy or remedies to apply. We also proposed that the selection of a particular remedy be based on the nature of the deficiencies and the remedy (or remedies) that either HCFA or the Medicaid State agency believes is most likely to achieve correction of the deficiencies. As we stated in the proposed rule, we believe that remedies applied in the manner described within the proposed regulations will deter violations as well as encourage immediate response and sustained compliance.

The new system also proposed changes in the enforcement authority for dually participating (Medicare and Medicaid) facilities. OBRA '89 provided the basis for decisions as to whether the State's or the Secretary's determination of compliance or noncompliance or choice of remedies is binding in the case of a dually participating facility. Moreover, the statute at section 1919(h)(8), provides that whether certification decisions and enforcement actions, as applied to Medicaid, are those of the Secretary or the State, the same certification decision and enforcement actions will also apply to Medicare in a dually participating facility. In addition, the statute specifies whether the Secretary's or State's certification decision and enforcement remedies will prevail in the case of Federal validation surveys. Our August 28, 1992 proposed rule reflected these changes.

II. Provisions of the Proposed Rule

In the proposed rule published on August 28, 1992 in the **Federal Register**, we proposed to implement the provisions of OBRA '87, as further amended by subsequent 1988, 1989, and 1990 legislation. The specific proposals were as follows:

A. Routine Process of Certification and Enforcement

1. State-Operated Facilities

We proposed at § 488.155 and § 488.180 that in all State-operated facilities, the State survey agency conduct the survey, recommend to HCFA a certification of compliance or noncompliance and recommend appropriate enforcement action(s). After the survey agency forwards its survey findings and recommended certification and enforcement action(s) to HCFA, HCFA in turn would certify facility compliance or noncompliance and impose any enforcement action(s).

2. Non-State Operated Facilities

At §§ 488.155 and 488.180, we proposed the following:

- For non-State operated SNFs, to continue to use the process in effect before October 1, 1990, whereby the State survey agency conducts the survey and certifies compliance or noncompliance with Federal requirements subject to HCFA approval. We also proposed that the survey agency recommend appropriate remedies, and that, after the survey agency forwards its survey findings and recommended enforcement action(s) to HCFA for review, HCFA determines the compliance or noncompliance of the facility and imposes any enforcement action(s).
- For non-State operated NFs, to continue to use the process in effect before October 1, 1990, whereby the survey agency conducts the survey, certifies compliance or noncompliance with Federal requirements, and recommends appropriate enforcement actions to HCFA and the Medicaid State agency. The certification of compliance or noncompliance by the State is final except in the case of a complaint or validation survey, or review of the State's findings by HCFA in which the Secretary substitutes her judgment for that of the State. Except where the Secretary intervenes, the State makes all enforcement decisions and imposes remedies after consideration of the survey findings and recommended enforcement remedies. Regardless of which agency of the State exercises certification and enforcement authority, however, we look to the Medicaid State agency to assure compliance with Federal requirements.
- For dually participating facilities, the survey agency would conduct the survey, certify compliance or noncompliance with Federal requirements, and recommend appropriate enforcement actions. The certification of compliance or noncompliance and recommended enforcement action(s) by the State would be sent to both HCFA and the Medicaid State agency for review. In a new subpart F (Remedies for Long-Term Care Facilities with Deficiencies), we proposed to add a new § 488.234, to set forth procedures for occasions when there are State and Federal disagreements involving findings when there is no immediate and serious threat to the residents. We view section 1919(h)(8) of the Act as calling for the application of the decision for Medicaid NFs to Medicare SNFs when a facility is dually participating.

B. Validation Surveys and HCFA Oversight

Sections 1819(g)(3)(A) and 1919(g)(3)(A) of the Act direct the Secretary to conduct onsite surveys of a representative sample of nursing homes within 2 months of the last day of survey when the Secretary is validating the State survey agency's performance. If the State determines that the facility is in compliance, but the Secretary finds that the facility is out of compliance, the Secretary's determination as to the facility's noncompliance is binding and supersedes that resulting from the State survey as specified at § 488.234(a)(2) of our NPRM and section 1919(h)(6)(B) of the Act. However, section 1919(h)(6)(A) specifies that when the State finds noncompliance and the Secretary makes no such finding, the State's noncompliance decision and enforcement actions control. We incorporated this in § 488.234(a)(1) of our proposed rule. At paragraph (a)(3) of § 488.234, we proposed that, when HCFA's survey findings take precedence, HCFA could—

- Impose any of the alternative remedies we specify in our proposed § 488.206 (Available remedies); or
- Permit payments to continue to the NF and dually participating facility if the applicable conditions at our proposed § 488.232 (Continuation of payments to a facility with deficiencies) are satisfied.

These provisions proposed to specify the means to determine compliance or noncompliance for the Medicaid NF which would then become the compliance/noncompliance decision for the Medicare SNF.

In our proposed § 488.234(b), we stated that, if both the Secretary and the State disagree over the decision to terminate a non-State operated NF or dually participating facility—

• HCFA's decision to terminate the participation of a facility takes precedence when—

+ Both HCFA and the State find that the facility has not met all requirements; and

+ HCFA, but not the State, finds that the facility's participation should be terminated. We proposed that HCFA would permit continuation of payment during the period prior to the effective date of termination not to exceed 6 months from the last day of the survey.

• The State's decision to terminate a facility's participation and the timing of termination would take precedence when—

+ The State, but not HCFA, finds that a facility's participation should be terminated; and

+ The State's timing for the termination is for no later than 6 months after the last day of survey.

In paragraph (c) of the proposed § 488.234, we stated that when the State and HCFA disagree over timing of termination of a facility, the State's timing takes precedence if it does not occur later than 6 months after the date of the finding to terminate. Paragraph (d) stated that when there is overlap of State and HCFA remedies, the HCFA remedies apply, and paragraph (e) stated that, regardless of whose decision controlled in paragraphs (b), (c), or (d), the compliance and enforcement decision for the Medicaid agreement is binding on the Medicare agreement in the case of a dually participating facility.

C. Hearings and Appeals

At § 488.180(e)(1), we proposed that the State must impose remedies on any Medicaid provider—

• When the State identifies violations of Federal requirements after notifying the provider of the deficiencies and impending remedy; and

• Except for civil money penalties, during the pendency of any hearing that the provider may request.

At § 488.180(e)(2), we proposed that appeal procedures under 42 CFR part 498 (Appeals Procedures for Determinations that Affect Participation in the Medicare Program) apply when the provider requests a hearing on HCFA's denial of participation, termination of provider agreement, or the Secretary's certification of noncompliance leading to an enforcement remedy, except State monitoring, against all State-operated facilities, as a result of a HCFA validation survey or HCFA's review of the State's survey findings and for non-State operated SNFs and dually participating facilities. The State must impose the same remedy, which is also subject to these appeal procedures. At § 488.180(e)(3) of our proposed rule, we proposed that the appeal procedures under 42 CFR part 431 (State Organization and General Administration) apply in cases when the provider requests a hearing on the State's denial of participation, termination of provider agreement, or certification of noncompliance leading to an alternative remedy against a non-State operated Medicaid NF.

D. Prospective Providers

At § 488.180(f), we proposed that prospective providers applying to participate in the Medicare or Medicaid (or both) programs meet all participation requirements as a precondition of their participation. As we explained in the preamble of the proposed rule, we based this on various provisions of the Act and the legislative history and on the overall structure of the Act which differs significantly from the one previously in effect.

E. Substandard Care

In § 488.151 (Definitions), we proposed defining substandard care as care furnished in a facility that has one or more deficiencies in any area with a severity level of 3 or 4, regardless of scope; or a level 2 in severity with a level 3 or 4 in scope in quality of care requirements, as defined in § 483.25 (Quality of care). We described the levels for severity and scope in detail under the section of the preamble entitled, "Enforcement Options." That discussion is summarized in section J.11 of this background statement.

F. Surveys

Sections 1819(g) (2) and (3) and 1919(g) (2) and (3) of the Act, as added by sections 4202 and 4212 of OBRA '87, specify the requirements for types and periodicity of surveys that are to be conducted for each facility; including standard, special, partial extended, extended, and validation surveys. These provisions include specific contents and procedures, frequency, consistency, and team composition, and are intended to protect residents' rights, health and safety and not unduly burden the facilities or the survey agencies. We proposed to set forth implementing regulations as follows:

Standard Surveys

At § 488.155, we proposed that, for each SNF and NF, the State survey agency must conduct standard surveys and stated what they must include.

At § 488.158, we proposed to require each SNF and NF to be subject to a standard survey not later than 15 months after the last day of the previous standard survey and that the statewide average intervals between standard surveys must not exceed 12 months. We also specified when and how the average intervals would be computed.

Special Surveys

Sections 1819(g)(2)(A)(iii) and 1919(g)(2)(A)(iii) of the Act, as added by OBRA '87, specify that a standard survey or an abbreviated standard survey may be conducted within 2 months of any change of ownership, administration, management of a facility, or director of nursing to determine whether the change has resulted in any decline in the quality of care furnished by the facility. A survey conducted for the purpose of investigating a complaint against a facility is also considered a special survey. An abbreviated standard survey is a partial survey that focuses on a specific participation requirement or requirements. At paragraph (e) of § 488.158, we proposed that the decision of whether to conduct a standard or an abbreviated standard survey under these circumstances be at a State survey agency's or the Secretary's discretion, based on the individuals and facilities involved and the State's concern that the quality of care may have declined.

Extended and Partial Extended Surveys

In accordance with Sections 1819(g)(2)(B) and 1919 (g)(2)(B) of the Act, we proposed to require that, during an extended survey, the survey team must review and identify the policies and procedures for those provisions of the regulations that produced the substandard quality of care and must determine whether a facility complies with all requirements of participation. The extended survey must also include an expansion of the size of the sample of residents' assessments reviewed, a review of the staffing levels and staff inservice training, and, if appropriate, an examination of contracts with consultants.

These provisions were incorporated in the proposed rule at § 488.160 (Extended survey).

Validation Surveys

We proposed that the validation surveys must be conducted within 2 months of the date of the State's surveys and must be of sufficient number to allow inferences about the adequacy of the State's surveys. In addition, the Act requires us to conduct validation surveys in at least 5 percent of the SNFs and NFs surveyed by each State during

the year but in no case less than 5 facilities in each State. The same protocol used for the standard or extended survey must be used for the validation survey. We proposed to incorporate these requirements in paragraph (a) of § 488.166 (Validation surveys).

In the proposed rule, we dealt with four other survey-related issues:

Composition of Survey Teams

At § 488.164, we proposed that—

—Surveys must be conducted by a multidisciplinary team of professionals, which must include a registered nurse.

—A surveyor is disqualified for surveying a particular facility if he or she currently serves or, within the previous 2 years has served as a member of the staff of, or as a consultant to that facility, or if a member of his or her immediate family has any financial interest or any direct or indirect ownership interest in that facility.

Surveyors must receive comprehensive training, including the application and interpretation of regulations for SNFs and NFs, techniques and survey procedures for conducting standard and extended surveys; and techniques and survey procedures for auditing resident assessments and plans of care.

Consistency of Surveys

The proposed regulations at § 488.162 specify that the State must conduct ongoing studies and analyses, and/or implement new programs to measure and improve consistency in survey results, such as validation of surveyor findings, and the application of enforcement remedies. The proposed regulations also specified that HCFA will perform the same tasks.

Unannounced Surveys

While sections 1819(g)(2)(A)(i) and 1919(g)(2)(A)(i) of the Act specifically require unannounced standard surveys, we proposed that all surveys, whether abbreviated, extended, follow-up, validation or otherwise, be unannounced and incorporated this provision in the proposed regulations at § 488.157. When a survey agency is found to have notified a SNF or NF through its scheduling or procedural policies, we are authorized to apply appropriate sanctions for inadequate survey performance specified at the proposed § 488.170 and described immediately below under the section entitled, "Inadequate Survey Performance."

Inadequate Survey Performance

If we find, as a result of the validation surveys, that the State has failed to perform the standard and extended surveys properly or that the State's performance is otherwise inadequate, we are authorized to apply an appropriate sanction for inadequate survey performance. Section 1819(g)(3)(C) of the Act requires the Secretary to provide an appropriate remedy (which may include training) when the State has failed to perform surveys required under the Act or when the Secretary has decided survey performance is not otherwise adequate. At § 488.170, we proposed the following remedies to be applied as appropriate:

- For Medicaid facilities HCFA will—
  + Reduce FFP and if appropriate,
  + Provide for training of survey teams.
- For Medicare facilities HCFA will—
  + Specify the inadequacy to the survey agency;
  + Require a plan of correction;
  + Provide for training of survey teams;
  + Provide technical assistance on scheduling and procedural policies;
  + Provide HCFA-directed scheduling; or
  + Initiate action to terminate the agreement between the Secretary and the State under section 1864 of the Act, either in whole or in part.

G. Investigations of Allegations of Resident Neglect and Abuse and Misappropriation of Resident Property

In § 488.151, we proposed to define "abuse" as physical, psychological, or verbal interaction with a facility resident, including, but not limited to, ill treatment, physical violation, and/or other disregard of an individual which could cause or result in mild to severe, temporary or permanent mental or physical injury, harm, or, ultimately, death. "Neglect" would mean a failure, through inattentiveness, carelessness, or omission, of an individual, to provide timely, consistent and safe services, treatment, and care to a facility resident. "Misappropriation of resident property" would mean the deliberate misplacement, exploitation, or wrongful, temporary, or permanent taking or use of a facility resident's belongings or money, or both, without the resident's consent.

Sections 1819(g)(1)(C) and 1919(g)(1)(C) of the Act, as added by OBRA '87 and amended by section 411(a)(5)(C) of Public Law 100–360 (MCCA), require the State, through the agency responsible for surveys and certification of nursing facilities, to develop a process for the receipt and timely review and investigation of allegations of neglect and abuse and misappropriation of resident property by a nurse aide of a facility or by another individual used by the facility in providing services to residents. These sections also provide, after notification of the allegations, for the State to provide the opportunity for a hearing to the individual against whom an allegation has been made; and if the allegations are confirmed, for the State to notify the individual, the nurse aide registry, and the appropriate licensure authorities if applicable. In § 488.185 (Action on complaints of neglect, abuse and misappropriation of property), we proposed regulations that would implement these provisions.

H. Investigation of Complaints of Violations of Federal Participation Requirements and Monitoring Compliance

In § 488.182 (Investigation of complaints of violations: Investigations and monitoring), we proposed that the survey agency be required to conduct surveys as frequently as necessary to ascertain compliance with the Federal requirements of participation or to confirm the correction of deficiencies under the cited circumstances. The proposed regulations would also incorporate the provisions of sections 1819(g)(4) and 1919(g)(4) of the Act that a State may maintain and use a specialized team to identify, survey, gather, and preserve evidence and to administer appropriate enforcement remedies against substandard facilities.

I. Disclosure of Survey Information

At § 488.175 (Disclosure of survey information), we proposed regulations to implement sections 1819(g)(5) and 1919(g)(5) of the Act, as added by OBRA '87. We proposed at § 488.175 to accept oral as well as written requests for information and to charge the public for the cost of retrieval, reproduction, and mailing information in accordance with regulations under the Freedom of Information/Privacy Act. The disclosing entity (HCFA, the survey agency, or the Medicaid State agency) would respond within 10 days with the requested information, if releasable and already available, or with an interim response explaining whether the information is releasable and when it will be available for release.

OBRA '90 specified which information is releasable and when it is available for release. Sections 1819(g)(5)(A) and 1919(g)(5)(A) of the Act provide that each State, and the Secretary, shall make available to the

public information concerning all surveys and certifications of NFs and SNFs, including statements of deficiencies, within 14 calendar days after such information is made available to those facilities, and approved plans of correction. We proposed to implement this provision at § 488.175(d)(3).

Sections 1819(g)(5)(B) and 1919(g)(5)(B) of the Act require State survey agencies to notify the State's long-term care ombudsman of any adverse actions imposed against a facility. We proposed at 488.175(e) that the State survey agency be required to provide the State's long-term care ombudsman with the report of noncompliance of a facility, report of any adverse actions imposed, any written response by the SNF or NF, and the results of any appeals.

As a result of sections 4008(h)(2)(E) and 4801(e)(5)(D) of OBRA '90, sections 1819(b)(4)(C)(ii)(IV) and 1919(b)(4)(C)(ii)(IV) of the Act require the Secretary and the State, respectively, to provide notice to the State long-term care ombudsman and the State protection and advocacy system for the mentally ill and mentally retarded of SNF and NF waivers. Sections 1819(b)(4)(C)(ii)(V) and 1919(b)(4)(C)(ii)(V), as added by OBRA '90, require the facility receiving such nursing waivers to notify the residents of the facility (or, when appropriate, the guardians or legal representatives of such residents) and a resident's immediate family of the waiver. We proposed, at section 488.175 (f) and (g), that facilities give this notice within 10 days from the date the SNF or NF is granted the waiver.

Under sections 1819(g)(5)(C) and 1919(g)(5)(C) of the Act, the State is required to notify each attending physician and the State board responsible for licensing nursing home administrators when a facility has provided substandard quality of care. We proposed requiring each SNF or NF to provide either HCFA or the State, no later than 10 days after receiving a notice of substandard care, with a list of each Medicare and Medicaid resident in the facility and the name and address of his or her attending physician. We also proposed at § 488.175 requiring the State to notify the attending physicians and the State licensing board within 30 days of the date the SNF or NF is notified of a finding of substandard care. We recognized that this and the notification requirement related to nurse waivers were the only provisions in our proposed regulation which set forth requirements for nursing homes. All other provisions in the proposed rule set forth requirements for the Secretary and the State in the enforcement of nursing homes requirements. We included these facility requirements in the proposed rule because they directly or indirectly pertain to the enforcement process. The same sections of the Act also required the State survey agency to provide access to any information incidental to a facility's participation in Medicare or Medicaid upon request by the State Medicaid fraud control unit established under 42 CFR part 1002, subpart C. We proposed incorporating this provision under paragraph (j) of § 488.175.

J. Enforcement Options

1. Overview

As stated earlier, before the passage of OBRA '87, the only adverse actions available to HCFA and the States for imposition against long term care facilities that were out of compliance with Federal requirements were termination of participation, nonrenewal and automatic cancellation, and denial of participation for prospective providers. In addition, HCFA and the States had authority, in cases of long-term care facilities, to deny payment for new admissions to facilities rather than to terminate the provider agreements when deficiencies did not present an immediate and serious threat to the health and safety of residents of the facilities. The denial of payment provision was considered both an alternative to the more severe measures, as well as an intermediate step that HCFA or the State could take prior to and possibly in lieu of termination from the Medicare and Medicaid programs. The sanction afforded HCFA and the States the opportunity to defer the decision to terminate. Thus, the terms "alternative sanction" and "intermediate sanction" came into use to designate denial of payment for new admissions to facilities for a period of up to 11 months after the month in which the sanction was imposed. Former sections 1866(f) and 1902(i) of the Act were the authority for the alternative sanction under Medicare and Medicaid respectively. The Family Support Act of 1988, Public Law 100–345, repealed the Medicare provision and MCCA made the Medicaid provision applicable only to ICFs/MR.

OBRA '87 included revised and expanded authority for enforcement of the Federal participation requirements for long-term care facilities. We proposed adding a new subpart, subpart F (Remedies for Long Term Care Facilities with Deficiencies) to part 488 to implement these new provisions.

2. Determination of Deficiencies

Effective October 1, 1990, providers of nursing services participating in the Medicare or Medicaid programs were subject to the requirements of participation that were published on February 2, 1989 (54 FR 5316). These requirements focus more sharply on the resident care practices and outcomes, and facility practices with respect to resident rights.

In the proposed rule we explained that the collective exercise of surveyor judgments, which has always been the vehicle for the identification of deficiencies would remain unchanged. For this reason, we concluded that there was no more reason to have specific regulations governing this process than there had been in the past. Thus, we proposed that, surveyors would gather information based upon direct observations, record review, and interviews with residents, staff, and family members. Based on their collection of information, they would collectively compile and analyze it, and match the data to the legal standards facilities are obliged to meet to determine if deficiencies exist. As is true now, these conclusions would be based upon single observations or groups of observations, either one of which may sustain a finding that a requirement has not been met. We proposed that once the survey team made its judgments about whether the facts supported a conclusion that deficiencies exist, it would be the team's responsibility to assess the scope and severity of those deficiencies (in the manner described later in this preamble) in order to recommend one or more remedies to either HCFA or the Medicaid State agency for the enforcement of the requirements.

3. Remedies To Be Imposed as Alternative or Intermediate Sanctions

Consistent with sections 1819(h) and 1919(h) of the Act as added by OBRA '87, we proposed to add a new § 488.206, listing the available remedies. It stated that, in addition to termination of the provider agreement, the following remedies would be available:

- Temporary management;
- Denial of payment including—
  + Denial of payment for all new admissions;
  + Denial of payment for all new admissions in certain diagnostic categories or requiring specialized care; and
  + Denial of all payment (to be imposed only by HCFA) to facilities, for Medicare and to States, for Medicaid.
- Directed plan of corrections;

- State monitoring; and
- Civil money penalties.

Section 488.206 also proposed other remedies for non-State-operated Medicaid-only and dually participating facilities. They were:

- Closure of the facility and transfer of residents; and
- Additional or alternative State remedies.

Finally, we proposed at § 488.153 that, if a State wishes to use additional or alternative remedies, it must specify those remedies in the State plan, and demonstrate to HCFA's satisfaction that those remedies are as effective as those set forth in the Act.

At § 488.208, we set forth proposed rules governing the choice of remedies. We said that the survey agency or HCFA would assess individual deficiencies or clusters of deficiencies first according to the presence or absence of immediate and serious threat to resident health and safety, the severity of the deficiency, and the scope of the deficiency. We proposed that, following the initial assessment, HCFA and the survey agency may consider the following secondary factors:

- The relationship of one deficiency or group (cluster) of deficiencies to other deficiencies; and
- The facility's prior compliance history in general and specifically with reference to the cited deficiencies.

We said that the selection of a remedy would be based on the nature of the deficiencies or cluster of deficiencies. Proposed §§ 488.210 and 488.212 set forth the rules for imposition of particular remedies in specified circumstances. We said that, regardless of which remedy or remedies are imposed, each facility that is out of compliance with a program requirement would be required to submit a plan of correction for approval by HCFA or the survey agency, except in the case of deficiencies that HCFA or the State determines to be at a scope and severity level of 1.

The choice of remedy, by either HCFA or the State, including the manner in which HCFA or the State uses the scope and severity scales specified in § 488.204 would not be subject to review as part of the appeals process set forth in part 431 or part 498.

4. Temporary Management as a Remedy

When alternative remedies are imposed instead of termination to bring a facility into compliance with program requirements in an immediate and serious threat situation, temporary management would always be imposed immediately to remove the threat to residents in accordance with sections 1819(h)(2)(A)(i), 1919(h)(1)(A), and 1919(h)(3)(B)(i) of the Act. We proposed that temporary management also be available in addition to termination in an immediate and serious threat situation while there is an orderly termination or closure of the facility. In situations where deficiencies do not constitute an immediate and serious threat, HCFA or the State also may appoint a temporary manager to substitute as a manager or administrator. (Other remedies in addition to temporary management may also be imposed in the case of immediate and serious threat situations.)

The temporary manager would have the authority to hire, terminate and reassign staff, obligate facility funds, alter facility procedures as appropriate, or otherwise manage the facility as necessary to correct deficiencies identified in the facility's operation. The temporary manager would be required to be a licensed nursing home administrator within the State or have a reciprocal agreement with the State in which he or she is to serve, demonstrate prior competence as a nursing home administrator, and have had no disciplinary action taken against him or her by any licensing board of any State or by any professional society in the past 5 years. We proposed as well that neither the temporary manager nor his or her immediate family could have a financial or ownership interest in the facility. The temporary manager's salary would be paid by the facility. We proposed that the salary for the temporary manager may not exceed an amount equivalent to the prevailing salary paid by providers in the geographic area for positions of this type, additional costs that would have reasonably been incurred by the provider if such person had been in an employment relationship, and any other costs incurred by such a person in furnishing services under such an arrangement (for example, travel allowance) or as otherwise set by the State.

We proposed that termination would be imposed if the facility does not agree to this remedy or refuses to relinquish authority to the temporary manager. In addition, if, despite the appointment of a temporary manager, the immediate and serious threat is not removed within 23 days of the appointment of the temporary manager or if non-immediate and serious threat deficiencies are not corrected within 6 months from the last day of survey, the facility's participation would be terminated.

We proposed incorporating the above provisions regarding temporary management in §§ 488.206, 488.210, and 488.215.

5. Denial of Payment for New Admissions As a Remedy

We proposed that a new § 488.217 be added to part 488 to set forth denial for payment for all new admissions as a sanction as follows:

- For all new admissions

—HCFA or the State may deny payment for new admissions. However, HCFA will and the State must deny payment for new admissions if—

+ Any deficiency remains uncorrected within 90 calendar days after the last day of survey identifying the deficiencies; or
+ The survey agency has cited a facility with substandard quality of care on the last 3 consecutive standard surveys.

—If the facility achieves compliance with the requirements, HCFA does or the State must resume payments to the facility prospectively from the date that it determined that compliance has been achieved.

- Denial of payment for new admissions in certain diagnostic categories or requiring specialized care.

—HCFA or the State may deny payment for new admissions who have certain specified diagnoses or special care needs when HCFA or the State finds that—

+ The facility is not currently able to provide care for these individuals; or
+ Caring for these individuals will adversely affect care provided to other residents.

—If the facility achieves compliance with the requirements, HCFA does or the State must resume payment to the facility prospectively from the date that it determines that compliance has been achieved.

6. Directed Plan of Correction

Sections 1819(h)(2)(B) and 1919(h)(2)(A) permit the Secretary and the State, respectively, to provide for other specified remedies. At § 488.224, we proposed adding a directed plan of correction as a remedy in which a facility could be required to take action within specified timeframes according to the plan of correction developed by HCFA, the survey agency, or the temporary manager (with HCFA or survey agency approval).

The directed plans of correction would set forth the expected correction actions which the facility must take to achieve compliance and the dates by which the actions must be taken.

7. Use of State Monitoring As a Remedy

In §§ 488.206 and 488.222, we proposed that, if State monitoring is

used as a remedy, State monitors would be required to be onsite as frequently as necessary to oversee the correction of specific deficiencies cited. This remedy differs from traditional revisits by the survey agency in that State monitors are onsite, as necessary, while corrections are being made, as opposed to a revisit which occurs after corrections are completed, and serve to confirm that the deficiency has been removed. We said that State monitoring must be used as a remedy when a survey agency has cited a facility with substandard quality of care on the last three consecutive standard surveys.

We proposed that individuals serving as State monitors would be required to be employees or contractors of the State survey agency, and maintain professional qualifications needed to address the specific nature of the deficiencies. The State would be responsible for ensuring that the monitors are appropriate health care professionals. A State monitor could not function as a consultant to the facility nor could the State monitor be an employee of the facility. We concluded that a monitor serving as a consultant to a facility would potentially put the State in a situation of defending the monitor's recommendations rather than making the facility responsible for correcting its deficiencies. Additionally, a monitor employed by a facility and working for the State would constitute a conflict of interest.

8. Civil Money Penalties

At § 488.230, we proposed allowing civil money penalties to be imposed for noncompliance regardless of whether or not the deficiencies constitute immediate and serious threat to resident health and safety. However, we proposed at § 488.230(b) that civil money penalties would not be imposed during the pendency of a hearing on the imposition of that remedy.

We proposed that, if HCFA wants to impose a civil money penalty, it must notify the provider in writing of the intent to impose a penalty. The notice would include reference to the statutory basis for the penalty, the amount of the penalty per day of noncompliance, any circumstances that were considered when determining the amount per day of the proposed penalty, and instructions for responding to the notice, including a specific statement of the facility's right to a hearing and implications of waiving a hearing.

If the State proposes to impose a civil money penalty, the State would notify the facility in accordance with State procedures.

We proposed that a penalty amount would be permitted to be imposed within the following ranges:

- For deficiencies constituting an immediate and serious threat (that is, a severity level of 4, regardless of scope)—$3,050 to $10,000 per day;
- For deficiencies constituting nonimmediate and nonserious threat above a scope or severity level of 1—$50 to $3,000 per day.
- For both levels, the amount of the civil money penalty would be set at $50 increments within these ranges.

Removal of the immediate and serious threat, but not the deficiencies, would justify the shift to the range of penalties that are imposed for nonimmediate and nonserious threat above a scope or severity level of 1. A penalty would be imposed at the immediate and serious level for the number of days the immediate and serious threat is present. We proposed that a provider may, in lieu of contesting the deficiency which led to the imposition of the civil money penalty, waive the right to a hearing within the specified timeframes and procedures in the regulations under § 498.40 (Request for hearing) for Medicare and § 431.221 (Request for hearing) for Medicaid. If the facility were to waive the right to a hearing within 60 days from the date of notice, HCFA or the State would be required to reduce the civil money penalty by 35 percent. If the facility were to waive the right to a hearing after the 60th day, HCFA's or the State's settlement would be discretionary. The reduction in the civil money penalty would reflect the savings to both the government and the provider of costs that would otherwise be incurred to formally adjudicate the dispute. The provider would be free to reject the option to waive the right to a hearing. We proposed that the daily fine amount of a facility could be increased if the facility alleges compliance, but on a revisit by HCFA or the State survey agency, the facility is still found to be noncompliant with the same requirements. The purpose of giving HCFA or the State discretion to increase the daily fine, we believe, would be to deter unfounded allegations of compliance. The amount of increase, if any, would be effective the day following the resurvey.

In determining the amount of the penalty, section 1128A(d) of the Act requires the Secretary to consider specific matters and also provides authority to take into account any other items relevant to the penalty determination. We proposed that the Secretary's nondiscretionary and discretionary requirements be applicable to the State as well to make the Medicare and Medicaid requirements equivalent for SNFs and NFs. We do not believe that the Congress intended to have two separate assessment methodologies in place between both enforcement authorities when a civil money penalty from each could potentially be imposed on a single facility. Our proposal included two additional factors so that the noncompliance itself is considered when determining the penalty amount.

In determining the amount of the penalty, we proposed at § 488.230(g) that HCFA or the State must take into account the following factors:

- The facility's degree of culpability;
- The facility's history of prior offenses, including repeat deficiencies;
- The facility's financial condition;
- The nature, scope, severity and duration of the noncompliance; and
- The category of requirement with which the facility is out of compliance.

The effective date for a civil money penalty would be the 10th day after the last day of the survey in the case of immediate and serious threat deficiencies; or the 20th day after the last day of survey in the case of non-immediate and non-serious threat deficiencies. These timeframes permit time to notify the facility of the intent to impose a civil money penalty 5 days after the last day of survey.

When HCFA's or the State's imposition of a civil money penalty is upheld on appeal or the facility waives its right to a hearing, we proposed that the civil money penalty would be for the number of days between the effective date of the penalty and the date of correction of deficiencies, or, if applicable, the effective date of termination. Penalties would be computed after compliance is verified or the facility has been sent notice of termination and the effective date. In the case of the facility achieving compliance, HCFA or the State would send a separate notice to the facility containing the amount of penalty per day, the number of days involved, the due date of the penalty, and the total amount due. In the case of a facility to be terminated, HCFA or the State would send this penalty information in the termination notice.

The daily accrual of civil money penalties would be imposed for no longer than 6 months for non-immediate and non-serious threat deficiencies after which HCFA would terminate a SNF provider agreement, or stop Federal funding to the State for a NF, and the State may terminate the provider agreement of the NF if deficiencies remain. In the case of immediate and serious threat deficiencies, the daily

accrual of civil money penalties would continue until HCFA or the State terminates the provider agreement or the deficiencies are corrected. If the facility can supply documentation acceptable to HCFA or the State survey agency that compliance with participation requirements was attained on a date preceding that of the revisit, fines would only accrue until that date.

Payments for civil money penalties would be due 15 days after—

- Compliance is verified, if a hearing decision upholding the imposition of the penalty had been rendered before compliance had been verified, or the 60-day period for requesting a hearing has expired and the facility has not requested a hearing or has waived its right to a hearing;
- A hearing decision upholding the imposition of the penalty if compliance was achieved before the hearing decision; or
- The effective date of termination if compliance has not been achieved by that time.

Currently, § 431.153 (Evidentiary hearing) does not specify the number of days a facility has to request a hearing. We proposed amending § 431.153 to add a new paragraph (b) which specifies that a NF or ICF/MR must file a request for hearing within 60 days of receipt of the notice of denial, termination, nonrenewal, or imposition of a civil money penalty or other remedies.

Consistent with the way other civil money penalties are recovered, as provided in section 1128A(f) of the Act, we proposed that the amount of any penalty, when determined, may be deducted from any sum then or later owing by HCFA or the State to the facility against whom the penalty has been assessed. Interest would be assessed on the unpaid balance of the penalty beginning on the due date. We proposed that the rate of interest to be assessed on the unpaid balance would be negotiable and for that reason might vary on a case by case basis. Funds collected by HCFA or the State as a result of a civil money penalty would be returned to the Medicare Trust Fund or to the State, respectively. Civil money penalties collected from dually participating facilities would be returned to the Medicare Trust Fund and the State in proportion commensurate with the relative proportions of the number of Medicare and Medicaid beds actually in use at the facility at the time the facility receives notice of the imposition of the civil money penalty. Under section 1919(h)(2)(A)(ii) of the Act, funds collected by a Medicaid State agency must be put into a common fund to be applied to the protection of the health or property of residents of any NF that the State or HCFA finds deficient, including payment for the cost of relocating residents to other facilities, maintenance of operation of a facility pending correction of deficiencies or closure, and reimbursement of residents for personal funds lost. Oversight of the collection and use of funds will be addressed through HCFA's State agency evaluation program now in place.

With respect to SNFs, State-operated facilities, or HCFA validation actions when HCFA's enforcement choice prevails, HCFA would have the exclusive authority to settle any case at any time prior to a final administrative law judge hearing decision. With respect to non-State-operated NFs or dually participating facilities or HCFA validation surveys when only the State's enforcement decision prevails, the State would have the authority to settle any case at any time prior to the hearing decision.

9. Closure of a Medicaid Facility and Transfer of Residents as a Remedy

Section 1919(h)(2)(A)(iv) of the Act allows the State to close a Medicaid facility and transfer its residents as an available remedy in emergency situations. This provision appeared in our proposed § 488.226 (Closure of a Medicaid facility and transfer of residents). Notice and appeal rights would be in accordance with State procedures.

10. Other Alternative or Additional State Remedies Other Than Termination—Medicaid only

Section 1919(h)(2)(A) allows the State to develop alternative or additional State remedies (other than denial of payment for new admissions and State monitoring). At § 488.228 (Alternative or additional State remedies), we proposed that for Medicaid facilities, the State may establish and impose alternative remedies if the State demonstrates to HCFA's satisfaction that the alternative remedies are as effective in deterring noncompliance and correcting deficiencies as the remedies of temporary management, civil money penalties, and emergency closure of the facility and transfer of residents. Regardless of which alternative remedies the State establishes, we proposed that they must include denial of payment for new admissions and State monitoring as remedies. We reached this conclusion because section 1919(h)(2)(D) of the Act requires that denial of payment for new admissions and State monitoring be imposed when a NF was found to have provided substandard quality of care on three consecutive standard surveys. We also required the State to include denial of payment for new admissions because section 1919(h)(2)(C) of the Act requires this remedy be imposed on a NF that has not complied with the participation requirements within 3 months after the last day of the survey which found the facility out of compliance with the requirements. We proposed requiring that these alternative or additional remedies be approved by HCFA and specified in the State plan.

11. Selecting an Enforcement Remedy

Once a State or HCFA determines that violations of nursing home requirements have occurred, there is an obligation to assess what the most effective remedy ought to be to assure the protection of the well being of the resident population. At § 488.208 (Choice of remedies), we proposed that the survey agency or HCFA assess individual deficiencies or clusters of deficiencies first according to the following initial factors:

- The presence or absence of immediate and serious threat to resident health and safety;
- The severity of the deficiency; and
- The scope of the deficiency.

We also proposed that, following the initial assessment, HCFA and survey agency could consider the following secondary factors:

- The relationship of one deficiency or group (cluster) of deficiencies to other deficiencies; and
- The facility's prior compliance history in general and specifically with reference to the cited deficiencies.

We said that the selection of a remedy would be based on the nature of the deficiencies or cluster of deficiencies. In the proposed §§ 488.210 (Action when there is immediate and serious threat) and 488.212 (Action when there is no immediate and serious threat), we set forth rules for the imposition of particular remedies in specified circumstances. Regardless of which remedy or remedies are imposed, each facility that is out of compliance with a program requirement must submit a plan of correction for approval by HCFA or the survey agency, except in the case of deficiencies that HCFA or the State determines to be at a scope and severity level of 1.

We said that the choice of remedy, by either HCFA or the State, including the manner in which HCFA or the State uses the scope and severity scales specified in § 488.204 (Determination of remedies) would not be subject to review as part of the appeals process.

We set forth the proposed severity and scope scale in § 488.204 (Determination of remedies). We said that, in order to determine the seriousness of deficiencies, the survey team would apply the following severity and scope scale guides:

• Severity scale.

The four levels of the severity scale are as follows:

—*Level 1.* Any deficiency with respect to requirements for long term care facilities that does not meet the criteria for severity levels 2, 3, or 4.

—*Level 2.* Either a negative outcome or resident rights violation has occurred, or, in the survey team's judgment, the ability of the individual to achieve the highest practicable physical, mental, or psychosocial well-being has been compromised, or both.

—*Level 3.* Potential physical harm, which could cause serious harm, impairment or death. In the survey team's judgment, there is a recognizable health or safety hazard, which if left unabated, is likely to cause serious harm, impairment or death.

—*Level 4.* Actual physical harm, which has caused serious impairment or death. Life threatening harm, severe impairment, or death has occurred.

• Scope scale.

The four levels of the scope scale are as follows:

—*Level 1*—Isolated. The survey team might conclude that a deficiency is isolated if its perception is such that, it believed the deficiency to exist only in a very limited number of cases.

—*Level 2*—Occasional. The survey team might conclude that a deficiency is occasional if, in its combined judgment, the deficiency is identified in a number of cases, but does not appear to reflect a pattern of facility behavior.

—*Level 3*—Pattern. The survey team might conclude that a pattern exists where, in its judgment, there are a sufficient number of repeated observations that it is likely that the deficiency might exist in cases not reviewed by the team.

—*Level 4*—Widespread. The survey team might conclude that a deficiency exists in sufficient number that, in its judgment, the deficiency represents a systemic or pervasive practice of the facility.

12. Application of Remedies

At § 488.210, we proposed that, if a determination has been made that a deficiency would present an immediate and serious threat to resident health or safety, HCFA or the State would take immediate action to appoint a temporary manager to remove the threat, impose other remedies as it determines necessary to bring the facility into full compliance, and/or terminate the facility's participation in the program within 23 calendar days of the last day of survey. If the facility does not accept temporary management, HCFA or the State would immediately terminate the provider agreement within 23 calendar days of the last day of survey. If the facility accepts temporary management but does not remove the immediate and serious threat within 23 calendar days of the appointment of the temporary manager, HCFA or the State would terminate the provider agreement on the 23rd day from that appointment. The 5-calendar day period for providing notice to facilities of termination of a provider agreement as specified in § 489.53 (Termination by HCFA) of the regulations would be included within this 23-day period.

At § 488.212, we proposed that, if the facility is found, at the time of the survey, to have deficiencies that do not pose an immediate and serious threat to resident health and safety, HCFA or the State may allow the facility to continue to participate for up to 6 months from the date of the survey if—

• The State finds that it is more appropriate to impose alternative remedies than to terminate the facility;

• The State survey agency has submitted a plan of correction approved by HCFA; and

• The facility (in the case of a Medicare SNF or the State in the case of a Medicaid NF) agrees to repay to the Federal government payments received if corrective action is not taken in accordance with the approved plan of correction.

We said that, if a facility does not meet these eligibility criteria for continuation of payment, HCFA would and the State must terminate the facility's provider agreement. If any deficiency at any severity or scope level remained uncorrected within 90 calendar days after the last day of survey, HCFA would and the State must deny payment for new admissions.

We proposed that HCFA terminate provider agreements for SNFs and NFs, and stop FFP for NFs for which participation was continued, if cited deficiencies were not corrected within 6 months of the last day of the survey.

In the proposed rule, we also set forth specific rules on how to apply both low severity and scope levels and all other severity and scope levels as follows:

• Low severity and scope levels

—If both the severity level and the scope level are 1, a deficiency still exists, but no alternative remedies are imposed or plan of correction required as long as correction is achieved within 90 calendar days from the last day of survey.

—The survey agency would be required to give the facility a summary of the deficiencies.

—If the survey agency identifies a recurrence of these deficiencies at the next standard survey, HCFA or the State would be required to impose one or more remedies specified at § 488.206 (Available remedies) due to the persistence of the deficiencies over time.

• All other severity and scope levels

—If the severity level is 1 and the scope is 2, 3, or 4, the State must (and HCFA does) require a plan of correction and may impose one or more remedies specified at § 488.206.

—If the severity level is 2 and the scope level is 1 or 2, the State must (and HCFA does) impose one or more of the remedies specified at § 488.206 paired with a plan of correction.

—If the severity level is 2 and the scope level is 3 or 4 in quality of care, the State must (and HCFA does) impose one or more of the remedies specified at § 488.206 paired with a plan of correction. The State would be required to notify the attending physician of each resident to which such finding is made, as well as any State board responsible for the licensing of the facility administrator.

13. Procedures for the Imposition of Remedies Notice

HCFA or the State would give the facility notice of intent to impose a remedy. At § 488.202(f), we proposed that HCFA or the State give the facility notice of the remedy at least 2 days but not more than 4 days before the effective date of the remedy in immediate jeopardy situations, and at least 15 days before the effective date of the remedy when there is no immediate jeopardy. Therefore, in practice, in immediate jeopardy situations, the remedy could be imposed anytime after the minimum 2 day notification period, but not later than the 10th day after the last day of survey. This would allow up to 5 days for HCFA or the State to send the notice and an additional 2 to 4 days before the remedy is imposed.

14. Hearings: Medicare and Medicaid Consistency

We proposed revising § 431.153 (Evidentiary hearing) to provide that States must impose remedies, with the exception of civil money penalties, against providers of services at the time that they identify the existence of violations of Federal requirements, notwithstanding any other provision of State law. We intended that, under this

provision, sanctions available under the program would become effective immediately after the identification of program violations and notification to the provider of the deficiencies and the impending sanction(s).

We also proposed to delete § 442.40 (Availability of FFP during appeals). This section has enabled States to continue to receive FFP, under certain circumstances, for facilities whose provider agreement has been terminated, for up to 120 days after the effective date of the termination if a required administrative hearing decision has not been reached. In light of our objective to be more aggressive in the enforcement of nursing home requirements by requiring that States provide only post-action hearings, just as is done under Medicare, we see § 442.40 as plainly inconsistent with this objective.

15. Continuation of Payment Pending Remedies

At § 488.232, we proposed that HCFA may continue payments to a facility with deficiencies if the following criteria are met:

- The State finds that it is more appropriate to impose alternative remedies than to terminate the facility;
- The State has submitted a plan of correction approved by HCFA; and
- The facility in the case of a Medicare SNF or the State in the case of a Medicaid NF agrees to repay the Federal government payments received if corrective action is not taken in accordance with the approved plan of correction.

We also proposed that HCFA or the State may terminate the SNF or NF agreement before the end of the 6-month correction period if these criteria are not met. We said that, if any of these criteria are not met or agreed to by either the State or the facility, the facility would receive no Medicare or Federal Medicaid payments, as applicable, from the date of the determination of noncompliance by either HCFA or the State.

If the criteria are met, HCFA or the State may continue payments to a facility with deficiencies that do not constitute an immediate and serious threat for up to 6 months from the last day of the survey. If the facility does not correct deficiencies by the end of the period specified, HCFA would—

- Terminate the provider agreement for Medicare SNFs; and
- Discontinue FFP to the State for Medicaid NFs. The State may terminate the provider agreement for NFs.

We proposed that the required termination notice would be sent 15 days before the end of the 6-month period, and that the notice period would run concurrently with the last 15 days of the 6-month period.

Medicare SNFs and dually participating facilities adversely affected by the requirement to repay to the government all payments received if corrective action is not taken could appeal the decision.

16. Resolution of Differences in Findings and Recommended Remedies Between State and HCFA for non-State operated Medicaid Facilities and Dually Participating Facilities.

Sections 1919(h) (6) and (7) of the Act set forth special rules for when the State and Secretary do not agree on findings of noncompliance, timing of termination or where remedies overlap. To implement these provisions, we provided in § 488.234 that, if HCFA finds that a non State-operated NF or a dually participating facility has met all requirements, but the State survey agency finds that the facility has not met all requirements and the failure does not immediately jeopardize the health and safety of its residents, the State survey agency's finding will control (proposed § 488.234(a)(1)). In this instance the State's certification of noncompliance would control. The dually participating facility would have its hearing rights met through the procedures set forth at 42 CFR part 498. The non-State operated NF would have its hearing rights met through the procedures set forth at 42 CFR part 431. If HCFA finds that a NF or a dually participating facility has not met all requirements and the failure does not immediately jeopardize the health or safety of its residents, but the State survey agency has not made such a finding, HFCA's finding could control. In this case, HCFA would impose the remedies and would permit the State to continue payments to the facility during the correction period (proposed § 488.234(a) (2) and (3)). These provisions specify the means to determine compliance or noncompliance for the Medicaid NF which will then, by virtue of section 1919(h)(8) of the Act, become the compliance/noncompliance decision for the Medicare SNF.

If both HCFA and the State find that a facility has not met all requirements and neither find that the failure immediately jeopardizes the health or safety of its residents, the following procedures would apply:

- If both HCFA and the State find that a facility's participation should be terminated, the State's timing of any termination (as specified in proposed § 431.153(c)) would control so long as the termination date does not occur later than 6 months after the date of the finding to terminate (§ 488.234(b)).
- If HCFA, but not the State finds that a facility's participation should be terminated, HCFA's decision to terminate would prevail and HCFA would permit continuation of payment during the period prior to the effective date of termination, not to exceed 6 months from the last day of survey (§ 488.234(b)(l)).
- If the State, but not HCFA finds that a facility's participation should be terminated, the State's decision to terminate and the timing of the termination (as specified in proposed section 431.153(c)) would control (§ 488.234(b)(2)).
- If HCFA or the State, but not both, would impose one or more remedies that are additional or alternative to termination, the additional or alternative remedies would also be applied (§ 488.234(d)(l)).
- If both HFCA and the State would impose one or more remedies that are additional or alternative to termination, only the additional or alternative remedies of HCFA would apply (§ 488.234(d)(2)).

17. Termination of Provider Agreements and Discontinuation of FFP

At § 488.238, we said that termination of the provider agreement would end payment to the facility and any alternative remedy. We proposed that HCFA and the State may terminate a facility's provider agreement if a facility—

- Fails to correct deficiencies within the specified time;
- Fails to submit a plan of correction within the time specified by HCFA; or
- Does not meet the eligibility criteria for continuation of payment.

We said that HCFA and the State would terminate a facility's provider agreement if a facility with immediate and serious threat deficiencies refuses temporary management, if that remedy is offered by HCFA or the Medicaid agency. In addition, we proposed that, before terminating a provider agreement, HCFA does and the State must notify the facility and the public—

- At least 2 and not more than 4 calendar days before termination for a facility with immediate and serious threat deficiencies; and
- At least 15 calendar days before termination for a facility with non-immediate and serious threat deficiencies.

The current termination notification requirement at § 489.53(c)(1) requires HCFA to give notice to any provider at least 15 days before the actual effective

date of a termination of a provider agreement, irrespective of whether the situation poses an immediate and serious threat, except in the case of Medicare SNFs. Section 489.53(c)(2) provides that SNFs with deficiencies that pose an immediate and serious threat are entitled to notice of the termination at least 2 days before the effective date of the termination of the provider agreement. Since the existing regulations do not discriminate between immediate and serious and nonimmediate and serious threat situations except in the case of Medicare SNFs, we proposed to amend § 489.53(c)(2) to require at least 2 and not more than 4 calendar days notice to all providers of a termination action involving an immediate and serious threat.

If HCFA or the State terminates the provider agreement, we would require the survey agency to arrange for the orderly transfer of all Medicare and Medicaid residents to another SNF or NF. If there is a closure of a Medicaid NF or dually participating facility by the State, we proposed at § 488.240 that the State would be required to arrange for an orderly transfer of all residents.

18. Conflict Resolution

In the proposed rule, we sought public comment about the desirability and feasibility of establishing a conflict resolution system whereby facilities dissatisfied with a certification of noncompliance would be afforded a formal mechanism for disputing deficiencies prior to the administrative and judicial review processes. We also requested comments on the best way for such a system to be implemented.

K. Incentives for High Quality Care

Section 1919(h)(2)(F) of the Act, as added by section 4213 of OBRA '87, provides that, in addition to the remedies discussed, a State may establish a program to reward, through public recognition, incentive payments, or both, nursing facilities that provide the highest quality care to residents who are entitled to Medicaid. A State would incorporate such an incentive program in its State plan. We proposed incorporating this provision in our proposed § 488.153(b).

L. Educational Program

Sections 1819(g)(1)(B) and 1919(g)(1)(B) of the Act provide that each State must conduct periodic educational programs for the staff and residents (and their representatives) of nursing homes in order to present current regulations, procedures, and policies on the survey and certification and enforcement processes. We proposed incorporating this provision in §§ 488.153(c) and 488.184.

M. Conforming Changes

In addition to changes already discussed in this preamble, we proposed making other conforming changes to regulations under part 431, 442, and 489.

III. Summary of Major Provisions in Final Rule

In response to public comments, we made numerous technical changes and some major policy changes, which are explained in detail in the following section. In summary, the major changes include the following:

- We reconfigured the criteria used to determine enforcement remedies when facilities are out of compliance with Federal requirements, so that there is a clearer correlation between levels of noncompliance and types of remedies imposed. We have also grouped the remedies into three remedy categories ranging from least to most severe. In this final rule, we present an enforcement scheme in which States may use their own methods for interpreting terms that describe the relative frequency or seriousness of deficiencies, other than immediate jeopardy, as long as they are consistent with the guidance presented in the regulation.
- We provide that remedies may cease when substantial compliance is achieved, and define substantial compliance as "a measure of compliance with the participation requirements such that no deficiencies exist which pose actual harm or have the potential for more than minimal harm." The only exceptions to this rule are those involving temporary management and State monitoring and denial of payment imposed for repeated noncompliance. In these cases, in addition to achieving substantial compliance, the facility must prove to HCFA's or the State's satisfaction that it will remain in substantial compliance.
- We also revise or add definitions for abuse, neglect, immediate jeopardy, substandard quality of care, standard survey, validation survey, extended survey, partial extended survey, abbreviated standard survey, deficiency, nursing facility, skilled nursing facility, substantial compliance, noncompliance and revisit.
- We clarify the term "professionals" as it relates to the members of a survey team by setting forth examples and by stating that the State, subject to HCFA approval, determines what constitutes a "professional."
- We modify the qualifications for temporary managers and set a salary floor.
- We expand the financial, employment, and familial circumstances that disqualify a surveyor from surveying a particular facility.
- We limit the instances in which a reduction in FFP is taken for inadequate survey performance to situations when a State demonstrates a pattern of failure to identify deficiencies in Medicaid facilities.
- We redefine what constitutes inadequate survey performance.
- We amend the regulations text at § 488.312 (§ 488.162 of the proposed rule), consistency of survey results, to require that State survey agencies study surveyor accuracy as well as consistency.
- We clarify that the survey agency will review complaint allegations and conduct a standard or abbreviated standard survey *if* the survey agency concludes that a deficiency in one or more requirements may have occurred and *only* a survey can confirm the existence of the deficiency or deficiencies.
- We limit HCFA's and the State agency's discretion to conduct an extended or partial extended survey to situations in which substandard quality of care has been identified. HCFA or the State will, however, continue to have complete discretion to examine any and all aspects of a facility's performance in order to determine compliance with the requirements.
- We add directed in-service training as a new remedy.
- We expressly state that denial of all payment for all Medicare residents in a facility may be imposed by HCFA and that HCFA may deny payment to the State for all Medicaid residents in a facility.
- We clarify that one or more remedies may be imposed for one or more deficiencies.
- We eliminate as a remedy denial of payment for certain diagnostic categories.
- We add the following to clarify the civil money penalty provisions:

  + The amount of the civil money penalty can be adjusted to reflect changes from non-immediate jeopardy to immediate jeopardy and from immediate jeopardy to non-immediate jeopardy.

  + A civil money penalty is increased for repeated deficiencies within the same regulatory grouping of requirements in those cases where a civil money penalty was imposed as a remedy for the first occurrence of the deficiency;

+ The interest rate for civil money penalties is in accordance with the rate fixed by the Secretary of the Treasury and used by the Department for Medicare and determined by the State for Medicaid;

+ The HCFA notice of the imposition of the civil money penalty does not have to be sent by mail;

+ The HCFA notice of intent to impose the civil money penalty includes more information regarding the nature of the noncompliance, dates of accrual and dates of collection;

+ The State's notice to non-State operated NFs when the State takes action must include at a minimum the information specified in the HCFA notice;

+ If the facility waives its right to a hearing in writing within 60 days from the date of the notice of intent to impose the civil money penalty, HCFA or the State reduces the civil money penalty by 35 percent.

+ The civil money penalty may start to accrue as early as the date the facility was first found out of compliance, as determined by HCFA or the State. This may be the last day of the survey or, in certain situations, before that date.

• When the basis for imposing a civil money penalty exists, the administrative law judge or State hearing officer may not set a penalty of zero, reduce the penalty to zero, or review the exercise of discretion to impose the civil money penalty.

• In the case of civil money penalties, facilities may challenge the level of noncompliance found by HCFA or the State if a successful challenge on the issue would affect the range of civil money penalty amounts from which HCFA or the State could collect a civil money penalty.

• We add a provision to direct the State during a complaint investigation to follow the specific procedures found at § 488.335 (§ 488.185 of the proposed rule), action on complaints of resident neglect and abuse, and misappropriation of resident property, when there is reason to believe that an identifiable individual neglected or abused a resident or misappropriated a resident's property.

• We add a requirement that the State must have written procedures for the timely review and investigation of allegations of resident neglect and abuse and misappropriation of resident property. In addition, we have required that the State should take appropriate precautions to protect a complainant's anonymity and privacy, if possible.

• If arrangements have been made with other State components for investigation of complaints, we require that the State have a means of communicating information among appropriate entities, and that the survey agency retain the responsibility for the investigation process.

• We require that findings of investigations be included in the nurse aide registry within 10 working days of the findings.

• We require that the survey agency determine if complaints violate any requirements of part 483, subpart B and take appropriate enforcement action as necessary if the allegation of neglect, abuse or misappropriation of property against an individual is a complaint against the facility.

• We require the notification of physicians of those residents identified as receiving substandard quality of care.

• We clarify that survey findings are reported with recommendations for corrective action to officials in the enforcing agency who determine what remedies to impose.

• With respect to the disclosure of survey information, we revise the provisions on fees, charges, and timeframes for release of information to provide that, with certain exceptions, HCFA or the State will disclose survey-related information and may charge the public in accordance with pre-existing Federal regulations and State procedures.

• We eliminate 120 days of FFP for a Medicaid NF and retain, for now, 120 days of FFP for an ICF/MR while the facility waits for a post-termination hearing.

• We formalize the opportunity for informal dispute resolution currently in the State Operations Manual for providers to raise unresolved issues to the State agency or the respective HCFA regional office after the provider's receipt of the official deficiency statement, and have prohibited challenges by providers from postponing or otherwise delaying the effective date of any enforcement action.

• We specify that a provider in substantial compliance at the end of 6 months may continue to participate without repayment of Federal funds.

• We delete the section on validation surveys from the regulation text because the statutory provisions are self-implementing and regulatory interpretation is not needed to clarify them. The few elaborations on the requirements in sections 1819(g)(3) and 1919(g)(3) of the Act are duplicated elsewhere in the regulation and there is little reason to repeat them.

• We renumber proposed §§ 488.150–488.185 and proposed §§ 488.200–488.240 as §§ 488.300–488.335 and §§ 488.400–488.456, respectively, to take into account existing section numbers already included in part 488, subpart D.

• We incorporate the provision of proposed § 488.240, Transfer of residents, into § 488.426 in the final rule. We revise the title of § 488.426 to Closure and/or transfer of residents.

• We incorporate the provisions of proposed § 488.228 into § 488.406 of the final rule.

IV. Discussion of Public Comments

We received more than 27,900 timely letters in response to our August 28, 1992 proposed rule. Most were from the owners and operators, administrators, staff, and attorneys of long term care facilities. Others were from professional organizations, chains of long term care facilities, employee unions, and vendors that supply facilities. We also heard from consumer advocates and ombudsmen, Federal, State, and local governments, consumer organizations, and residents of long term care facilities. Families of residents and their guardians and other legal representatives commented as well. A discussion of the comments follows. We do not discuss sections of the rule on which the public had no comment.

Normally, a final rule is not effective until 30 or 60 days after it is published in the **Federal Register**. Because implementation of the complex and far-reaching provisions of this final rule will require a major, nationwide training effort to train surveyors, their supervisors and related personnel, this rule is effective June 1, 1995.

Effective Date

Comment: One commenter stated that HCFA must provide nursing homes with a reasonable education and retraining grace period of no less than one year before implementing the new survey standards so that facilities can adjust to the enormous changes. The States and HCFA should provide reasonable funding to ensure that training is completed before the new requirements take effect. There is a precedent for this in HCFA's recent recognition that State certification requirements for home health care aides should be accompanied by State funding to help facilitate retraining.

Response: HCFA routinely provides a long lag time for the effective date of particularly complicated regulations and has done so for this regulation as well. The new long term care requirements were published in the **Federal Register** on September 26, 1991 (56 FR 48826), and were effective April 1, 1992. This final enforcement rule should have no effect on the

requirements for long-term care as stated in the September 1991 regulation and the facilities should have had ample time to become familiar with its requirements. Our primary concern is to provide oversight for the protection of residents in nursing homes who are dependent upon others for the care they receive. It would serve no purpose to allow facilities to have additional time to become familiar with requirements of which they are already aware. Our responsibility is to continue to move forward in enacting the enforcement provisions for long term care facilities.

Part 431 State Organization and General Administration

Comment: In response to our proposed revisions to part 431, most opposing comments concerned the effect on ICFs/MR of withdrawing FFP during appeals. Some commenters noted that OBRA '87 specifically exempted ICFs/MR from its scope, and stated that it is not appropriate to change the ICF/MR rules in implementing a law that applies to other facilities. Some commenters stated that the discussion on ICFs/MR was lost within the SNF/NF regulations, and there was no discussion in the preamble concerning applicability to ICFs/MR. Some stated that HCFA provided no rationale for this change in the ICF/MR rules, and therefore a proposed rule should be published which allows for full notice and comment rulemaking. Some commented that if the proposal had been written in a more direct manner, more groups would have written to object.

Response: We agree that it would be preferable to include the provisions applicable to ICFs/MR at a later date in rulemaking focused on ICFs/MR. Therefore, we are adopting the commenters' proposals that the 120 days of FFP continue for ICFs/MR until this issue may be more fairly resolved in such a rulemaking. Therefore, at this time, we are leaving the existing appeals system in place for ICFs/MR. There were other comments concerning ICFs/MR that are outside the purview of this regulation, and are therefore not addressed in this discussion.

For the reasons stated directly above, we are revising §§ 431.151, 431.153, and 431.154 to delete reference to SNFs and ICFs as follows:

- § 431.151 ("Scope and applicability.") is revised so that subpart B of part 431 specifies the appeal procedures the State must make available to an ICF/MR for which the State denies, terminates, or fails to renew certification or a provider agreement for the Medicaid program.
- § 431.153 ("Evidentiary hearing.") is revised to state that

—An ICF/MR whose certification or provider agreement is denied, terminated, or not renewed must be given an opportunity for a full evidentiary hearing on the denial, termination or nonrenewal;

—If the facility requests a hearing, it must be completed either before the effective date of the denial, termination or nonrenewal or within 120 days after that date; and

—The hearing must, at a minimum, include the provisions of § 431.153(e).

Comment: Several commenters responded to our specific request for comments on whether States, adversely affected by the repayment statutory provisions of section 1919(h)(3)(D), should have the right to appeal resulting disallowances to the Departmental Appeals Board (DAB) in addition to appealing a provider's certification of noncompliance under part 498. The commenters said that States should have this right to appeal but believed that few States would find it necessary to exercise this right.

Response: We agree that States probably would not often find it worthwhile to challenge a decision that had withstood the test of an appeal in accordance with part 498. However, because section 1116(d) of the Act provides States with a statutory right to reconsideration whenever HCFA takes a disallowance, and regulations at 45 CFR part 16 provide States with a hearing before the DAB when disallowances are made, we agree that appeal to the DAB should be an option for the States. At any such DAB hearing, the decision of the ALJ upholding HCFA's adverse action against the provider would, of course, be part of the evidence.

Comment: A few commenters noted that State hearings will significantly increase, and stated that the regulatory impact statement fails to consider the amount of time surveyors and other staff, including attorneys, will need to prepare for and participate in hearings. They commented that overall costs for which HCFA must reimburse the states will be increased.

Response: We recognize that the revised regulations expand the initial determinations for which States are required to grant an appeal. However, we have no program experience upon which to base a prediction of appeal volume or costs. There is not even a precedent to follow from the Medicare program, inasmuch as the expanded initial determinations are also new in the Medicare regulations. We anticipate that, in many cases, providers will be able to meet the necessary requirements before remedies are to be imposed, thus obviating the need for a hearing. Moreover, we are finding that the percentage of facilities with no deficiencies continues to increase, thereby causing us to predict fewer facilities facing some form of appealable enforcement action than has been the case previously. Because of these factors which may affect the increased number of initial determinations that are appealable, we can offer no valid prediction as to effect on volume or costs of appeals. However, we expect that the informal dispute resolution process will reduce the number (or scope) of adverse actions that lead to a hearing. Any increased net costs to States that are found to occur will be reflected in the budget process.

Because we are now providing for an informal dispute resolution, we are revising § 431.154 ("Informal reconsideration") to delete references to SNFs and NFs and state that—

- If the State decides to provide an ICF/MR with an opportunity for an evidentiary hearing required by § 431.153(a) only after the effective date of a denial of participation or termination, the State must offer the ICF/MR an informal reconsideration, to be completed before the effective date of the adverse action; and
- The informal reconsideration must, at a minimum, include

—Written notice to the facility of the denial of participation or termination, and the findings upon which it was based;

—A reasonable opportunity for the facility to refute those findings in writing; and

—A written affirmation or reversal of the denial, termination, or non-renewal.

Section 442.40 Availability of FFP During Appeals

We proposed deleting § 442.40, which presently provides for continuing FFP for up to 120 days after the effective date of termination of a Medicaid provider agreement if an appeal is pending. (See the discussion of comments on part 431 above.)

Comment: Several commenters wanted to retain the current provisions which allow for up to 120 days of FFP during a State's appeal process. A few wanted Federal funding to continue until a final decision is issued after a hearing. A few stated that elimination of the current rule would provide no benefit to the overall process.

Response: As we stated in the proposed rule, it is our belief that the needs of individual residents are best

served by the availability of prompt and effective remedial action that will motivate the fastest efforts by providers to comply with Federal program requirements. The Congress has already set the maximum time for a termination at 6 months. Because a State could be paid for perhaps as long as 4 months after the effective date of provider termination, the State would have no incentive to challenge NFs to promptly comply with all program requirements. This is because, in all likelihood, the State would continue funding the Medicaid facility while receiving Federal payments. If we eliminate Federal funding to the State on a more accelerated schedule, States are likely to stop funding the NF once we stop Federal payments to the State. Thus, a greater incentive will exist for NFs to promptly comply with program requirements. Moreover, because the 120-day provision would significantly delay the imposition of certain remedies, it would not be consistent with section 1919(h)(2) of the Act, which calls for States to minimize the period of time between the identification of deficiencies and the imposition of remedies. In our opinion, the residents will benefit because the facilities in which they reside will come into substantial compliance faster. However, for the reasons previously explained, we have decided to continue FFP to ICFs/MR whose agreements have been terminated for up to 120 days after termination while we work on the publication of a separate rulemaking on ICF/MR policy.

Comment: A few commenters stated that if pre-hearings were provided, the 120 day regulation would not be necessary for SNFs and NFs, but that if pre-hearings were not provided, the 120 regulation should be retained in order to give a facility time to present its side of the story before suffering irreparable harm.

Response: As discussed elsewhere in this preamble, we are providing for dispute resolution beginning with the provider's receipt of the official Statement of Deficiencies, in order to give facilities an opportunity to rebut survey findings early in the process. By adding this feature to the enforcement process, we are balancing the needs of facilities to avoid unnecessary disputes and protracted litigation, on one hand, with the interests of facility residents, which we believe to be paramount, in assuring the most rapid correction of deficiencies. In so doing, we believe that the continued application of the 120-day rule would upset this balance of interests that we believe the Congress intended us to have.

Comment: A few commenters predicted that the courts would be clogged with pretermination or presanction hearings if FFP were denied during the State appeal procedures.

Response: Post-termination hearings have been upheld by all the circuit courts that have analyzed the issue of whether post-termination hearings satisfy the due process clause of the Constitution (see discussion titled, "Hearings: Medicare and Medicaid Consistency"). Moreover, we do not believe that the courts will be eager to entertain legal challenges from providers that have failed to exhaust their administrative remedies.

We note that the Federal courts are not clogged with pre-termination challenges when Medicare agreements are terminated and Federal funding ceases on the effective date of termination. Under both Medicare and Medicaid, 30 days of funding will be available, as it is now, to provide a period of time for orderly transfer of residents.

Comment: A few commenters believed that HCFA would be punishing those States that aggressively implement the Act, and some noted that States would have a financial incentive to "settle" during the survey process.

Response: Because the Medicaid program is a joint Federal-State program, we do not believe that States have an incentive to spend their own State money on nursing care provided in a facility that does not meet the statutory requirements.

Comment: Some wondered why HCFA's finding of noncompliance takes precedence over a State survey agency's finding of compliance, yet HCFA has no obligation to provide FFP during the appeal.

Response: HCFA's finding of noncompliance takes precedence over a State's finding of compliance because the Act mandates this result in sections 1919(h)(6) and 1919(g)(3)(A). The Congress provided detailed procedures for resolving differences between a State and HCFA, but did not provide that FFP should continue merely because HCFA and a State disagree about a facility's compliance status. If HCFA's termination determination is overturned as a result of the appeal process, the State would receive FFP based on the reinstated provider agreement should the State have continued to make Medicaid payments to the facility.

Comment: Some commenters apparently equated the availability of 120 days FFP during the hearing process with providing a pre-termination hearing. These commenters noted that Medicare's post-termination hearing does not cause concern to most providers because Medicare pays for only a small portion of days, whereas, to require post-termination hearings for Medicaid will cause greater concern because more money is at stake.

Response: As we explain more fully elsewhere in this preamble, we believe it is important that, in light of the great similarity between facility requirements in Medicare and Medicaid and the fact that such a large percentage of facilities participate in both programs, appeal procedures ought to be the same for both programs. Additionally, because of the informal opportunities to resolve differences in the form of an informal dispute resolution mechanism, we believe that a facility's concerns for due process are more than adequately protected when balanced with the interests of nursing home residents in the swift correction of deficiencies

Redesignation of Sections

A new Subpart D of part 488, consisting of §§ 488.201–488.211, became effective on August 31, 1992, shortly after the proposed rule was published on August 28. This requires that we designate Subpart E, which was to consist of §§ 488.150–488.185, with subsequent numbers. To assist the reader, we are publishing the new table of contents for Subpart E, with designations of the proposed rule shown in parenthesis. In the following discussions, we refer to the sections as renumbered, with the proposal's identification included only if distinction is necessary.

Sec.

488.300 Statutory basis. (§ 488.150)
488.301 Definitions. (§ 488.151)
488.303 State plan requirement. (§ 488.153)
488.305 Standard surveys. (§ 488.155)
488.307 Unannounced surveys. (§ 488.157)
488.308 Survey frequency. (§ 488.158)
488.310 Extended survey. (§ 488.160)
488.312 Consistency of survey results. (§ 488.162)
488.314 Survey teams. (§ 488.164)
488.318 Inadequate survey performance. (§ 488.168)
488.320 Sanctions for inadequate survey performance. (§ 488.170)
488.325 Disclosure of results of surveys and activities. (§ 488.175)
488.330 Certification of compliance and noncompliance. (§ 488.180)
488.331 Informal dispute resolution. (Not in proposal)
488.332 Investigation of complaints of violations and monitoring of compliance. (§ 488.182)
488.334 Educational programs. (§ 488.184)
488.335 Action on complaints of resident neglect and abuse, and misappropriation of resident property. (§ 488.185)

Section 488.301 Definitions

Comment: Many commenters were concerned that the proposed definition of "abuse" is too broad and ambiguous. Unless the definition is amended, they believe it will generate inconsistency in the survey process and overburden the system with complaints of abuse. Other suggestions and recommendations are as follows:

- Willfulness and/or deliberate intent should be incorporated into the definition;
- Change "and/or otherwise disregard of an individual which could cause or result in mild to severe harm" and replace with "has caused or creates a high probability of causing serious harm";
- Physical harm should be defined; include a definition of assault suggested by a particular State's definition;
- The phrase "otherwise disregard of an individual" should be deleted as this statement more accurately describes neglect;
- Incorporate the definition of abuse as found in the Older Americans Act.

Response: We have considered the above comments and are revising the definition of abuse in § 488.301 to address some of the aforementioned concerns. However, we do not believe it appropriate to adopt any one State's definition as there is no evidence to suggest that one definition is superior to another. We are adopting the major concepts of the definition in the Older Americans Act. Therefore, the modified definition of abuse now reads: Abuse means the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish.

Comment: Some commenters suggested that we require that the resident perceive the conduct as abusive.

Response: We do not accept this comment. Our obligation is to protect the health and safety of every resident, including those that are incapable of perception or are unable to express themselves. This presumes that instances of abuse of any resident, whether cognizant or not, cause physical harm, pain, or mental anguish.

Comment: Some commenters believed that the definitions of abuse and neglect should also apply to nurse aides in hospitals as well as in nursing facilities.

Response: This comment falls outside the purview of this regulation. This rule specifically pertains to the survey, certification and enforcement of requirements of participation for SNFs and NFs.

Comment: Some commenters thought that the proposed definition of abuse was inconsistent with that in § 483.13.

Response: Section 483.13(b) does not provide a definition of abuse. What it does provide is a list of the types of abuse from which residents have a right to be free. The definition, a statement as to the meaning of the term "abuse," is offered at § 488.301.

Comment: Several commenters thought the proposed definition of "neglect" was too broad and ambiguous. They contend it is necessary to narrow the definition in order not to inundate the system with complaints. Some commenters requested that the terms "willful" and "intent" be inserted into the definition to limit the scope of actions that could be considered neglect.

Response: In order to promote consistency in the survey process, there needs to be a common definition of neglect for a variety of applications. We have, therefore, adopted the concept of the definition used in the Older Americans Act, as we explain below. That definition does not incorporate the terms "willful" or "intent." While an act of neglect can be intentional, neglect can also occur unintentionally. However, we are specifying at § 488.335(e) that a State must not make a finding that an individual has neglected a resident if the individual demonstrates that such neglect was caused by factors beyond his or her control. If the inattentiveness is due to factors within that person's control, intentional or unintentional, he or she can be considered to have neglected the resident(s). Therefore, while willfulness and intent may be considered when a State finds that an individual has neglected a resident, we believe the terms "willful" or "intent" should not be included in the definition because neglect can occur unintentionally.

Comment: Some commenters perceived that, in order for a finding of neglect to be made against an individual, the alleged neglect must be within the individual's control or job responsibility. It was suggested that a provision be added to the proposed definition that includes the individual's "breach of duty to provide * * * needed * * * services." The commenters contend that the proposed definition places the blame upon the individual and excludes the extent of the culpability of the facility to provide the necessary services or goods.

Response: We agree that an employee should not be found to have neglected a resident if the neglect was caused by factors beyond the control of the employee. As this provision is already addressed in § 488.335(e), we do not believe it needs to be restated in § 488.301.

Comment: Other commenters suggested their own State definition of neglect should suffice in order not to confuse facilities with separate definitions.

Response: As noted earlier, there has been no evidence to suggest that any State definition is preferable to ours. In fact, we believe allowing each State definition to stand, as is, would increase confusion among the providers and promote inconsistency from State to State.

Comment: Many commenters wished to add the phrase: "Each resident should be free from * * *," prior to the proposed definition of neglect.

Response: We agree that each resident should be free from neglect as well as other forms of mistreatment. This prohibition of neglect is inherent in § 483.13(c). We do not believe the phrase suggested by the commenters defines the term. Therefore, we did not include it in § 488.301.

Comment: Other commenters requested that we require (within the definition of neglect) that evidence be presented that physical, emotional or psychological harm or some other negative outcome had occurred.

Response: We do not accept this comment because neglect may be determined even if no apparent negative outcome has occurred. The potential for negative outcome must also be considered. For example, instances of neglect may include, but are not limited to, being left to sit or lie in urine or feces, isolating dependent residents by leaving them in their rooms or other isolated locations, or failing to answer call bells to provide needed assistance.

Comment: Many commenters believed that "timely" should be removed from the definition of neglect or else be defined, as it is overly broad. Other commenters wish to add the language incorporated within section 102(37) of the Older Americans Act.

Response: Although the term "timely" does not appear in the final definition, we believe timeliness is an integral component in determining neglect. A delay in providing needed services for a resident has the potential to cause physical harm and/or mental anguish. Such a delay (or lack of timeliness) can be considered neglect under the definition we are incorporating in the final regulation. We are adopting the concept from the Older Americans Act which provides that neglect means failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness.

Comment: Many commenters asked that HCFA include the following occupations in the proposed list of licensed health professionals:

- Clinical Nurse Specialist;
- Medical Records Specialist;
- Dietitian;
- Social Work Assistant;
- Speech Pathologist or Audiologist;
- Recreational or Activities Specialist;
- Respiratory Therapist;
- Dentist or Dental Hygienist;
- Optometrist;
- Podiatrist;
- Pharmacist;
- Psychologist;
- Chiropractor;
- Nursing Home Administrator; and
- All other licensed health professionals.

Other commenters believed that licensed practical nurses (LPNs) should not be included on the list because, although licensed, LPNs are not professional nurses by education or by legal accountability and must work under the supervision of a registered nurse or a medical doctor. It was also suggested that the term be changed to "licensed health personnel."

Response: We are deleting the definition of "licensed health professional" as it is not used in this part.

Comment: Several commenters recommended changing the proposed definition of "misappropriation of resident property" to apply to the resident's "real or personal property," as opposed to "belongings or money," because they believe the current language is not broad enough to encompass every type of resident property. Other commenters recommended that the definition include "attempted" misappropriation or the "intent to deprive."

Response: We do not discern any substantial difference between the terms "belongings or money" and "real or personal property." We believe the terms "belongings or money" are sufficient to implement the statutory requirement in sections 1819(g)(1) and 1919(g)(1) of the Act. Additionally, the concept of "intent to deprive" is inherent within the phrase "deliberate misplacement" in the definition. Therefore, we are not accepting these comments as we believe the suggested changes do not substantially enhance the proposed definition.

Comment: Some commenters proposed to limit the definition of misappropriation to that incurred by a nurse aide.

Response: We disagree. Limiting the definition of misappropriation to a specific individual would exempt all others from the provisions of the Act which explicitly states in sections 1819(g)(1)(C) and 1919(g)(1)(C):

> * * * allegations of * * * misappropriation of resident property [is] by a nurse aide of a resident in a nursing facility *or by another individual* used by the facility in providing services to such a resident." (emphasis added)

Comment: Some commenters wanted our definition to set a minimum of $50 on the amount of money or property which can be deliberately misplaced or wrongfully used without the resident's consent in order to be considered misappropriation of resident property.

Response: We disagree because we believe that it is impossible to quantify the value of some personal items. Moreover, possessions, regardless of their apparent value to others, must be treated with respect, for what they are and for what they may represent to the resident. As no such limitations are dictated by the Act, we interpret misappropriation to apply to any belongings or money, regardless of their actual value.

Comment: Some commenters questioned whether the proposed definition of "nurse aide" includes dietary aide or private duty paid individuals. They recommended that the definition of nurse aide be amended to read "provides personal care and nursing related services under the supervision of licensed nurses." Additionally, commenters wanted a list of distinct duties required of nurse aides to be added to the final definition.

Response: We do not adopt these comments because the definition of a nurse aide is specified by sections 1819(b)(5)(F) and 1919(b)(6)(F) of the Act and by implementing regulations at § 483.75(e).

Comment: Some commenters stated that the phrase "substandard quality of care" was specifically used in the Act and that HCFA should recognize and adopt the same language.

Response: We agree with the above comment. To be consistent with the Act, we are using that terminology throughout this final rule, where appropriate.

Comment: Some commenters wanted HCFA to include "any violation of the requirements that leads to, or is likely to lead to a failure of the resident to achieve the highest practicable physical and mental well-being" in the definition of substandard quality of care.

Response: We are not accepting this suggestion. We believe that any infringement of any requirement could be construed to compromise some ability of a resident to achieve his or her highest practicable well-being. The definition proposed by the commenter could encompass every deficiency under every regulatory requirement. Given the ramifications a determination of substandard quality of care has for a provider (loss of NATCEP, notification of licensing boards and physicians), we are limiting the definition of substandard quality of care to reflect the most egregious situations related to participation requirements under §§ 483.13 ("Resident behavior and facility practices"), 483.15 ("Quality of life"), and 483.25 ("Quality of care"). However, we are not minimizing deficiencies in other participation requirements. As discussed later under the response to public comments for § 488.401, it is possible that a deficiency under any requirement can encompass any degree of seriousness. Deficiencies under the remaining requirements can be more appropriately addressed through specified remedies rather than through the loss of NATCEP which would be precipitated by a substandard quality of care determination.

Comment: Several commenters thought that the scope and severity grid should not be a determining factor in defining substandard quality of care.

Response: As we discuss later at § 488.404, we are removing references to the scope and severity grid from the definition of substandard quality of care. We are retaining, however, concepts of seriousness and frequency which we believe are important to determining this type of deficient facility practices.

Comment: Other commenters wished to include compliance history in the final definition of substandard quality of care.

Response: We do not agree with this comment. Our first priority is to protect the health and safety of the residents. If violations are identified, the problem must be rectified, regardless of the facility's compliance history.

Comment: Some commenters wanted us to explicitly state in the definition of substandard quality of care that deficiencies of immediate jeopardy are regarded as substandard quality of care.

Response: We are not adopting this comment. Given the ramifications a finding of substandard quality of care has for a provider, we are limiting the definition of substandard quality of care to those requirements mentioned previously. The only immediate jeopardy deficiencies considered substandard quality of care are those determined under the participation requirements of §§ 483.13 ("Resident behavior and facility practices"), 483.15

("Quality of life"), and 483.25 ("Quality of care"). Because we are removing references to the scope and severity scales from the definition of substandard quality of care we believe that it is necessary to amend the definition. We are now defining substandard quality of care as care furnished in a facility that has one or more deficiencies related to participation requirements under §§ 483.13 ("Resident behavior and facility practices"), 483.15 ("Quality of life"), or 483.25 ("Quality of care") that constitutes immediate jeopardy, a pattern of widespread actual harm that is not immediate jeopardy, or widespread potential for more than minimal harm, but less than immediate jeopardy with no actual harm.

Comment: Some commenters wanted compliance and correction to be defined as "substantially meeting all applicable certification requirements."

Response: While we do not agree with the suggested definition, we do agree with the intent of the commenters that there should be some range of compliance within which prospective and current providers may participate. This concept is discussed further in § 488.330 "Certification of compliance". Accordingly, in § 488.301, we define "substantial compliance" to mean a level of compliance with requirements of participation such that any identified deficiencies pose no greater risk to patient health and safety than the potential for causing minimal harm.

As we discuss later in this preamble, a facility may avoid a remedy even if it has failed to comply perfectly with all statutory requirements. However, the facility still has the duty to provide the care to each resident which enhances the chances for positive outcomes and avoids negative ones. If a single resident experiences *any* harm, no matter how minimal, the facility will not have satisfied its statutory obligations.

We acknowledge that there might be many definitions that we could have chosen, but in our view, the definition we have settled on best implements the Act and accommodates both facility and resident concerns.

Additionally, since we are incorporating the concept of substantial compliance, we believe it is necessary to provide a definition of noncompliance at § 488.301. Noncompliance with the requirements of participation is any deficiency that causes a facility to not be in substantial compliance.

Section 488.303 State Plan Requirement

Comment: There were several comments concerning the requirement for and content of incentive programs.

- Some commenters suggested that the incentives to reward quality care be required and implemented on a national scale by HCFA as well as the States.
- A few commenters suggested that the States develop incentive programs with consultation from residents, families and the ombudsman.
- One commenter presented an elaborate process including applications, group evaluations and resident participation for any award.
- One commenter said that the regulation should define the rewards for quality to support quality improvement.

Response: Section 1919(h)(2)(F) of the Act does not permit HCFA to require the States to establish a public recognition or incentive payment system for nursing facilities that provide high quality care. If the commenters mean that the same public recognition or incentive payment system be permitted for Medicare SNFs, the Act does not authorize such recognition. In addition, a HCFA program for nursing facilities would be duplicative.

Section 1919(h)(2)(F) of the Act gives States the flexibility to decide if an incentive program would be appropriate and how they will implement the program. If a State decides to implement an incentive program, the State should have the option to consult those individuals and organizations it thinks necessary. In the same vein, it would be inadvisable to restrict the States' programs to elaborate regulatory procedures because, in so doing, we may inadvertently discourage States from establishing such programs. Although we encourage States to develop effective incentive programs, we are not making any changes to § 488.303 because we want to preserve the States' flexibility in establishing such incentive programs.

Comment: A few commenters suggested that the Medicaid program should fund the incentive payments through civil money penalties.

Response: The Act provides that State expenses for the implementation and maintenance of an incentive program is an authorized Medicaid administrative expense: the Act does not permit the use of funds collected from civil money penalties for this purpose. Indeed, section 1919(h)(2)(A)(ii) of the Act provides that when the State uses the specified civil money penalty remedy, the State must apply funds collected through civil money penalties to the protection of the health or property of nursing home residents. Therefore, we reject this comment.

Comment: Several commenters suggested that the regulation should go beyond the Act and specify certain topics and methods of training.

- Some wanted mandated educational programs for assessment and care planning, resident rights and quality of care issues as well as those in subparts E and F of part 488.
- Other commenters believe that the scope of the educational program should include a section on complaint investigation and resolution.
- A few commenters asked that States work with the ombudsman program to develop and present training.
- Another commenter believes that literature and/or video presentations would be more effective than State presentations.

Response: Sections 1819(g)(1)(B) and 1919(g)(1)(B) of the Act require that States conduct educational programs for staff and residents of facilities regarding current regulations, procedures and policies of the long term care survey and certification process. We agree with the commenters that the proposed regulation unnecessarily restricts the scope of the mandated educational programs. We are revising it to permit the education programs to cover all aspects of the long term care survey process so that the States have the flexibility to structure the educational programs to the needs of the facilities. The methods to develop the programs (for example, consultation with the ombudsman program) and the methods of presentation are being left to the States.

Comment: A few commenters suggested that these requirements be met, in part, by giving facility staff and residents access to HCFA and State agency surveyor training sessions.

Response: We believe that this suggestion, if done at the participant's expense, may have merit. Traditionally, we have not had the ability within available resources to accommodate all providers or other interested parties wanting to attend training; our available resources are devoted, for the most part, to providing timely training for surveyors. However, being able to offer surveyor training universally to providers and interested others at their own cost, and if space allows, may help improve understanding and cooperation between surveyors and the other parties. We are, therefore, seriously considering what changes in policy and legislation will be necessary to allow this.

Comment: One commenter suggested that a review of the State educational

activities be made a part of HCFA's State agency evaluation program which would assure its implementation.

Response: The HCFA State Agency Evaluation Program (SAEP) currently is undergoing substantial review and revision. We are unable, at this time, to assert that a review of State educational activities will become a part of the revised SAEP. Nonetheless, the HCFA regional offices will continue to have the responsibility to monitor and assess the States' educational activities.

Comment: Several commenters suggested that the States be directed to include bans on all new admissions as a required remedy because a ban on only Medicaid admissions is discriminatory. A majority of those commenting suggested that a directed plan of correction also be included as a required remedy.

Response: We do not have statutory authority to allow the States the option of banning all new admissions. States are free, however, to enact their own laws regarding facility licensure that may extend enforcement options beyond the reach of the Act.

Section 1919(h)(2)(A)(i) of the Act expressly gives States the authority to impose payment denials with respect to new Medicaid admissions. While the Act also provides States with the opportunity to design other remedies, subject to Federal approval, that are as effective as those enumerated in the Medicaid law, we believe that it would be inappropriate for us to evaluate a remedy that would be aimed at the admissions of persons over whom the Medicaid law provides no jurisdiction. We believe it would be more appropriate to leave to State law remedies that extend as far as the commenters suggest. In any event, while a denial of payment for new Medicaid admissions does not reach all potential admissions, it will provide an incentive to a facility to correct deficiencies rapidly, which would serve to benefit not only Medicaid residents but all those persons who are receiving care at the facility regardless of payment source. Also, States may provide public notice of the imposition of the denial of payment for new admissions remedy which would alert potential residents to the situation in the facility.

We are not accepting the suggestion that directed plans of correction be a required remedy. As discussed under "Factors to be considered in selecting remedies" later in this preamble, we have provided a revised enforcement scheme in this final rule that correlates the seriousness of noncompliance with the selection of remedies from within specified enforcement remedy categories. While we do not intend to mandate the specific selection of the directed plan of correction remedy from among the available enforcement actions for any specific level of actionable noncompliance, in other words, when the facility is not in substantial compliance, we note that it is always an enforcement option and it may be the only remedy used for lower level deficiencies.

Comment: Some commenters requested that we require States to submit any alternative or additional remedies to a full State rulemaking process with an opportunity for comment. Other commenters believed that States should be allowed to implement additional or alternative remedies unless HCFA can demonstrate that the State remedies are not as effective as the HCFA remedies.

Response: The States must follow any internal State procedures which govern the development and submittal of a Medicaid State plan amendment. The Act does not require nor do we believe our regulations should require specific procedures that would limit State prerogatives for promulgating enforcement policies. Similarly, section 1919(h)(2)(B)(ii) of the Act states that the State must demonstrate that any alternative remedies are as effective as the remedies specified in the Act.

Comment: Commenters suggested that the effective remedies established by the States be made applicable to dually participating facilities.

Response: We are accepting this comment with some clarification. Since States may establish their own sanctions through their respective State plan amendment, and since HCFA will be the entity imposing sanctions for dually participating facilities, it is highly likely that a State may choose to impose one of its own remedies on a Medicaid NF which HCFA would have no authority to impose against the Medicare provider agreement. It would not be rational for us to proceed with an enforcement scheme whereby a single facility, by virtue of participating in both Medicare and Medicaid, would be subject to a dual enforcement track. Also, and more importantly, since HCFA will be taking the lead on enforcement actions against dually participating facilities under part 498, we have concluded that HCFA needs to have the authority to impose these alternative or additional remedies against Medicare facilities in the States that have established these remedies. While we acknowledge that this would not permit consistency nationally relative to remedies available for dually participating facilities, we conclude that it is a realistic and necessary response to statutory intent that enforcement decisions made regarding the Medicaid agreement, which could include imposition of these "other" State remedies, will be applied by the Secretary to the Medicare agreement as well. Therefore, under the Secretary's general rulemaking authority, this final rule provides that, if the State's remedy is unique to the State plan and has been approved by HCFA, then that remedy, as imposed by the State under its Medicaid authority, can be imposed by HCFA against the Medicare provider agreement of a dually participating facility.

Comment: One commenter suggested that the regulations create penalties for States that fail to implement the State enforcement rules.

Response: The Act provides no specific penalty for State failure to implement the enforcement provisions of the Act, nor do we wish to add one. However, there are existing Medicaid rules regarding the submission of and adherence to State plan amendments. If a State does not comply with the Medicaid rules, the failure could lead to Medicaid administrative sanctions.

Section 488.305 Standard Surveys

Comment: A large number of commenters opposed the provision at proposed 488.155(b) and suggested we delete it. This section states that the State survey agency's failure to follow HCFA survey procedures will not invalidate otherwise legitimate determinations that a facility's deficiencies exist. Because the provision does not appear in the Act, a few commenters questioned whether the Congress sanctioned this policy, and certain commenters asked that facilities be allowed to appeal surveyor noncompliance with the survey protocol. Many commenters felt that this provision would encourage disregard of established survey guidelines, and for this reason one commenter believed this provision would cause the standard survey to violate the Fourth Amendment.

Response: We believe the provision accurately reflects the intent of the Act and are retaining it in § 488.305(b). To invalidate legitimate determinations of noncompliance and leave them unaddressed would be in opposition to the mandate of OBRA '87 that all requirements be met and enforced, and would lead to inconsistent application of the law.

Sections 1819(g)(2)(C) and 1919(g)(2)(C) of the Act reveal the intent of the Act very clearly. These sections state that standard surveys must be conducted based upon a protocol, but

add that the failure of the Secretary to develop, test or validate such a protocol will not relieve any State or the Secretary of the responsibility to conduct surveys. Because the Congress intended for survey results to be binding even when surveys were conducted in the absence of a formal protocol, it is clear that the Congress views the substance of survey findings to be of greater importance than the process used to identify them. An appeal of a deficiency based on surveyor noncompliance with the established protocol would be inconsistent with this position, and as a result, we will not offer facilities an appeal on these grounds. In particular, we wish to avoid situations where otherwise well documented deficiencies are subject to challenge, and potentially invalidated, simply because a surveyor did not follow every last detail of the survey protocol. We believe this would be surrendering all substance to form and would clearly thwart Congressional will. Moreover, since the source of binding requirements on facilities is not in the survey protocol, but in the Act and regulations, the ultimate, and proper, test of facility noncompliance will not rest on whether the survey protocol was rigorously followed, but on whether a requirement of the Act or the regulations has been violated.

The foregoing does not imply that HCFA encourages or condones disregard of its established survey policy; on the contrary, HCFA trains surveyors in survey policies and procedures and is responsible for assessing State survey agency performance and applying sanctions when there has been a failure to use Federal standards and protocols. The guidance we provide to surveyors, and the expectation we have that they adhere to our directives, contradict the claim that surveyors are given unbridled discretion which would render the standard survey an unreasonable administrative search in violation of the Fourth Amendment. Once a facility seeks participation in the Medicare or Medicaid programs, it must accept the responsibility of demonstrating its compliance with Federal certification requirements which the Congress has directed must be done through the survey process. A facility cannot seek such participation, and accept program funds, and then argue that Federal or State efforts to monitor compliance with essential health or safety requirements constitute a violation of the Fourth Amendment as an unreasonable search and seizure. In any event, surveys that nursing homes experience in the Medicare and Medicaid programs are reasonable. They advance the government's interest in protecting the health and safety of individual residents, and because of the various requirements for surveys in both the Act the Federal regulations, no facility can be said to be unaware of its obligations to permit onsite visits by State or Federal surveyors as a condition of its participation in these programs. Commercial enterprises, such as nursing homes, do not have the same expectation to be free of warrantless searches as individuals in their homes do. Indeed, the United States Supreme Court has ruled that warrantless searches of closely regulated businesses do not pose a violation of constitutional Fourth Amendment protections that commercial enterprises have.

We recognize that protocols and guidelines are necessary to promote consistent survey practice. However, whether or not a surveyor follows protocols must be subordinate in importance to whether or not a facility meets Federal participation requirements. Violations must be recognized and remedied appropriately if resident interests are to be protected and integrity is to remain in the enforcement system.

Comment: One commenter questioned whether proposed § 488.155(a)(3) conflicts with subpart III of Appendix P of the State Operations Manual, Transmittal No. 250. Section 488.155(a)(3) would require the State survey agency to include in the standard survey an audit of written plans of care and residents' assessments. Subpart III states that a review of the accuracy of resident assessments is to be performed as part of the extended survey which is triggered by the identification of a deficiency in quality of care during the standard survey.

Response: There is no conflict because a review of comprehensive assessments and care plans is not limited to the extended survey. It is also a major part of the Quality of Care Assessment performed during the standard survey (see Task 5 in Appendix P of State Operations Manual Transmittal No. 250). The review that occurs during the extended survey is slightly different, though, in that surveyors are directed to review more recent care plan and assessment information, and are given more flexibility in choosing sample size than in the standard survey.

Comment: One commenter suggested that we require surveyors to determine whether a facility attempted to accommodate both the exercise of a resident's rights and the resident's health when there appears to be a conflict. The commenter believed that accommodation should include exploration of care alternatives through a thorough care planning process in which the resident may participate.

Response: Surveyors are presently instructed to make such determinations. At tag number F295 in the Interpretive Guidance to Surveyors, the surveyor is directed to determine whether the care plan reflects the facility's efforts to find alternative means to address a problem if a resident has refused treatment. Additional guidance concerning this matter is found at tags F174 and F158. We believe such specific instructions are more appropriately located in the State Operations Manual than in the regulation itself, so we are not incorporating them into the regulation.

Comment: A few commenters suggested that we explicitly mention a review of the quantity and quality of nursing services staff in § 488.305(a)(2) where we outline a survey of the quality of care.

Response: Inherent in an evaluation of the indicators of care and services listed at § 488.305(a)(2) is an examination of the quality of the staff providing them. As part of the observational portion of the Quality of Care Assessment, surveyors are directed to make observations of staff/resident interactions which necessarily involve evaluating the quality of care and services provided by the staff, which is an indication of the quality of the staff itself. For this reason we do not explicitly mention this assessment in the regulation. We do specifically address a review of staffing in Appendix P of the State Operations Manual Transmittal No. 250.

Comment: One commenter recommended that we include, as part of the standard survey, private meetings between surveyors and family groups during evening and or weekend hours and another conference at the conclusion of the survey process to explain survey findings in lay person language.

Response: We recognize the value of family input in the survey process, and direct surveyors when interviewing to provide the opportunity for all interested parties to give what they believe is pertinent information. We expect this to include accommodating family members who wish to speak with the survey team but are unable to be at the facility at the time of the survey. It is possible for family members to call surveyors at the facility and be either interviewed over the telephone or scheduled for a personal meeting as the survey schedule allows. The survey team is in a better position than HCFA

to know how to best accommodate these groups within the time and personnel constraints of the standard survey, and for this reason it would be unduly restrictive of us to require evening and week-end meetings.

Neither will we require that there be an exit conference specifically for family groups. If survey teams conduct an exit conference for facility residents, family members are not prohibited from attending. If such a conference does not take place, family members still have many other opportunities to learn about the outcome of a survey. Survey results are available to family members whenever they visit a facility, because facilities are required to accessibly post the results of the most recent survey. These survey reports are thorough and detailed, and if a family member has any difficulty understanding the results, he or she may resolve it by contacting either the long-term care ombudsman or the State survey agency.

Comment: One commenter proposed that we allow the survey team to expand the standard survey when it identifies substandard quality of care instead of requiring it to conduct an extended or partial extended survey to investigate the extent of the facility's problems.

Response: We must reject this proposal. We are bound by sections 1819(g)(2)(B) and 1919(g)(2)(B) of the Act which require a facility to be subject to an extended survey when it is found to have provided substandard quality of care during the standard survey.

Comment: One commenter proposed that we specify that the audit of written plans of care outlined at proposed § 488.455(a)(3) must include an investigation of whether the written plans were implemented and subsequently reevaluated and revised, as necessary.

Response: In Appendix P of State Operations Manual Transmittal No. 250, surveyors are directed, when conducting an audit of written plans of care, to determine whether care plans were consistently implemented, evaluated, and revised as necessary. We believe such detailed instruction is more appropriate in the manual than in the regulation itself, and so we are not including it in the regulation.

Section 488.307 Unannounced Surveys

Comment: Many commenters agreed that all surveys should be unannounced. Some commenters stated that survey schedules should be more unpredictable and one suggested that there should be even more unannounced inspections. Several commenters emphasized that many nursing homes are aware that they are about to be surveyed. One commenter stated that randomness of surveys has not yet been achieved and that HCFA should require States to demonstrate through survey scheduling that chronically substandard facilities have been targeted. Another commenter stated that annual licensure cycles, such as billings and certificates, may compromise unannounced surveys. Several commenters suggested that we require that the States provide a randomization plan or scheduling methods which would ensure that the timing of inspections is not predictable.

Response: We realize that commenters, in many cases, feel it is preferable to have unannounced surveys for the welfare of residents in nursing homes. However, after careful consideration, we have concluded that requiring all surveys to be unannounced is not mandated by the Act. Moreover, doing so would, in some cases, undermine the efficiency of the survey process in which, for example, the only thing necessary to verify compliance is a request for documentation or an interview with a particular part time employee who may, otherwise, not be at the facility if a survey is not announced. We are, therefore, revising § 488.307(a) to require that only standard surveys be unannounced.

We agree that survey schedules should be more unpredictable and have made this more possible at § 488.308(a) by allowing the flexibility of conducting standard surveys no later than 15 months after the previous survey. We disagree with the recommendation that there should be more unannounced inspections than presently required by HCFA. The States are responsible for determining which facilities need to be surveyed and when the surveys should be scheduled, subject to the requirements of § 488.307. The States already have the obligation to conduct extended surveys and complaint surveys as the need arises. Moreover, because of time and money constraints and the difficulty of scheduling the surveys already required, it would be unfair to place an additional burden on the States for conducting more surveys than required by law.

We agree that complete randomness of surveys has not been achieved but we believe that complete randomness should not be our goal. Sections 1819(g)(2)(A)(iii) and 1919(g)(2)(A)(iii) of the Act provide for a flexible survey cycle. While the law does not specify the criteria to be used to determine intervals between consecutive surveys, States will undoubtedly use past performance as a primary criterion. If past performance is considered in determining how frequently to survey specific facilities, the survey cycle can not be completely random.

Our intention is to strive to have surveys conducted on as random a basis as possible consistent with effective enforcement. We are aware that annual licensure cycles may compromise unannounced surveys. However, we believe that, over time, State licensure cycles will not be a factor in survey predictability since licensure and certification surveys are generally conducted concurrently. In the event that States do not move to a more flexible licensing schedule, this will not create a problem because licensing schedules will not substitute for certification requirements. We believe that it is unnecessary to require States to provide a randomization plan for the timing of surveys because we are already stating at § 488.307(b) that we will review States' procedures on at least an annual basis. In addition, the law does not require States to demonstrate that substandard facilities have been targeted, but in examining the States' scheduling practices annually, we will look for logical scheduling criteria and past performance will undoubtedly be one of the reasonable criteria States can use.

Comment: Several commenters stated that it is unfair for surveyors to come into a facility without any advance notice. Another commenter stated that unannounced surveys are not more beneficial than announced ones. This commenter stated that the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) announces its surveys and that this practice is less stressful and avoids placing an unnecessary mystique on the process since it is known that a survey must occur 90 days before the license expires. (We assume the commenter is referring to the expiration of accreditation.) This commenter feels that the same objective is achieved. Another commenter stated that facilities should always be given a warning that a survey will occur and ample time to correct whatever is wrong.

Response: We cannot accept the comments advocating announced standard surveys. To do so would be inconsistent with sections 1819(g)(2)(A) and 1919(g)(2)(A) of the Act. Moreover, warning facilities in all cases of an upcoming survey can undermine the accuracy of survey findings which sometimes is predicated on the element of surprise.

Comment: Two commenters proposed that paragraph (a) of § 488.307 be revised as follows:

"(a) *Basic rule.* All surveys must be unannounced and their timing should be unpredictable. State survey agencies must adopt survey schedules that maximize the element of surprise. Scheduling procedures and practices must not have the effect of giving facilities notice of inspections. For example, inspections should not occur around the same time each year nor be conducted in a predictable sequential cycle."

Response: We agree that the timing of surveys should be made as unpredictable to long term care facilities as possible. However, at this point, it does not seem practical or even possible to mandate, or enforce the total unpredictability of surveys by States or to require that all surveys be unannounced, as explained in the response to prior comments in this section. We will be looking into the possibility of incorporating some guidance on ways in which to maximize unpredictability into manual instructions.

Comment: Two commenters suggested that § 488.307(b) be changed to provide that HCFA shall identify successful scheduling methods, distribute them, then monitor State agency performance, taking corrective action when necessary. One commenter thought that the way the provision was written, an agency gets constructive suggestions about scheduling surveys only after the surveys have been done and at the time of a review of its procedures. Two other commenters suggested it would be helpful if HCFA could put in the Regional Office Manual the successful methods it has identified that assure that surveys are unannounced.

Response: We disagree with these comments suggesting that HCFA specify in regulations that it will provide successful scheduling methods because we believe the States are better able than we are to identify successful scheduling methods which may differ from one locality or region to another. Each State uses the methods that work best for it to schedule surveys within the required timeframes. We believe that the controls in place at § 488.307, which provide that all standard surveys must be unannounced, and that we will review each State's scheduling procedures on an annual basis, are sufficient.

Comment: One commenter asked what the term "any individual" means in reference to penalizing someone who notifies a facility that a survey is scheduled. Another commenter suggested that individuals other than an employee of the Federal and State government should be held harmless from fine if he or she notifies a facility that it is scheduled to be surveyed. This commenter further suggests that any individual who is fined for notifying a facility, should have the right to contest the fine in a formal hearing.

Response: The Act, in sections 1819(g)(2)(A)(i) and 1919(g)(2)(A)(i), is clear that "any individual" who notifies a nursing home of the time and date of a standard survey is subject to a civil money penalty. We, therefore, disagree that only employees of the Federal and State governments should be held responsible for notifying a facility that it is scheduled to be surveyed; any individual who knowingly advises a facility that a standard survey is scheduled will be held accountable, according to the Act. Any individual who is fined for notifying a facility is entitled to the appeals mechanisms specified at section 1128A of the Act. The administrative appeals policy for civil money penalties imposed against an individual announcing a standard survey is not established by HCFA but rather by the Office of Inspector General (OIG) and is already in place.

Comment: Two commenters suggested that ombudsmen should be informed in advance of a survey in order to be able to participate fully, provided ombudsmen are subject to the penalties mandated by law and to loss of employment if they cause the time of the survey to be known. One of these commenters suggested that advance notice of the survey should be given to the local ombudsman by means of a letter from the survey agency stamped "CONFIDENTIAL." This commenter feels ombudsmen should be informed in advance because they are currently notified on the first or second day of three or four day surveys and may have already scheduled appointments which cannot be changed in order to accommodate the survey schedule. This commenter feels that advance notice would guarantee better surveys by strengthening ombudsman/consumer input.

Response: We disagree. Each additional individual or organization that has knowledge of a scheduled survey decreases the likelihood that the survey will remain unannounced. The ombudsman is contacted soon after the survey team has entered the facility and can participate meaningfully even if not present for the initial tour of the facility or other early phases of the survey.

Comment: Two commenters stated that a $2,000 fine is not a severe enough penalty for willfully disclosing in advance the timing of a nursing home inspection or taking advantage of foreknowledge of an inspection. Another suggested that this type of violation should also be referred to the Department of Justice for prosecution for obstruction of justice.

Response: The $2,000 fine is the maximum allowable under sections 1819(g)(2)(A)(i) and 1919(g)(2)(A)(i) of the Act. The exact amount of the civil money penalty is determined by the OIG. In response to the suggestion that this violation be referred to the Department of Justice, OIG decides which cases are appropriate for such referral.

Comment: This commenter stated that § 488.307(c) is weakened by the use of the word "standard" and that civil money penalties should be applied as a penalty for the announcement of any type of survey including validation, complaint, or other surveys.

Response: Sections 1819(g)(2)(A) and 1919(g)(2)(A) of the Act are applicable to standard surveys only, so that the civil money penalties specified at sections 1819(g)(2)(A)(i) and 1919(g)(2)(A)(i) are imposed for announcing standard surveys. We do not have the statutory authority to require that civil money penalties be imposed for announcing anything other than standard surveys.

Section 488.308 Survey Frequency

The nursing home reform provisions of OBRA '87 reconfigured the way in which HCFA and the States would track nursing home compliance with Federal requirements and approach enforcement remedies. The survey and certification provisions, set forth at sections 1819(g) and 1919(g) of the Act, require implementation of a flexible survey cycle for Medicare skilled nursing facilities and Medicaid nursing facilities so that standard surveys are conducted at intervals not later than 15 months after the date of the previous standard survey with a statewide average interval that does not exceed 12 months.

The legislative history of OBRA '87 and the National Academy of Science's Institute of Medicine (IoM) study (1986) are plain in their stated reasons for this change from the rigid, time limited system of having surveys for all facilities follow a 12 month cycle. First, a flexible survey cycle provides less predictability to the scheduling of surveys, thus reducing the opportunities for certain providers, by anticipating the survey, to achieve only temporary compliance for the short term period around the time of survey. Second, flexible survey cycles allow survey agencies to better allocate their limited resources by increasing the frequency of surveys for problem facilities while allowing other facilities with a better record of compliance to be less

rigorously monitored. Additionally, because time limited agreements have automatic cancellation clauses, a significant paperwork and recordkeeping burden results from the frequent need to conduct resurveys as a means of avoiding provider agreement expirations. Third, the enforcement provisions of nursing home reform, set forth at sections 1819(h) and 1919(h) of the Act, are designed to work in the context of provider agreements that do not have a fixed ending date.

Specifically, sections 1819(h)(2)(C) and 1919(h)(3)(D) of the Act speak to the ability of the Secretary to continue payments for up to 6 months after the identification of deficiencies if certain criteria, described in those sections, are met. Sections 1819(h)(2)(D) and 1919(h)(2)(C) of the Act require the Secretary and States to impose denials of payment for new admissions should deficient facilities fail to achieve compliance within 3 months after they have been determined not to comply with Federal requirements. In both cases, these remedies make sense only where a facility's provider agreement has no set expiration date.

We reach this conclusion because under a time limited agreement survey system in which surveys are typically conducted shortly before the expiration of provider agreements, facilities would have only the shortest period of time to correct deficiencies if they are to be entitled to renewed agreements. The statutory remedies described above, however, contemplate periods of time that far exceed what would be available under a time limited agreement system for providers to achieve compliance.

For HCFA and the States to attempt to fit this survey system into the procedures described in sections 1819(h) and 1919(h) of the Act would require the wholesale revamping of surveys so that they occur no later than mid-way through the term of the 12 month provider agreement. Such a radical departure from more than 20 years of practice would require the kind of massive reallocation of survey resources that is not possible under a time limited agreement survey system and would likely cause many facilities to go unsurveyed by the time their time limited agreements are scheduled to expire. Of equal significance, we do not believe that the Congress would approve of a survey system in which the decisions about renewal of a provider agreement are made as far as 6 months prior to the expiration of that agreement, since determinations of compliance made so far in advance may not be reflective of the degree of facility compliance at the time the agreement is set to expire.

Continued implementation of time limited agreement requirements for skilled nursing facilities and nursing facilities frustrated many aspects of nursing home reform and, in a practical way, rendered them inoperable. For these reasons, a HCFA Ruling was signed on August 26, 1992 eliminating time limited agreements for skilled nursing facilities and nursing facilities participating in the Medicare and Medicaid programs and these regulations further adopt this position.

Section 488.308 implements sections 1819(g)(2)(A)(iii) and 1919(g)(2)(A)(iii) of the Act, which require that each skilled nursing facility and nursing facility be subject to a standard survey not later than 15 months after the last day of the previous standard survey and that the statewide average interval between standard surveys not exceed 12 months. The regulation specifies when and how the average interval is computed, specific conditions that may prompt a standard or an abbreviated standard survey and HCFA's corrective action to ensure that State survey agencies meet the 12 month average interval requirement. These final rules also codify the substance of the HCFA ruling described above by eliminating from the regulations the requirements for time limited agreements for SNFs and NFs.

Comment: One commenter requested clarification of the 15 month interval by asking if determination would be "to the day" or "during the 15th month."

Response: We intend to calculate the 15-month interval by counting days. The survey agency calculates the number of days between the last day of the current standard survey and the last day of the facility's previous standard survey.

Comment: Several commenters recommended that survey frequency be related to the compliance/noncompliance history of the facility. A few commenters suggested that States be required to conduct more frequent inspections of nursing homes with poor care histories. One commenter recommended that States take facility compliance history into account when establishing survey cycles and conduct more frequent surveys of nursing homes with a history of substandard quality of care.

Response: We are retaining this provision of the regulation as written because we believe that the Act, as previously cited, provides a framework within which the State survey agency can establish a flexible survey cycle that effectively ensures that quality health care is furnished in a safe environment. Without restricting this flexibility, we expect that State survey agencies will consider a facility's compliance history when scheduling standard surveys and revisits. The survey agency may conduct surveys as frequently as necessary to determine compliance with participation requirements, to confirm that previously cited deficiencies have been corrected, to investigate complaints and to ensure that certain changes do not cause a decline in the quality of care furnished to the resident.

Comment: Several commenters recommended that an additional provision be incorporated which would allow State survey agencies to conduct tailored or abbreviated surveys in those facilities which were deficiency-free in the previous standard survey. Some additional commenters recommended that facilities with a record of deficiency-free surveys be inspected less frequently than every 12 months. One commenter specifically suggested that surveys not be conducted yearly if there is in place good surveillance and monitoring from the State, and that, perhaps, over time a survey would be conducted every third year as hospitals are surveyed by the Joint Commission on the Accreditation of Healthcare Organizations. One commenter recommended a demonstration project that would test the possibility of an extended survey cycle for excellent facilities.

Response: We cannot accept the comment to conduct abbreviated or tailored surveys of facilities that were free of deficiencies in the previous standard survey, because the Act does not include abbreviated standard surveys in the computation of the 15 month interval between standard surveys of a facility or in the computation of the 12 month statewide average for all facilities in a particular State. Abbreviated standard surveys are premised on complaints received, or a change of ownership, management or director of nursing, or other indicators of specific concern and, therefore, could be focused on certain specific requirements, whereas, a standard survey is a periodic inspection to gather information about the quality of service furnished in a facility to determine compliance with the certification requirements for participation. To use an abbreviated standard survey instead of a standard survey in the computation of the 15 month survey interval or the 12 month statewide average would not meet the intent of the Act, nor would it be an accurate assessment of the State's ability to ensure that each facility

furnishes quality health care in a safe environment.

Sections 1819(g)(2) and 1919(g)(2) of the Act require that each facility must have a standard survey no less frequently than every 15 months. With this constraint, we can accept the comment to conduct a standard survey of facilities with good compliance histories less frequently than every 12 months but not less frequently than every 15 months. Once we have had the benefit of experience under the new survey process, we will consider whether it might be appropriate to approve a demonstration project that would explore whether other survey frequencies would be more effective.

Comment: A commenter stated that a State could survey small facilities or facilities near the survey office most often to meet the 12 month average interval requirement.

Response: Existing procedures call for HCFA regional office review of State survey agency workload planning. This review will continue and can identify and respond to inadequate survey practices. We do not believe a regulatory requirement is necessary to ensure the use of meaningful criteria for determining survey intervals.

Comment: One commenter was confused about how HCFA can determine which facility survey did not meet the 12 month average interval requirement.

Response: The regulation specifies that it is the statewide average interval between standard surveys that must not exceed 12 months, rather than the interval between consecutive surveys of specific facilities.

Comment: Several commenters suggested alternative language for proposed § 488.158(b)(2). These writers recommended that the sentence which reads, "If the provider is a Medicaid facility, HCFA reduces FFP in accordance with § 488.170" be replaced with "HCFA will reduce FFP in accordance with § 488.170 and may apply corrective action which includes the following: * * *" or "HCFA reduces FFP to the State in accordance with § 488.170." Another commenter recommended that HCFA's corrective action be limited to technical assistance and inservice training during the first year and only include FFP reduction if there is a gross violation.

Response: While we appreciate the merits of these suggestions, the FFP reduction formula now specified at § 488.320 has certain limitations as it cannot logically be used to sanction a State for failure to achieve a 12 month statewide average interval requirement for standard surveys. This is because a survey agency's performance in calculating the 12 month statewide average interval is unrelated to the terms of the FFP reduction formula. The formula is comprised of two terms: the total number of residents in nursing facilities surveyed by HCFA during a quarter and the total number of residents in nursing facilities found, in accordance with HCFA surveys, to be noncompliant. Thus, the statutory formula does not lend itself to remedying problems States might be experiencing in conducting timely surveys. However, section 1919(g)(3) of the Act states that we may respond to inadequate State survey performance in Medicaid facilities by providing for the training of the State's survey teams. We are revising §§ 488.308 and 488.320 in this final rule accordingly.

Comment: A commenter asked that we explain which date is used for computation of the 12 month statewide average interval when an extended survey follows a standard survey.

Response: The last day of the standard survey, not the last day of the extended survey, is the date used in the computation of the statewide average interval. Sections 1819(g)(2)(A)(iii)(I) and 1919(g)(2)(A)(iii)(I) of the Act specify the statewide average interval between standard surveys shall not exceed 12 months.

Comment: In examining the criteria which trigger special surveys, one commenter agreed that survey agencies may need to conduct a survey when changes occur as specified in the regulation. A few other commenters disagreed and indicated that an abbreviated or standard survey within 60 days of a change in ownership, management, nursing home administrator and/or director of nursing was stressful, wasteful of taxpayer dollars or unnecessary. One commenter specifically stated that the change of a director of nursing as a survey trigger was inappropriate and should be removed.

Response: We are retaining this provision as written. Sections 1819(g)(2)(A)(iii)(II) and 1919(g)(2)(A)(iii)(II) of the Act use the word "may," thus permitting the State survey agency discretion in deciding to conduct a standard survey or an abbreviated standard survey within 60 days of any of the above stated changes to determine whether these changes have caused a decline in the quality of care furnished by the facility.

Comment: A few other commenters recommended that the regulation specify that other surveys (§ 488.308(c)) must be conducted as frequently as necessary to determine compliance with participation requirements and to confirm the correction of previously cited deficiencies.

Response: We are retaining this provision in which the decision to conduct other surveys under the circumstances specified at § 488.308(c) be at the State survey agency's discretion. We expect the survey agency to base its decision on the individuals and facilities involved and the State's concern that the quality of care may have declined, and to conduct a survey in those cases where one is necessary to confirm compliance with participation requirements. The correction of noncompliance will be monitored and verified by some type of follow up activity which may or may not be a survey. Section 488.332 states that the State survey agency conducts on-site monitoring as needed when: a facility is not in substantial compliance with the requirements and is in the process of correcting deficiencies; verification of continued substantial compliance is needed after deficiencies have been corrected; or, the survey agency has reason to question the substantial compliance of the facility with the requirements of participation. (Please refer to the discussion at § 488.332, Investigation of complaints of violations and monitoring of compliance.)

Comment: The proposed regulation indicates that the survey agency may conduct a standard or an abbreviated standard survey to determine whether certain changes have caused a decline in the quality of care furnished by a facility. The commenter recommended that the phrase "decline in the quality of care furnished by" be modified to allow special surveys for the purpose of determining whether the facility is out of compliance with any conditions of participation.

Response: Since the language of concern to the commenter simply reiterates the Act, at sections 1819(g)(2)(A)(iii)(II) and 1919(g)(2)(A)(iii)(II), we are not free to modify the language as suggested. However, we believe the Act gives States ample authority to conduct surveys any time they suspect that conditions at a facility may be declining.

Comment: A commenter proposed amending the regulation to expressly permit the survey agency to screen complaints to decide if they merit an on-site investigation. Another commenter wrote that this rule goes beyond the Act and requires a standard or abbreviated survey in every instance, including those which may be an isolated complaint or abuse. One commenter proposed revising

§ 488.308(e)(2) to read, "The survey agency must conduct a standard or an abbreviated standard survey to investigate complaints of violations of the requirements by SNFs and NFs that the agency has reviewed and determined to provide a reasonable basis for investigation."

Response: We are clarifying the wording of this provision to say the survey agency must review all complaint allegations and conduct a standard or an abbreviated standard survey to investigate complaints of deficiencies in requirements by SNFs and NFs if after reviewing the allegation, the survey agency concludes that a violation of one or more of the requirements may have occurred and only a survey can confirm that a deficiency or deficiencies exist. A survey will not be conducted if the complaint raises issues that are outside the purview of Federal participation requirements.

Section 488.310 Extended Surveys

Comment: Several commenters advocated that HCFA mandate extended surveys and/or more frequent surveys (every 6 months) whenever a facility has a nurse staffing waiver. Commenters reasoned that requiring extended surveys would protect residents through the process of reviewing a facility's staffing, as required in sections 1819(g)(2)(B)(iii) and 1919(g)(2)(B)(iii) of the Act. One commenter raised the presumption that in the case of nurse staffing waivers, quality of care problems exist and need to be closely examined. Further, the commenters fundamentally questioned the legality of granting nurse staffing waivers because they believe it contradicts the statutory definition of a SNF and NF.

Response: While we agree that facilities with nurse staffing waivers should be carefully examined to ensure sufficient staffing, we do not believe that conducting an extended survey is the only means available to do so. The standard survey, as described in the Appendix P of the State Operations Manual Transmittal No. 250, permits surveyors to expand the standard survey "as needed" for any reason without requiring an extended survey. Subpart I of the State Operations Manual, Appendix P, Section A states, "If in conducting the information gathering tasks of the standard survey you identify a possible noncompliant situation related to any requirement, investigate the situation to determine whether the facility is in full compliance with the requirements." Therefore, surveyors could review facility staffing records during the standard survey to assure sufficient staffing. We wish to reserve the use of extended surveys to those circumstances in which we have found substandard quality of care.

We are not accepting the commenters' suggestion that we require more frequent surveys for facilities with nurse staffing waivers. To do so would undermine the State survey agency's ability to choose survey intervals. We believe that the Congress intended State survey agencies to have the flexibility to choose the survey intervals. The law specifies that the interval between 2 successive standard surveys must not exceed 15 months and that the State survey agency must maintain no greater than a 12 month Statewide average for standard surveys.

We do not address the comments regarding the legality of nurse staffing waivers. The requirements for nurse staffing waivers are outside of the purview of this rule and were included in a final rule published in the **Federal Register** on September 26, 1991 (56 FR 48826).

Comment: Several commenters questioned the use of the survey agency and HCFA discretion to conduct an extended survey at any time for any reason. Some commenters disagreed that the Act gives HCFA or the survey agency the discretion to conduct an extended survey at any time. These commenters urged HCFA to clarify that the purpose of an extended survey is to identify policies and procedures that caused the facility to furnish substandard quality of care.

Response: We disagree with commenters who believe that the Act does not give HCFA or the survey agency the discretion to conduct an extended survey at any time. Sections 1819(g)(2)(B)(i) and 1919(g)(2)(B)(i) of the Act specifically state, "Any other facility may, at the Secretary's or State's discretion, be subject to such an extended survey (or a partial extended survey)." However, we recognize that when facilities are subject to an extended survey or partial extended survey, they are disadvantaged because they automatically lose approval of their nurse aide training and competency evaluation programs (NATCEP) for two years. There may be other instances when a facility would lose their NATCEP, for example, when a facility has a nurse staffing waiver or has had a denial of payment for new admissions remedy, or temporary manager remedy imposed. Therefore, as a matter of policy, we do not expect to exercise our discretionary authority to conduct an extended or partial extended survey unless we have found substandard quality of care on a standard survey or abbreviated standard survey and we will advise the State survey agencies in manual instructions to adopt the same policy.

We have built into our survey process the ability of the survey team to expand a standard survey at any time. The expanded standard survey can be tailored to the unique situation in a particular facility and need not include all of the tasks listed at § 488.310(b). It allows more thorough investigation of specific areas in order to confirm noncompliance when the initial scope of the standard survey is not adequate to substantiate a particular deficiency. But it does not penalize a facility with loss of approval of a NATCEP.

We are not including proposed § 488.160(c)(2) which would spell out the State survey agency's and Secretary's discretion to conduct extended surveys, as it is unnecessary given the explicit language of sections 1819(g)(2)(B)(i) and 1919(g)(2)(B)(i) of the Act.

Comment: We received numerous comments urging us to amend the purpose of an extended survey as stated in § 488.310(a). One commenter suggested the following revision:

> The purpose of an extended survey is to determine the extent of the problems and their effect on residents, when surveyors determine or suspect that jeopardy exists, in order to document the problems fully and determine the appropriate combination of remedies. Extended surveys must be conducted whenever a facility has been granted a waiver of nurse staffing requirements.

Response: We are not accepting this proposed change because it is inconsistent with the Act. Sections 1819(g)(2)(B)(i) and 1919(g)(2)(B)(i) of the Act specify that an extended survey must be conducted when the Secretary or State survey agency finds substandard quality of care. Substandard quality of care does not necessarily pose immediate jeopardy to residents. Therefore, the commenter's proposal is more restrictive than the Act. As we discussed previously, we are not requiring that the Secretary or the State survey agency conduct an extended survey when a facility has a nurse staffing waiver.

We believe that adding "to determine the extent of problems and their effect on residents" to the stated purpose of an extended survey is not necessary because it is inherent in identifying policies and procedures that caused substandard quality of care. For example, if there are poor policies and procedures (rather than isolated practices that don't conform to appropriate policies and procedures),

the extent of the problem in the facility could be potentially pervasive.

Comment: Other commenters suggested that random discretionary extended surveys are a good idea. However, they do not believe that penalties should be applied to facilities as a result of such random surveys when the facility was not cited for substandard quality of care.

Response: Sections 1819(f)(2)(B)(iii)(I)(*b*) and 1919(f)(2)(B)(iii)(I)(*b*) of the Act require that the approval of NATCEP be withheld or withdrawn for 2 years when the State or HCFA conducts an extended survey. The law makes no exceptions for extended surveys conducted at the discretion of the Secretary or the State. However, we believe that we can achieve the indepth random survey favored by commenters through the standard survey. As we discussed above, the State survey agency or HCFA may expand a standard survey at any time without the threat of a loss of NATCEP.

Comment: Several commenters disagreed with or suggested alternatives for the items included in an extended survey, as specified in proposed § 488.160(b). Some commenters asked that we add "and review sampled residents in more depth" after paragraph (b)(1). The majority of commenters asked that we delete paragraph (b)(5) which requires that an extended survey include "an investigation of any participation requirement at the discretion of the survey agency." These commenters believe that the proposed language exceeds the concept of the statutory language. In part the commenters stated:

> It returns to the old methodology of checking everything in contrast to the intent of the IoM study and resident-centered outcomes. It would also waste fiscal resources that could be better utilized elsewhere in the survey system.

Response: We are not accepting the proposed amendment to § 488.310(b)(1) which would add the requirement that the survey agency review sampled residents in more depth. The purpose of an extended survey is to look at the policies and procedures that produced substandard quality of care. The Act only requires an expansion of the size of the sample of resident assessments and not the depth of the reviews of the residents themselves. A more indepth look at residents will not facilitate an investigation of policies and procedures and should, therefore, be accomplished through a standard survey if the survey agency so desires. We also disagree with commenters that § 488.310(b) should not include "an investigation of any participation requirement at the discretion of the survey agency." Section 488.310(b) says "all" and paragraph (b)(5) says "any participation requirement at the discretion of the survey agency." This does not mean, as the commenter suggests, that every requirement would be surveyed, rather, only those that the survey agency chooses.

Comment: One commenter asked that we indicate whether the 2 weeks specified in § 488.310(c) is 2 work or calendar weeks (that is, 10 work days or 14 calendar days). Another commenter asked that we define "partial extended survey." One commenter wondered whether the survey agency would notify facilities that they were going to receive an extended survey.

Response: We are revising § 488.310(c) to state that the 2 weeks are computed in calendar days. We are defining the term "partial extended survey" in § 488.301 ("Definitions"). The survey agency will not notify a facility when an extended survey will be conducted. The survey team will let the facility know at the exit conference when it finds substandard quality of care. Based on the finding of substandard quality of care, the facility will then know that an extended survey will be conducted any time within the next 14 calendar days. In most cases, we expect that the survey team will conduct the extended survey immediately following the standard survey especially when it would be more cost effective for the State to complete both the standard and extended survey while on site rather than scheduling another visit.

Section 488.312 Consistency of Survey Results

We specifically asked in the preamble of the proposed regulation for comments or suggestions for enhancing surveyor consistency.

Comment: Several commenters support efforts by HCFA to assure consistency of survey results and the application of remedies. However, it was stressed that consistency should not receive greater emphasis than accuracy and efficiency. Increased accuracy of the citation of deficiencies will lead to greater consistency within the survey process.

Response: In the preamble of the proposed rule, we stressed that surveyors should be trained to "exercise consistency and accuracy." We agree that accuracy is as important as consistency and we are including the term in the text of the final regulation. Additionally, we believe that the recommendations of the studies and analyses required by the regulation should be implemented to enhance consistency and be monitored by each HCFA regional office. These changes are reflected in the final text at § 488.312.

Comment: Some commenters suggested the use of consumers, ombudsmen, other resident advocates, and providers to evaluate the quality of the survey process.

Response: This rule requires each State survey agency to implement programs to enhance consistency. Each State survey agency is encouraged to gather pertinent data and consider varied sources in its data collection. While we agree with this suggestion, we do not want to limit, in regulations, what data each State may consider.

Comment: Commenters also suggested that deference be given to the data compiled on survey consistency by "entities and their associations." These commenters believe that these data are valuable and often compiled in a manner which permits "valid and reliable statistical conclusions about the degree of inconsistency among surveyor results." Additionally, these commenters wanted the final regulation to require survey agencies to consult with the regulated entities as part of the effort to reduce inconsistency among survey teams.

Response: We assume that the commenters mean "long-term care facilities" when they refer to "entities and their associations." Sections 1819(g)(2)(D) and 1919(g)(2)(D) of the Act require that the State (and the Secretary under section 1819) implement programs to improve consistency in the interpretation and application of survey results among surveyors. The intent of the Act is to assign the authority to administer these programs to the States, not to facilities. In fact, the compilation of data to allow statistical conclusions about surveyor consistency may be a part of the programs that the law requires the States and the Secretary to establish. As far as mandating that the State survey agency must consult with facilities in the effort to ensure consistency, we believe it is unnecessary to require this in regulation as it is already inherent within the survey process.

Comment: Other commenters wanted the required studies and programs outlined within the final regulation or the State Operations Manual. A few commenters wanted a written quality assurance program approved by HCFA which would outline specific data to be included in the required studies and programs.

Response: The only requirements that we are specifying in regulations are that the State survey agencies must consider surveyor accuracy as well as consistency. We believe that it is preferable for individual State survey agencies to develop their own programs.

Comment: Some commenters believed increased surveyor training and testing would enhance surveyor consistency.

Response: As previously stated in the preamble to the proposed rule, HCFA has implemented an exhaustive surveyor training and testing program that will ensure that surveyors are adequately trained and competent at performing surveys. This requirement is in § 488.314.

Comment: Some commenters advocate the review of every statement of deficiencies by survey agency supervisory personnel for compliance with the requirements before the statement is sent to the provider.

Response: As stated in the preamble of the proposed rule, surveyors will, based upon their collective information, match the data to the legal standards the facilities are obligated to meet in order to determine if deficiencies exist. Most State survey agencies already employ some type of supervisory review for all statements of deficiencies prior to provider notification. However, we will not require a 100 percent supervisory review in all State survey agencies.

Comment: A few commenters suggested that a procedure for maintaining and monitoring records of individual surveyor's proficiency should be initiated and these records should be considered in the preparation of deficiency reports for facilities.

Response: We are not making changes suggested by this commenter because there is no statutory basis for using the records of individual surveyor's proficiency in the preparation of deficiency reports. Compliance is something achieved or not achieved by the facility; therefore, individual surveyor proficiency records do not obviate the obligation of each facility to abide by Federal regulations. All decisions regarding the preparation of deficiency reports are made as a team, rather than by individual members. In fact, we require team decision making and provide comprehensive training on the regulations and documentation techniques in order to enhance consistency.

Comment: One commenter claimed the section of the proposed regulation regarding consistency violates the Congressional mandate to establish new programs to improve consistency by stating "* * * the collective exercise of surveyor judgements, which has always been the vehicle for the identification of deficiencies, will remain unchanged." (57 FR 39290)

Response: We do not agree with this comment. The above passage refers to the method by which the survey team collects the data for the identification of deficiencies. Following the above passage, as stated in the preamble of the proposed rule, this "collective exercise" is described as how "* * * surveyors will *gather* information based upon direct observations, record review, and interviews with residents, staff, and family members" (emphasis added). (57 FR 39290) Through training, surveyors are instructed on this method of information gathering which assists them in identifying situations that are indicative of a facility's compliance with the regulations. Additionally, the Congressional mandate refers to the "*establishment* of new programs, studies and analyses" (emphasis added), not to the method in which the information is gathered.

Comment: A few commenters stressed the importance of consistency being sought in the application of enforcement remedies as well as the survey procedures.

Response: We agree with the commenters. The final regulation requires that State survey agencies conduct programs designed to enhance consistency in the application of enforcement remedies as well as in survey results.

Comment: A few commenters questioned the inclusion of the application of remedies as part of the evaluation of survey consistency. They assume it is not the surveyors who would be responsible for the selection and implementation of remedies.

Response: We recognize that the surveyors are not ultimately responsible for the selection and implementation of remedies. As stated in the preamble of the proposed rule, it is the surveyor's responsibility to "* * * *recommend* one or more remedies to either HCFA or the SMA [State Medicaid agency] for the enforcement of the requirements." (emphasis added) However, we disagree with the comment questioning the inclusion of the application of remedies as part of the evaluation of survey consistency. As it was the intention of the Congress to "* * * measure and reduce inconsistencies in the application of survey *results* * * *," (emphasis added) we interpret sections 1819(g)(2)(D) and 1919(g)(2)(D) of the Act to include both inconsistencies in survey findings as well as inconsistencies in the application of enforcement remedies. In order for each State survey agency to measure accuracy and consistency in the application of survey results among surveyors, it must first ensure that these results are consistent across surveyors, and then determine that the enforcement actions precipitated by the survey results are consistently applied.

Comment: One commenter suggested that facilities be requested to fill out a questionnaire after their survey to give feedback on the quality, competence and attitude of their survey teams.

Response: We believe that it is unnecessary to require a questionnaire because feedback is inherent in the survey process. There are numerous times throughout the survey process for the provider to comment upon the performance of the survey team. Providers have the opportunity to question survey findings during the survey, at the exit conference, while awaiting receipt of the official deficiency statement, upon receipt of the same, and through dialogue with the State survey agency and HCFA regional officials.

Section 488.314 Survey Teams

Comment: Virtually everyone who commented on this proposed section emphasized the importance of ensuring that surveyors have the appropriate professional credentials for the job and that they receive adequate training. For the most part, the only differences were over exactly what constitutes "appropriate" professional credentials and "adequate" training. Opinion ran the gamut from maintenance/safety experts to physicians with experience in geriatric medicine or long term care. Some suggested that trainees work under the supervision of an experienced surveyor.

Numerous commenters offered suggestions regarding team composition. Two examples included—

- A nurse, licensed administrator, pharmacist, nutritionist, and social services/activities therapist; and
- A nurse, a maintenance/safety expert, and a social worker.

One commenter suggested that one team member must be "a physician trained in geriatric and psycho-pharmacology," and said that, "To the extent the new survey process incorporates new guidelines for chemical and physical restraints, a physician (MD/DO) team member must be included." Some said that nurse surveyors should have, as a minimum qualification, a B.S.N. One commenter said that the nurse on the team should have spent 2 or 3 years as a director of nursing at a long term care facility. Other disciplines that commenters said should be represented in the ranks of

surveyors include speech-language pathologists, sanitarians, gerontologists, and dietitians. A number of commenters suggested a specific requirement that all surveyors must have at least 1 year of experience with geriatric populations in a health care or related setting or experience in long term care. Some said that this experience should be "hands on" experience, and a few commenters suggested that we set forth the size of the team in regulations, with the size being proportional to the number of beds in the facility or increasing in certain instances such as a historical pattern of serious deficiencies or complaints.

Many commenters asked for clarification of the meaning of "multidisciplinary" and "professionals," and one suggested we use the word "interdisciplinary" instead of "multidisciplinary."

Finally, one commenter said that surveyors should be sent to the same facilities year after year so that they become more familiar with the facility and its staff. This would, the commenter suggested, enable the team to do a better job. Another commenter said that surveyors should be rotated among facilities to maintain their objectivity.

Response: We are deleting the modifier, "health," and clarifying the term, "professionals," in § 488.314(a)(1) by setting forth examples. Examples of professionals include physicians, physician assistants, nurse practitioners, physical, speech, or occupational therapists, physical or occupational therapy assistants, registered professional nurses, dieticians, licensed practical nurses, sanitarians, engineers, and social workers, but are not completely inclusive; the State, subject to HCFA's approval, determines what constitutes a "professional." We are deleting the word "health" because it may be appropriate in some cases to include other types of professionals on a survey team. For example, if the facility has or may have structural problems or other physical plant facilities, an engineer may be needed.

We have chosen to continue to use the term "multidisciplinary," rather than change it to "interdisciplinary." Dictionary definitions of the prefixes "multi-" and "inter-" are very broad, with the former generally meaning "more than one," and the latter generally meaning "between or among." Therefore, we believe that "multidisciplinary" is the more appropriate choice. Furthermore, "multidisciplinary" is the term used in the Act.

Different States have different licensure requirements and different staffing patterns. Also, it is difficult to recruit qualified professionals in certain areas of the country. Therefore, other than requiring that there at least be a registered nurse on the team, we do not believe dictating to the States in Federal regulations the precise composition of survey teams is necessary at this time. (The registered nurse member of the team is necessary because SNFs and NFs are primarily engaged in providing skilled nursing care and/or related services.) The most important considerations are that the surveys be conducted by professionals and that the survey guidelines be followed. All surveyors must pass HCFA's "Surveyor Minimum Qualifications Test" (SMQT), which is in itself, a test of several disciplines directly related to the survey of health care facilities.

Cogent cases can be made both for and against surveyor rotation, as is evidenced by the comments themselves. For this reason, we are considering this an administrative matter and leaving it to the discretion of the States.

Comment: One commenter thought that § 488.314(a)(2)(i) should be expanded to include surveyors who serve, or within the previous 2 years, have served as a member of the staff or as a consultant to the chain of which the facility is a part (if applicable). Another commenter said that we should also disqualify surveyors who work or who have worked in the previous 2 years as agency staff. The commenter said that, in many States, nurses who work for agencies and are sent to nursing homes for discrete periods of time are not always considered to be "staff."

Other suggestions were to revise § 488.314(a)(2)(ii) to disqualify surveyors who—

- Own a part of any nursing home in the State;
- Own a part of any nursing home in the United States;
- Have a financial interest or any direct or indirect ownership interest in the facility to be surveyed, or in any related facility, company, or chain; or
- Have an immediate family member who is a resident or an employee of the facility.

Finally, one commenter wants to prohibit any surveyor from accepting a job with a facility for 1 year after the individual has last surveyed it.

Response: In response to comments, to preclude conflicts of interest and to ensure survey objectivity, we are expanding § 488.314(a)(2) to disqualify anyone from surveying a facility if he or she works, or, within the previous 2 years, has worked as an employee, as employment agency staff at the facility, or as an officer, consultant or agent for the facility to be surveyed. The surveyor is also disqualified if a member of his or her immediate family has, or, within the previous 2 years has had, such a relationship with the facility or if a member of his or her immediate family is, or within the previous 2 years has been, a resident of the facility.

In § 488.314(a)(2), we continue to disqualify surveyors who have a financial interest or any ownership interest in the facility but have deleted the modifying phrase "direct or indirect" to preclude misunderstandings. One commenter, for example, interpreted the restriction against "indirect" financial interest to mean that a surveyor would be disqualified if he or she held shares in a broad-based mutual fund which included ownership in health care facilities. (This was not our intent.) The issue of what constitutes disqualifying financial interest must be discussed in considerable detail, and our manuals provide the most appropriate vehicle for this discussion. However, we have broken out the parallel restriction on surveyors whose family members have direct or indirect ownership interest and placed it in a new § 488.314(a)(2)(iii). We are also extending the § 488.314(a)(2)(i) disqualifying requirement to family members in paragraph (a)(2)(iii). Finally, in a new paragraph (a)(2)(iv), we disqualify any surveyor who has an immediate family member who is a resident of the facility.

We believe that these safeguards are sufficient to ensure objectivity and that nothing beyond these is warranted. Finally, in our view, prohibiting any surveyor from accepting a job with a facility for 1 year after he or she has last surveyed it is unnecessary and would be difficult to enforce. Whether or not the ex-surveyor has surveyed that particular facility before would be of less benefit to the facility than the in-depth knowledge of Federal requirements that the individual could share with the facility. We believe that such knowledge can help the facility achieve and maintain compliance which ultimately serves the residents. The protection of the residents' health, safety, dignity, and general interests is our primary goal.

Comment: Commenters were generally critical of surveyor training and skills, and most offered specific suggestions on how training could be enhanced. Some examples follow:

- There should be provider and/or ombudsman input for surveyor training and/or testing;
- "Activity professionals" or "individuals with significant clinical and investigative skills" should teach at

least part of the surveyor training course;

• Training should include——

—Interviewing and investigatory skills;
—Quality of care standards;
—Communication skills, particularly for communicating with residents who may have communication barriers;
—How to identify outcomes;
—How to identify iatrogenic declines;
—How to identify care conditions that could lead to decline or failure to improve if not properly addressed;
—Standards of care for the professional disciplines involved;
—More training on long term care issues;
—Rules of evidence;
—120 hours or more field work experience in a long term care facility;
—Pharmacology;
—Gerontology;
—Therapeutic recreation;
—Training to produce or to update clinical competency in each surveyor's area of expertise;
—Residents' rights;
—Resident assessment and care planning;
—Mental health care and services;
—Rehabilitation;
—Correct application of the applicable statutes and regulations; and
—Proper documentation;

• Some of the training should be done in the field;

• There should be annual in-service training for surveyors;

• Training should be held not only for surveyors, but for other State personnel with related duties;

• There should be a continuing education requirement for surveyors;

• Surveyor training must stress that only the established Federal survey methodology may be used in determining facility compliance;

• The techniques taught in surveyor training courses should be published for public comment;

• Providers, at their own expense, should be permitted to take surveyor training courses;

• The number of training slots must be increased so new survey agency employees do not have to wait so long to receive HCFA surveyor training;

• Training should be made available locally or through interactive video;

• A passing score on a pre-test should not exempt a surveyor from the final test; all should be required to take and pass the final test;

• All Federal and State surveyors should be trained by qualified, national HCFA staff;

• Survey agencies should have built in mechanisms for quality assurance and supervision;

• The survey agency's leadership should include health professionals and attorneys;

• There should be a formal complaint mechanism that providers may use without fear of reprisal to challenge the actions and activities of "rogue" surveyors;

• No one should be a member of a survey team unless he or she has successfully completed a training and testing program, not only on how to conduct a standard survey, but on how to conduct an extended survey as well. Proof of successful completion of this training must be made available to the facility prior to the initiation of a survey; and

• Before a citation is given, the surveyor must be able to demonstrate a negative outcome.

One commenter said that the HCFA policy that surveyors are not to be consultants is a great disservice; surveyors should adopt a role like the JCAHO surveyors. Another said that HCFA should convene a national group of experts, including State and Federal surveyors with extensive experience, nursing facility providers, and consumers, to identify the knowledge and skills needed by survey teams.

Some said that surveyors should pass not only the initial examination, but be tested annually. The passing scores for the tests should be 85 percent or more, commenters said, and the results of the testing and remediation must be made available to the public.

One commenter said that, when surveyors are cross-trained, their expertise in the new area is not good enough to survey facilities' performances in that area. For this reason, the commenter suggested that § 488.314 be revised "* * * to preclude the use of surveyors without demonstrated professional training and experience in the substantive area being surveyed. By professional training and experience," the commenter said, "we do not mean on-the-job or inter-agency in-service training. Rather, we mean graduates of accredited or approved educational institutions."

One commenter said that there should be no "grandfathering" of surveyors. Another asked the following three questions:

• What validity and reliability studies were conducted to ensure the test measures the ability of surveyors to perform their functions in a consistent manner?

• Has the test been validated to allow States to meet their affirmative action plans?

• Are the results of the tests in line with the State's requirements for merit systems and collective bargain contracts?

Response: The listing of suggested topics for surveyor training was extensive. Some of the items (for example, correct application of the applicable statutes and regulations, quality of care standards, and proper documentation) are already covered in surveyor training. We believe others are inappropriate to require as part of survey training; they should be provided as part of each team member's initial and continuing training within the context of training for his or her area of professional expertise.

We would encourage, but do not require, States to allow surveyors in training to act as observers on actual surveys in the field, and are taking all possible measures to meet the demand for surveyor training. For example, we are planning to use satellite transmissions for training courses. We have already begun to move ahead with one of the other suggestions, interactive video training. As for provider and/or ombudsman input for surveyor training and testing, we have convened a national workgroup which includes provider organization and consumer advocacy group representatives to assess the surveyor training program and make recommendations for changes. Finally, we will listen to all reasonable suggestions from providers and ombudsmen, but do not agree that the regulations need to be revised to require this input.

The qualifications for surveyors, other survey agency personnel, and HCFA trainers, we believe, are already high. In our operating experience, we have seen no reason to believe otherwise. Even if we required that each team include a physician, as some commenters recommended, we are not certain that some providers would be any more pleased with the survey results than they are now. We remain unconvinced that one must be a physician or an acknowledged expert in a clinical specialty in order to perform a valid survey. We believe that the heart of the survey process consists of clear guidelines and a detailed review of the results.

The suggestions that survey training materials be published for public comment are addressed under the "Determination of a Deficiency" section of this preamble.

The suggestion that providers be permitted to attend survey training courses at their own expense has merit. Traditionally, we have had no provisions for accommodating all providers interested in attending: our resources are taxed enough by simply

trying to provide timely training for surveyors. However, being able to offer surveyor training universally to providers at their own cost may help improve understanding and cooperation between surveyors and providers. We are therefore seriously considering the changes in law necessary to allow this.

We do not accept the suggestion that surveyors present providers with proof of the successful completion of surveyor training. The fact that a surveyor is sent by the State or HCFA is, in itself, evidence that the bearer meets the requirements to be a surveyor.

A number of the commenters did not make any suggestions with respect to the proposed rule. Instead, their comments were in the context of denigrating surveyors with whom they had had unpleasant experiences, declaring that running a facility is costly, frustrating, and unappreciated, or protesting the whole survey process in general. Because no specific suggestions were made concerning the proposed rule, we are unable to respond to these kinds of broad complaints.

Comment: Two commenters suggested revising the end of the sentence at proposed § 488.164(c) as follows: * * * completed the required training and competency testing program." Another said that, at the onset of each survey, facilities should be told which surveyors are serving as observers, and regulations should stipulate that these individuals should be excluded from active participation in the survey process.

Some other commenters said that surveyors-in-training should be allowed to participate in the survey process as long as they are appropriately supervised. They said that, historically, these individuals have been used to "* * * collect information to be used by qualified surveyors during the deficiency decision making process." Further, two commenters said, not allowing surveyors-in-training to observe would mean that new surveyors would face significant periods of nonproductive time while waiting for courses to be offered.

Response: We agree that surveyors must not only complete the required training, but the competency testing program as well. However, paragraph (c) already requires that a surveyor successfully complete "* * * a training and testing program." We do not agree that the survey team should, at the outset of a survey, identify which of its members (if any) have not yet completed the required training and competency testing program. We also disagree that surveyors who have not yet completed the training and testing program should "be excluded from active participation." We do not want to prohibit the "historic" role of observers mentioned by two of the commenters, that is, to "* * * collect information to be used by qualified surveyors during the deficiency decision making process," or forbid individuals from making valuable contributions to the survey process if they are in a position to do so. We are, therefore, amending this section (§ 488.164(d) in the proposed rule) redesignated as § 488.314(c)(3) in the final rule, to provide that the survey agency may permit an individual who has not completed a training program to participate in a survey as a trainee if accompanied onsite by a surveyor who has successfully completed the required training and testing program.

Proposed § 488.166 Validation Surveys

We have reconsidered the necessity of including this section in the text of the regulation, and have concluded that it would be pointless and redundant to retain it. We believe that the statutory provisions upon which this section is based are self-implementing, and that regulatory interpretation is not needed to clarify them. In addition, the few elaborations on the requirements in sections 1819(g)(3) and 1919(g)(3) of the Act, which are found at § 488.316 are duplicated elsewhere in the regulations, and we believe there is little reason to repeat them. Appeals applicable to certifications of noncompliance based on validation surveys will be conducted according to § 488.330, Certification of compliance or noncompliance.

In the absence of a regulatory section devoted to validation surveys, we are adding a definition of a validation survey to § 488.301, Definitions, to serve as a reference because the term is used elsewhere in the regulations.

Our decision to not finalize proposed § 488.166 does not make the public comments we received on this section any less valuable for they are still pertinent commentary on validation survey policy and we are responding to them, accordingly.

Comment: Several commenters insisted that HCFA validation surveys should be conducted concurrently with the State survey. Other commenters encouraged HCFA to use the Onsite Performance Assessment and Training Survey (OSPATS) as the validation survey method. Still other commenters said the HCFA validation survey should be as soon as possible after the State survey, but no more than 2 weeks, 3 weeks or 30 days after the State survey. Most commenters noted that survey findings may vary slightly from day to day and that it was essential that both survey teams were viewing the same set of facts. In addition, concurrent surveys cause less disruption to facilities and residents and enable HCFA to provide immediate feedback to State surveyors. One commenter recommended that HCFA validation surveys not be concurrent; another said the unexpected nature of the validation survey was important in that the facility will return to its "normal daily routine" after the State survey; and one commenter said the HCFA validation surveys were a waste of time.

Response: We agree with the commenters as to the advantages of a validation survey concurrent with the State standard recertification survey. To that end, HCFA has developed the OSPATS. The OSPATS long term care survey process has Federal surveyors assessing the facility while evaluating State survey agency performance. This process, which is fairly new for long term care surveys, is believed by some providers to be less disruptive to facilities and residents. It does ensure that both Federal and State surveyors observe the same conditions in the facility. It is our intent to expand the use of the OSPATS process for validation surveys. We also agree that when the validation survey is not concurrent with the State survey, it should occur as soon as possible after the State survey. Sections 1819(g)(3)(A) and 1919(g)(3)(A) of the Act permit a 2 month period; in practice HCFA attempts to schedule the surveys closer to the State survey. However, often there are scheduling and/or travel difficulties, which make minimum intervals between the two surveys difficult to achieve. We want to retain the flexibility to use whatever survey process best achieves the goals of the Act. The commenters who said that the validation surveys should not be concurrent or were a waste of time presented no reasons or alternative proposals. We can say only that validation surveys, concurrent or not, are mandated by sections 1819(g)(3) and 1919(g)(3) of the Act.

Comment: Several commenters proposed that HCFA establish procedures that would enable resident advocates, families and the interested public to request validation (complaint) surveys for specific facilities. These procedures should include public notice including a regulatory requirement that a poster notice be displayed in facilities. HCFA would be required to respond to such requests and investigate complaints against facilities and allegations of poor performance of State agencies.

Response: Disclosure of survey-related information is in accordance with § 488.325, and it is also discussed in detail under the section of this preamble entitled, "Disclosure of Survey Information."

We understand the concerns expressed by the commenters who would like HCFA to perform complaint investigations and validation surveys at the request of advocates and other individuals. The Act and current regulations ensure that the State survey agencies will respond to allegations of poor care or abuse and will investigate these allegations according to State law and HCFA requirements. Most complaints directed to HCFA are referred to the State agencies for investigation. HCFA is not staffed sufficiently to respond directly to complaints and/or requests for validation surveys. The small HCFA survey staff is occupied fully in the assessment of State agency performance of its survey and certification responsibilities under section 1864 of the Act. Because of these constraints, we are unable to accept the commenters' suggestions.

Comment: Certain commenters asked that we give a facility that is dissatisfied with the State survey the ability to request a validation survey and receive it within a reasonable time period.

Response: As mentioned above, we do not have the resources to conduct validation surveys upon every request. If a provider believes that the State survey was done in an inappropriate manner, it may file a complaint with the HCFA regional office at whose discretion a validation survey may be, but need not be, performed.

Comment: One commenter was concerned that when selecting facilities for validation surveys, HCFA will not draw a random sample but will select inferior facilities in order to cut its Medicaid obligations to the States.

Response: This fear is groundless. It is not the quality of the facility that determines whether the State will be sanctioned for inadequate State survey agency performance, but rather the quality of the State's assessment of the facility which is relevant. Facility noncompliance does not reflect poorly upon the State unless the State has failed to identify it.

Comment: One commenter believed that the identities of facilities on which validation surveys are to be performed should not be disclosed to the State survey agency.

Response: There is no justification for such a policy. Currently, HCFA notifies States of an impending validation survey either 3 days before a nonconcurrent Federal validation survey or 3 weeks before a Federal/State OSPATS survey. In the case of the nonconcurrent Federal validation survey, this allows the State to arrange to have a surveyor present to observe the Federal survey and take advantage of the instructional opportunities that it presents.

Comment: Several commenters with recent experience with validation surveys noted that the State and Federal surveys were very different; the Federal surveys stressed concepts (for example, use of restraints) not emphasized by the State.

Response: The primary emphasis of the Federal validation survey is on assessing State survey performance. Therefore, the Federal review may stress certain areas of compliance in which an evaluation of State performance is particularly important. In addition, the long term care survey protocol has only been in effect since October 1990, with appropriate instruction enhancements for the final long term care regulations which were effective April 1, 1992. It is not unusual that some variation in emphasis will occur in a new survey process. HCFA is committed to a survey process that produces accurate and consistent findings. To that end, we have organized numerous educational sessions for Federal and State surveyors, held regional training conferences in the HCFA regions and produced the "Principles of Documentation" which is an attempt to standardize the writing of deficiency citations. Despite all of these continuing efforts, some variation will remain as long as human beings perform surveys and statutory requirements involve the making of professional judgments. As far as the use of restraints is involved, the decrease of restraints has been a HCFA priority since the inception of the new survey protocol.

Comment: One commenter suggested that HCFA perform validation surveys of all facilities that have a waiver of the RN director of nursing or other licensed nursing requirements for a year or more. Others suggested that HCFA list the criteria it uses to select facilities for validation surveys and that the validation sample should reflect the State's diversity in location, size and ownership of facilities.

Response: The selection of facilities for validation surveys depends upon which facilities the State has surveyed recently or intends to survey imminently. Within those constraints, the typical sampling process for selecting facilities for a validation survey ensures that a wide variety of facilities are selected. Because of this and the heavy demands placed upon HCFA survey staff, we do not accept these suggestions that add survey responsibilities not mandated by the Act. Moreover, we do not see the necessity of targeting facilities with waivers for validation surveys because an annual review of the appropriateness of each waiver will be conducted whether the facility to which it was granted is subject to a validation survey or not.

Comment: Several commenters suggested that HCFA validation surveys be required to use the "methods, procedures, and forms prescribed for use by the survey agency."

Response: The language used in the proposed rule (that HCFA conduct validation surveys "using the HCFA protocol prescribed for use by the survey agency") was derived from sections 1819(g)(3)(A) and 1919(g)(3)(A) of the Act, which require that the Secretary conduct validation surveys using "the same survey protocols as the State is required to use * * *." We do not believe that there is any meaningful difference between the phraseology suggested by the commenter and that used in the proposed rule.

Comment: A few commenters said that when HCFA conducts a focused review at its discretion, it should not exceed the authority contained in the Act.

Response: HCFA's authority to conduct a survey at its discretion is pervasive in the Act.

Comment: One commenter suggested that all validation surveys should be conducted by special teams dispatched from and responsible to the HCFA headquarters office.

Response: The HCFA survey staff is located in the ten HCFA regional offices. Although there are staff persons in the HCFA headquarters qualified to conduct surveys, surveying is not their primary function.

Comment: One commenter stressed that the HCFA surveyors should meet with the State surveyors if the Federal survey findings disagree with the State findings. Another commenter said that the Federal validation survey team should not review the State survey findings until after the Federal survey.

Response: It is HCFA practice to meet with the State survey agency whenever possible if there is a significant difference of findings between a State survey and the Federal validation survey. Often this is not possible because of time and travel constraints. In these cases, we notify the State survey agency of the findings and begin discussions regarding the appropriate enforcement remedy to apply. We agree with the commenter that a face to face

meeting is the best practice. Current instructions to Federal and State surveyors are to review all pertinent documents regarding the performance of the facility before starting the survey. In practice, this review seldom covers the most recent State survey, because it is not available, as these survey reports are not sent routinely to the HCFA regional offices. We appreciate the apparent concerns of the commenter; however, it will be difficult to prevent Federal surveyors from seeing the most recent State report at some time during the Federal survey because, in accordance with § 483.10(g)(1), survey results must be made available in the facility. Despite the concerns of the commenter, we believe that the accuracy of the Federal survey is not compromised by the knowledge of what the State findings were. In any case, the increased use of the OSPATS process should reduce the concerns of both commenters.

Comment: One commenter said that the statutory provision that requires no fewer than five validation surveys in each State is discriminatory to small States.

Response: We understand the commenter's concerns. However, sections 1819(g)(3)(B) and 1919(g)(3)(B) of the Act are explicit that HCFA must conduct surveys in no fewer than five facilities in each State.

Comment: A few commenters said that validation surveys should be focused on State survey performance, not facility compliance. Unless the HCFA survey discovers a serious threat to residents, the findings should be directed toward the State. For egregious failures of State survey performance, HCFA should consider contracting with another professional survey entity.

Response: The primary purpose of the validation survey is to assess State survey performance. In the process, we do determine facility compliance and must take action consistent with this information. Therefore, the validation survey can result in actions against non-compliant facilities and against the State. Section 488.320 provides the sanctions authorized by the Act to be imposed against the States.

Comment: One commenter said that validation surveys should focus on the validity of State deficiencies cited as well as the failure to cite deficiencies. If the focus is on only the State's failure to cite deficiencies, it may lead State surveyors to cite more deficiencies as a means of preventing Federal sanctions.

Response: We agree with this comment. The HCFA focus is now and will continue to be on the accuracy of the State survey. Part of that focus is to alert the State survey agency to situations where State surveyors are failing to cite valid deficiencies. We are aware of the possibility that some State surveyors might cite more deficiencies in order to avoid sanctions against the State. We have no concrete evidence that any actually have done so. In any case, our education efforts, including training on the "Principles of Documentation," are directed to the writing of accurate, well documented deficiencies. Well documented deficiencies are more likely to prompt corrective action and avoid unnecessary contentiousness between providers and survey agencies than poorly documented deficiencies.

Comment: One commenter said that HCFA should provide for two separate hearings because the deficiency determinations and the remedies selected are based on two sets of facts. Other commenters said it would be better to have one hearing; either State or Federal. One commenter suggested that the closer the validation survey was to the State survey, the easier it would be to hold one hearing.

Response: The Act is constructed so that a facility subject to a validation survey is entitled to only one hearing, either State or Federal. The provisions at section 1919(h)(7) of the Act furnish the means for resolving disagreements between HCFA and the State over whose enforcement action will control, which in turn, determines whether the facility is entitled to a hearing under part 431 or part 498. Moreover, HCFA excludes from the validation sample any facility against which adverse action has been initiated by the State survey agency. Therefore, if HCFA imposes remedies against a provider on the basis of noncompliance identified during a validation survey, HCFA's remedies are the only ones imposed, and the provider can contest the determination of noncompliance leading to the enforcement remedy in one Federal hearing.

Section 488.318 Inadequate Survey Performance

Comment: Some commenters asked how HCFA would determine "inadequate survey performance" by a State agency.

Response: We monitor State agency survey performance primarily by reviewing State survey team findings and by conducting validation surveys. Sections 1819(g)(3) and 1919(g)(3) of the Act, as added by sections 4202 and 4212 of OBRA '87, require the Secretary to conduct validation surveys of at least 5 percent of the SNFs and NFs in each State that have been surveyed by the State survey agency (but in no case less than 5 facilities). Prior to the effective date of OBRA '87, HCFA, acting for the Secretary, monitored State performance by conducting Federal monitoring surveys. OBRA '87 formalizes this process. The validation surveys must be conducted within 2 months of the date of the State's surveys and must be of sufficient number to allow inferences about the adequacy of the State's surveys.

Comment: Several commenters said HCFA should sanction individual surveyors when they make erroneous findings against facilities, whether the errors are intentional or unintentional.

Response: Section 1864(a) of the Act authorizes the Secretary to enter into agreements with State survey agencies to determine whether SNFs meet the Federal participation requirements for Medicare. Section 1902(a)(33)(B) of the Act provides for State survey agencies to perform the same survey tasks for facilities participating or seeking to participate in the Medicaid program. HCFA assesses the performance of each State's survey and certification program annually, and § 488.320 sets forth the sanctions that HCFA may impose upon the States for inadequate survey performance. With respect to sanctions against individuals, we note that, with the exception of the relatively small number of HCFA staff who perform validation surveys, surveyors are State agency personnel, appointed and paid by the State agency, and supervised by State managers. For these reasons, HCFA considers that any corrective or disciplinary action is a State matter. Whenever HCFA validation surveys uncover errors on the part of any individual State agency surveyor, the State is informed so it can take whatever action is necessary.

As a final measure, formal mechanisms are in place which provide an opportunity for facilities to appeal certifications of noncompliance that lead to enforcement remedies, except State monitoring.

Comment: A few commenters said States may begin to cite more deficiencies than usual in order to avoid sanctions by HCFA based on failure to meet the requirement at § 488.168(c) of the proposed rule, which provided that HCFA would consider it inadequate performance when a State agency fails to identify an immediate or nonimmediate jeopardy situation, substandard care, or other deficiencies.

Response: HCFA monitors the accuracy of a State survey agency's findings by performing validation surveys and reviews. Accuracy means not only that the State team has appropriately cited all the deficiencies

that existed, but also that it has not cited a deficiency when no violation of a requirement has occurred. HCFA conducts random surveys concurrently with the State surveys as well as independent surveys within 2 months of the States' surveys, and also conducts indepth reviews of selected State survey documentation. If HCFA discovers that a State is systematically citing unfounded deficiencies, HCFA will consider there to be inadequate survey performance and may apply any of the sanctions provided for at § 488.320(b)(2) of the proposed rule, Sanctions for Inadequate Survey Performance, in the case of Medicare facilities. In the case of Medicaid facilities, HCFA cannot reduce FFP as specified at § 488.170(b)(1)(i) of the proposed rule because we have concluded that section 1919(g)(3)(C) of the Act does not accommodate such action under this scenario. The two terms of the FFP reduction formula at section 1919(g)(3)(C) of the Act are: the total number of residents in nursing facilities surveyed by HCFA during a quarter; and, the total number of residents in nursing facilities found pursuant to HCFA surveys to be noncompliant. The number of residents in nursing facilities which HCFA found to be compliant but which the State determined were noncompliant does not figure into the calculation; therefore, no FFP reduction can be taken when the form of the State survey inadequacy is the citation of unfounded deficiencies, or indeed when the inadequacy is anything other than the State's failure to identify deficiencies. However, the Act does allow the Secretary to impose another sanction for the citation of unfounded deficiencies in Medicaid facilities. Section 1919(g)(3) of the Act states that the Secretary may also respond to inadequate State survey performance in Medicaid facilities by providing for the training of the State's survey teams. We are amending § 488.320 of the regulation to indicate this and to clarify that the citation of unfounded deficiencies will be considered inadequate survey performance. An additional safeguard against the citation of unfounded deficiencies will be afforded to facilities by their opportunity to engage in informal dispute resolution, as described in § 488.331.

Comment: Some commenters said that § 488.318 precluded facilities from informally challenging or expressing disagreement with survey findings.

Response: All States currently offer some opportunity for providers to refute survey findings. In one State, the process is required by State law. It is State policy in the rest. Although these policies vary among States, they all apply to State surveys of Medicare and Medicaid providers. In addition, HCFA's State Operations Manual requires that States allow facilities to interact with the survey team during the survey, to discuss findings at an exit conference, to raise unresolved issues to the State survey agency or the HCFA regional office, or both, and to record their disagreement on the HCFA–2567. If none of these courses of action satisfy the provider, there are appeal mechanisms available.

However, whenever possible, we want to provide every opportunity to settle disagreements at the earliest stage, before much time and money are spent by the provider, the State agency, and HCFA. Therefore, we are requiring, at § 488.331, that States offer an opportunity for informal dispute resolution beginning with the provider's receipt of the official statement of deficiencies. Although inadequate survey performance will not invalidate adequately documented deficiencies, neither the State's inadequate performance nor a resulting HCFA sanction imposed on the State will prevent the facility from formally or informally challenging or expressing disagreement with survey findings.

Comment: One State was concerned that any disagreement between the Federal and State agencies will equate to inadequate survey performance on the part of the State.

Response: We will not automatically consider any disparity between validation and State survey findings as inadequate survey performance. For example, when Federal surveyors find a facility in compliance with a requirement that the State cited as a deficiency, Federal surveyors are directed to go through a decision making process to determine if the disparity is due to facility correction or a flaw of the State survey. When Federal surveyors find deficiencies that were not previously cited by the State, we will consider whether the discrepancies can be explained by changed facility conditions or by other case specific factors before concluding that State survey performance has been inadequate.

Comment: One commenter suggested we reverse the order of the provisions of this section, making the reference to the failure to identify poor resident care of greater importance.

Response: We do not imply that the way in which paragraphs (a), (b), and (c) are ordered is of any relevance. All are of equal importance.

Comment: One suggestion was that determinations of inadequate survey performance be based on a State agency's overall performance rather than on isolated instances. Commenters believed that a pattern of noncompliance and noncorrection should be established before HCFA concludes that there is inadequate survey performance, and that HCFA should only consider State survey performance to be inadequate when the State "substantially" fails to perform as required. Others requested that we consider there to be inadequate survey performance only when the State fails to identify serious deficiencies.

Response: Sections 1819(g)(3)(C) and 1919(g)(3)(C) of the Act specify actions the Secretary may and must take if the State has failed to perform surveys as required by the Act or if a State's survey and certification performance is otherwise inadequate. Although the Act requires us to apply sanctions for inadequate survey performance, it gives us leeway when it comes to determining what inadequate survey performance actually is. The Act does not specify the criteria by which the Secretary is to make determinations of inadequate State performance, and does not obligate us to sanction the State for every survey shortcoming. It would be inappropriate and unduly harsh to automatically consider any failure by a State to cite a deficiency or to follow proper procedure to be inadequate survey performance. Rather, we believe it would be preferable to reserve sanctions for States that demonstrate a pattern of failure to identify deficiencies, or to follow proper procedure, or whose isolated oversights are particularly egregious. Changing facility conditions may account for many of the discrepancies between Federal and State survey findings, and because not every discrepancy or omission indicates systemic inadequate survey performance, not every one should cause a State to automatically lose FFP or be subject to other sanctions.

We reflect this policy in § 488.320. Guidelines for making determinations of inadequate survey performance will be forthcoming in future manual instructions.

Comment: Some commenters said that any findings or remedies resulting from inadequate survey performance should be rescinded.

Response: As we stated in § 488.168(c) of the proposed rule (which has been redesignated as § 488.318(b) in this final rule), "Inadequate survey performance does not relieve a SNF or NF of its obligations to meet all requirements for program participation, nor does it invalidate *adequately documented* deficiencies." (emphasis

added) In other words, a flawed survey can still validly document one or many deficiencies; the facility is still liable for sanctions where deficiencies, in fact, exist.

Section 488.320 Sanctions for Inadequate Survey Performance

Comment: Some commenters asked if the State Agency Evaluation Program (SAEP) was going to be used to evaluate State survey agency performance under this section. Certain commenters believe that it should be.

Response: The SAEP is currently undergoing comprehensive evaluation. We do not know if the program, in its future form, will be designed to identify performance problems of individual States for enforcement purposes, or whether the purpose of the program will be more geared toward global evaluation of the State agency survey and certification process as a whole. HCFA will, however, obtain information on the adequacy of State agency survey activity through validation surveys and otherwise through its general oversight authority.

Comment: Certain commenters recommended that we limit determinations of inadequate survey performance to the OSPATS. It was their view that it is unfair to reduce FFP based on a comparison of survey findings, as conditions in nursing homes change daily.

Response: As stated previously, we acknowledge that there are great advantages to conducting a validation survey concurrently with the State's standard recertification survey, and it is our intent to expand the use of the OSPATS process for validation surveys. However, we reiterate that it is necessary to continue to use nonconcurrent validation surveys, despite the preference of the States and HCFA for OSPATS, because Federal surveyors must have at least one year of experience surveying before they are eligible to conduct an OSPATS.

Comment: Some comments suggested the rules should state whether or not appeals under this section should stay the reduction of FFP action.

Response: Section 1919(g)(3)(C) of the Act requires that appeals of sanctions under this rule are to be made according to section 1116 of the Act. According to section 1903(d)(5) of the Act, if an appeal of a disallowance is made, the State has the option of retaining the funds disallowed pending a final administrative decision. If the final decision upholds the disallowance and the State elected to retain the funds during the appeal process, the proper amount of the disallowance, plus interest computed in accordance with § 488.442 will be offset in a subsequent grant award.

Comment: Some commenters complained that FFP reduction is an excessive measure, and suggested that FFP not be reduced as a sanction, or be reduced only after other methods of addressing inadequate State agency performance have been tried and failed. Other commenters asked that the same sanctions be imposed against the State for inadequate survey performance regardless of whether the inadequately surveyed facilities participate in Medicare or Medicaid. An additional commenter recommended that we levy financial penalties against the survey agency instead of reducing FFP to the State.

Response: While we appreciate the merits of these suggestions, section 1919(g)(3)(C) of the Act does not give us such flexibility. Rather, it requires that, when HCFA finds, on the basis of validation surveys that the State has inadequately surveyed Medicaid nursing facilities, HCFA may provide for training of State survey teams, but shall provide for a reduction of FFP according to a prescribed formula.

However, the FFP reduction formula specified at section 1919(g)(3)(C) of the Act and at § 488.170(c) of the proposed rule has certain limitations: it cannot be used to sanction a State when it has cited unfounded deficiencies or when its survey findings are appropriate but its survey scheduling, team composition or other practices are unacceptable. However, these survey defects are no less serious than a failure to identify deficiencies, and it is unlikely that the Congress intended for us to disregard them. HCFA does have the authority to provide for the training of survey teams in these instances. We are revising § 488.320(b)(2) to provide that when the State's survey performance in Medicaid facilities is inadequate but the inadequacy is not accommodated by the FFP reduction formula, HCFA will provide for the training of State survey teams. In addition, HCFA has the authority to consider the Medicaid provider agreement to be invalid for failure to follow proper survey procedures, and may invoke the FFP disallowance provision at § 442.30, Agreement as evidence of certification.

We are unable to make the sanctions for inadequate survey performance parallel across facility type as commenters suggested. As discussed above, the Act does not permit us to eliminate FFP reduction as a sanction for inadequate survey performance in Medicaid facilities, and neither does it allow us to expand the application of this sanction to inadequate survey performance in Medicare facilities. The conspicuous absence of Federal payment reduction in section 1819(g)(3)(C) of the Act, which lists sanctions for inadequate survey performance in Medicare facilities, as opposed to the inclusion of FFP reduction in section 1919(g)(3)(C), which specifies sanctions for inadequate performance in Medicaid facilities, is a clear indication that the Congress intended to restrict Federal payment reduction for inadequate survey performance in Medicaid facilities alone. Likewise, section 1819(g)(3)(C) gives us the flexibility to devise our own sanctions for inadequate survey performance in Medicare facilities, but no comparable authority exists in section 1919(g)(3)(C). Therefore, we must assume that the Congress did not intend for us to impose sanctions other than the two specified in the statute for inadequate survey performance in Medicaid facilities.

Comment: One commenter asked that we convene a technical advisory group composed of State agency and HCFA regional office personnel to explore the possibility of a legislative amendment to the Act's FFP reduction requirement.

Response: We do not see the necessity of requesting a legislative amendment, but will not discourage the States if they choose to pursue one.

Comment: A question was asked regarding whether the reduction of FFP would be by audit exception or through a reduction in the amounts of future budget approvals.

Response: Procedures for such actions will be written following existing procedures found in section 3165, "Non-audit Medicaid Disallowances", of the Regional Office Manual. As noted above, such procedures will be in accordance with section 1116 of the Act.

Section 488.325 Disclosure of Results of Surveys and Activities

Comment: A few commenters suggested that § 488.325(a)(1) be expanded to require that the scope and severity levels of all deficiencies, including those deficiencies with a scope and severity level of 1, be recorded on and, therefore disclosable as part of, the official deficiency statement, in an effort to promote facility competition and quality. Some of these commenters argue that we must disclose notice of all deficiencies, regardless of scope and severity level, if we are to provide the public with a complete and accurate report of a facility's current compliance status. Some propose that another requirement

be added under § 488.325(a) to read: "(9) The summary of 1–1 deficiencies."

Response: As discussed later in this preamble, we are revising the scheme that appeared in the proposed rule by eliminating scope and severity scales, as such, and by substituting instead a scheme in which HCFA and the State will assess deficiencies by application of several factors that will gear enforcement remedies to the seriousness of noncompliance at facilities. However, we are accepting the second comment with some modification. With the exception of isolated deficiencies that HCFA or the State determines constitute no actual harm with a potential for only minimal harm, all deficiencies will be recorded on the HCFA–2567. Those isolated deficiencies will not be recorded on the official deficiency statement, but will be recorded on a separate document as discussed in the preamble of the proposed rule. However, all of a facility's deficiencies, including those deficiencies that HCFA or the State determines constitute no actual harm with potential for minimal harm, will be disclosable. We are revising § 488.325(a)(2) to require the release of the summary of isolated deficiencies that HCFA or the State determines constitute no actual harm with potential for minimal harm deficiencies.

Comment: One commenter asked how this information will be disclosed to the public and also wanted to know if facilities have any responsibility relative to disclosure. The same commenter wasn't sure what we meant by "direct or indirect interest in a SNF or NF" as used at § 488.325(a) (7) and (8).

Response: Existing procedural requirements at §§ 401.133–136 and 431.115 as well as sections 3300–3320 in the State Operations Manual remain in effect relative to public disclosure of Medicare and Medicaid survey documents, respectively. While § 431.115 provides only minimum disclosure requirements for States, it directs that States have a procedure for disclosing the specified survey information.

Sections 1819(g)(5) and 1919(g)(5) of the Act provide the statutory bases for § 488.325 regarding disclosure of inspection and other information on SNFs and NFs by the States and HCFA. The only requirement we are imposing on nursing home providers in this regard is that, not later than 10 working days after receiving a notice of substandard quality of care, a SNF or a NF must provide the State with a list of each resident in the facility and the name and address of his or her attending physician. Failure of the facility to disclose the information timely will result in termination or alternative remedies being imposed.

Due to an administrative oversight, the word "ownership" was omitted from the proposed regulation text at proposed § 488.175(a) (7) and (8), clarifying "direct or indirect interest." We are revising both cites, which have been redesignated as § 488.325(a) (8) and (9), respectively, to specify "ownership" interest. We are also cross-referring these cites to § 420.201, which defines "direct" and "indirect" ownership interest.

Comment: Several commenters suggested that results of complaint surveys be disclosable under this subpart.

Response: The regulation implementing sections 1819(g)(5) and 1919(g)(5) of the Act provides that information must be made available by the State or HCFA for all surveys and certifications. Therefore, information from any survey, including a complaint survey, is disclosable under this subpart.

Comment: We received four distinct comments on § 488.325(b), which concerns charges associated with making information available. First, some commenters believe that, while charges should be permitted, they should not be required, nor should they, when imposed, exceed the amount facilities charge residents for copies of records. They proposed that the requirement to follow 42 CFR 401.140 regarding fees and charges be reduced to a suggestion by changing the word "will" to "may." Second, other commenters contended that § 401.140 is outdated, too restrictive, and in conflict with some States' Freedom of Information laws. Since many States have adopted their own fee schedule, they suggested that this provision be revised to permit States to use their own fee schedule. Third, one commenter questioned HCFA's authority to require States to impose any charges. Lastly, some commenters proposed that the regulation allow for waiver of fees or reduced fees so that survey information is truly accessible to all.

Response: We are not accepting the suggestion that fees imposed by HCFA or the States relative to disclosure parallel those charged by facilities to residents because we have no basis to develop a provider-specific disclosure policy relative to fees. However, since § 431.115(d) requires only that the Medicaid agency "have a procedure for disclosing pertinent findings obtained from surveys made by the State survey agency," and since we understand that most, if not all, States have their own fee schedules, we are amending this subsection to allow, but not require, States to use their respective fee schedules for documents which they maintain and which they have been asked to disclose. In response to the comments that fees be permissible but not required, as well as the request for a fee exception clause, we refer the commenters to § 401.140(c), which provides for waiver or reduction of fees for Medicare. That section discusses when a waiver of fees and charges would be appropriate and permissible; States are free to use any such waiver provisions within their respective disclosure procedures in the same way that they are free to use or not use a fee schedule at all.

Comment: Numerous commenters were strongly opposed to allowing oral requests for information. Some say that this is clearly inconsistent with past practice which has generally been that requests be in writing. This claim is further substantiated by the Freedom of Information Act which provides that all agencies generally stipulate that requests for information be in writing. Some commenters say that only written requests can substantiate specific charges and fees, while others, specifically States, use the written requests as a record of the distribution of information which is used for workload and expenditure reporting, as well as for other administrative purposes.

Response: Since publishing the proposed rule, we have concluded that it is not necessary to create a facility-specific requirement relative to the method by which requests for survey information should be made, and we are revising § 488.325(c) to provide that such requests are to be made in accordance with the Department of Health and Human Services' regulations relative to disclosure at 45 CFR Part 5, in other words, generally in writing.

Comment: Many commenters suggested that paragraph (d)(3) be expanded to include providers' responses in order to be consistent with § 488.325(a)(1) as well as to ensure full disclosure of all affected parties.

Response: With the exception of those isolated deficiencies that HCFA or the State determines constitute no actual harm with potential for minimal harm, which are recorded on a separate form and which can be refuted by providers during the dispute resolution process, any provider response to the deficiency statement itself would be noted on the plan of correction (both of which are explicitly releasable under the Freedom of Information Act), we are making explicit in § 488.325(d) that provider

responses to the deficiency statements are disclosable.

Comment: Some commenters believed that States and facilities should be required to provide information immediately, especially when State law or policy provides immediate access. Commenters also wanted to know whose disclosure provisions apply (HCFA's or the State's) when there is a difference about what is releasable and when. A few commenters asked us to specify whether the 10 days referred to in paragraphs (d) (1) and (2) are calendar or working days.

Response: As we have stated above, we have no basis to require facilities to disclose any information other than that which is statutorily mandated. OBRA '90 provided that each State and the Secretary (HCFA), must make available to the public information concerning all surveys and certifications of NFs and SNFs, including statements of deficiencies, and approved plans of correction, within 14 calendar days after such information is made available to those facilities. For procedures relative to release of information not included in the OBRA '90 provision, HCFA or the State should defer to § 401.136 or State procedures, respectively. Also, we note that § 488.325(d) implements sections 4008(h)(2)(M) and 4801(e)(14) of OBRA '90, which require release of information by HCFA and the States, respectively, not by providers.

Since paragraphs (d) (1) and (2) of the proposed rule offered no additional guidance to HCFA or the States beyond what is currently at § 401.136 or in State procedures, respectively, we are deleting them. However, we are clarifying the 10-day timeframe at § 401.136 as "working" days.

The question of whose regulations prevail when disclosure requirements differ between HCFA and the State should not arise since the State and Federal disclosure systems operate separately from one another. It is possible that the same document could be releasable under a State's disclosure laws yet not be releasable under Federal law, or vice versa. It is also possible that a disclosable document may be released by HCFA and the State subject to different disclosure timeframes. In other words, documents maintained by Federal agencies are subject to Federal regulations; those maintained by the State are subject to the State's regulations.

Comment: A few commenters requested clarification regarding the 14 calendar days referenced in paragraphs (d)(3). They weren't sure whether there was a single release of information that would occur 14 calendar days after some event, or whether more than one release of information, each after 14 calendar days, was contemplated. Another commenter wanted to know if the statement of deficiencies and plan of correction are a single document.

Response: While the statement of deficiencies and the plan of correction are recorded on the same form (Statement of Deficiencies and Plan of Correction, Form HCFA–2567), the completion and disclosure of each is separate, not concurrent. The deficiency statement, as well as the separate sheet transmitting survey findings of isolated deficiencies which constitute no actual harm with potential for minimal harm, are notices that the certifying agency gives to a provider transmitting its official survey findings. We have concluded that, since the separate listing of a facility's isolated deficiencies which constitute no actual harm with a potential for minimal harm supplements the official deficiency statement, the listing must be disclosed along with the official statement of deficiencies if we are to provide the public with an accurate and complete report of that facility's compliance status. This information is disclosable within 14 calendar days after it is made available to the provider. Upon receipt of the statement of deficiencies, the provider responds, on the same form, with its plan and timetable for correction of cited deficiencies, as well as any disagreement with the survey findings. Sections 1819(h)(2)(C) and 1919(h)(3)(D) of the Act require that a plan and timetable for corrective action be approved by HCFA if alternative remedies are the only remedies being sought, and if the facility is to continue to participate with deficiencies that do not constitute immediate jeopardy in either or both the Medicare and Medicaid programs. Information about the plan of correction must be released to the public, upon request, within 14 calendar days after the provider is notified of the approval status of its plan. Therefore, each part, that is, the deficiency statement and the plan of correction, is releasable within 14 calendar days after the provider's notification of that part.

Comment: A few commenters believe that States should not charge the State ombudsman for the notifications specified in this subsection.

Response: Since the information in this subsection is being disclosed by the State, any fees and charges, or waivers thereof, would be subject to the specific State's disclosure law.

Comment: Several commenters requested that proposed § 488.175(e)(4) (redesignated in this final rule as § 488.325(f)(4)), be expanded to include requests for appeals as well as results of appeals. A few other commenters suggested that the paragraph be revised to include facility cost reports, confidential survey records, for example, surveyor notes, etc.

Response: We are accepting the first suggestion and are revising redesignated paragraph (f)(4), to provide that the State must provide the State's long term care ombudsman with requests for appeals and results of appeals. We are not accepting the second suggestion. The fact that the Congress explicitly provided that a facility's Medicare and Medicaid cost reports are disclosable to the public in accordance with applicable disclosure laws, and not routinely disseminated to any specific party, demonstrates its intention that release of these reports should be based on the requestor's right to know the information. The State's long-term care ombudsman, as well as any other member of the public, may request these cost reports, surveyors' notes, and any other survey-related documents not included in this subsection through the appropriate disclosure mechanism, for example, the Freedom of Information Act, where they will be evaluated accordingly.

Comment: Many commenters, mostly State agencies, were opposed to routinely providing ombudsmen with the information required by this subsection. They contend that this results in a costly and overwhelming task especially in the larger States; for example, California has 1300 nursing homes and 42 ombudsman field offices. They propose that a more reasonable approach to notification would be that in cases where a specified degree of noncompliance exists, for example, substandard care, notification would be automatic; in all other cases, notification would be upon request. Another comment was that HCFA should develop a report using data from current reporting systems to provide the needed information.

Response: We cannot accept these suggestions. Sections 1819(g)(5)(B) and 1919(g)(5)(B) of the Act, as amended by sections 4008(h)(2)(N) and 4801(e)(15) of OBRA '90, specifically provide, without exception, that "States" will notify "the State long-term care ombudsman" of a State finding of noncompliance with "any" participation requirement as well as of "any" adverse action imposed against a facility in that State. Regarding the number of ombudsmen offices within a State to which notifications must be made, we note that, since the statutory requirement to notify "the State long-

term care ombudsman" is singular, the State's central long-term care ombudsman office within each State's organizational structure is the intended contact point for satisfying such notification requirements. While we see the function of disseminating the information further among the district and other ombudsmen offices to be the responsibility of the State's central long-term care ombudsman office, each State has the flexibility to design its own system.

Comment: A few commenters wanted HCFA or the State to notify the ombudsman of a nurse staffing waiver within 7 days of its approval. Several commenters proposed that notice of nurse staffing waivers be provided to prospective residents, their physicians, families or legal representatives, the State licensure board for nursing and the State and local medical societies. They based their proposal on the public's need to know, not only from a consumer's perspective, but as taxpayers who directly subsidize the affected facilities.

One commenter wanted to know who validates that nurse staffing waiver information is actually provided to those required to receive it.

A couple of commenters asked that the notice to residents about nurse staffing waivers be in the form of a sign and be posted in a prominent place in the facility to ensure that notice is received.

Response: Since publishing the proposed rule, we found that disclosure of nurse staffing waivers is addressed in regulations at 42 CFR 483.30. Also, since sections 1819(g)(5)(C) and 1919(g)(5)(C) of the Act are clear as to the individuals and organizations that would have the greatest need for specified survey-related information, we believe that all interests have been adequately represented and that such information is easily accessible to any other interested parties either through their respective professional affiliations, or through the public disclosure mechanism. Therefore, we are eliminating notifications specific to nurse staffing waivers from this final rule.

Comment: Some commenters urge that ombudsmen, protection and advocacy systems for the mentally ill and mentally retarded, residents or legal representatives and immediate family members, and the public should be given an opportunity to comment on a proposed nurse staffing waiver before it is granted.

Response: This comment is outside of the purview of this regulation.

Comment: One commenter suggested that we delete the last sentence of § 488.175(h) (redesignated in this final rule as § 488.325(g)) relating to enforcement consequences to a facility that fails to satisfy the disclosure requirement timely because it is not necessary.

Response: We are not accepting this comment. We believe we must retain this provision since this final rule provides HCFA's and the State's enforcement strategy when facilities do not substantially meet the nursing home participation requirements which are codified at 42 CFR Part 483, Subpart B. The requirement that facilities provide information to the State relative to specified residents so that the State can meet its statutory obligation to notify attending physicians and licensing boards is in addition to the other participation requirements at Part 483, Subpart B, and we believe that consequences for facility noncompliance with this requirement are noteworthy.

Comment: Many commenters were opposed to our proposal implementing sections 1819(g)(5)(C)(i) and 1919(g)(5)(C)(i) of the Act regarding notice to physicians when the State finds that a nursing home has provided substandard quality of care. All of these commenters objected to the requirement that the attending physician of each Medicare and Medicaid resident receive notification of the substandard quality of care. Some believed that physicians of all residents in the facility should be notified when such care is found because they contend that all residents are vulnerable to such care and a program relationship should not need to exist before notifications occur. An equal number of commenters argued that this subsection exceeds the statutory requirement that provides for notification of "* * * the attending physician of each resident with respect to which such finding is made * * *". These commenters suggested that the purpose of the statutory requirement was to ensure that the physician of a resident who has allegedly received substandard quality of care is apprised of the situation in order to ensure appropriate medical interventions, if needed.

Response: We are adopting a modified version of the above suggestions and are requiring that the physician of each resident in the facility who was found to have suffered substandard quality of care, regardless of payment source, be notified of findings of substandard quality of care. Findings of substandard quality of care are indicative of the facility's inability or unwillingness to meet specific participation requirements relative to the entire resident population. While we have the statutory responsibility to ensure the safety and well-being of program beneficiaries and recipients in nursing homes that participate in one or both programs, noncompliance frequently affects residents in a facility, other than just Medicare and Medicaid residents. Moreover, the Act plainly applies to all residents receiving substandard quality of care regardless of payment source. Therefore, findings of substandard quality of care must be communicated to the physician of each resident who was the subject of such care.

Comment: A few commenters suggested that notification to the State board responsible for the licensing of the facility administrator be limited to those situations where the administrator is found culpable for the violations identified. They describe situations in which a reputable administrator is recruited to a problem facility in an effort to turn the facility around. Shortly thereafter, a survey is performed which identifies substandard quality of care, and as a result, the newly hired administrator is reported to the licensing board. They point out that this situation provides a disincentive for quality administrators to assume control of problem facilities due to the risk to their reputation. A few commenters wondered why licensing boards need to be notified, while others believed that notification should be expanded to include State licensure boards for nursing and medicine as well as the State and local medical societies.

Response: We are not accepting these suggestions. First, the requirements to notify the licensing board, as well as physicians of Medicare and Medicaid residents, when substandard quality of care is identified, are statutory and do not provide for exceptions. Second, a facility administrator, regardless of recency of appointment, is ultimately accountable for the care and services provided in his or her facility at the time of the survey. We would expect that this consideration as well as others would be evaluated by a prospective facility administrator.

Regarding the comment that notification should be expanded, sections 1819(g)(5)(C) and 1919(g)(5)(C) of the Act are clear as to the individuals and organizations that would have the greatest need for the specified survey-related information. We believe that all interests have been adequately represented and that such information is easily accessible to any other interested parties either through their respective professional affiliations, or through the

public disclosure mechanism. Therefore, we see no need to expand the list of parties the State must notify about substandard quality of care.

Comment: Several commenters asked whether the State notification requirements at sections 1819(g)(5)(C) and 1919(g)(5)(C) of the Act apply to surveys performed by HCFA.

Response: States will provide the notification regardless of who performed the survey that identified the substandard quality of care. For all State-operated facilities, as well as non-State-operated facilities which are subject to a Federal survey, HCFA will notify the State of the finding of substandard quality of care so that the State can fulfill the notification requirements. This requirement is based on the rationale that the State "finds" noncompliance when it is notified of it by HCFA. This approach permits use of existing State systems and centralizes notification efforts.

Comment: Some commenters complained that in cases where the facility fails to provide the list of residents and their physicians required in proposed § 488.175(h) (redesignated in this rule as paragraph § 488.325(g)), the State will be unable to comply with the State notification requirements in proposed paragraph (i) (redesignated in this rule as paragraph (h)). If the facility provides the list late, the State will miss its 30-day deadline. These commenters believe that this paragraph should be rewritten to require the State to issue notice within 30 calendar days of receipt of the resident/physician information from the facility.

Response: We are accepting this suggestion with some modification and are revising redesignated paragraph (h) to read, "Not later than 20 calendar days after a SNF or NF complies with paragraph (g), the State must provide written notice of the noncompliance to—". This revision imposes the notification requirement on the State once the State has received the necessary information from the facility. Also, § 488.325(g) provides that facilities that fail to provide the information to the State timely will have termination or alternative remedies imposed.

Comment: A few commenters questioned whether there would be a revisit prior to the notification to physicians and licensing boards, and, if so, and corrections had been made, whether notifications must still occur.

Response: The Act does not require revisits, appeals or any other pre-notification activity prior to notification to physicians and licensing boards. If the facility does manage to correct the deficiencies designated as substandard quality of care and have the correction substantiated by State or Federal surveyors before the notification, that notification should indicate that corrections have been made. However, the Act is clear that physicians and licensing boards are to be notified when the facility has provided substandard quality of care. Therefore, substandard quality of care provided before corrective action was taken, still must be reported.

Comment: A few commenters wanted to know how physicians will know when a facility, previously found to have provided substandard quality of care, has achieved compliance. Other commenters questioned whether physician and licensing board notifications are subject to an appeal by the facility, and if so, whether the results of the appeal will be communicated to the physicians and licensing board. These commenters also asked what becomes of this information.

Response: There is no statutory basis for notifying physicians more than once about a facility's compliance status. However, there is nothing to preclude facilities, physicians, or licensing boards from following up on this matter absent a statutory or regulatory requirement. Physicians are free to initiate inquiries into this matter, just as facilities are free to contact physicians and licensing boards about corrective action having occurred after the initial notification by the State.

While the notification in and of itself is not appealable, providers may appeal, in accordance with parts 431 or 498, as applicable, a finding of noncompliance that caused a remedy or remedies to be imposed. However, there is no statutory basis to require that results of provider appeals be communicated to the physicians and licensing board previously notified of the substandard quality of care. Again, the providers are free to notify physicians and licensing boards about the outcomes of these appeals and physicians and licensing boards are free to inquire about such matters.

All information related to the survey and certification of Medicare and Medicaid providers is retained in accordance with Federal and State provider survey and certification records retention requirements.

Section 488.330 Certification of Compliance or Noncompliance

Comment: A small number of commenters suggested that HCFA delegate to the State all enforcement responsibilities for the SNF portion of dually participating facilities. Commenters believe that States have better resources to perform the enforcement functions and this solution would eliminate duplicative efforts and be more cost effective. One commenter further suggested that the State handle all enforcement responsibilities for all SNFs.

Response: We cannot accept this suggestion. Section 1819(h)(2) of the Act requires the Secretary to take certain enforcement actions when the Secretary finds either through his or her own survey, or through the State's survey, that a SNF no longer meets the requirements set forth in section 1819(b), (c) or (d) of the Act. Thus, we do not have the authority to delegate the enforcement authority for SNFs to the State.

Comment: A few commenters believed that HCFA, not the State, should perform the on-site surveys of State-operated nursing homes.

Response: To the extent possible, we have attempted to use the survey and certification process in effect before October 1, 1990, whereby the survey agency would conduct the survey and certify compliance or noncompliance with Federal requirements, subject to HCFA approval as necessary for SNFs. The OBRA '87 legislation made a distinction between State operated and non-State operated facilities. Specifically, OBRA '87 provided that the Secretary would be responsible for certifying State-operated facilities. To be as consistent as possible with our present survey process, we proposed that the State survey agency would conduct all surveys (with the exception of validation surveys). We believe that requiring survey agencies to survey all facilities will make surveys for all nursing homes in a State more consistent since the same entity will conduct all surveys. However, HCFA would maintain the certification responsibility, thus assuring oversight as envisioned by the Act.

Comment: Some commenters were concerned that, although the Secretary's determination of a facility's noncompliance takes precedence over a State's finding of compliance, the regulation is unclear about which agency's remedies control when both HCFA and the State determine that the facility is not in compliance.

Response: When both the Secretary and the State survey agency agree that a facility is not in compliance, the rules at proposed § 488.232 (redesignated as § 488.452(b),(c),(d) and (e)) are applied to determine whether the Secretary's or the State's timing and choice of remedies control.

Comment: A few commenters were unclear about whether the validation survey and the certification survey would be counted as separate surveys for sanction purposes because the denial of payment sanction must be imposed when the State or Secretary finds substandard quality of care through three consecutive standard surveys.

Response: The Secretary's finding of noncompliance during a validation survey would not be counted toward three consecutive findings of substandard quality of care. Sections 1819(h)(2)(E) and 1919(h)(2)(D) of the Act refer to facilities being found to have provided substandard care under three consecutive standard surveys conducted under sections 1819(g)(2) and 1919(g)(2) of the Act, respectively. Sections 1819(g)(2) and 1919(g)(2) of the Act describe the State's standard survey of a facility.

Prospective Providers

In the proposed rule, we asked for public comments regarding our requirement that prospective providers be in full compliance with the requirements of sections 1819 (b), (c) and (d) and 1919 (b), (c) and (d) of the Act in order to participate in the Medicare and Medicaid programs, respectively.

Comment: Many commenters believe that HCFA's proposal ignores the concept of substantial compliance because the proposed regulations define any failure to comply with the regulations as a deficiency. The commenters suggest that the regulation be rewritten to state that facilities will be judged on substantial compliance. A few commenters asked if a deficiency with a scope of 1 and a severity of 1 would constitute noncompliance that is sufficient to exclude a prospective provider from program participation.

Response: After carefully considering the matter, we are accepting the commenters' suggestion to incorporate the concept of substantial compliance in the regulation as the standard that prospective providers and existing providers must meet in order to begin or continue to participate in the Medicare and Medicaid programs. We arrived at this conclusion for several reasons.

Based on public comments and further consideration on our part, we believe that the notion of perfect compliance, as discussed in the proposed rule, is an impractical and, perhaps, unrealistic standard for providers or prospective providers to meet. This is because in lieu of approximately 15 statutory requirements with which facilities had to comply before OBRA '87, the Act now sets forth more than 100 requirements that facilities have to meet in order to participate in the Medicare or Medicaid programs. In fact, in 1992 only 7.3 percent of all nursing homes surveyed were deficiency-free. Under a regulatory system defined by condition and standard level requirements, such as the system in place for many years, we found that almost all facilities that were experiencing only minor problems did retain program eligibility since the system allowed for some noncompliance at the standard level. That is no longer the case. By vastly increasing the number of statutory requirements that facilities have to meet in order to meet the statutory definition of a SNF or NF, and by directing the Department to do away with its former hierarchy of requirements, the Congress made it far more difficult for facilities to meet prerequisites for program participation. As discussed above, however, we do not believe that the Congress intended to write into law a set of requirements that would eliminate almost all providers from the Medicare and Medicaid programs. Accordingly, we have drawn upon the principles enunciated by the Institute of Medicine in its study of nursing home regulation that helped spawn nursing home reform.

A benchmark of the IoM study was its conclusion that the focus of nursing home regulation should be on resident outcomes and not procedural requirements that do not always accurately measure whether quality care is being rendered. Sections 1819 and 1919 of the Act, and the implementing regulations at 42 CFR Part 483, as well as our survey process, reflect this focus.

We believe that the Act sets forth many examples of requirements which, if violated by a facility, would not necessarily expose a resident to the potential for anything more than minimal harm, much less actual harm. For example, § 1919(b)(3)(C) requires that a facility conduct a resident assessment for each individual no later than 14 days after admission. If a facility were to conduct almost all of its assessments in compliance with this requirement, but failed in the case of only one resident who was assessed on the 15th day after admission, a very narrow reading of the statute would compel a conclusion that the facility was out of compliance and thereby failed to meet the statutory definition of a nursing facility under § 1919(a) of the Act. This kind of approach to nursing home regulation, as we alluded to above, would be unduly harsh and impractical where the facility's failure did not expose the resident to any harm. Indeed, it may be the case that the facility prepared an exemplary assessment for the one resident for whom it acted untimely. The same type of analysis could be made for violations of the requirement at § 1919(c)(2)(B) regarding the requirement to be given at least 30 days in advance notice of a resident's transfer. Where in a given case, a facility gives 29 days advance notice, the question might better be, was there a potential for minimal harm as a result of this infraction rather than conclude that the Act was violated and expose the facility to one or more remedies, even where the resident experienced no more than the potential for minimal harm.

Accordingly, we are defining "substantial compliance" at § 488.301 as a level of compliance with requirements of participation such that any identified deficiencies pose no greater risk to patient health and safety than the potential for causing minimal harm. Thus, while a facility may avoid a remedy even if it fails to comply perfectly with all statutory requirements, it still has a duty to each resident to provide care that enhances the chances of positive outcomes and avoids negative outcomes. If a single resident experiences any harm, a facility will not have satisfied its statutory obligations. Given the statute's focus on each resident's right to receive quality care, and the facility's mirrored obligation to provide it, we believe that we could not adopt a less rigorous standard of compliance.

We acknowledge that there might be many definitions that we could have chosen from, but in our view the definition we have settled upon strikes the appropriate balance that best implements the statute, the IoM study, and accommodates both facility and resident concerns.

Second, as commenters suggested, we considered the fact that section 1866(b)(2) of the Act allows the Secretary to enter into provider agreements with facilities that "substantially" meet applicable requirements. Although there is no analogous provision in the Medicaid law for nursing facilities, we are exercising our general rulemaking authority in section 1102 of the Act, to extend the "substantiality" concept to Medicaid providers. We believe that since Congress stressed that it intended to adopt the IoM recommendation that the same requirements apply to both Medicare and Medicaid facilities, it is logical to recognize substantial compliance as an acceptable standard to meet for participation in both programs.

As we discuss in more detail later in this preamble, the scope and severity gradations that appeared in the proposed rule will only serve as one example of how States can determine remedies. Furthermore, we are removing the numerical designations from the scope and severity measure. In response to the commenter who asked if a deficiency at a scope of 1 and a severity of 1 would constitute noncompliance sufficient enough to exclude a prospective provider from program participation, the answer is no. While we are not mandating the use of numerical ranges, if States use such ranges, and if a 1/1 designation denotes a deficiency which is of limited scope and which has caused no harm and is unlikely to cause more than minimal harm, a facility with such a deficiency would not be precluded from participating in the Medicare or Medicaid program.

Comment: Several commenters raised concerns with the provision that facilities must meet all requirements because they wonder how many follow-up surveys will be necessary to ascertain that a facility is in full compliance.

Response: As we discussed earlier, we reconsidered our position spelled out in the proposed rule that prospective providers had to comply perfectly with all requirements to participate in the Medicare and Medicaid programs. Instead, we are requiring that providers and prospective providers be in substantial compliance with all requirements in order to participate in both programs. If a State survey agency is requested to conduct more than one initial survey of a prospective provider because it was not in substantial compliance, the State survey agency will have the flexibility to conduct follow-up surveys up to three weeks after the facility alleges correction of the noncompliance that disqualified it from Medicare and/or Medicaid participation. This is consistent with section 2008 of the State Operations Manual which established 3 weeks as the timeframe in which the State should conduct an initial survey of a prospective provider after its notification of full operation. The 3-week interval is necessary to allow the State survey agency adequate time to schedule a revisit, and gives the prospective provider who has corrected noncompliance the opportunity to demonstrate that it is capable of continued substantial compliance.

Comment: Some commenters suggested adding a phrase at the end of the sentence in § 488.330(b)(2)(ii) to require that when a provider has achieved compliance, the State can only remove the remedy if the State has reason to believe that compliance will be maintained.

Response: We accept this suggestion, but only with regard to the denial of payment and State monitor sanctions imposed for repeated substandard quality of care, as specified at sections 1819(h)(2)(E) and 1919(h)(2)(D) of the Act, and for the imposition of temporary management as specified at sections 1819(h)(2)(B)(iii), 1919(h)(2)(A)(iii), and 1919(h)(3)(C)(iii) of the Act. Sections 1819(h)(2)(E) and 1919(h)(2)(D) of the Act provide that, if the State or Secretary finds substandard quality of care on three consecutive standard surveys, the State or the Secretary must impose a denial of payment remedy and monitor the facility until the facility has demonstrated to the satisfaction of the Secretary or State that it is in compliance with the requirements of sections 1819 (b), (c), and (d) and 1919 (b), (c), and (d), and that it will remain in compliance with such requirements. Likewise sections 1819(h)(2)(B)(iii), 1919(h)(2)(B)(iii) and 1919(h)(3)(C)(iii) of the Act specify that temporary management must not be lifted until the Secretary or State has determined that the facility has the management capacity to ensure continued compliance with all the requirements of sections 1819 (b), (c), and (d) and 1919 (b), (c), and (d) of the Act. We are, as explained earlier in this preamble, imposing a substantial compliance standard for the purpose of imposing and lifting sanctions. Therefore, for the above mentioned remedies, we are requiring that the remedies be lifted when the facility achieves substantial compliance and the facility has demonstrated to the Secretary or the State that substantial compliance can be maintained. There is no statutory authority for the continuation of any other remedies past the date that a facility achieves substantial compliance. We are making changes to § 488.330(b)(2)(ii) accordingly and corresponding changes to proposed § 488.236 (redesignated as § 488.454).

Comment: A few commenters recommended amending the proposed text to provide that a facility that is certified meets all Federal requirements, except that a facility may be considered to meet the requirements if it has requested and been granted a waiver by either HCFA or the State survey agency. Commenters further requested that we clarify in the regulation that once a waiver is granted, the existing situation which required the waiver is not considered a deficiency for the purpose of remedies or repeat deficiencies.

Response: We do not believe the regulation needs to be changed. Waiving requirements renders those requirements not applicable to a particular facility for the duration of the waiver. If requirements are not applicable to a particular facility, that facility cannot be out of compliance with those requirements. Therefore, when a facility has been granted a waiver of certain requirements, there would be no remedies imposed nor would those waived requirements be considered when looking at a pattern of repeated noncompliance.

Comment: Some State commenters believed that the proposed rule was unclear about when the certification of compliance or noncompliance would be issued. For example, in the case of a plan of correction, would HCFA or the State certify compliance after an acceptable plan of correction was received or would noncompliance be certified, and after successful completion of the plan of correction, a subsequent certification of compliance be issued.

Response: The certification of compliance or noncompliance is issued by the State survey agency approximately 20 to 25 days after the last day of the survey. A finding of substantial compliance is considered within the range of compliance and would receive a certification of compliance. A certification of compliance would be issued after a certification of noncompliance if, as in the example the commenter offers, a facility submits a plan of correction and achieves substantial compliance. The exact mechanism by which the facility will be notified of the subsequent certification of compliance will be specified in manual instructions.

Comment: One commenter suggested that HCFA not terminate a Medicaid provider agreement based on a validation survey unless there is immediate jeopardy to resident health and safety.

Response: We continue to believe that there is ample authority in the Act for the Secretary to terminate Medicaid provider agreements in situations that do not pose immediate jeopardy. First, section 1919(h)(3)(B) of the Act provides that "[n]othing in this subparagraph shall be construed as restricting the remedies available to the Secretary to remedy a facility's deficiencies." Second, section 1919(h)(3)(C) of the Act provides that the Secretary may provide for other specified remedies. We view these provisions as statutory authority and Congressional intent that the Secretary design enforcement remedies that will assist in effectively assuring

prompt and lasting compliance by nursing facilities that serve the Medicaid population. Third, the Act already expressly provides for terminations by the Secretary in non-immediate jeopardy cases. Specifically, sections 1919(h)(6) and 1919(h)(7) of the Act, by their own terms, apply to findings of noncompliance by the Secretary when there is no immediate jeopardy to resident health and safety. Each of these provisions speaks to actions of the Secretary to terminate the provider agreement of such facilities. Accordingly, we are not accepting the commenter's suggestion.

Comment: A few commenters recommended that we revise § 488.330(d)(1) to remove "nature of noncompliance" and replace it with "basis for the determination." The commenters suggested that the word "nature" was not specific enough and does not furnish the provider with the necessary information to formulate an appropriate plan of correction or response to deny the allegation. Some commenters further suggested that the facility should be provided with full information that supports each citation and the survey agency's decisions including the underlying reason, basis or rationale for the findings of noncompliance with a regulatory requirement.

Response: We are not accepting this suggestion because we believe that the Statement of Deficiencies and Plan of Correction Form (HCFA–2567) provide facilities with the specific information necessary to formulate an acceptable plan of correction. To include such detailed information regarding deficiencies in the notice of noncompliance would be duplicative and administratively burdensome. We also are not accepting the suggestion to replace "nature of noncompliance" with "basis for the determination" because we believe there is virtually no substantive difference.

Comment: A few commenters suggested that the notice of a certification of noncompliance should include all of the specified items in § 488.330(d) and not only some of them.

Response: We agree with the commenters and are amending § 488.330(d) to require that all of the information included in proposed paragraph (d) must be included in the notice.

Comment: Many commenters supported our proposal to impose remedies prior to the hearing, and noted that from the perspective of the residents and their families this proposal is a strength of the proposed rules. These commenters approved of applying remedies once the violations are found. Consumer groups emphasized that imposing remedies prior to appeals is essential to carrying out the statutory requirement to "minimize the time between identification of violations and the final imposition of remedies". They also commented that the IoM report expressed a similar view, stating that HCFA "should develop regulations that would allow states to implement sanctions prior to hearings and appeals." Many commenters stressed that delays in enforcement could harm the residents, and that remedies should not be delayed pending a hearing. One consumer group noted that immediately imposing a restriction on admissions while a hearing is pending is particularly effective.

Many commenters also indicated that facilities should initiate a plan of correction immediately.

Response: We agree with the above comments, and are adopting procedures that allow for the swift imposition of remedies prior to a hearing. We believe that the intent of the Act was that remedies be imposed as soon as possible in order to protect the residents.

Comment: Several commenters were concerned that providing hearings only after imposition of remedies denied providers their rights to due process. Many commenters recognized that in cases of immediate jeopardy to resident health or safety, pre-hearings were not necessary, but in cases in which there is no immediate jeopardy, they favored a hearing prior to imposition of any sanctions. Some commenters wanted HCFA to require the States to give an informal hearing prior to imposition of alternative remedies if the deficiencies do not pose immediate jeopardy to resident health or safety.

A few commenters recognized that the majority of courts that have addressed the issue have found that providers are not constitutionally entitled to pre-hearing relief, but that a minority of courts have found that hardships are imposed on providers and residents when no pre-termination process is afforded. These minority-view courts have found facilities entitled to a pre-termination hearing on due process grounds when no pre-termination procedures are available.

A few commenters challenged HCFA's reliance on the court cases which have upheld post-termination hearings on the grounds that these cases involved deficiencies analogous to immediate jeopardy situations. These commenters concede that in immediate jeopardy situations, the residents' interests are compelling enough to permit post-termination relief to providers, but not otherwise.

Several providers noted that residents could suffer transfer trauma, the facility's business could be destroyed, and facility employees could lose their jobs, none of which could be restored if the facility were ultimately successful on appeal. A few commenters noted that a prior hearing is often the only safeguard against a mistake or incorrect judgment of a less experienced surveyor.

A few people commented that when penalties become incrementally more severe for repeated non-compliance, and imposition of penalties takes into account a facility's compliance history, the need for hearings becomes more critical.

A few commenters urged that facilities be given an opportunity to correct deficiencies before any remedy is imposed.

Response: We believe that post-sanction hearings are entirely compatible with due process. Courts that have addressed this issue have concluded that, because the facility has numerous opportunities to prevent mistakes from occurring and to present its side of the story both during the survey process, at the exit interview, and by submitting written statements and a plan of correction, due process is satisfied by the availability of post-sanction hearings. See, for example *Case* v. *Weinberger*, 523 F.2nd 602 (2nd Cir. 1975), *Caton Ridge Nursing Home* v. *Califano*, 596 F.2d 608 (4th Cir. 1979), *Green* v. *Cashman*, 605 F.2d 945 (6th Cir. 1979), *Northlake Community Hospital* v. *United States*, 654 F.2d 1234 (7th Cir. 1981), *Geriatrics, Inc.* v. *Harris*, 640 F.2d 262 (10th Cir. 1981), cert. denied 454 U.S. 832, 102 S.Ct. 1295. Although the Supreme Court has not directly decided the issue of due process requirements when a provider is terminated, the Court has decided in *O'Bannon* v. *Town Court*, 447 U.S. 773, 100 S.Ct. 2467 (1980), that residents are not entitled to a pre-termination hearing. The Court reached this result notwithstanding the fact that residents were the intended beneficiaries of the provider agreement through their entitlement to high quality care. Moreover, consistent with the balancing of interests formula first enunciated by the Supreme Court in *Mathews* v. *Eldridge*, 434 U.S. 319 (1976), we have concluded, first and foremost, that the private interest that facilities have in their continued participation in the Medicare and Medicaid programs must give way to the Government's interest in protecting the health and safety of the resident population. Additionally, in

light of the opportunities available to providers to question the accuracy of survey findings at various points during the survey process including during the survey, exit conference, and through informal meetings with State or Federal officials, we believe that the chances for an erroneous deprivation are quite small when compared to the enormous delay in the correction of noncompliance that could occur were hearings to be routinely held prior to the institution of remedies. The use of an informal dispute resolution process, to be discussed later in this preamble, should serve to reduce even further the chances of an erroneous deprivation.

Apart from the support of case law, the nursing home reform statutory provisions clearly reflect the desire expressed in the enactment's legislative history that remedies be applied swiftly once deficiencies are identified. Specifically, sections 1919(h)(2)(A) and (h)(3)(C) of the Act require that when States and the Secretary develop criteria detailing the manner in which remedies are to be imposed that they be designed so as to minimize the time between the identification of violations and final imposition of the remedies. Additionally, section 1919(h)(8) of the Act specifies that States may impose a denial of payments for new admissions, temporary management, and facility closures during the pendency of any hearing. We believe it would be incompatible with these pronouncements were we to devise an appeal scheme that would provide for hearings before the imposition of remedies. Moreover, we conclude that this is the case regardless of whether the facility's deficiencies pose immediate jeopardy to resident health or safety since the Act makes no distinction on this basis and because the delay in imposing remedies once noncompliance has been identified could be considerable.

Comment: One commenter stated that residents should have the right to remain in their nursing homes until after the alleged deficiencies are substantiated.

Response: The Supreme Court has addressed the issue of the right of residents to a pre-termination hearing when the nursing home in which they reside loses its Medicaid agreement (*O'Bannon* v. *Town Court*, 447 U.S. 773, 100 S. Ct. 2467 (1980)). The Court noted that although termination may be harmful to some residents, residents are moved to a complying nursing facility for their own benefit, so that they can obtain the care to which they are entitled as Medicaid residents. The Court noted that Medicaid residents who are forced to move may have difficulty locating other homes they consider suitable or may suffer both emotional and physical harms as a result of the disruption associated with their move, and might have a claim for damages against the nursing home, yet they would not have any claim against the government for deprivation of an interest in life, liberty or property (Id. 447 U.S. at 788, 100 S.Ct. at 2476).

As discussed more fully below, residents do have opportunities for giving information to the surveyors during the survey process.

Comment: One commenter believed that providing pre-hearings for monetary penalties, without providing any hearing, formal or informal, prior to imposition of harsher sanctions is irrational.

Response: Pre-sanction hearings are available when monetary penalties are assessed because the provisions of section 1128A of the Act apply. These procedures require pre-sanction hearings when civil monetary penalties are assessed. As discussed above, the statute clearly provides for the immediate imposition of remedies where civil money penalties are not involved.

Comment: One commenter argued in favor of a written appeals process prior to revocation of the facility's license.

Response: Termination of a provider agreement is not termination of a license to do business; therefore, we do not accept the implication that pre-termination hearings should be available on the grounds that a license is being revoked, especially when the statute, legislative history and case law so clearly point in the other direction.

Comment: A few commenters stated their belief that HCFA is inappropriately extending its rulemaking authority to supersede State laws which provide pre-sanction hearings. Some commenters noted that current Medicaid regulations at § 431.153(b) allow States the option of providing pre-hearings.

A few commenters stated that there was no statutory basis for HCFA's proposal to eliminate pre-sanction hearings in the Medicaid program, and no indication that the Congress intended to eliminate this State practice. These commenters noted that there is a material difference between the Medicare and Medicaid programs in the impact of not having a pre-hearing available because nursing homes usually have many more Medicaid residents than Medicare residents. They stated that loss of Medicaid reimbursement has a greater financial impact than the loss of Medicare reimbursement.

A few people commented that the statutory requirement to minimize the length of time between identification of deficiencies and imposition of remedies is not a mandate to eliminate the time between the two events.

A few people commented that the proposed regulation was making terminations so easy to accomplish, by providing only for post-termination hearings, that the Congressional intent to provide alternatives to termination was being undermined.

One commenter noted that the legislative history of Public Law 96–499, indicated that the Congress wanted providers to have an opportunity to present their cases at an informal hearing prior to imposition of a sanction, citing H.R. 1169 at 56, reprinted in 1980 U.S. Code, Cong. & Admin News, 5526, 5569.

Response: OBRA '87, as discussed more fully above, OBRA '87 specifically provides that the Secretary must "minimize the time between the identification of violations and final imposition of the remedies" (see sections 1819(h)(2)(B) and 1919(h)(2)(A) of the Act). In addition, OBRA '87 provides that, "It is the duty and responsibility of the Secretary to assure that requirements which govern the provision of care [* * * in both Medicare and Medicaid facilities * * *] and *the enforcement of such requirements*, are adequate to protect the health, safety, welfare, and rights of residents and to promote the effective and efficient use of public moneys." (Sections 1819(f) and 1919(f) of the Act, emphasis added).

As we stated in the proposed rule, we believe that there are compelling reasons to provide for an appeals mechanism under Medicaid that is triggered only after an adverse action has gone into effect. As discussed above, we believe this scheme most accurately reflects legislative intent. Additionally, we believe the Act gives us general rulemaking authority to achieve this objective and that, in particular, we have authority to regulate the timing of State Medicaid hearings that may be provided in accordance with section 1919(h)(7) of the Act. We also see no reason why the rules governing the Medicaid program in this area should be any different than those governing the Medicare program when the substantive requirements affecting providers are exactly the same and the enforcement options are virtually identical.

For Medicaid, the only hearing a provider will receive is that which is provided for in this final rule, as determined by § 488.330(e)(4). When States hear certification and licensure

appeals under the same process, that process can be used for Medicaid purposes as long as it does not go beyond the scope of the hearing procedures in part 431. Part 431 only provides for appeals of deficiencies that lead to an enforcement remedy; therefore, appeals of deficiencies that did not lead to an enforcement remedy will not be recognized for Medicaid purposes.

As stated above, we believe that residents are the primary beneficiaries of the Medicare and Medicaid program, and their interests are paramount. The Second Circuit Court of Appeals stated as follows in *Case* v. *Weinberger*, 523 F.2d 602, 607 (2nd Cir. 1975):

> This anticipated damage to Mrs. Case, which is certainly serious, does not compare favorably with the government's interest in the safety of her patients. A nursing facility's "need" for patients has nothing to do with the statutory benefits structure. The facility's need is incidental. That a particular nursing facility cannot survive without Medicaid participation was certainly not Congress' foremost consideration in its creation of the Medicaid program. This is not to derogate Mrs. Case's property interest in her expectation of continued participation. We must, however, place that right in proper perspective with regard to the health and safety expectations of the patients, which expectations the Secretary has a valid interest in protecting. The benefits to a nursing home from its participation in Medicaid reimbursement result from nothing more than a statutory business relationship.

The above comments on the relationship of providers to the Medicare and Medicaid programs were cited with approval by the Tenth Circuit Court of Appeals in *Geriatrics* v. *Harris*, 640 F.2d 262, 265 cert denied, U.S. Supreme Court (1981).

Comment: Several commenters offered alternatives to the proposed post-sanction hearings. Some accepted HCFA's goal of applying remedies immediately, but proposed that States should be allowed the flexibility to use pre-sanction hearings in limited circumstances.

Some wanted the option to use pre-sanction hearings in cases where deficiencies are minor and States have a high caseload of appeals (presumably making it difficult to obtain a speedy post-remedy hearing); some wanted pre-sanction hearings in all cases unless the facility was substantially out of compliance or the deficiency was deemed life threatening.

Some stated that although the residents' interests prevail when the deficiencies impair their safety, the facility's interests should prevail when the deficiencies are less serious, thereby justifying pre-sanction hearings. For example, some commenters agreed that substandard care needed to be addressed expeditiously, prior to any hearing, but other deficiencies could be addressed after an expedited appeals process.

Some proposed a balancing test under which the procedures would vary according to the interests at stake. The residents' interests would specifically be balanced against the nursing home's interests on a case by case basis. A post-sanction hearing would be held in cases of immediate jeopardy, and pre-sanction hearings would be held when the threat to residents was less extreme.

Some wanted States to have the option of providing pre-sanction hearings in all cases. Some wanted to retain the present State option in the Medicaid program to provide either pre-termination hearings or post-termination hearings which must be completed within 120 days of the effective date of the termination. A few commented that requiring completion of the hearing within 120 days would alleviate HCFA's concern that pre-sanction hearings would delay imposition of remedies.

One commenter proposed that an existing State procedure be adopted, whereby the State schedules an appeal within 30 days of receiving a request for a hearing; an impartial decision maker makes a recommendation within 30 days of the hearing, and the Secretary makes a final decision within 10 days. Another proposed a 10 day filing period for requesting an appeal; a hearing held within 30 days of request; and a decision within 30 days of the hearing.

A few commenters proposed minimizing the time between identification of remedies and imposition of remedies by instituting deadlines in an expedited hearing process. These commenters proposed imposing time periods for filing of documents by all parties, and mandatory deadlines for decisions by hearing officers.

Some commenters proposed allowing States to follow their own Administrative Procedure Act provisions.

Some submitted State license laws for our consideration. For example, under one State's license law, deficiencies are classified based on whether there is a substantial probability of death or serious mental or physical harm (Class A), a direct threat to health, safety or welfare of a resident (Class B), or no direct threat to health, safety or welfare of a resident (Class C). Class A violations require immediate abatement, subject to a Court injunction for failure to abate; Class B or C violations require a plan of correction within 10 days (extendable to 30). Timeframes are included, providing generally for requesting hearings within 10 days after notice, and providing hearings within 30 days of request.

Response: We are not accepting suggestions that would require pre-sanction hearings because we continue to believe that residents are best served if remedies are imposed promptly. The residents are the beneficiaries of the Medicare and Medicaid programs, and their best interests are the motivating force behind OBRA '87 and these regulations. We are not mandating post-remedy hearings. We are merely not requiring a hearing to be completed before imposing any sanction but civil money penalties. Depending on the size of the case load and processing times, a State could complete a hearing prior to the imposition of a remedy, but to be consistent with these regulations any hearing would need to be conducted and concluded very shortly after noncompliance was identified. However, we acknowledge that the ability to provide a pre-sanction hearing would be difficult for most States.

We are not accepting the various proposals on timing events within the hearing process itself. With respect to Medicare, some of these time periods are established by the Act, as is true, for example, for the 60 day period in which to appeal. With respect to both Medicare and Medicaid, hearings are held by independent hearing officers who are in a far better position than HCFA to determine how quickly various hearings can be held.

We do not believe that State license law is analogous to Medicare and Medicaid provider agreements. As we stated above, providers have entered into agreements with Medicare and Medicaid in which they have agreed to comply with Federal requirements, including the requirements applicable to remedies for noncompliance.

Comment: Several commenters proposed an explicit review period during which the State survey agency's central office would give providers an opportunity to question, clarify and develop the issues.

Response: We are adopting this proposal with some modification to require dispute resolution by an official in the survey agency and/or HCFA regional office. See discussion under the heading, Dispute resolution. We believe that making an informal dispute resolution process available alleviates many of the concerns expressed above, and gives a provider an opportunity to present its side of the story to the survey

agency and/or regional office officials prior to imposition of remedies.

Comment: Several commenters wanted a right to appeal all deficiencies, even if no remedy was imposed.

Response: We are not accepting this suggestion because if no remedy is imposed, the provider has suffered no injury calling for an appeal. We agree that deficiencies that constitute noncompliance and that result in a remedy imposed are appealable (except for minor remedies such as State monitoring).

Comment: Several commenters approved our plan to provide a single hearing for dually participating SNF/NFs. One commenter wanted two hearings, if the same deficiency was cited by two survey agencies, unless the provider requested a single hearing.

Response: We are adopting a single hearing, as proposed, in accordance with procedures in 42 CFR part 498, because we believe that it would be extremely burdensome and costly for the government to participate in two hearings. Witnesses would need to testify twice, in different locations. Attorneys would be required to prepare for two separate proceedings, and respond to two different sets of procedural rules. Further, because the two hearings would be based on the same set of facts, a second hearing is not necessary. Before OBRA '87, the practice was to provide one hearing for dually participating facilities, in accordance with procedures at 42 CFR part 498, and this proved to be satisfactory.

Comment: One commenter stated that the ombudsman should participate in the hearing because sections 712(a)(3)(E), and 712(a)(5)(B)(iv) of the Older Americans Act Amendments of 1992 authorize ombudsmen to represent the interests of the residents before governmental agencies.

Response: We are not adopting this suggestion because residents are not a party to the Medicare or Medicaid agreements between providers and HCFA or the State agency. Moreover, the entire process of surveys, determining compliance or noncompliance, and citing deficiencies is a process designed to protect the interests of the residents. The ombudsman can, of course, advise the survey agency of any concerns relevant to a particular facility.

Comment: A few commenters suggested that States should be necessary parties in any hearing, stating that when HCFA decertifies facilities the results of the survey could be used as evidence that the State survey agency was negligent in surveying the facility.

Response: This comment apparently refers to decertification of a facility after a HCFA validation survey. We are not adopting this proposal, because in any hearing the parties to the hearing are the complainant (the provider, in this case) and the party who made the decision about which the complaint is made (HCFA in the case of a validation survey).

Comment: A few commenters recommended that residents be permitted to be parties in any hearings, to ensure that terminations are used only as a last resort. A few also wanted residents to be able to initiate challenges through the appeal process when either HCFA or the State failed to apply remedies when appropriate. A few wanted residents to be notified of enforcement actions at the same time a nursing home is notified.

Response: We are not adopting these suggestions, because we believe that the needs of the residents to be heard are addressed in other ways. As a threshold matter, the Supreme Court has already concluded in the previously cited *O'Bannon* decision that residents do not have a right to a pre-termination hearing when the facility in which they reside faces a provider agreement termination. Whether residents might testify to a facility's compliance or noncompliance, arguments on both sides of the issue are already being made by either the government or the provider. Certainly, a provider has every incentive to state its case that it was in compliance with certification requirements and that it ought not be the subject of an adverse action.

On the other hand, if residents were interested in contributing to the case against a facility, whatever evidence they might have could be shared with surveyors before, during, or after the completion of a survey. Residents have always had, and will continue to have, opportunities to discuss facility conditions with surveyors either individually or in group meetings, and always have the right to comment on the care they are receiving. Except when there is immediate jeopardy to resident health or safety, the States and the Secretary have very broad discretion under the Act to select among enumerated remedies. Just as we believe it is not for facilities to choose what remedies they should be subject to, we do not believe that facility residents should make that choice either.

Comment: Many commenters favored an informal procedure to challenge the survey agency's findings prior to making the Statement of Deficiencies (HCFA–2567) final.

Response: As discussed in the section entitled, Dispute Resolution, we are accepting this proposal and are providing for such a process in § 488.331. We believe that such a process will alleviate many of the concerns expressed on providing only post-sanction formal hearings.

Comment: A few commenters noted that the existing appeals regulations at 42 CFR part 498 should be amended to reflect the additional issues which can now be appealed in addition to termination.

Response: We agree and are amending § 498.3 to make it clear that noncompliance leading to an enforcement remedy (other than State monitoring) is appealable. These changes are identified in section V. of this preamble, Additional Conforming Changes.

Comment: Several commenters proposed that we clarify when sanctions are to be imposed. Some feared that sanctions would be imposed by the survey team onsite as soon as a deficiency is cited. Some wanted clarification that the State survey agency would be given a reasonable period of time in which to review surveyor findings in order to decide upon a sanction.

Response: It is not our intent that the survey team impose remedies. Moreover, the appropriate agency for imposing remedies does not do so prior to the time the facility receives written notice of the noncompliance and written notice of the remedy(ies) to be imposed. The survey agency will have time to review the findings and make a decision as to compliance or noncompliance, and recommend a remedy or remedies to the appropriate State entity or to HCFA, depending on whose decision controls as specified at sections 1919(h)(6) and (7) of the Act.

Comment: A few commenters wanted clarification of the timing and meaning of a certification of noncompliance specified in proposed § 488.180(d), the notice of hearing given specified in proposed § 431.153(e), and the notice of imposition of remedies specified in proposed § 488.202(f).

Response: Under section 1864 of the Act, the State survey agency certifies to HCFA, in a document called a "Certification and Transmittal," the status of a facility's compliance with the statutory and regulatory requirements. In certain situations, HCFA itself makes the decision on whether a facility complies, as is the case for State facilities and in the case of validation surveys. This certification of compliance or noncompliance is a decision made by one of the

governmental agencies (HCFA or the State) prior to notification of the provider.

If a certification of noncompliance is made, the provider is notified in accordance with § 488.330(c). It is usually notified in a separate notice of remedies to be imposed, in accordance with § 488.402(f). (There may not be two separate notices in the case of immediate jeopardy.) Except for the imposition of civil money penalties, providers are given notice before the effective date of all remedies. In the case of civil money penalties, providers are given a pre-sanction hearing before civil money penalties can be collected. The notice given to the provider includes a notice of the remaining noncompliance, (even if there was a prior notice of deficiencies constituting noncompliance found on the survey) and notice of an opportunity to request a hearing, in accordance with § 431.153(d) and § 498.20(a).

If a hearing is requested, the hearing must include the components specified in § 431.153(e). Note that the requirement in § 431.153(e) that the facility receive notice and a copy of the statement of deficiencies is accomplished prior to the hearing, in accordance with § 431.153(d).

We do not believe that the regulations need to be re-written to achieve the above intended result. Providers will be given notice of any deficiencies if HCFA or the State survey agency determines, that is, certifies noncompliance. They will also be given notice of any remedies that are imposed, and notice of their right to request a hearing.

Comment: A few commenters requested that the notice given to the provider include not only the deficiencies found and the remedies selected but also the severity/scope rating for each deficiency. These commenters wanted an opportunity to appeal the severity/scope ratings.

Response: We are not accepting this comment. As we discuss later in this preamble, with the exception of certain civil money penalties, providers will not have the opportunity to appeal the scope and severity of deficiencies.

Comment: Many States commenting on this section believe that the HCFA finding of noncompliance should not supersede a State survey agency certification of compliance when both are available. States assert that State surveyors are more familiar with the operation of specific facilities in the State and that HCFA's surveyors may impose remedies because of their lack of familiarity with a particular facility.

Response: Section 1919(g)(3)(A) of the Act mandates that the Secretary's determination as to the facility's noncompliance is binding and supersedes that of the State survey. Moreover, HCFA surveyors do not impose remedies. Rather, the managerial staff in the HCFA regional offices decide on the most appropriate remedy to be imposed. Therefore, we are not accepting this suggestion.

Section 488.332 Investigation of Complaints of Violations and Monitoring of Compliance

Comment: A few commenters said that the certification and validation surveys constitute unreasonable administrative searches which violate the Fourth Amendment. They stated that routine inspections require a warrant unless the survey is initiated in accordance with neutral criteria and the surveyor's discretion is limited by an administrative plan defining the scope and procedure of the inspection, citing *Barlow's Inc.*, 436 U.S. at 323 and *Donovan* v. *Dewey*, 452 U.S. 594 (1981).

A few commented that warrantless complaint investigations also violate the Fourth Amendment because the proposed rule provides no assurance that investigations are justified and because the proposed rule contains no limits on time, place, scope and manner of any complaint investigation.

Response: Providers have consented to certification and validation surveys and to complaint investigations by choosing to participate as providers in the Medicare or Medicaid programs, or both. As indicated previously, the Supreme Court has long upheld warrantless searches of closely regulated businesses, and the nursing home industry is no exception. Moreover, section 1128(b)(12) of the Act provides for the exclusion from the Medicare and Medicaid programs of an individual or an entity who denies access to the Secretary or the State agency for the purpose of a survey to determine a provider's compliance with Federal requirements.

Comment: Some commenters suggested that we require coordination of complaint investigations with the State or local ombudsman program.

Response: The Act does not require the State to coordinate complaint investigations with ombudsman programs. However, under the Act, each State is required to notify the State long-term care ombudsman of its findings of noncompliance as specified on the HCFA–2567, with any of the requirements pertaining to provision of services, resident rights, or administration and other matters. The State also provides the long term care ombudsman with any report of adverse action (specified at § 488.406 of this rule) imposed on a facility. We are including the requirement for disclosing such information to long term care ombudsman at § 488.325.

Comment: Some commenters believed that § 488.332 should include procedures, including timing, evaluation of severity, and protocols, to be used in the investigation of complaints of violations of participation requirements. These commenters offered a variety of specific procedures to be included in this regulatory section. Also, commenters suggested that the State investigate all complaints received, while other commenters suggested giving States flexibility to determine whether there is a reasonable basis for an investigation.

Response: As explained fully in the preamble to the proposed rule, sections 1819(g)(4)(A) and 1919(g)(4)(A) of the Act require each State to maintain procedures to investigate complaints of violations of Federal participation requirements. Additionally, the State Operations Manual has prescribed procedures State agencies must follow if complaints involve Medicare and/or Medicaid facilities. We believe these procedures, which are subject to ongoing revisions, provide basic minimum instructions, with sufficient flexibility, for State agencies to follow when investigating complaints.

We do not believe that it would be reasonable or economically feasible to require States, especially those with remotely located facilities, to survey all facilities for which complaints are received. The experience of State survey agencies has shown that many complaints are either groundless or are not potential violations of requirements for certification. This position, however, does not relieve the States from their responsibilities to properly evaluate and investigate all complaints that may affect a facility's certification.

To ensure these responsibilities are properly carried out, §§ 488.318 and 488.320 of these rules and sections 1819(g)(3)(C) and 1919(g)(3)(C) of the Act require that the Secretary provide appropriate remedies when a State fails to perform survey and certification responsibilities required under the Act. In addition, HCFA evaluates the Medicare/Medicaid survey and certification performance of State survey agencies with the State Agency Evaluation Program (SAEP). The SAEP identifies, among other factors, State actions with regard to the investigation of complaints. In Federal fiscal year 1992, the SAEP assessment of the State agency's timely processing of general certification related complaints

indicated that on a national average between 90 and 99 percent of all general certification related complaints reviewed in the sample were processed in a timely manner. The evaluation included determining if allegations which may involve immediate jeopardy were investigated within two working days of receipt and also determining if non-immediate jeopardy complaints were processed in accordance with existing State agency procedures for prioritizing and investigating general certification related complaints. The SAEP data for fiscal year 1992 also confirmed that in the sample of complaints reviewed, which included general certification related complaints, complaints against accredited hospitals and violations of section 1867 of the Act (Examination and Treatment for Emergency Medical Conditions and Women in Labor), between 90 and 100 percent of complaints were collected, logged, referred and acknowledged in accordance with the guidelines provided in the State Operations Manual and specific policy memoranda. Any inappropriate State actions are discussed with State survey agency management and reconciled accordingly.

Comment: Some commenters suggested that the regulations state that complaints may be accepted from anonymous sources or provide for the anonymity of complainants if requested.

Response: We recognize there are instances when it is necessary to protect the identity of a complainant to avoid possible reprisal. In keeping with this, States are instructed in the State Operations Manual to take appropriate precautions to protect a complainant's anonymity and privacy, if possible. While we do not believe we can guarantee anonymity should an adverse action result from the investigation, we would expect that ultimately the issue before a trier of fact would be the substantial compliance or noncompliance with certification requirements, not the identity of the individual who brought the allegation to the survey agency's attention. We are revising § 488.332 to provide that, if possible, the State survey agency takes appropriate precautions to protect a complainant's anonymity and privacy.

Comment: Many commenters asked for an explanation of the term "monitoring" used in this section. There seemed to be a pervasive thought that the term as used in this section was analogous to the remedy of "State monitoring" found in § 488.406.

Response: We believe the term "monitoring," as found in section 1819(g)(4) and 1919(g)(4) of the Act, is intended to encompass the entire survey process, which is to ascertain whether a facility is in substantial compliance with the requirements for participation in the Medicare or Medicaid programs, or both. The use of this term in this section of the rules should not be construed as to alter the protocols for long term care surveys which are found in the State Operations Manual.

Section 488.332(b) gives States flexibility to visit facilities at their discretion in order to determine whether or not they are in compliance with program requirements. It should not, as some commenters felt, be an option whether or not to follow up on deficiencies cited on previous visits. (Note the following comment and response regarding follow up visits.)

Finally, we are changing the title of this section so that "monitoring" is distinct and separate from complaint investigation.

Comment: Commenters asked whether or not follow up visits for determining correction of all cited deficiencies must be conducted.

Response: The proposed rules do not change our position regarding the scheduling and conduct of follow up visits. This position is described in the State Operations Manual. Correction of noncompliance must be verified by some type of follow up activity; albeit, not necessarily by an on-site visit. The timing of follow up visits must be determined by factors such as the effect of the noncompliance on the care of the facility's residents and the date of correction specified in the provider's plan of correction.

Comment: Some commenters suggested that investigations of complaints regarding violations of participation requirements be solely the responsibility of the State survey agency. Other commenters maintained that necessary referrals are not being made to other State agencies.

Response: The Act provides that a State may maintain and utilize a specialized team for the purpose of identifying, surveying, gathering and preserving evidence and does not specify that such team be part of the survey agency. However, if a State uses a specialized team that is not part of the survey agency, the State survey agency is not absolved of its responsibility to properly document complaints and their findings and take required certification action with respect to a facility's Medicaid or Medicare participation, or both.

In keeping with this responsibility, we are strengthening § 488.332 by requiring that, if arrangements have been made with other State components for investigation of complaints, the State must have a means of communicating information among appropriate entities, and the State survey agency retains responsibility for the investigation process.

Also, we are adding a paragraph to § 488.335 requiring that State survey agencies consider complaints of neglect, abuse or misappropriation of resident property by an individual used by a facility to provide services to residents as a potential reflection on a facility's compliance with Medicaid and/or Medicare participation requirements.

Comment: Some commenters expressed concern about the use of an attorney on a specialized investigation team.

Response: The Act, at sections 1819(g)(4) and 1919(g)(4), refers to an "attorney" as well as other professions (auditor, appropriate health care professionals) to describe examples of various disciplines that may be used to make up specialized teams to investigate violations of requirements by nursing facilities or skilled nursing facilities and, in a broader sense, to monitor all facilities for compliance with the requirements of sections 1819(b), (c), and (d) and 1919(b), (c), and (d) of the Act.

We did not intend that attorneys be a routine part of such teams; however, the language of the Act and proposed rules gives States a broad choice of occupations from which to choose for the survey and certification process.

Comment: Several commenters requested that a facility have prior notice of a complaint investigation to notify its attorney in those instances when an attorney is part of the specialized complaint investigation team.

Response: Notifying a facility in advance of a complaint survey so that its attorney might be present is, in fact, announcing the survey. To do so is inconsistent with HCFA policy, which intends that as many surveys as possible be unannounced.

Comment: A few commenters identified specific areas of concern in the complaint investigation process. These concerns stemmed from the general comment that the complaint investigation team may not have proper training.

Response: We appreciate the concern of these commenters who recognize that the investigation and resolution of complaints is a critical certification activity requiring properly trained investigators, and we will consider these concerns as we strive to continually improve our training courses. However, we believe that the

expertise of a special investigation team and the overall State survey agency responsibility for complaint investigations provides a coordinated effort that assures that the complaint investigation process is executed by properly trained individuals. Sections 1819(g)(4) and 1919(g)(4) of the Act provide that the State may maintain and utilize a specialized team which may include an auditor, an attorney, and appropriate health care professionals to identify, survey, gather and preserve evidence, and carry out appropriate enforcement action against substandard facilities. The discipline, specific training, and education of such a specialized team provides the narrow focus that is often essential to conduct a comprehensive complaint investigation. The State survey agency has the overall survey and certification responsibility and expertise that assures that surveyors can ascertain when Medicare and Medicaid facilities meet participation requirements.

Comment: A few commenters recommended that a process for appeal by the complainant be implemented.

Response: While we cannot deny that there may be instances in which a complainant is dissatisfied with the findings of a complaint investigation, we cannot accept the recommendation to include an appeal process for the complainant in the regulation as the complainant is not a party to the provider agreement.

Comment: A commenter asked what type of action could be invoked when a complaint was received after the violation occurred and was resolved by the time the surveyors arrived.

Response: Although we may have discretion with the selection of remedies to address noncompliance with requirements that are corrected by the time of a survey, it is likely that we would give serious consideration to imposing a civil money penalty in such cases. Sections 1819(h)(1) and 1919(h)(1) and (3) of the Act expressly authorize the impositions of these sanctions even if, at the time of the survey, the facility is in compliance.

Comment: A few commenters recommended that the provision which includes administering remedies to noncompliant facilities found during a complaint investigation be revised to say that the State will carry out appropriate enforcement remedies against chronically substandard facilities.

Response: We do not agree. While the facility's compliance history is a factor in general and specifically with reference to the cited deficiencies in determining the appropriate remedy or remedies, we will not limit the remedies to only those facilities which have chronically provided substandard care. To do so, would be to allow many deficiencies that constitute noncompliance to go unsanctioned. This undermines the purpose of remedies that are intended to motivate prompt compliance with participation requirements.

Section 488.334 Educational Programs

Comment: The consensus of those who commented on § 488.334, with the exception of the following two commenters, was that there is a definite need for educational programs for facilities, residents, and their representatives. The two commenters stated that it was unrealistic to expect the States to conduct periodic educational programs for the staff and residents of facilities either because of the cost, because they felt the requirement was already met when surveyors interviewed residents, or because the appearance of objectivity would be jeopardized.

Response: The regulatory provision requiring the States to conduct periodic educational programs stems from a statutory requirement at sections 1819(g)(1) and 1919(g)(1) of the Act. The concept that the requirement is met when surveyors interview residents is not acceptable for two reasons: First, surveyors do not interview every resident. Secondly, the responsibility of a surveyor is to survey nursing homes and not to have attention deflected to educate staff and residents as to regulations, procedures, and policies. In fact, even if surveyors were to attempt an educational task, time and money constraints would prevent them from being able to provide complete information to staff and residents. As to the appearance of objectivity being jeopardized, this is not an issue since the Act requires that States assume this responsibility. However, irrespective of the Act, there is no reason why a State's educational program, explaining the Federal requirements, should jeopardize the State's objectivity in exercising its survey function. We believe that well-informed staff and residents contribute to nursing homes' being able to achieve and maintain compliance. If the implementation of training programs is followed by a pattern of increased facility compliance, one can just as easily conclude that providers and their clients are becoming more knowledgeable about the requirements to which they are subject, than that surveyors are losing their objectivity.

Comment: Several commenters recommended that State educational programs for consumers be expanded. Several commenters suggested that we require State survey agencies to involve ombudsmen in the development of educational programs and in the planning and implementation of additional training of residents. Another commenter suggested that we require State agencies to give NFs access to training programs for State surveyors. Several commenters suggested that we conduct joint continuing education programs for providers and surveyors. A few commenters recommended that we make HCFA's inservice training programs available to facilities. Another commenter recommended adding to this regulation that the State make available to staff and residents documents related to current regulations, procedures, and policies.

Response: Sections 1819(g)(1)(B) and 1919(g)(1)(B) of the Act require that States conduct educational programs for facility staff and residents (and their representatives) regarding current regulations, procedures and policies of the long-term care survey process. We include ombudsmen as representatives of residents. Such information will be provided during educational programs as they relate to the content of the program. Such regulations, policies, and procedures are also releasable under the Freedom of Information Act, and can be requested outside of the scope of the educational program. There is no statutory requirement to include ombudsmen in the development, planning, and implementation of educational programs and we feel that each State should develop its own program regarding these activities. A State may or may not choose to include ombudsmen in the *development* of its program. In any case, we are interpreting the Act to include ombudsmen in educational programs as representatives of residents. The suggestion has been made that providers be permitted to attend survey training courses. Traditionally, we have had no provisions for accommodating all providers interested in attending; our resources are taxed enough by simply trying to provide timely training for surveyors. However, being able to offer surveyor training universally to providers at their own cost may help improve understanding and cooperation between surveyors and providers. We are therefore seriously considering changing our policy to allow this.

Comment: Two commenters representing consumer groups, suggested that §§ 488.303 and 488.334 be expanded to require State agencies to provide education to residents and their

representatives in a variety of additional areas such as

- How to participate in assessment and care planning.
- Residents' rights.
- Rights to rehabilitation and other services.

One of these commenters also recommended that States work with residents and family councils to:

- Solicit recommendations prior to any changes in the requirements.
- Evaluate the effectiveness of the survey process.
- Receive consultation prior to and during imposition of remedies to determine their effectiveness.
- Receive consultation prior to determining whether to grant a waiver of nurse staffing.

Another commenter suggested that residents' understanding is critical and their education should be expanded to include:

- How the survey process works and how to participate.
- How the investigation process works and how to participate.
- How the care planning process works and how to participate.

Response: These suggestions have considerable merit and are within both the spirit and intent of the Act. We agree with the commenters that the proposed regulation unnecessarily restricted the scope of the mandated educational programs. The regulation is being revised to permit the education programs to cover all aspects of the long-term care survey process. We believe the States should have the flexibility to structure the educational programs to the needs of the facilities. The methods of developing the programs (for example, consultation with the ombudsmen program) and the methods of presentation are best left to the States. The comment that States should work with residents and family councils to solicit their recommendations prior to any changes in requirements goes beyond the educational process. In some respects, this comment incorporates residents and families as participants in the survey and enforcement processes. Whenever there is public rulemaking, any member of the public is a participant in the process and can comment and make recommendations on such matters. In addition, when surveyors speak with residents during the survey, residents are free to bring up comments about the survey process if they wish. Regarding the comment that residents' understanding of the survey, investigation, and the care planning processes should be expanded, we repeat that the regulation is being amended to permit the educational programs to cover all aspects of the long-term care process.

Comment: One commenter recommended that HCFA share central office and regional office satellite training to provide training simultaneously with nursing facility staff and consumers.

Response: It is beyond the scope of this regulation to institute such detailed procedures as providing satellite training to consumers or specifying any other training medium. It is beyond our technological capabilities to provide training via satellite to every SNF and NF in the country. The costs of installing the necessary equipment in each facility would far exceed our budgetary resources.

Comment: One commenter stated that, although this section providing education to residents and staff of facilities is an excellent idea, it lacks specificity and oversight. Because of budgetary crises, this is but another educational program at State expense and will receive low priority. HCFA must ensure that the State will conduct educational programs at particular time intervals or face sanctioning by HCFA.

Response: Although there is no statutory provision requiring HCFA to oversee States to determine if they have failed to conduct educational programs as required by the Act, we recognize that we have some responsibility to do so. It is within the purview of the States to decide how and when to conduct their educational programs. We believe it is wiser to leave these decisions to the individual States since they must design the educational programs the Act specifies. However, we are looking into the feasibility of monitoring the States in some way to assure that they are in compliance with this statutory requirement. We plan to find an acceptable approach to evaluating State efforts in providing educational programs to facilities and their staffs, and residents and their representatives.

Comment: A commenter stated that further definition of the nature and frequency of educational programs is needed and, for consistency, HCFA should establish the nature and content of such programs. There could be extensive new resource requirements if the program is not considered adequate. Another commenter recommends that we define "periodic" and detail the process for State compliance.

Response: As previously mentioned, the nature and content could cover any of the requirements of sections 1819 and 1919 of the Act. When manual instructions are developed, they will provide guidelines on topics such as frequency of educational programs.

Comment: One commenter questioned whether on-site presentations were preferable to written communication.

Response: This is a detailed and specific matter. The methods of training will be determined by the States, but HCFA will publish guidelines in manuals to assist States in structuring their programs.

Comment: This commenter also recommends replacing the word "conduct" with "provide" to allow for the use of subcontractors, and for the distribution of written and/or auto-visual materials toward this end.

Response: We believe to make such a change could be interpreted as changing the intent of the Act, which uses the word "conduct." The Act gives the responsibility for developing educational programs specifically to the States.

Comment: Two commenters stated that funds must be made available to the States for educational purposes.

Response: HCFA does make funding available to the States for the required periodic education program through its budget process.

Section 488.335 Action on Complaints of Resident Neglect and Abuse, and Misappropriation of Resident Property

Upon further analysis, we revised the title of this section to be more explicit.

Comment: Some commenters suggested regulatory language requiring coordination of investigations of complaints of neglect, abuse, or misappropriation of property with the State or local ombudsman program.

Response: The Act does not require the State to coordinate complaint investigations with the State long term care ombudsman. However, under the Act, each State is required to notify the State long term care ombudsman of its findings of noncompliance with any of the requirements pertaining to provision of services, resident rights, or administration and other matters. The State also provides the State long term care ombudsman with any report of adverse action (specified at § 488.406 of this rule) imposed on a facility. We have included the requirement for disclosing such information to the long term care ombudsman at § 488.325.

Comment: Some commenters felt procedures for investigating complaints of neglect, abuse, or misappropriation of property should be included in the final rule.

Response: As stated in the proposed rule, we believe such an approach is inconsistent with our view that States should have the flexibility to rely on

State entities other than the State survey agency to investigate and adjudicate these matters. States will likely use an array of different licensing or investigative bodies to meet their obligations in this area.

Comment: Several commenters suggested that investigations of allegations of neglect, abuse, or misappropriation of property be integrated into the comprehensive survey, certification and enforcement process. Further, there were suggestions that investigations of these complaints be conducted solely by the State survey agency.

Response: The Act requires that States must provide, through the agency responsible for surveys and certification of nursing facilities, for a process for the receipt and timely review and investigation of allegations of resident neglect or abuse, or misappropriation of resident property.

As pointed out in the preamble to the proposed rule, while the State is free to delegate to other State agencies the adjudicatory functions described in sections 1819(g)(1)(C) and 1919(g)(1)(C) of the Act, we fully expect State survey agencies to retain ultimate responsibility for compliance with these statutory requirements. If a State uses an agency which is not part of the State survey agency, the State survey agency cannot be absolved of its responsibility to properly document complaints and take required certification action with respect to a facility's participation in either the Medicaid or Medicare programs.

In keeping with this responsibility, we are strengthening the rules under § 488.335(a) by cross referencing § 488.332, which specifies that the State survey agency retains responsibility for the investigation process and requiring the State survey agency to have a means of communicating information among appropriate entities if other State agencies are involved in the investigation of these complaints.

In response to the above comments we are adding a new requirement that State survey agencies consider all complaints of resident neglect or abuse, or misappropriation of resident property as a potential reflection on a facility's compliance with Medicaid and/or Medicare participation requirements. This new requirement is at § 488.335(h). (The provisions in § 488.185 (g) and (h) of the proposed rule are revised and combined in § 488.335(g) and are discussed later in this preamble.)

Comment: Some commenters suggested that the words, "by an individual used by the facility" be added to paragraph (a) of this section as it requires the State to review all allegations of neglect, abuse, or misappropriation of resident property. Commenters pointed out that the suggested text is found in the Act and the preamble to the proposed rule.

Response: We are revising and expanding § 488.335(a), and in doing so, incorporating the comment. This paragraph now specifies that the State reviews all allegations of resident abuse and neglect and misappropriation of resident property. The State also follows the procedures of § 488.332. We are adding that, if there is reason to believe, either through oral or written evidence, that an individual used by the facility to provide services to residents could have abused or neglected a resident or misappropriated a resident's property, the State must investigate the allegation. We also now specify in this section that the State must have written procedures for the timely review and investigation of these allegations.

Comment: Several commenters mentioned that the proposed rules do not specify a timeframe for initiation of an investigation nor a time limit on the length of an investigation of neglect, abuse, or misappropriation of resident property.

Response: Our intent in writing this rule was to not be too prescriptive of State investigation processes. However, manual instructions to State survey agencies specify a timeframe for situations of immediate jeopardy in which they should initiate complaint investigations.

We chose not to regulate the time in which a State must complete its investigation of these types of complaints. We thought a specific time limit could, in some instances, compromise the outcome of the investigation.

Comment: Some commenters suggested that the rules specify a timeframe in which the State must notify an individual when there is reason to believe that the abuse, neglect, or misappropriation of resident property did occur. Also, some suggested that we notify the administrator or owner of the facility employing such person, or both.

Also, some commenters suggested that we include in the notice to the accused person the consequences of the hearing determination or waiving the right to a hearing.

Response: We do not accept the comment to send a notice to the individual implicated in an allegation of resident neglect or abuse or misappropriation of resident property before the State has conducted an investigation. To do so could possibly jeopardize the outcome of the investigation and in some cases would be premature as the investigation might find the allegation unsupported. However, we are revising the final rule at § 488.335(c) to require that a State must notify the individual implicated in the allegation and the current administrator of the facility in which the incident occurred, in writing within 10 working days of its preliminary determination, which is based on oral or written evidence and its investigation, that resident neglect or abuse, or misappropriation of resident property occurred. This timeframe was selected to provide timely notice to the individual involved and yet, give States sufficient time to provide such notice. We are also revising the final rule to reflect that this notice to the individual includes the consequences of a hearing finding and of waiving the right to a hearing. We are adding that the notice includes a statement to inform the accused individual of the right to be represented by an attorney at the individual's own expense.

Comment: We received several comments suggesting that we establish, by regulation, a more extensive "due process" appeal mechanism for facility employees accused of neglect, abuse, or misappropriation of a resident's property.

Response: We recognize the importance of the need for a fair and impartial hearing whenever an individual used by the facility is accused of resident neglect or abuse, or misappropriation of a resident's property. However, we recognize that all States have administrative procedure acts which allow for resolution of disputed cases of this nature. Thus, we chose to allow the need for these appeals to be addressed by State law.

Comment: Some commenters felt the provision to allow 120 days for States to conduct hearings of staff accused of neglect, abuse, or misappropriation of a resident's property was excessive and suggested other dates, while other commenters felt the 120 day period did not allow sufficient time for a State's administrative process to complete the hearing.

Response: While we agree that a person accused of resident neglect, abuse, or misappropriation of a resident's property is entitled to swift determination of the accusation, we believe States must be given reasonable time in which to schedule and conduct the hearing process under their administrative procedure acts. Our experience with other related State hearings indicates that 120 days is a reasonable timeframe for scheduling and completing these appeals.

Comment: Several commenters suggested we modify the rules so they specify who should be notified when a person accused of neglect, abuse, or misappropriation of a resident's property waives the right to a hearing or when a State hearing finds that such an individual did, in fact, act as accused. In addition, some commenters suggested we specify timeframes for such reporting.

Response: In response to these comments, we are rewriting § 488.335(f) and combining paragraphs (g) and (h) into (g) to clarify the reporting process and to include timeframes for reporting. We are specifying that the State survey agency, which may not delegate this responsibility, must report in writing the finding that an individual neglected or abused a resident or misappropriated a resident's property within 10 working days of the finding to: the individual; the current administrator of the facility in which the incident occurred; the administrator of the facility currently employing the individual, if different; the licensing authority for individuals other than nurse aides; and the nurse aide registry. For nurse aides, these findings must not only be reported to the nurse aide registry but must be included in the nurse aide registry within 10 working days of the finding in accordance with § 483.156(c)(iv)(D).

Comment: We received comments suggesting that if an allegation was found to be untrue, that accusation be expunged from the nurse aide registry.

Response: An allegation of resident abuse or neglect or misappropriation of resident property that is not substantiated would not be entered on the nurse aide registry. Only a finding of resident abuse or neglect or misappropriation of resident property would be entered on the nurse aide registry. Section 483.156(c)(1)(iv) specifies the particular information that the registry must contain with regard to any finding by the State survey agency of abuse, neglect or misappropriation of property. This information includes documentation of the State's investigation (including the nature of the allegation and the evidence that led the State to conclude that the allegation was valid), the date of the hearing and its outcome (if a hearing was requested), and a statement by the individual disputing the allegation (if the individual chooses to make one). The rule also provides that this information must be included in the registry within 10 working days of the finding and must remain in the registry permanently unless the finding was made in error, the individual was found not guilty in a court of law, or the State is notified of the individual's death.

Comment: We received several comments regarding the nurse aide registry. Commenters offered suggestions for the contents of the registry, its availability to the public and action taken as a result of substantiation of abuse, neglect or misappropriation of property.

One commenter suggested that the report of findings provision include notifying the appropriate law enforcement authorities in those cases where a crime has been committed.

Another commenter suggested that HCFA offer guidance to facilities concerning the treatment of employees who are awaiting the resolution of a complaint.

Response: These specific comments fall outside the purview of this regulation on the survey, certification and enforcement of skilled nursing facilities and nursing facilities. However, a discussion of these and other related issues can be found in a final rule titled Medicare and Medicaid; Requirements for Long Term Care Facilities and Nurse Aide Training and Competency Evaluation Programs, published September 26, 1991 in the **Federal Register** at 56 FR 48880.

Comment: Several commenters suggested that every investigation seek to identify facility practices which led to the neglect, abuse or misappropriation of resident property.

Response: We believe that every investigation does seek to identify facility practices which led to the resident neglect or abuse, or misappropriation of resident property and this is evidenced by the guidance currently provided to the States in manual instructions. These guidelines include the general procedures for conducting complaint investigations and stipulate that, if significant problems are identified during an initial assessment or other observations, the scope of the review is expanded as necessary. The procedures also specify that when the team is investigating allegations of substandard care, they are to evaluate not only the care of the individuals involved in the allegation, but also to evaluate the facility's patterns of related care. Also, noncompliance identified during the survey is recorded on the Statement of Deficiencies and Plan of Correction (HCFA–2567) and a plan of correction is requested. When the facility is not in substantial compliance as a result of the deficiencies identified, enforcement actions could include the imposition of alternative remedies or termination of a facility's provider agreement.

Comment: A few commenters suggested that in those cases where neglect was found and determined to be caused by factors beyond the control of the individual, the State agency must impose sanctions upon the facility or document why such sanctions are inappropriate.

Response: We do not accept this suggestion to add a regulatory requirement that obligates HCFA or the State to impose sanctions where resident neglect was found and determined to be caused by factors beyond the control of the individual. Regardless of the cause of the noncompliance, a facility is not relieved of its responsibility to correct its deficiencies. This responsibility assures that residents consistently receive quality health care in a safe environment and it exists whether or not a remedy is imposed. However, there are instances in which a remedy will be imposed due to the egregious nature of the deficiency and to encourage prompt compliance. Conversely, there are situations in which a remedy might not be necessary because the facility corrected the practice which led to the abuse. For example, firing an employee who neglects a resident or residents could immediately correct that deficiency.

We do not accept the suggestion to incorporate into the regulation a provision that would require documentation for those cases in which a remedy is not imposed. We are not required by the Act to document why sanctions are not imposed and to require this through regulations would impose a significant workload burden because, as stated above, there are many cases in which deficiencies are corrected and remedies are not imposed.

Redesignation of Subpart F

As noted earlier, a new Subpart D of part 488, consisting of §§ 488.201–488.211, became effective on August 31, 1992, shortly after this proposed rule was published on August 28. Consequently, we must designate Subpart F, which was to consist of §§ 488.200–488.240, with subsequent numbers. To assist the reader, we are publishing the new table of contents for Subpart F, with designations of the proposed rule shown in parenthesis. In the following discussions, we refer to the sections as renumbered, with the proposal's identification included only if distinction is necessary.

Sec.
488.400 Statutory basis. (§ 488.200)
488.401 Definitions. (§ 488.201)
488.402 General provisions. (§ 488.202)

488.404 Factors to be considered in selecting remedies. (§ 488.204)
488.406 Available remedies. (§ 488.206)
488.408 Selection of remedies. (§ 488.208)
488.410 Action when there is immediate jeopardy. (§ 488.210)
488.412 Action when there is no immediate jeopardy. (§ 488.212)
488.414 Action when there is repeated substandard quality of care. (§ 488.214)
488.415 Temporary management. (§ 488.215)
488.417 Denial of payment for all new admissions. (§ 488.217)
488.418 Secretarial authority to deny all payments.
488.422 State monitoring. (§ 488.222)
488.424 Directed plan of correction. (§ 488.224)
488.425 Directed inservice training.
488.426 Closure of a facility or transfer of residents, or both. (§§ 488.226 and 488.240)
488.430 Civil money penalties: Basis for imposing penalty. (§ 488.230)
488.432 Civil money penalties: When penalty is collected.
488.434 Civil money penalties: Notice of penalty.
488.436 Civil money penalties: Waiver of hearing, reduction of penalty amount.
488.438 Civil money penalties: Amount of penalty.
488.440 Civil money penalties: Effective date and duration of penalty.
488.442 Civil money penalties: Due date for payment of penalty.
488.444 Civil money penalties: Settlement of penalties.
488.450 Continuation of payments to a facility with deficiencies. (§ 488.232)
488.452 State and Federal disagreements involving findings not in agreement in situations where there is no immediate jeopardy. (§ 488.234)
488.454 Duration of remedies. (§ 488.236)
488.456 Termination of provider agreement. (§ 488.238)

Section 488.401 Definitions

It was brought to our attention that the term "immediate family" also appears in subpart E as well as subpart F. Therefore, in the final regulation we are moving the definition of "immediate family" to subpart E, § 488.301, but we are stating the comments and responses below.

Comment: A few commenters believe that the definition of "immediate family" should be expanded to include niece, nephew, and domestic partner.

Response: We have not accepted this suggestion. Section 1004, part 1, of the Provider Reimbursement Manual defines "immediate family" for Medicare purposes. The commenters offered no compelling argument as to why any individual should be added to the definition of immediate family. In fact, we are amending our definition to be consistent with the definition found in the Provider Reimbursement Manual by deleting "spouse of grandparent or grandchild."

Comment: Some commenters pointed out that the definition of "immediate jeopardy" should be located in subpart E instead of subpart F because the term is first introduced in subpart E.

Comment: We agree with the commenters. In the final rule, we have relocated the definition of "immediate jeopardy" from proposed § 488.201 in subpart F to § 488.301 in subpart E. However, since commenters concerned with responses regarding the definition of immediate jeopardy will first look in this section, we have retained the comments and responses below.

Comment: We received numerous comments about HCFA's or the State survey agency's ability to assign resident rights and/or physical environment violations at higher severity levels. These commenters believe that any deficiency could be egregious enough to be considered "moderate harm" or "immediate jeopardy."

Response: We agree with these commenters and are allowing violations of any participation requirement, including resident rights and physical environment, to be assessed at any degree of seriousness.

Comment: Many commenters wanted clarification regarding cases in which termination actions for immediate jeopardy would be applicable.

Response: Sections 1819(h)(2)(A)(i), 1819(h)(4), 1919(h)(1)(A), 1919(h)(3)(B)(i), and 1919(h)(5) of the Act specifically state that termination of participation for a facility is possible with any determination of noncompliance where the State or the Secretary finds this noncompliance immediately jeopardizes the health or safety of the residents. For example, immediate jeopardy to resident health or safety may exist, but is not limited to, the presence of one of more of the following:

• Insect or rodent infestation indicative of food contamination or the possible spread of contagion;

• Failure to control infections as evidenced by the presence of facility-acquired infections;

• Patient abuse or poor resident care, including;

+ Instances of malnutrition or dehydration that are unrelated to the resident's condition and are a result of patient care;

+ Neglect by the staff with the result that residents are often left lying in urine, feces and other waste;

• Drug or pharmaceutical hazards that directly affect resident health and safety, such as:

+ Excessive drug errors or mishandling of drugs;

+ Failure to provide medications as prescribed;

+ Failure to monitor drugs as evidenced by lack of ordered laboratory work, failure to take vital signs as indicated by drug regimen, and lack of other nursing monitoring practices;

+ Gross mishandling of drugs such as leaving drug trays unattended and available to residents and visitors.

+ Administration of drugs by unqualified staff; or

+ Administration of experimental drugs without the informed consent of the resident (or responsible party). This list is not to be interpreted as all-inclusive, but rather as examples of what may be construed as immediate jeopardy situations warranting termination.

Comment: Other commenters were unclear about how the phrase "at any time" constitutes "immediate threat."

Response: We agree that it is unclear and are removing the phrase in § 488.401.

Comment: Some commenters believe the definition in § 442.2 conflicts with the proposed definition of immediate jeopardy.

Response: We agree that these definitions are in conflict. However, the definition in § 442.2 will no longer apply to nursing facilities and is being revised to reflect this change. We are maintaining two separate definitions of immediate jeopardy because of the different regulations applicable to ICFs/MR and SNFs or NFs.

Comment: Some commenters suggested striking references to the scope and severity scale and inserting the phrase "creates imminent danger." Other commenters recommended that immediate jeopardy should represent the most severe or life threatening violation.

Response: We agree with the commenters and we have removed references to the scope and severity scale from the definition of immediate jeopardy. We are redefining immediate jeopardy to encompass all situations that pose actual or potential life threatening harm, death, serious injury or impairment. Therefore, a life threatening situation or imminent danger will inevitably be considered immediate jeopardy.

Comment: Many commenters were concerned that the definition of immediate jeopardy pertains to only physical harm and not emotional harm.

Response: We agree with the commenters that significant emotional as well as physical harm may be considered immediate jeopardy. Every

determination of the seriousness of a deficiency includes the consideration of whether a resident has failed to achieve his or her highest practicable physical, mental, or psychosocial function.

Comment: Many commenters expressed the need for us to clarify the definition of "new admission" to indicate whether or not residents transferred to the hospital, with the intention of returning, are considered new admissions. They are concerned that if denial of payment for new admissions is imposed, those transferred residents will not be covered if they return to the facility.

Response: New admission is described within § 442.2 as well as § 488.401. We believe these descriptions are sufficient and further clarification is not necessary.

Comment: Some commenters suggested that the definition of "plan of correction" be amended to require the facility to identify the systemic underlying problem, make restitution to the affected resident or residents, contain measurable outcomes for all quality of care deficiencies, and require the facility to take further measures to ensure future compliance.

Response: The purpose of a plan of correction is to identify and address the underlying problem or problems for the facility. Individual residents have other legal means at their disposal to seek restitution. It is impracticable to develop model thresholds for each and every plan of correction as each situation is different and is evaluated accordingly. Plans of correction are geared toward prospective compliance to ensure the underlying causes of cited deficiencies do not recur. As it is virtually impossible to afford retroactive restitution to residents who have been injured or have been deprived of their rights, we have not accepted these suggestions.

Comment: Many commenters wanted to have a definition of "highest practicable well-being."

Response: The phrase "highest practicable well-being" was established in sections 1819(b)(2) and 1919(b)(2) of the Act. We believe the conspicuous absence of a definition demonstrates that the Congress recognized the impossibility of establishing a single definition of this phrase, as every resident, and his or her particular needs and abilities, must be evaluated individually.

Comment: Some commenters wanted a definition of "repeat deficiency."

Response: The Act, in section 1819(h)(2)(B) and 1919(h)(3)(C), specifies that incrementally more severe fines must be imposed for repeated or uncorrected deficiencies. Repeated deficiencies are described in § 488.438 as deficiencies in the same regulatory grouping of requirements found at the last survey, subsequently corrected, and found again at the next survey.

Comment: A few commenters wanted a definition of "distinct part."

Response: "Distinct part" is defined in sections 2110 and 2762 of the State Operations Manual. As it is beyond the scope of this regulation, we do not believe it is necessary to place this definition in these regulations.

Comment: Some commenters wanted various other terms defined or clarified.

Response: We define terms in regulations only if the use of those terms, within the regulation, has a different application than that which is accepted in common English usage.

Section 488.402 General Provisions.

Comment: We received a number of comments from the health care industry, from consumer organizations, and from professional groups regarding the purpose of the regulations as set forth in proposed § 488.202. The consensus of those who commented on paragraph (a) was that protecting residents from "actual or potential harmful outcomes resulting from deficiencies" is but one of many purposes of the regulations. Other purposes commenters suggested we include were to—

- Deter noncompliance;
- Punish noncompliance through the use of appropriate sanctions;
- Ensure correction of deficiencies for residents whose care is deficient;
- Encourage sustained compliance; and
- Protect patient rights.

Two commenters suggested we change paragraph (a) of proposed § 488.202 to read, "The purpose of remedies is to encourage prompt, rapid compliance with program requirements at the minimum level that will achieve correction so as to protect residents from actual or potential outcomes resulting from deficiencies." They said that, "The Congress made it clear that a purpose of enforcement remedies is to render the time period between identification of deficiencies and *correction* (emphasis in original) as short as possible. This intent precludes punitive measures and promotes the least disruption to facility operation. Based on Congressional intent, general consensus now exists that the enforcement process should be corrective, not punitive, and that enforcement remedies should be set at the minimum level required to achieve the desired correction. Successively stricter measures would be used as needed for failure to correct."

Finally, one commenter said that "prompt, rapid," is redundant.

Response: A number of these comments suggest to us that there is some confusion between the purpose of these remedies and the expected outcomes of the regulations. Therefore, in order to be absolutely unequivocal, we are revising § 488.402(a) to read, "The purpose of remedies is to ensure prompt compliance with program requirements."

Comment: Two commenters suggested that the last sentence of proposed § 488.202(b)(1) be revised to read, "Survey findings are reported to the State and HCFA which will make recommendations for corrective action." Their rationale was that the determination of remedies to fit a particular deficiency or deficiencies should be made by an objective party in the survey agency or HCFA who did not survey the facility.

Another said that the same sentence should be revised to state, "Survey findings are reported to the State or HCFA, as appropriate, with recommendations for corrective action." Still another said that we should clarify the fact that the survey findings are reported with recommendations for remedies, and one commenter said that our proposed paragraph (b)(1) appears to exclude the possibility of imposing remedies based on HCFA's paper review of State survey agency findings.

Two commenters suggested a new paragraph (b)(1) to read substantially as follows:

(b) Requirement for State enforcement plan.

(1) The State and HCFA shall develop a plan for imposing intermediate remedies. The plan shall—

(i) Vary remedies with the scope and severity so that more substantial remedies are imposed for more serious deficiencies;

(ii) Assure that the State and HCFA minimize the time between identification of violations and final imposition of remedies;

(iii) Assure that remedies serve goals of requiring immediate correction of deficiencies, protecting residents, correcting deficiencies for specific residents who are harmed, punishing violations and deterring violations;

(iv) Include rules and policies about when and how various sanctions are imposed and when remedies are imposed singly or in combination; and

(v) Develop procedures to solicit the active participation of residents in the enforcement process, including permitting residents to participate in

any formal proceedings the State offers to providers to contest imposition of an intermediate remedy.

The two commenters who made this suggestion also said that enforcement under the reform law is not a collection of free-standing remedies that States and the Secretary apply on an ad hoc basis; enforcement under the law requires enforcement agencies to have a systematic way of making decisions to apply sanctions. They cite the Institute of Medicine (IoM) report, issued in March 1986, that says that guidelines on when to initiate sanctions are necessary for effective State enforcement. The commenters also cite the October 9, 1992 final settlement of *Valdivia* v. *California Department of Health Services* which reads in part:

The enforcement system shall:

A. Define the purposes of the system and of the remedies;

B. Set forth guidelines for appropriately assessing monetary penalties and other intermediate remedies (in lieu of or in addition to termination) allowed under Federal requirements;

C. Identify guidelines for approving and monitoring plans of correction;

D. Define the role of the complaint investigation process in the comprehensive enforcement system;

E. Encourage and promote use of intermediate sanctions, as appropriate, rather than termination, to achieve the purposes of the comprehensive enforcement system;

F. Identify mechanisms to better inform the public as to actions taken by the State against facilities that are not in compliance with Federal Requirements of Participation;

G. Identify the factors to be considered in determining which remedies may or must be imposed, assuring that more substantial remedies are imposed for more serious deficiencies.

Finally, two of these commenters suggested that HCFA specify that one of the bases for the imposition of remedies be interfering with the work of a survey team, monitor, and/or temporary manager.

Response: We agree that it would be more accurate to say that survey findings are reported with recommendations for remedies, and we are making that change in this final rule. We do not, however, believe that either the IoM study or OBRA '87 calls for an inflexible cookbook approach to enforcement. As noted in the comment, the IoM study speaks of establishing "guidelines," and we believe that this term connotes that there be a range of options available to the Secretary and the States (including the option not to impose any remedies). In sections 4203 and 4213 of OBRA '87, the intent to provide a flexible range of options is clearer still. Those sections amended sections 1819(h) and 1919(h) of the Act at several places to reflect this intent. For example, the Act now provides:

- "* * * the Secretary may impose any of the remedies described in subparagraph (B)." (1819(h)(2)(A)(ii));
- "Nothing in this subparagraph shall be construed as restricting the remedies available to the Secretary * * *" (1819(h)(2)(A));
- "The Secretary may take the following actions***" (1819(h)(2)(B)); and
- "The Secretary may impose a civil money penalty in an amount not to exceed $10,000 * * *." (1819(h)(2)(B)(ii)).

Further evidence of the need to retain flexibility in the choice of remedies is found in the House of Representatives Committee on the Budget report (H.R. Rep. No. 391, 100th Cong., 1st Sess. 472 (1987)) that accompanied OBRA '87. It states that, "the Committee amendment would specify a broad range of sanctions for use by both the Secretary and the States." The committee report goes on to say that, "The Committee emphasizes that the remedies specified under the amendment are not exclusive, and should not be construed to limit the use of other remedies that may be available to either the States or the Secretary under State or Federal law." It is clear that flexibility was the statutory intent. Therefore, in order to ensure this intended flexibility, we have set forth minimum remedies for deficiencies according to their seriousness and offered several additional optional ones.

We agree, for the most part, with the thrust of the final settlement in *Valdivia*, and are making revisions to the relationship between deficiencies and remedies which reflect aspects of the final settlement of that case. However, these revised policies are not appropriate for paragraph (b), which is intended only to succinctly set forth the basis for the imposition of remedies, and not the outline for the entire enforcement process. Rather, we have specified the linkage between deficiencies and remedies imposed at § 488.408, Selection of remedies.

We do not believe that proposed § 488.202(b)(1) excludes the possibility of imposing remedies based on "HCFA's paper review of survey agency findings." Since HCFA's "paper review" is itself based on survey findings, it is clear that remedies may be imposed as a result.

Finally, in response to the commenters who suggested that HCFA specify that one of the bases for the imposition of remedies be interfering with the work of a survey team, monitor, and/or temporary manager, there is authority at section 1128(b)(12) of the Act to exclude a facility based on its failure to grant access to the Secretary or to the State survey agency, and we believe this includes not only a survey team, but a monitor. Our regulations at § 488.415 set forth what happens if a facility does not relinquish control to a temporary manager.

Based on the above discussion, we are revising § 488.402(b)(1) to state that in every instance of noncompliance, one or more remedies are imposed based on deficiencies found during surveys conducted by HCFA or by the survey agency. We are deleting paragraph (b)(2) because we believe that manual issuances are the most appropriate places for procedural information of this sort.

Comment: Two commenters suggested that we set forth at § 488.402(b)(2) the principle that termination of provider agreements is a measure taken only as a last resort when the imposition of intermediate remedies has failed to correct the deficiencies. One commenter recommends that paragraph (b)(2) be amended to state that the survey agencies should be allowed to impose one or more remedies for each deficiency or cluster of deficiencies.

Finally, one commenter said that OBRA '87 stated that when deficiencies constitute an immediate and serious threat to residents' health and safety, neither HCFA nor the States have any discretion with regard to remedies. Rather, the commenter said that, in such cases, HCFA or the States must impose either temporary management or a provider agreement termination.

Response: We agree that termination of provider agreements is a serious measure, but not that it is a "last resort" in the strictest sense. While we believe that the Congress wrote into the law the wide array of alternative remedies to encourage their use, the Act does not require that in every case the States or the Secretary may not choose provider agreement termination until alternative remedies have been used. We believe that the Act's alternative remedies offer States and the Secretary a valuable opportunity to redress a wide variety of facility shortcomings through means that will promote quick correction without having to exclude the facility from program participation, and it is our expectation not only that serious consideration will be given for such opportunities when there is facility non-

compliance, but that they will be used far more frequently than they have in the past. It would be an entirely erroneous impression of the Act, however, to conclude that it deprives States and the Secretary from exercising discretion to choose *any* remedy, including termination, whenever they determine it appropriate to do so. The comment suggesting that the proposed paragraph (b)(2) be amended to state that the survey agencies should be allowed to impose one or more remedies for each deficiency or cluster of deficiencies is inappropriate; the number of remedies that may be imposed is covered in the proposed § 488.202(c). We will discuss this comment in connection with others on that paragraph.

It is true that, when no immediate jeopardy exists, the Congress stated that the State or the Secretary may impose termination or may impose one or more intermediate sanctions against the provider, or may impose both, and that this is in contrast to the specific measures that must be imposed when immediate jeopardy exists. However, it does not follow that the State, rather than the Federal government, should have the ability and the obligation to specify when and how each remedy is to be applied. The Committee report that accompanied OBRA '87 clearly states:

> * * * it is the responsibility of the Secretary to take the enforcement measures necessary to assure compliance by Medicaid facilities with the requirements of participation as well as to assure that State enforcement activities are adequate to protect the health and safety of residents. To enable the Secretary to discharge this responsibility, the committee amendment would greatly expand the remedies available to the Secretary under current law.
>
> * * * [I]f both the State and the Secretary decide that remedies other than termination are appropriate, the Secretary's selection of alternative remedies, and not those of the State apply. (H.R. Rep. No. 391, 100th Cong., 1st Sess. 475–7 (1987)).

Moreover, section 1919(h)(2)(B) of the Act specifies that the Secretary shall provide, through regulations, guidance to States in establishing remedies.

However, when there is disagreement between HCFA and the State regarding enforcement action, the disagreement is resolved in accordance with the policy set forth in § 488.452(d). For example, paragraph (d) says that when HCFA or the State, but not both, establishes one or more remedies, in addition to or as an alternative to termination, the additional or alternative remedies will also apply when—

- Both HCFA and the State find that a NF has not met all the participation requirements; and
- Both HCFA and the State find that no immediate jeopardy exists.

In this way, the sanction(s) proposed by the State can take effect.

Based on the above discussion and the need to make conforming changes with other provisions of the regulation, we are revising § 488.402(b)(2) to indicate that the State or HCFA may apply one or more of the remedies specified in § 488.406 instead of terminating the provider agreement, or in addition to termination procedures, to continue until the effective date of the termination or until substantial compliance is achieved, and, in some cases, until the State or HCFA is assured that substantial compliance can be maintained.

Comment: As stated above, one State said that § 488.402(b)(2) should be amended to state that the survey agencies should be allowed to impose one or more remedies for each deficiency or cluster of deficiencies. The State's rationale is that the proposed paragraph (c) would restrict both HCFA and the States in their efforts to encourage prompt corrective action, and to protect residents' health and safety. Another commenter said the application of a separate remedy for each deficiency seems unduly harsh. A remedy or set of remedies should be imposed relating to the entire universe on deficiencies cited. Still another said that one incident should trigger the citing of no more than one remedy.

Two commenters said that there is no statutory basis for paragraph (c). Other commenters asked for clarification, suggesting that we use examples, limits, and further guidelines to ensure consistency. Of particular concern to many was the fear that, absent these guidelines and limits, providers might incur multiple sanctions for single deficiencies or for multiple deficiencies arising from a single act or incident. Some suggested that HCFA and the State be directed to consider whether a facility's deficiencies are "clustered" or "bundled" (we used the term "interrelated" in the proposed rule) or scattered throughout the facility in deciding which remedy(ies) to impose in particular situations.

A number of commenters wanted us to specifically set forth in regulations exactly which sanctions should be imposed for each type of possible deficiency or group of deficiencies.

One State expressed concern about the potentially large number of separate follow-up visits required to verify corrections of the deficiencies under each remedy. "For example," it said—

> If separate civil monetary penalties are imposed for several deficiencies, or groups of deficiencies, it would be expected that deficiencies would be corrected on different dates and that the facility would insist on immediate followup on each deficiency or group of deficiencies in order to immediately end the daily monetary penalty. Additionally, a follow-up would be required at 90 days after the survey to determine if denial of payments would be required under [the proposed] 488.212(a)(3), and another followup would be required at six months to determine if termination is required under [the proposed] 488.212(a)(4).

Finally, one commenter wanted us to insert the words, "Subject to the provisions of this subpart," at the beginning of the paragraph, and another wanted us to define interrelated deficiencies as deficiencies caused by or resulting from the same action or occurrence.

Response: Sections 4203 and 4213 of OBRA '87 and subsequent related legislation were enacted partially because of the Congress' recognition that the Secretary and the States needed more flexibility in enforcing regulations pertaining to Medicare SNFs and Medicaid NFs, and, therefore, more choices of enforcement actions. The selection of a particular remedy is based on the nature of noncompliance and the remedy (or remedies) that either HCFA or the Medicaid agency believes is most likely to achieve correction of the deficiencies. We believe that this approach best fulfills the Congressional mandate to "promote compliance with the requirements of participation and assure high quality care for nursing facility residents" (H.R. Rep. No. 391, 100th Cong., 1st Sess. 472 (1987)). In some instances, the most effective remedy may be two or more remedies. Furthermore, section 1919(h)(1) (A) and (B) of the Act clearly states that this is the case. The first reads in part, "* * * the State * * * may provide * * * for one or more of the other remedies," and the second, "* * * the State may provide for one or more of the remedies." Consequently, we are revising § 488.402(c) to clearly state that more than one remedy may be considered appropriate for noncompliance for each deficiency. However, it may also be appropriate for one remedy to be imposed for multiple deficiencies that constitute noncompliance, and the revised regulation reflects this policy as well. In any case, the choice of one or multiple remedies for each deficiency constituting noncompliance is part of the decision making process. The actual

imposition of a remedy or remedies is imposed on a facility for noncompliance as a whole, with participation requirements. We are deleting the limitation in the proposed paragraph (c) that, for a single remedy for all deficiencies to be imposed, the deficiencies must be interrelated and subject to correction by the same remedy. This change offers more flexibility to the State survey agencies and to HCFA, and is in keeping with the statute.

Further, setting forth specific sanctions to be applied for each deficiency constituting noncompliance or a group of deficiencies constituting noncompliance would defeat the whole purpose of providing maximum flexibility to both the Secretary and to the States. We are adopting certain minimum sanctions that will be imposed according to how serious the noncompliance is, but beyond that, there is enough flexibility to tailor the remedy or remedies to the specific case at hand.

The statutory authority for § 488.402(c) is found at sections 1819(h) and 1919(h) of the Act. We have discussed this statutory authority in both the proposed rule and elsewhere in the preamble of this final rule.

The matter of a potentially large number of follow-up visits is a possibility. If it materializes, State survey agencies and possibly HCFA's regional offices may require additional resources. We will be closely monitoring implementation of these regulations to determine the resources needed for this task. However, not every deficiency will require or even merit a separate revisit for certification of substantial compliance. As stated above, sometimes several deficiencies will lead to the imposition of only one remedy. Moreover, even if different remedies can be traced to different deficiencies, the survey agency is under no obligation to make multiple revisits. The noncompliance which led to the imposition of remedies is due entirely to facility performance. The survey agency is not responsible for the noncompliance and is under no obligation to spend valuable resources on multiple revisits. Furthermore, remedies are imposed for noncompliance in a facility, rather than for deficiency "a" or "b" or "c," etc. The survey agency is generally obligated to revisit only when the facility makes a credible allegation of compliance with all requirements and, in some cases, no revisit is required even then.

Finally, we are not adding the phrase, "Subject to the provisions of this subpart," at the beginning of paragraph (c) because we believe it to be unnecessary. Since we are revising this final rule to allow HCFA or the State to impose one or more remedies for all deficiencies constituting noncompliance whether they are interrelated or not, there is no need to define "interrelated deficiencies."

For the reasons given directly above, we are revising § 488.402(c) to provide that HCFA or the State may apply one or more remedies for each deficiency constituting noncompliance, or single or multiple remedies for all deficiencies constituting noncompliance.

Comment: A number of commenters said that they opposed our proposed exemption of deficiencies with scope and severity levels of 1 from the requirement for a plan of correction. The consensus of these commenters was that all deficiencies should require a plan of correction. As one commenter remarked:

> While we understand that it is inappropriate to punish or sanction a facility for an isolated, minor deficiency, the government should ask facilities to correct such problems and there should be a public record of the facility's plan to do so. Since the regulations and the reform law require compliance with all requirements, there cannot be any exclusions from completing plans of correction. Plans of correction are a management tool for both the facility and the regulators, not a penalty or punishment.

Two commenters said the exception should be retained, but only if HCFA applies a "substantiality factor" to the determination of what constitutes a deficiency. By "substantiality" they meant that nothing would be cited as a deficiency unless it is *not* an isolated or occasional occurrence or unless it has a significant impact on resident rights or quality of life. If this were the case, they said, then all deficiencies should require a plan of correction.

One commenter asked, "Why cite a deficiency at scope and severity level 1?"

Regarding the issue of approval of the plans of correction, one commenter suggested that HCFA approve all plans of correction. Another suggested we add the following specific language:

> HCFA will or the survey agency must approve the plan of correction if it is reasonably calculated to result in substantial correction of the deficiency within a reasonable time. Neither HCFA nor the survey agency may disapprove a plan of correction because the facility denies the existence of the deficiency, if the plan otherwise meets the criteria specified by this paragraph. The facility may submit an amended plan of correction at any time, and HCFA will or the survey agency must approve the amended plan if it meets the criteria specified in this paragraph. A facility's submission of a plan of correction does not constitute an admission that the deficiency exists.

Finally, one commenter said that there is a need for clearer plans of correction, and another said that the plans need to be more specific and focus on care issues.

Response: We agree that all deficiencies should require either a plan of correction or an agreement to correct, and are revising this final regulation at § 488.408 ("Selection of remedies."). accordingly. One commenter expressed the rationale for this succinctly: "* * * the government should ask facilities to correct [deficiencies] and there should be a public record of the facilities' plan to do so."

We do not accept the suggestion that the regulations specify that HCFA will or the survey agency must approve the plan of correction if it is reasonably calculated to result in substantial correction of the deficiency within a reasonable time. We have discussed the meaning of substantial compliance elsewhere in this preamble. As for the terms "reasonably calculated" and "reasonable time," it has been our experience that putting general language such as this in regulations is not useful. Plans of correction are considered on a case-by-case basis by both the States and by HCFA because circumstances vary greatly from facility to facility. To state in the regulations that HCFA and the States have a moral and legal responsibility to be reasonable in their dealings with providers would be to belabor the obvious; there is no need for such a pronouncement.

One of the commenters who proposed that plans of correction be required for all deficiencies made the observation that some plans of correction do nothing more than complain about the law, the surveyor, or the circumstances, without ever describing how the violation will be corrected. We agree and would only add that it is highly probable that facilities submitting these plans considered them to be "reasonable," and extremely improbable that these plans would be acceptable to HCFA or the State.

Finally, we agree that plans of correction must be clear and specific, but believe that there is no need to state this in regulations.

Comment: Two commenters suggested that, in addition to cross-referring to § 488.234 of the proposed rule (redesignated as § 488.452, "State and Federal disagreements involving findings not in agreement in situations where there is no immediate and serious threat"), we should refer the reader to proposed § 488.212(a) ("Action when

there is no immediate and serious threat"), and to § 488.232 of the proposed rule (redesignated as § 488.450, "Continuation of payments to a facility with deficiencies").

Response: We believe this to be unnecessary. We try, to the greatest extent possible, to avoid redundancy in regulations. When trying to determine what to do when there is State and Federal disagreement, it is most likely that the reader will consult § 488.452.

Comment: Another commenter suggested that the text of our proposed § 488.202(e) be revised to state, "If the State and HCFA disagree on the decision to impose remedies when HCFA has performed a validation survey, the disagreement is resolved in accordance with [proposed] § 488.234."

Response: Not allowing HCFA to impose remedies unless and until it has performed its own validation survey would, in most cases, significantly lengthen the amount of time between the facility's being cited for a deficiency and the time when a remedy would be imposed. This would not fulfill the intent of the Act, which states that criteria as to when and how each of the remedies is to be applied "shall be designed so as to minimize the time between the identification of violations and final imposition of the remedies * * *" (sections 1819(h)(2)(B) and 1919(h)(2)(B) of the Act). In any event, the Act does not limit the Secretary's ability to make findings exclusively through the use of validation surveys. The Act says only that the Secretary may impose sanctions if he or she "finds" noncompliance. There may be occasions, for example, when the Secretary may choose to impose sanctions based on a State agency survey. We have therefore concluded that the Act did not intend that the Secretary exercise his or her oversight authority only through Federal onsite validation surveys. Nonetheless, in some cases it will only be possible to draw conclusions about facility compliance through onsite surveys. Moreover, sections 1819(g)(3)(B) and 1919(g)(3)(B) of the Act require the Secretary to conduct validation surveys for at least 5 percent of the State survey agency's standard surveys, as long as the 5 percent equals at least 5 facilities. Therefore, many times the Secretary's enforcement decisions will arise as a result of Federal validation surveys. However, this will not always be the case.

For the reasons listed immediately above, we are making no revisions to proposed § 488.202(e).

Comment: Some members of the health care community said that the proposed 2–4 and 15-day periods are inadequate to allow facilities a fair opportunity for correcting deficiencies. In addition, commenters suggested that HCFA—

- Specify whether the days are calendar days or business days;
- Specify that the time frames for correction will not begin until the facility receives the notice, rather than when notice is sent;
- Specify that the notice must be sent by certified mail, return receipt requested or by personal delivery, and that the State must give the facility notice in the same manner; and
- Provide an expedited hearing process to safeguard the facility's ability to continue its business and protect its residents from wrongful government action. This measure must be taken, the commenter said, due to the short notice we proposed to give in the case of immediate and serious threat.

Other commenters said that the time frames we proposed are too long. One of these commenters expressed serious concern, noting that the Act clearly requires that immediate action be taken to remove the jeopardy in immediate and serious threat situations. This commenter urged that no notice be given before the imposition of a sanction in these cases, and suggested that, in nonimmediate and serious threat situations, 5 days notice should be given. Another said that, in many cases, it is obvious that the remedy should be imposed immediately. This consumer organization asked why a State survey agency should ever have to delay initiating monitoring visits to a facility or why a facility with widespread quality of care problems should be allowed to admit new residents for 15 days after such problems are discovered. Other commenters cited the possible continuance of "roller coaster compliance" unless we shorten the time frames. "Roller coaster compliance" refers to the facility practice of coming into compliance only long enough to stave off an impending remedy, then reverting to noncompliant activities or practices until the next time the deficiencies are cited, when the cycle begins all over again.

Other commenters said that our proposed time frames do not adequately protect residents, referring to monitors as an example. One said that in a case of jeopardy, the State might feel it necessary to have a monitor in the facility as the survey team is leaving. Waiting two days without outside scrutiny may be too long under some circumstances.

Two commenters said that, in the case of civil money penalties, notice before an effective date is meaningless, since the fine may be imposed for a past violation that has already been corrected.

One commenter said that the "not more than four days" notice in § 488.402(f) conflicts with § 488.410, and another that paragraph (f) conflicts with § 488.330(e)(1)(i) and (ii). Another said that the clause, "* * * the remedy could be imposed anytime after the minimum 2 day notification period, but not later than the 10th day after the last day of survey," is confusing.

Finally, one commenter suggested that residents and their representatives be notified of enforcement actions and their implications at the same time the nursing home is notified. Two other commenters said that States should be required to compile, at least monthly, a list of facilities against which they have taken adverse action and imposed sanctions. They suggested that this listing be sent to newspapers, to the State long-term care ombudsman, to the State protection and advocacy agency, to acute care hospitals, and to public and private agencies that regularly make referrals of individuals to nursing facilities. They also suggested that States be required to develop poster notices for each intermediate remedy, and require facilities to post the notice in a prominent place.

Response: We are revising § 488.402(f) to specify that the time frames given are calendar days, and that they begin when the facility receives the notice, but in no event will the effective date of the enforcement action be later than 20 days after the notice is sent. We are not accepting the suggestion that the notices be sent via certified mail, with return receipt requested. This would preclude a valid notice sent via other means, such as telefax, telegram, commercial overnight delivery services, or other means that may be faster. This becomes an especially important consideration in the case of immediate jeopardy deficiencies.

The commenter who asks for an expedited hearing process due to the short notice alleging immediate jeopardy seems to be suggesting that the hearing take place before the effective date of a sanction to safeguard the facility's ability to continue its business and protect its residents from wrongful government action. In the case of immediate jeopardy, this would mean a hearing would have to be held as early as the first 48 hours after the survey. It is entirely possible that, when a survey uncovers such jeopardy, the State or HCFA may immediately set an effective

date at the minimum required time after notice, that is, 2 days. It is virtually impossible to set up a hearing this quickly, and expanding the time between the notice and the effective date of a remedy to make it possible to hold a hearing before the effective date would not be in the best interests of the residents. The whole point of a short time frame is to safeguard the lives and the safety of residents by taking immediate action. As discussed at proposed § 488.180 (now designated as § 488.330), Certification of compliance or noncompliance, it is not necessary to hold a hearing before the effective date of termination to adequately protect a facility's right to due process.

As noted above, we received comments saying our time frames were too short, and others saying that they were too long. While we are mindful of the Act's requirement that the Secretary take immediate action in the case of immediate jeopardy (sections 1819(h)(4) and 1919(h)(4) of the Act), and to minimize the time between the identification of violations and final imposition of the other remedies (sections 1819(h)(2)(B) and 1919(h)(2)(B) of the Act), we have chosen not to shorten them, except for the same day (if necessary) installation of a State monitor in the case of an immediate jeopardy. We believe that, for other available remedies when there is an immediate jeopardy deficiency, the facility should be allowed at least 2 days before imposition of sanctions. This is because we believe that even in cases of immediate jeopardy, providers are entitled to some notice before the imposition of sanctions. We believe that, in the case of non-immediate jeopardy, we should not allow any less than 15 days for similar reasons.

We chose not to set the minimum amount of notice required any higher than 2 days in the case of immediate jeopardy because the longer immediate jeopardy persists, the greater the likelihood that actual harm or even death may result or continue. We have, for the reasons cited in the paragraph immediately preceding determined that a facility be given no less than 2 days before imposition of sanctions. Besides, it has been our experience that, as a practical matter, it takes longer than 2 days to complete termination proceedings once they are begun. It is our belief that we have struck a fair balance between giving facilities fair notice and a reasonable chance to correct deficiencies and fulfilling our responsibility to safeguard the health or safety of residents.

We have chosen 15 days in the case of nonimmediate jeopardy by carefully weighing the same considerations. It is important to understand that we are bound by Federal law to minimize the time between the identification of violations and final imposition of remedies. While sections 1819 and 1919 of the Act do not require giving specific notice before the imposition of remedies, constitutional principles of due process generally do require such a notice of agency adverse action. On the other hand, neither the Act nor the Constitution require that providers have the opportunity to correct deficiencies before sanctions are imposed. In other words, there is a need for prior notice, but not an entitlement on the providers' part to an opportunity to correct deficiencies. This policy, we believe, satisfies due process concerns of providers. As we have said, the only exception is the immediate imposition of a State monitor when there is an immediate jeopardy situation, because, above all else, it is our responsibility to protect the lives of residents. The facility will not be required to pay the salary of the State monitor; nor will the State monitor have managerial authority to obligate facility funds. (That authority is reserved for the temporary manager who could be installed a couple of days later.) The State monitor can be appointed immediately, while other sanctions are pending during notice periods to protect residents. With respect to civil money penalties, we do not believe that any notice is required before HCFA or a State advises a facility that noncompliance has occurred and that a penalty is to be imposed. As the statute clearly suggests, civil money penalties may be imposed for past periods of noncompliance even if a facility is currently in compliance. Notice is required, however, before a civil money penalty can be *collected*, and the regulations call for exactly this procedure. Like any other commercial enterprise, nursing homes must structure their debits and credits around their cash flow. We believe that notifying a facility that it must pay a civil money penalty instantly is unfair, unrealistic, and not in accordance with the basic principles of due process.

In this final rule, we are removing the provision requiring a maximum of 4 days notice before the imposition of a sanction in § 488.402(f). We may impose a remedy for immediate jeopardy, as § 488.410 allows, as long as we give the facility at least 2 days' notice before the imposition of the remedy and no more than 23 days from the last day of the survey to remove the jeopardy or be terminated. In actual practice, the facility is notified that there is an immediate jeopardy deficiency as soon as the survey has been completed. It is only the official notice of the imposition of a remedy that may not be sent until later, as long as it is received by the facility at least two days before the effective date of the remedy.

As a result of our review of these comments, we are not making final proposed § 488.180(e)(1)(i), Certification of compliance or noncompliance, because it appears to conflict with § 488.402(f).

As proposed, we are providing in § 488.325(f), that the State must provide the State's long-term care ombudsman with any report of adverse actions specified at § 488.406 imposed on a facility. We believe that this provision will keep residents informed about each enforcement action. Whatever additional publicity States may wish to give notices of adverse action is their decision.

We are also revising paragraph (f) to note the exceptions in notification requirements for civil money penalties and restructured it to clarify them.

Section 488.404 Factors To Be Considered in Selecting Remedies

We received comments on proposed § 488.204, as well as on our solicitation of comments in the preamble to the proposed rule, about the scope and severity measures; specifically, we asked for comments on how scope and severity values were described and how they were to be assigned. We will address all of the comments we received on scope and severity in this section of the preamble.

Comment: The majority of commenters did not comment on the scope scale. Several commenters expressed support for using scope and severity scales to determine the enforcement response to facility noncompliance. Other commenters opposed using these scales. Of those opposed, some believed that the scales, absent any measurable criteria, introduce another opportunity for surveyor inconsistencies to occur.

Others thought the scope and severity level definitions were too broad and vague to be applied consistently by surveyors, allowing too much government discretion in the selection of remedies, while one commenter believed that the determination of remedies should be left to the judgment of the survey agency.

A few commenters argued that the scales were impractical because they were either too complex or prescriptive and left no room for surveyor judgment.

Several commenters argued that the use of scope and severity scales conflict

with Congressional intent to eliminate a hierarchy of participation requirements. They contend that by ranking the seriousness, that is, importance, of a facility's deficiencies, the scope and severity scales foster the belief that some requirements are more important than others.

One commenter questioned why the scope and severity scales were being put into regulation. This commenter believed that codifying the criteria used for determining remedies is inappropriate and will invite additional legal challenges by nursing home providers dissatisfied with severity and scope level determinations.

One commenter was concerned that the scope and severity scales failed to provide enough regulatory guidance on the exact criteria that will be used in making remedy determinations to ensure that the enforcement response is appropriate to the nature of the noncompliance.

We received a variety of proposals for reconfiguring the scope and severity scales from provider organizations, State governments and consumer advocate organizations.

One consumer advocate organization proposed a scope and severity scale with three tiers of severity (immediate jeopardy, substandard quality of care, and other violations), while retaining the definition of scope as we proposed.

This proposal called for a plan of correction for all level 1 deficiencies (other violations) regardless of scope and a mandatory civil money penalty for scopes of 3 and 4. Additionally, the proposal specified that the State or HCFA must impose a directed plan of correction if the violation is repeated. All other remedies could be imposed at the option of the State or HCFA.

The second tier (substandard quality of care) would require a civil money penalty, public notice, a plan of correction and, at the State's option, any other remedy. If repeated, the State or HCFA would require a State monitor and a directed plan of correction. There were additional mandatory remedies imposed at higher scope levels.

The third tier (immediate jeopardy) would require the statutorily mandated temporary management and physician and nursing home administrator licensing board notice, as well as a denial of payment for new admissions and a plan of correction.

Another organization also proposed three severity levels (Actual harm, impairment or death; potential harm, impairment and death; and negative outcome). The scope levels were also pared down to three levels (isolated, occasional and widespread/pattern). Substandard quality of care would be defined as a severity of 2 with a scope of 3 in quality of care and all of severity level 3. For non-immediate jeopardy, this proposal would require termination in 180 days from the last date of survey unless compliance is achieved during the correction period. For immediate jeopardy, termination would take effect in 23 days if no temporary manager is appointed or accepted. This proposal would not require any mandatory fines but rather, would leave the choice of remedy to the State or HCFA. Other statutorily driven remedies have also been included in the proposed plan.

One State organization proposed a matrix which had five severity levels (harm or death; negative outcome non-staff action; negative outcome staff action; negative outcome likely; and no negative outcome). As in some other proposals, the scope levels remained as we had provided in the proposed rule. Under this plan, no remedies would be imposed for severity level of 1 and scope of 1 or severity level of 1 and scope of 2 or severity level of 2 and scope of 1. A plan of correction would be required for a severity and scope of 1–3, 1–4 and 2–2, respectively. A civil money penalty would be imposed for a severity and scope of 2–3 and 2–4. No fine would be imposed for a scope of 1, even if a deficiency is at the severity of 3 or 4. Denial of payment for new admissions would only be imposed for severity levels of 4 and 5 (except severity 4 and scope of 1). This plan also would exempt facilities from any remedies in certain situations where new requirements had not been disseminated to nursing homes.

Another State organization proposed a scope and severity scale using the four scope levels defined in our proposed rule, but defining the severity levels differently. The four severity levels would be defined as level 4—life threatening harm or death; 3—actual harm; 2—potential harm; and 1—no harm or likelihood of harm. Severity and scope of 1 would have no remedies imposed. Severity level of 1 and scope of 2 and severity of 2 and scope of 1 or 2 would have no remedy imposed the first time the deficiency was cited, but the State or HCFA would impose a directed plan of correction if the same deficiency(ies) was found at the next survey. This plan also requires the State or HCFA to choose between a denial of payment for new admissions or a civil money penalty for severity levels of 3 and 4.

Another State disagreed with our use of the term immediate jeopardy relative to the scales because it believes that the term, as described for the scales, carries no connotation of immediacy and is not equivalent to the language "likely to cause at any time" we had proposed in the definition of the term in § 488.201 of the proposed rule. Also, the State questioned our definition of substandard quality of care in relationship to severity and scope. It believed that substandard quality of care should not apply to one or two residents but should reflect deficient patterns of care, policies or procedures present in or used by the facility. The State recommended that HCFA provide that a finding of substandard quality of care may be made (but is not required) for scope levels of 1 and 2 and severity levels of 3 and 4.

Several commenters suggested that severity levels 3 and 4 should be redefined. Specifically, these commenters found virtually no difference in the application of remedies in the two levels. Other commenters believed that a potential for life threatening harm should not be an immediate jeopardy finding subject to harsher remedies.

Many commenters disagreed that facilities be furnished with a separate summary of all level 1–1 deficiencies rather than receiving notice of them on the official deficiency statement. They believed that it would be confusing to have a facility's deficiencies recorded, in parts, between two separate documents, as well as harder to track repeat deficiencies at the next standard survey.

Many commenters made specific recommendations of required remedies for various levels of severity and scope. Some suggested that HCFA or the State only impose a plan of correction at the lower scope and severity levels, while other commenters wanted HCFA to mandate civil money penalties and other remedies.

Many consumer advocates expressed concern that the proposed scope and severity scales did not represent the intent of the Congress to make resident rights and physical environment requirements equivalent to quality of care requirements. They contend that the way the scales are currently written, resident rights and physical environment deficiencies would never rise above severity level 2.

A few commenters believe that the scope and severity scales should be predicated on a statistical analysis of probability and suggest that this could be done by health care professionals who could factor into the scales the predisposition of a given individual to a particular incident. Many commenters asked that the ambiguous terms used within the level descriptions be defined,

for example, how many cases constitute "in a number of cases." One commenter suggested that a numerical or percentage determination be made to clarify the terms, for example, 1–3 instances = isolated, or less than 17 percent occurrences = isolated.

One commenter suggested that the scope scale include only three levels, combining the proposed levels 3 and 4 because there was no distinction for the remedies. Another commenter observed that the scope scale level descriptions were written in terms of the number of times that the surveyors made a particular observation, and contended that while this approach may be appropriate for certain types of problems, it is not for others. For example, when surveying for life safety code compliance, what scope would be assigned to a total sprinkler system failure? This problem is a single observation, but it is one that affects every resident in the facility. This commenter, therefore, suggested that if we are to accurately reflect the extent of the deficiency, then scope should be based on the number of residents who are affected by the deficient practice. Overall, many commenters feared that the scope and severity scales, as proposed, give the enforcing agency virtually unlimited discretion in selecting remedies. They contended that the proposed scheme does not limit imposition of the most onerous remedies only to the most serious deficiencies and they, therefore, suggest that a prescriptive approach be developed for correlating deficiencies and remedies.

Response: Historically, the enforcement system was based on a hierarchical set of requirements called conditions of participation, standards, and elements. Each condition of participation included groups of standards, and standards were made up of separate elements. Enforcement was based on the level of the requirement for which a deficiency was cited. For example, condition-level deficiencies in a SNF resulted in the initiation of termination procedures or a denial of payment for new admissions. However, if only standard-level deficiencies were found, only a plan of correction was required. Since the Congress has expressly eliminated the use of hierarchical requirements in nursing homes, we needed an organized way to determine how serious a facility's deficiencies are, as well as a consistent approach to guide enforcing agencies in making enforcement decisions.

We believe that we have implemented the Congress' mandate to abandon our pre-OBRA hierarchical requirements and to develop a system capable of detecting and responding to deficiencies in any participation requirement. The enforcement scheme provided in this final rule is built on the assumption that all requirements must be met and enforced and that requirements take on greater or lesser significance depending on the circumstances and resident outcomes in a particular facility. In addition, we wish to emphasize that measuring the seriousness of deficiencies is only for the purpose of determining the enforcement response most appropriate for specific degrees of noncompliance.

In order to grant the statutory flexibility given to HCFA and the States to design their own enforcement approaches (with guidance from the Secretary), we are providing a modified enforcement scheme to be used to assess the seriousness of deficiencies and then used to select an enforcement response. The scheme requires that specified factors be considered by HCFA or the State to assess the seriousness of a facility's deficiencies, and it correlates seriousness to specific enforcement responses. However, with the exception of the immediate jeopardy level, the enforcing agencies may exercise the flexibility to design their own methods of interpreting and applying the assessment factors to the identified deficiencies. Historically, determinations of immediate jeopardy to resident health or safety have been made by HCFA and the States in accordance with guidance provided in Appendix Q of the State Operations Manual. We conclude that there is no compelling reason for States to redefine this level of noncompliance. The enforcing agencies may also exercise their statutory authority to determine whether an alternative remedy is or is not preferable to termination. In determining the seriousness of Life Safety Code (LSC) deficiencies, States are encouraged to apply the Fire Safety Evaluation System (FSES), which is Appendix C of the 1985 edition of the LSC. Since the FSES is an equivalency system based on point values, it is possible to utilize the system to document the seriousness of deficiencies on a quantitative basis in accordance with the revised enforcement matrix. Once the seriousness of the deficiencies is determined and the decision to impose alternative remedies instead of, or in addition to, termination, HCFA or the State must make its remedy selection from the remedy category associated with the specific level of noncompliance. This correlation is provided in § 488.408 of this final rule.

This approach has the added benefit of promoting national consistency because all systems will be considering the same initial assessment factors, and the remedy choice will then be based on the nature of the noncompliance and the corrective action most likely to achieve correction and continued compliance. In other words, we developed, for use by the States and by HCFA, an organized and consistent method by which to first, determine how serious a facility's deficiencies are, and second, to select an enforcement response from a specified remedy category linked to that degree of noncompliance.

We believe that the enforcement scheme we are providing in this final rule for HCFA and the States to use in rating deficiencies and selecting remedies satisfies a variety of concerns posed by the former scope and severity scale and the proposed rule in general. Under the proposed rule, we set out two scales, one for scope and one for severity, that HCFA and the States were to apply in determining which remedy to apply once deficiencies were identified. While the rule provided some definition for each of the levels of scope and severity, HCFA and the States were essentially free to determine what constituted a "sufficient" number of "repeated observations" in concluding whether or not a "pattern" of deficiencies could be said to exist.

In the final rule, we have removed the scope and severity scales, as such, and have replaced them with a set of criteria that must be used (should a decision be made to impose alternative remedies at all) to select an enforcement remedy. Specifically, while the enforcement scheme in this final rule is conceptually the same as the former scope and severity scales, it differs from that approach in numerous significant ways:

- It leaves to the judgment of both HCFA and the States whether to impose alternative remedies at all, regardless of the seriousness of a facility's deficiencies.
- It incorporates the concept of substantial compliance, whereby deficiencies found which constitute no more than a potential for minimal harm are not sanctioned.
- With the exception of immediate jeopardy, a State may use its own method for interpreting terms that describe the relative frequency or seriousness of deficiencies as long as it is consistent with the guidance presented in the regulation.
- It correlates, to a greater extent than in the proposed rule, specific enforcement categories from which an

enforcement response must be selected with specified degrees of noncompliance.

• It can be applied to physical environment deficiencies, as well as to all others, and it should relieve commenters' fears that resident rights violations and physical environment deficiencies could not be considered as serious deficiencies.

• Providers will have a clearer idea of the enforcement consequences they could be subject to for specific degrees of noncompliance because, in § 488.408, we have correlated enforcement categories with levels of noncompliance.

The establishment of these remedy categories will provide regulatory guidance to HCFA and the States in selecting remedies and will necessitate that States and HCFA clearly define the seriousness of cited deficiencies in order to select an appropriate remedy.

We have not accepted any of the commenters' proposed revisions to the scope and severity scales for inclusion in the modified enforcement scheme in this final rule. After reviewing the proposals, we concluded that, while the terminology may have been different, all of the proposals were conceptually the same as the scales that were published in the proposed rule. In addition, those commenting provided no evidence (for example, success data) to indicate that their respective proposed enforcement systems would be more effective than the scales we published in the proposed rule. We, therefore, have not adopted any of the commenters' proposals in place of the enforcement model we are presenting in this final rule. In addition and equally noteworthy, we spent considerable time meeting with various groups representing the nursing home industry, State agencies and consumer organizations to discuss and seek input on the various approaches to restructure and refocus the survey and enforcement processes. The resulting approach was presented in the notice of proposed rulemaking as well as in what has been carried over into this final rule.

In response to concerns that repeated 1–1 deficiencies (now referred to as isolated deficiencies that HCFA or the State determines constitute no actual harm with a potential for minimum harm) would be hard to monitor on subsequent surveys, we note that, while such deficiencies are not cited on the official deficiency statement and are not sanctioned, their existence is maintained in the official provider file along with the official deficiency statement. The separate listing of these deficiencies is also accessible to the surveying agency and disclosable to the public.

While we intend that the enforcement scheme provide internal guidance to States and to HCFA, we are including it in the regulations to provide the public, and particularly regulated facilities and facility residents, with full disclosure as to how enforcing agencies will determine appropriate remedies for providers that have been found out of compliance with Federal participation requirements.

Comment: One commenter wanted a remedy to be imposed for insufficient nurse staffing.

Response: The law requires that nursing homes meet all participation requirements. Should noncompliance with nurse staffing requirements be identified, either during an extended survey or when a waiver of RN and/or licensed nursing staffing has been requested or granted, the facility would be subject to an enforcement response from HCFA or the State, just as it would be for other instances of noncompliance.

Comment: Some commenters wanted to remove the distinction between initial and secondary factors in § 488.404 (proposed at § 488.208) believing that the secondary criteria are equally important as the initial assessment.

Response: The secondary factors are not less important; they just come later in the process of selecting an appropriate remedy or remedies. However, we are replacing the word "secondary" with the word "other" to avoid any further confusion. The first step is to assess the seriousness of the deficiency(ies), including the presence or absence of immediate jeopardy, to determine the minimum recommended categories of remedies to impose, as well as the suggested optional categories from which to choose. The other factors (that is, the relationship of one deficiency to other deficiencies, and the facility's prior compliance history in general and specifically with reference to the cited deficiencies) assist in making choices from among all remedies available in any of the categories applicable to specific deficiencies.

Comment: Other commenters want the compliance history of the facility to remain secondary because facilities with a change of ownership and/or personnel may not be able to otherwise emerge positively due to poor compliance in the past. It was suggested that we change § 408.404 (proposed at § 488.208) accordingly.

Response: We did not revise the regulations text to reflect this suggestion. A facility's prior compliance history should be considered regardless of a change in ownership. A facility is purchased "as is." The new owner acquires the compliance history, good or bad, as well as the assets. While we agree that after consideration of the facility's compliance history, HCFA or the State may conclude that such history is no longer a valid predictive factor of the facility's ability to achieve and maintain compliance (for example, following a change of ownership where the new owner "cleans house") the burden of proof is on the new owner to demonstrate that poor past performance no longer is a predictive factor.

Comment: Other commenters wanted additional factors to be considered in addition to those outlined in § 488.404 (proposed at § 488.208). The suggestions for additional factors are:

• Whether the deficiency or deficiencies are directly related to resident care;

• The corrective, long-term compliance, resident protective, and non-punitive outcomes sought by the agency;

• The facility's degree of culpability;

• The accuracy, extent, and availability of facility records;

• The facility's financial condition;

• Any adverse effect that the remedy would have on the health and safety of facility residents;

• Whether there has been a change in ownership or operation of the facility;

• The facility's action to correct the deficiency prior to the conclusion of the survey.

Response: While we are not expanding § 488.404 to include these additional factors, there is nothing to preclude HCFA or the State from considering any other factors they believe to be relevant in the decision-making process. We are, however, revising § 488.404(b) to clarify that the other factors that HCFA and the State may consider include, but are not limited to, only those factors listed. Because we do not want to limit valid assessment considerations unnecessarily, we do not desire to provide an all-inclusive list. We realize that it is impossible to predict every factor that would have a bearing on every particular case. The two factors that we have included in the regulatory model have a direct bearing on the determination of the most appropriate remedy or remedies. We have explained above how the interrelationships among deficiencies can impact the decision to impose one as opposed to several remedies. The second factor, the facility's prior compliance history, is pertinent because sections 1819(h)(2)(B), 1919(h)(2)(A), and

1919(h)(3)(C) of the Act provide for increased penalty amounts for uncorrected or repeated noncompliance. Moreover, sections 1819(h)(2)(E) and 1919(h)(2)(D) of the Act require the imposition of the denial of payment remedy for repeated substandard quality of care.

Comment: One commenter didn't believe that surveyors should make binding decisions regarding remedies, but rather this authority should be retained by the surveyors' supervisor in order to promote centralization as well as consistency in decision making.

Response: Surveyors do not have the authority to make binding enforcement determinations; rather, either HCFA or the State makes binding enforcement determinations in accordance with criteria at § 488.452.

Section 488.406 Available Remedies

While analyzing the comments for this section, we again reviewed the provisions of the Act to ensure conformance in the final regulation. In doing so, we noted that proposed § 488.206(c) did not include the remedies of civil money penalties, temporary management, and closure of the facility and transfer of residents, or their equivalents, in the listing of available remedies. We have also clarified that, regardless of what other additional remedies a State may have approved, the State must establish, at a minimum, those specified remedies, or an approved alternative to a specified remedy, that is, termination, State monitoring, denial of payment for new admissions, closure of a facility by the State in emergency situations and/or transfer of residents, civil money penalties, and temporary management. We are correcting this oversight in this final regulation.

In addition, during the process of reviewing and analyzing comments, we added another remedy. This remedy, directed in-service training, is described in the discussion of § 488.425.

Also, since the proposed § 488.228, "Alternative or additional State remedies", contained virtually the same information as this section, we are eliminating the proposed § 488.228 and moving the remaining non-duplicative provisions to this section. All comments received in response to proposed § 488.228 are being included and addressed below.

Comment: One of the major concerns expressed throughout the comments was that it should be possible to address many or most instances of facility noncompliance through a traditional plan of correction. Several commenters indicated that plan of correction should be added to the list of possible remedies.

Response: A plan of correction is a minimum requirement for any facility with deficiencies other than those isolated deficiencies that HCFA or the State determines constitute no actual harm with a potential for minimal harm, and, as for other providers and suppliers, it is not considered an enforcement remedy. Therefore, while we are clarifying the regulation to require that a facility complete and submit a plan of correction each time deficiencies are noted (other than those isolated deficiencies that HCFA or the State determines constitute no actual harm with a potential for minimal harm), we are not adding plan of correction to the listing of available remedies.

Comment: Many commenters expressed concerns that the proposed remedies are punitive rather than corrective in nature, excessively burdensome in relationship to the deficiencies, too harsh or that they will direct the focus away from resident care, thereby having a negative effect on long term care. Some commenters stated that the remedies do not allow for one time digressions from a facility's history of compliance. Others believed that the proposed remedies would threaten job security for nursing home staff or the security of facility residents.

Response: As indicated in response to the previous comment, many commenters assumed that it was not possible to have a plan of correction as the only corrective measure required in a facility, even when the deficiencies were of a low degree of seriousness. In this final regulation, we acknowledge that a traditional plan of correction may be the only measure needed to correct deficiencies in some facilities which have only lower level deficiencies. While we believe that using plans of corrections in this fashion should alleviate some of the concerns expressed by the commenters, we do not accept the notion that the use of more severe remedies for more severe deficiencies is excessive. There can be little question that the Congress was concerned about what it concluded was an unsatisfactory enforcement scheme prior to nursing home reform. As a result, it wrote into the law a series of remedies that it expects to be used should circumstances at individual facilities warrant. The driving force behind the legislation in this context was to provide the Secretary and the States with the authority to aggressively enforce the Act's new requirements in a way that would discourage facility noncompliance that the Congress believed to be widely evident between surveys, and thereby, to encourage lasting compliance. The design of these enforcement rules provides for incrementally more severe remedies as cited noncompliance is more egregious. We do not believe that an enforcement approach styled this way is harsh or excessive.

Comment: Six commenters suggested that the regulation include a remedy which would allow a ban on all admissions to a facility, regardless of the resident's source of payment. Three commenters further indicated that this remedy should be mandatory in cases involving immediate jeopardy.

Response: We cannot accept these suggestions. The Act does not provide the authority to ban admissions for residents whose source of payment is other than Medicare or Medicaid. The Act does provide for the remedies of denial of all payment for SNFs and NFs by the Secretary and for denial of payment for all new admissions for SNFs by the Secretary, and for NFs, by the Secretary or the States. The proposed rule included denial of payment for all new admissions in certain diagnostic categories or requiring specialized care, but we have not included that remedy in this final rule for the reasons discussed under "Denial of Payment" later in this preamble. We believe that these remedies, along with the other available remedies for noncompliance, should be sufficient to promote a shift from noncompliance to substantial compliance.

Comment: Two commenters stated that the option of closing the facility should be available for SNFs and not just for those facilities that participate as NFs or SNF/NFs.

Response: For SNFs, HCFA has termination as an option for remedying noncompliance. While HCFA can terminate a SNF's Medicare participation, it cannot revoke a facility's license to operate within a State. Therefore, actual closures of facilities and transfers of residents are remedies which are options only for those facilities for which the State is the enforcing agency because the State also has licensing authority; closures of facilities are license related actions.

Comment: One commenter proposed that off-site monitoring be added to the list of available remedies.

Response: We are not accepting this suggestion. Enforcement remedies are designed to motivate providers to achieve and maintain compliance with participation requirements. The motivation is provided by the nature of the various available enforcement

remedies that either require some action to be taken by the provider or that involve financial consequences directly or indirectly to the provider. Since off-site monitoring would be performed by the State rather than imposed on the facility, and since there would be no responsibility and, therefore, no incentive for a facility response, we conclude that this type of monitor is not an enforcement remedy to be imposed against facilities with deficiencies.

Comment: One commenter proposed the addition of State and Secretarial authority to order the hospitalization of residents in cases involving immediate jeopardy, if the facility is unable or unwilling to respond to the residents' needs.

Response: We do not believe an additional remedy is needed in order to respond to this commenter's concern. As temporary management will be imposed in those cases where immediate jeopardy is identified in a facility that will not be terminated immediately, control of the situation, including determinations as to the care of individual residents, will be shifted away from the facility's own management until the jeopardy is removed. Should the facility fail to relinquish control to the temporary manager, termination will result and residents will be transferred to facilities that are able to provide care in a manner consistent with certification requirements.

Comment: One commenter proposed that public notice be included as an available remedy.

Response: Public notices are already required by regulation for any SNF termination. Public notices are also allowed, but not required (unless the State has its own public notice requirement), for NFs that will be subject to termination.

We do not believe that the regulation should expand the use of public notices as a remedy for noncompliance by including them in this section's listing. Public notices are frequently costly, and they do not always serve the intent of notifying the widest possible audience of a facility's noncompliance. Further, facilities are already required to post the availability of the results of their surveys on their premises. Accordingly, we are not adopting this suggestion in the final regulation.

Comment: A few commenters indicated that the prohibition of nurse aide training and competency evaluation programs (NATCEPs) is a penalty which should be included in the listing of available remedies.

Response: The prohibition of a NATCEP is predicated on, among other things, the existence of a nurse staffing waiver, the fact that a facility has been subject to an extended or partial extended survey, or the imposition of an adverse action, including termination of the provider agreement. The enforcement remedies, on the other hand, are the consequences of facility noncompliance once deficiencies have been identified through the survey process. While the disapproval of a NATCEP is automatic when criteria set forth in the Act are met, the imposition of remedies is a matter requiring some discretion on the part of HCFA or the State.

It is possible for a facility with a nurse staffing waiver to be surveyed and have no deficiencies identified or have no deficiencies found which cause the facility to be out of compliance. In these cases, an enforcement action would not be in order, even though other provisions of the Act and regulations would require that a prohibition of a NATCEP be imposed. Further, it would be possible for a facility with no nurse staffing waiver, which had not been subject to an extended or partial extended survey, to have a civil money penalty imposed as a remedy for deficiencies identified. In this latter case, the civil money penalty is the enforcement remedy, and not the prohibition of a NATCEP, which is an automatic statutory consequence of the civil money penalty being imposed.

Because we believe that the Act, as well as regulations published on September 26, 1991, separately address how the State arrives at the disapproval of a NATCEP as opposed to how it or HCFA determines that an enforcement action is in order, we are not adopting these comments in the final regulation.

Comment: One commenter indicated that denial of payment for new admissions for certain diagnostic categories is too difficult to implement or monitor. Another stated that it is too broadly defined and that it was not the intention of the Act to modify remedies included in the Act.

Response: The first comment is discussed in detail under "Denial of Payment" later in this preamble.

Regarding the comment that the Act does not allow for modifications of its listed remedies, we point to the provisions of the Act at sections 1819(h)(2)(B), 1919(h)(2)(A), 1919(h)(2)(B)(ii) and 1919(h)(3)(C), all of which indicate that remedies other than those specified in the Act are allowed.

Comment: Two commenters asked that the proposed available remedy of denial of payment for new admissions for certain diagnostic categories be amended to ensure that it not promote discrimination against residents a facility does not want to admit. Both indicated that a directed plan of correction should be required in these situations, and one comment further stated that the directed plan of correction should direct the facility on how to regain the capability to care for residents with the designated diagnoses.

Response: This issue is discussed in detail under "Denial of Payment" later in this preamble.

Comment: Five commenters indicated that HCFA should specify in the regulation the criteria by which the Secretary will determine whether a State's alternative or additional remedies are as effective in determining noncompliance and correcting deficiencies as the remedies specified in the Act. Other commenters insisted that any alternative or additional remedies must be made available for public comment before adoption.

Response: We agree that there is a need for uniformity in the process which is used to approve State remedies which are alternative or additional to those included in the regulation. While we will prepare manual instructions that will address how these reviews and approvals should be processed, we believe such information is not appropriate for the text of the regulation itself since it would be impossible to contemplate the vast array of alternatives that States might propose. The Act does not require and HCFA will not require specific public notice procedures that limit State prerogatives in the State plan amendment process.

Comment: One commenter indicated that States should be able to develop and implement additional or alternative remedies unless HCFA can demonstrate that the States' remedies are not as effective as the HCFA remedies.

Response: We cannot adopt this comment. The Act provides, at section 1919(h)(2)(B)(ii), that the State must demonstrate to the Secretary's satisfaction that the alternative or additional remedies it proposes are as effective in deterring noncompliance and correcting the noncompliance as those included in the Act. To shift the burden of proof to HCFA would be contrary to the Act's clear instruction.

Comment: One commenter indicated that any State remedies approved as alternative or additional remedies should apply to SNF/NFs as well as NFs, unless HCFA takes a different action based on a validation survey.

Response: The determination of whose remedies prevail in a dually participating facility is made in accordance with section 1919(h)(7) of

the Act and codified at § 488.452 of this final rule.

Comment: One commenter indicated that the final rule should clarify and refer to the relationship of these rules to the sanctions available under section 1128 of the Act and to how the Office of Inspector General's (OIG) actions will have an impact on enforcement actions taken under this regulation.

Response: The provisions of sections 1819(h) and 1919(h) of the Act, for which HCFA takes action, and the provision of section 1128 of the Act, for which the OIG takes action, are two independent sources of enforcement authority that are triggered by separate considerations. Section 1128 of the Act contains mandatory and permissive exclusions which are, for the most part, applied in cases of individuals and entities who have been charged with or convicted of certain types of behavior (such as fraud and abuse, and obstruction of investigation) under Federal or State law. Section 1128 does not generally apply to cases of facility noncompliance, which are covered under sections 1819 and 1919 of the Act that specify survey and enforcement provisions. Section 1128A is cited in sections 1819 and 1919 to give guidance on the imposition of civil money penalties which will be imposed in accordance with common statutory provisions by HCFA and OIG for their respective purposes. If a case happens to involve both noncompliance and fraud, abuse or obstruction of investigation, each agency has the authority to take separate action, independently of the other.

Comment: Commenters from several States indicated that their States had effective remedies that should be adopted without change. One commenter stated that HCFA approval of alternative or additional remedies should not be required.

Response: The Act gives the States the option of requesting that HCFA authorize the adoption of existing State remedies. The regulation follows the Act, which leaves the decision to request the adoption of these remedies up to each State. However, the Act provides that HCFA approval is necessary and that the State must bear the burden of proof that any alternative or additional remedies are as effective as the remedies specified in the Act.

Comment: Several commenters were concerned that the State's ability to impose alternative remedies instead of termination was impaired by the proposed provision that would require the repayment of the Federal share of the Medicaid payment (FFP) if the correction of the deficiencies was not made in accordance with the approved plan and timetable. These commenters said that the regulations should allow States to enter into agreements under which the facilities would agree to repay States, which would then repay the Federal government FFP if compliance was not achieved according to the approved plan.

Response: Neither the Act nor the proposed or final regulations prevent the States from entering into agreements with facilities to repay States if the facility fails to adhere to its plan of correction. The Act is silent on this issue. Therefore, it follows that the States have the option to consider such agreements with facilities. Many facilities may find such agreements preferable to termination.

Comment: One commenter stated that the authority to implement alternative or additional remedies should rest within the single State agency.

Response: The Act gives the States the authority to elect alternative or additional remedies through the use of the Medicaid State plan process. Medicaid regulations at § 431.10 specify that a single State agency administer or supervise the administration of the State plan. In most States, the Medicaid agency is the single State agency that implements the current transitional enforcement remedies against Medicaid facilities. In some States, enforcement remedies, such as civil money penalties, are implemented by the survey agency. We believe that States should retain the flexibility to organize their enforcement activity as they deem necessary as long as the organizations meet Medicaid regulations.

Comment: One commenter believed that every State should implement the same penalty system.

Response: We cannot accept this suggestion because the Act permits the States to elect alternative or additional remedies if they can demonstrate that the alternative or additional remedies are as effective as the remedies specified by the Act. Further, section 1919(h)(2)(A) of the Act provides that the State shall specify criteria, as to when and how each remedy is to be applied, the amount of any fines, and the severity of each of these remedies, to be used in the imposition of such fines.

Comment: One commenter suggested that the final rule include a list of remedies other than termination which HCFA finds acceptable.

Response: Such a list is provided at § 488.406(a) and (b).

Section 488.408 Selection of Remedies

The comments we received on this section, as it was proposed, which relate to the factors considered when making remedy determinations, have already been included and addressed in our discussion of § 488.404 of this preamble.

Comment: Some commenters were uncertain about how the "determination" of remedies in § 488.404 and the "choice" of remedies in § 488.408 differ.

Response: We are retitling §§ 488.404 and 488.408 to "Factors to be considered in selecting remedies" and to "Selection of remedies," respectively, and are revising the content of both sections as a result of the revision to the criteria for selecting among enforcement options as discussed earlier in this preamble. After the survey team has determined that a deficiency or deficiencies exist, it is required to determine the seriousness of the violations. The factors that HCFA and the States must and may consider in determining the seriousness of a facility's deficiencies can be found at § 488.404. The optional process of determining the most appropriate enforcement action is described at § 488.408, which correlates the level of noncompliance with a required and/or optional category of remedies.

Comment: A few commenters wanted HCFA to include a statement from the preamble of the proposed rule that asserts "the more pervasive or severe the facility's shortcomings, the more severe the penalty."

Response: We agree with the commenters, and are providing such a linkage in the revised § 488.408.

Comment: Some commenters wanted HCFA to explain the purpose of intermediate sanctions.

Response: The purpose of an intermediate sanction (or alternative remedy) is to motivate providers to achieve and maintain substantial compliance before termination becomes necessary. Prior to OBRA '87, the term "intermediate sanction" was limited to a denial of payment for new admissions. Sections 1819(h) and 1919(h) of the Act specify that remedies for noncompliance are to be imposed in lieu of, or in addition to, the remedy of termination of a facility's participation in the programs. This legislation expanded the range of alternative remedies for the Secretary and the State to use as an incentive for correction and as a way that might avoid termination of the provider agreement.

Comment: A few commenters wanted to revise § 488.408 to require that HCFA and the State make appropriate remedy

selections, but not select a specific remedy solely to punish the facility.

Response: Alternative remedies are designed to motivate providers to comply quickly with the requirements of participation. While some providers may view the remedies as punishment, our first responsibility is to protect the health and safety of the residents. We are interested in motivating providers to achieve and maintain compliance with health and safety requirements so that they may continue to provide quality services to the residents. Accordingly, the selection of an enforcement action is based on that which is most likely to elicit a prompt response from the facility to achieve and maintain compliance before termination becomes necessary. We believe the proposed change does not significantly add to the process of selecting remedies; therefore, we are not incorporating it in the final regulation.

Comment: A few commenters wanted a definition of "clusters of deficiencies" included in § 488.408, which deals with the initial assessment of the seriousness of deficiencies. Other commenters wanted instruction on which deficiencies are cited as a cluster versus those deficiencies cited individually.

Response: We have removed the reference to clusters in this final rule because we do not want to limit the discretion HCFA and the States have been given by the statute to make enforcement decisions. We believe that the relationship between and among deficiencies is inherent in remedy determinations and should be made on a case-by-case basis. While we do not intend to include instructions in this final rule on which deficiencies would be treated individually and which would be consolidated, we will offer examples in the HCFA Regional Office Manual and the State Operations Manual of how deficiencies could be grouped together.

Comment: We received many general comments about how HCFA should be more specific in its guidance on selecting an appropriate remedy. This guidance must help determine the criteria for the selection of remedies and must require the use of specific remedies for particular deficiencies. Some of these commenters suggested a scope and severity scale linked with specific remedies at specific levels.

Response: While we agree with the above commenters advocating more guidance on the selection of remedies, and have developed an enforcement scheme capable of doing just that, we are bound by the statutory provisions giving HCFA and the States some discretion in designing their own schemes within a Federal framework. Therefore, we are providing the method by which facility deficiencies, including physical environment deficiencies, will be measured, and we are linking specific categories of remedies with certain levels of noncompliance. We are revising § 488.408 accordingly.

Comment: Many commenters believe that level 1–1 deficiencies, now referred to as isolated deficiencies which HCFA or the State determines constitute no actual harm with a potential for minimal harm, must be cited and a plan of correction required. Additionally, these commenters urge that every deficiency should be cited before leaving the facility. They believe that unless each deficiency is cited, important patterns of repeat noncompliance can be missed.

Response: We disagree. As we stated in the preamble to the proposed rule, providers must be aware that they are responsible for complying with all participation requirements. Notifying the facility of this level of deficiency acknowledges that a problem could potentially occur if the deficiency is permitted to go uncorrected. While no formal plan of correction is required for this low level deficiency and no remedy is applied, correction is necessary nevertheless.

The exit conference focuses primarily on the most serious preliminary findings by the surveyors. While the survey team documents its observations relative to the survey, the surveyors' findings are not official until the provider receives the official deficiency statement.

Comment: Many commenters commended HCFA for prohibiting facilities from challenging the choice of remedy or remedies. These commenters assert that giving the facility the right to challenge the existence of deficiencies adequately protects their rights. A few commenters agreed that the choice of the remedy should not be appealable but that the scope and severity of a deficiency should be. Other commenters believed providers should be permitted to formally appeal both the existence of a deficiency as well as challenge determinations of scope and severity and the remedy imposed.

Response: The most important issue on which to grant an appeal is the existence of deficiencies which lead to a remedy. We are requiring that such an appeal before an administrative law judge be offered, and that dispute resolution procedures be applied first, at the request of the provider.

Providers have the opportunity to appeal certifications of noncompliance leading to an enforcement remedy but, with the one exception noted below, do not have the opportunity to appeal either the level of noncompliance or the enforcement choice made by HCFA or the State. We have reached this conclusion for several reasons. First, as a general matter, whether HCFA or a State chooses one remedy or another to address facility noncompliance is a matter that we believe is a prosecutorial prerogative of the government, not with the provider of services. It is an inherent function of government in this context to make choices as to which kind of enforcement action will best achieve prompt compliance so that residents face noncompliant conditions for as short a time as possible.

Second, in the case of provider agreement terminations, even if a facility were able to successfully contest a conclusion that immediate jeopardy exists, the agency could still proceed with the termination action since the agency's authority to bring such an action is not limited to immediate jeopardy cases, but may span all noncompliant facility behavior. As has been agency policy for many years, the determination of what remedy to seek is beyond challenge in light of the government's fundamental necessity to protect the welfare of facility residents as expeditiously as possible. This is especially the case with respect to provider agreement terminations since residents may be at considerable risk even where there is no immediate jeopardy.

Third, in the case of most alternative sanctions, the regulations are structured so that whether a facility's noncompliance falls in category 1 or category 2, HCFA and the States have complete discretion to choose from either category. Thus, even if a facility were able to successfully demonstrate that the agency had erred in its conclusion that the noncompliance belonged in category 1, that fact would be irrelevant since noncompliance in category 1 could still trigger the same remedy. Only a showing that the facility was in substantial compliance would enable the facility to avoid sanctions, and it is this issue that we agree must be subject to challenge.

Fourth, with respect to the imposition of temporary management, a facility facing this remedy would have the opportunity to argue during informal dispute resolution that the agency had erred in concluding that immediate jeopardy existed. Should it succeed in making this showing, the remedy would not be imposed. On the other hand, should the facility fail to convince agency officials that the noncompliance was of a lesser nature, the facility would

face temporary management well before it could more formally challenge the agency finding of immediate jeopardy. Thus, even if the facility ultimately prevailed in a hearing in proving that its noncompliance posed less than immediate jeopardy, the facility's appeal would not be effective since the remedy would have already been imposed and the facility would either have achieved substantial compliance or been terminated by the time of the hearing.

For this reason, we considered whether, in light of this sequence of events, facilities should be given a prior hearing in temporary management cases, but concluded that would completely undermine the purpose of this remedy which is to resolve the most serious noncompliance in the shortest possible time frame. This is particularly the case when facilities facing such remedies have available to them an informal means to contest agency action prior to the imposition of the remedy and when, ultimately, it is the facility's choice to accept temporary management rather than face termination. Accordingly, we concluded that in the balancing of interest of facilities and residents in such cases, the interests of residents must take precedence.

Only in the case of civil money penalties could we see the necessity of allowing facilities the opportunity to challenge the level of noncompliance since the amount of these penalties hinges upon discrete levels of noncompliance rather than noncompliance as a whole. Thus, it may be legally significant to a facility facing a $10,000 per day civil money penalty to be able to prove that its noncompliance belonged in category 2, rather than category 3, since in category 2 the largest civil money penalty available to HCF or a State would be $3,000 per day. Accordingly, we are revising the rules to allow a facility to challenge the level of noncompliance when a successful challenge on this issue would affect the amount of a civil money penalty that HCFA or a State could collect.

We believe that a provider's burden of upsetting survey findings relating to the level of noncompliance should be high, however. As we indicated in the proposed rule, distinctions between different levels of noncompliance, whether measured in terms of their frequency or seriousness, do not represent mathematical judgments for which there are clear or objectively measured boundaries. Identifying failures in a facility's obligation to provide the kind of high quality care required by the Act and the implementing regulations most often reflect judgments that will reflect a range of noncompliant behavior. Thus, in civil money penalty cases, whether deficiencies pose immediate jeopardy, or are widespread and cause actual harm that is not immediate jeopardy, or are widespread and have a potential for more than minimal harm that is not immediate jeopardy does not reflect that a precise point of noncompliance has occurred, but rather that a range of noncompliance has occurred which may vary from facility to facility. While we understand the desire of those who seek the greatest possible consistency in survey findings, an objective that we share, the answer does not lie in designing yardsticks of compliance that can be reduced to rigid and objectively calculated numbers. Survey team members and their supervisors ought to have some degree of flexibility, and deference, in applying their expertise in working with these less than perfectly precise concepts. For these reasons, we have revised the regulations to require an administrative law judge or appellate administrative review authority to uphold State or HCFA findings on the seriousness of facility deficiencies in civil money penalty cases unless they are clearly erroneous.

Comment: A few commenters believe it is not sufficient to simply state that the choice of a remedy is not appealable and recommend that the regulation explicitly state that HCFA will not look behind or "second guess" the State's selection of remedy or remedies.

Response: We cannot accept these comments as sections 1919(h)(6) and (7) of the Act specify the means to resolve any disagreement between the State and the Secretary regarding noncompliance or enforcement action.

Comment: Some commenters wanted sanctions imposed upon the facility for interfering with the survey team, monitor or temporary manager.

Response: Section 1128(b)(12) of the Act permits the Secretary to exclude SNFs from Medicare and to direct that NFs be excluded from Medicaid for failure to grant access to the applicable survey agencies performing survey and certification functions in accordance with sections 1864(a) and 1902(a)(33)(B) of the Act. Failure to grant access can certainly be regarded as interference with the activities of State agency personnel. However, interference with the temporary manager is different. Sections 488.410 and 488.438 specify that if the facility does not agree to the conditions under which the temporary manager is imposed, the facility may refuse to relinquish control to the temporary manager, and, in so doing, opt for termination.

Comment: One commenter wanted HCFA to include a "sole community provider exception" to allow States to oversee the operations of noncompliant facilities with uncorrected deficiencies in rural areas, where the closure would result in hardship to the residents and the community.

Response: States have the authority to oversee (appoint a State monitor) any noncompliant facility, regardless of the location. However, if the commenter wants a provider in a rural area to be exempted from correcting deficiencies, we do not have the authority to grant such an exception. Waiver authority requirements are provided at § 483.70 and at § 483.30(c) and (d), relative to the Physical Environment and Nursing Services participation requirements, respectively, and then only when specified conditions are met.

Section 488.410 Action When There Is Immediate Jeopardy

In conducting our review of the provisions of the regulation for conformance with the Act, we noted that the Act uses "immediate jeopardy to resident health or safety" to describe those situations in which immediate corrections must be achieved and immediate enforcement action must ensue, while the text of the proposed rule refers to such situations as "immediate and serious threat." We have attempted to modify the terminology used in the final regulation to consistently reflect the language of the Act.

Comment: Many commenters stated that the 23-day timeframe for termination is not included in the Act, that it is too short and that it does not allow adequate time for corrections. Some suggested that other timeframes, such as 45 days or 90 days, be used, while others indicated that the 23-day clock should not start until the facility has been given a chance to undertake corrections.

Response: While the 23-day timeframe is not specified in the Act, HCFA has for many years used a 23-day timeframe for addressing immediate jeopardy situations encountered in other provider and supplier types. In fact, the enforcement procedures which were in effect for long term care facilities prior to the implementation of OBRA '87 provisions called for processing termination actions within 23 calendar days when immediate and serious threat to patient health or safety was documented. In these cases, if the immediate and serious threat was resolved before the end of the 23

calendar days, the termination action was lifted entirely, or if the threat was removed but other serious deficiencies remained, the termination date was extended to allow the facility additional time to correct the remaining deficiencies.

Our experience in processing noncompliance actions against other facilities and against long term care facilities (both before and after OBRA '87 implementation) whose deficiencies constitute immediate jeopardy indicates that 23 calendar days is a reasonable amount of time for proper notice to the facility and to the public, as may be required. Further, it provides the facility sufficient time to react to the immediate jeopardy without unnecessarily lengthening the amount of time the facility's residents are at risk because of the situation or situations which constitute the immediate jeopardy.

While we appreciate the concerns expressed by the commenters, we are not amending the 23-day timeframe in the final regulation.

Comment: Another group of commenters believed that the 23-day timeframe is too long and that, for facilities in which immediate jeopardy is identified, the requirement should be that corrections be initiated immediately.

Response: The 23-day timeframe is not the amount of time the facility has to begin making corrections. Rather, it is the maximum amount of time available to the facility to resolve the immediate jeopardy. It begins on the last day of the survey. A facility is ordinarily advised of the existence of immediate jeopardy at the conclusion of the survey which identified the immediate jeopardy. Most facilities in this situation that want to remain in the Medicare or Medicaid program will begin to make corrections immediately. Even for those that do not begin making corrections on their own, some time must be allowed for provision of proper notices, as required by regulation, and/or the appointment of temporary management. In consideration of these factors and the fact that it is also possible for the enforcement process to be completed in less than 23 calendar days, we are not adopting these comments in the final regulation.

Comment: Some commenters asked that the regulation be amended to clarify that 23 calendar days is the maximum amount of time which a facility will be given to resolve a finding of immediate jeopardy, whether or not temporary management is utilized. One commenter said that the facility should be given an additional 23 days beyond the termination date during which a temporary manager would be utilized to attempt to achieve compliance.

Response: We have accepted the first comment. We agree that 23 calendar days is the maximum time allowed for a facility with immediate jeopardy to resolve the jeopardy. It is not possible for a facility to first be given 23 calendar days to correct deficiencies pending termination followed by another period of time during which temporary management is utilized in an attempt to regain compliance.

Comment: Some commenters cited the 23-day timeframe as a disincentive for the use of temporary management as an alternative remedy.

Response: We do not believe that use of the 23-day timeframe is a disincentive for use of temporary management based on the seriousness of deficiencies identified at this level as well as the need to take immediate corrective action.

Comment: A number of commenters indicated that the facility should not be given the opportunity to refuse temporary management.

Response: As noted in the comments and responses for § 488.415, facilities will not be offered a formal choice of whether to accept or refuse temporary management. When HCFA or a State chooses to implement this remedy, a temporary manager will be installed unless the facility refuses to relinquish control to the temporary manager, in which case, immediate termination will be sought.

Comment: A few comments indicated that there should be an immediate ban on admissions to the facility, large civil money penalties and/or immediate assignment of a State monitor for these cases.

Response: While the Act does not allow for bans on all admissions under these or any other circumstances, it is possible for the State or HCFA to impose State monitoring as an additional remedy. While large civil money penalties are also allowed, they may not be as likely to result in immediate corrections, since they may not be collected until the facility has the opportunity for a hearing.

Comment: Several commenters believed that the regulation as proposed does not promote the use of alternative remedies in situations involving immediate jeopardy and argued that this approach does not follow the spirit of OBRA '87.

Response: The Act makes a clear distinction between how cases involving immediate jeopardy will be handled as opposed to how all other cases will be handled. The Act requires immediate action to remove the jeopardy and correct the deficiencies through the use of temporary management or termination, or both. While it allows for the use of other remedies which are in addition to temporary management or termination, it is clear that the penalty for a facility with noncompliance which constitutes immediate jeopardy is intended to be swift and severe. The regulation reflects the intent of the Act; therefore, the use of alternative remedies in addition to temporary management is allowed but not stressed for immediate jeopardy situations.

Comment: Several commenters asked for a better definition of immediate and serious threat. Others indicated that the scope and severity scale, as issued for comment in the proposed rule, would lead to many more instances of immediate jeopardy than are now being identified.

Response: In response to the many comments received regarding the proposed scope and severity scale, we are amending the definition of immediate jeopardy in the final regulation (see § 488.301). In making decisions on the existence of immediate jeopardy, HCFA and the States will continue to refer to the traditional guidance on this subject which is contained in Appendix Q of the State Operations Manual.

Comment: One commenter pointed out that the proposed regulation does not address who will prevail (HCFA or the State) about whether or not immediate jeopardy exists in a facility, and asked for clarification.

Response: HCFA always has the option of reviewing the State's compliance determination and making its own decision based on the survey agency's survey findings. It is not necessary for HCFA to conduct its own survey of a facility in order to make a decision as to whether immediate jeopardy does or does not exist. Whether HCFA's decision is based on its own survey or on a review of the State's findings, the decision as to whether or not immediate jeopardy exists is made pursuant to section 1919(h)(5) of the Act. Specifically, the determination of immediate jeopardy, whether it is the survey agency's or the Secretary's, will prevail.

Comment: One commenter asked that the facility and not the State be responsible for notifying attending physicians and licensure boards, as outlined in §§ 488.410(e) and 488.325(h).

Response: As indicated in sections 1819(g)(5)(C) and 1919(g)(5)(C) of the Act, Disclosure of Results of Inspections and Activities, the responsibility for this

notification lies with the State; it may not be redelegated to the facility.

Comment: One commenter asked that we clarify § 488.410(e) to indicate that the notice should go to the licensing authority of the nursing home administrator.

Response: We agree, and this comment is reflected in the final regulation.

Comment: Two commenters asked that the text of § 488.410(c)(2)(i) be amended to indicate that the use of temporary management is for the purpose of correcting the deficiencies that resulted in a finding of immediate jeopardy.

Response: We are not adopting these comments, as we believe they would provide for a more narrow interpretation than the Act specifies at sections 1819(h)(4) and 1919(h)(5). These sections state that the appointment of a temporary manager shall be for the purpose of removing the jeopardy and correcting the deficiencies. Further, as indicated in the comments and responses for § 488.415, temporary management will be removed when the facility is terminated, or when HCFA or the survey agency has determined that the facility is in substantial compliance and has the management capability to ensure continued substantial compliance with all requirements. Consistent with sections 1819(h)(2), 1919(h)(2) and (h)(3) of the Act, temporary management would not necessarily end as soon as deficiencies causing the immediate jeopardy have been corrected.

Comment: Four commenters indicated that HCFA should adopt a procedure utilized in Louisiana, whereby a facility may request sanctions other than a temporary manager and the request may be granted if the State determines that an adequate plan to correct has been devised by the facility and the State can monitor the implementation of the facility's plan.

Response: As presented, this procedure does not appear to meet the requirements of the Act which call for immediate action to remove the immediate jeopardy through termination or appointment of temporary management, or both. It would appear that the proposed procedure would allow something similar to a directed plan of correction and State monitoring to replace termination or temporary management as the remedies for immediate jeopardy cases. Such a policy would constitute a violation of the Act.

Section 488.412 Action When There Is No Immediate Jeopardy

Comment: Many commenters said that the requirement for the State or the facility to repay funds received from the Federal government if corrective action was not taken in accordance with the approved plan of correction conflicts with HCFA's intent to promote the use of alternative remedies.

Response: Comments regarding the State and facility repayment provision of § 488.412(a) will be answered in our discussion of proposed § 488.232 (redesignated as § 488.450, Continuation of payments to a facility with deficiencies).

Comment: Several commenters objected to the requirement that a denial of payment for new admissions be imposed if any deficiency remains uncorrected 90 days after the survey. They believed that it is illogical to cut off funds after 90 days because the funds might be needed to make the corrections. Other commenters said that the regulations should allow continued participation with substantial compliance because the 100 percent compliance is impossible to achieve. Still other commenters made the following points:

- Major physical environment deficiencies may take longer than 90 days to correct;
- The regulations should permit an appeal of the decision to deny payments for new admissions;
- It is unclear whether mailing time is included in the 90 days and whether an appeal stops the action; and
- It is unclear whether there is notice to the public regarding the remedy at the 90th day.

Response: Sections 1819(h)(2)(D) and 1919(h)(2)(C) of the Act stipulate that the Secretary or the State, respectively, must impose a denial of payment for new admissions if the facility is not in compliance 3 months after the date that the facility was noncompliant, regardless of the requirement that is deficient. In answer to the commenter who raised the issue of substantial compliance, we are revising § 488.412(c) to require a mandatory denial of payment for new admissions when a facility is not in substantial compliance 3 months after the last day of the survey. Therefore, if a facility is in substantial compliance, it would not be subject to the mandatory denial of payment for new admissions remedy, or the denial of payment remedy would be lifted if it had already been imposed. Substantial compliance is discussed in detail earlier in this preamble. The fact that physical environment deficiencies may take longer to correct than others is an example of facility noncompliance which may not be wholly corrected after the completion of the 6-month continuation of payment period, but which could be considered substantial compliance if corrective action had progressed in accordance with the approved corrective action plan and timetable. With respect to the other points raised by the commenters, § 488.330(e) (3) and (4) specify that a facility may appeal the certification of noncompliance leading to the denial of payment remedy; § 488.330, paragraphs (e)(1)(ii) and (e)(2)(ii) specify that, except for civil money penalties, a pending appeal will not stop the action. Mailing time is included within the 3 months because the 3 months constitutes a statutory limit. There are neither statutory nor regulatory public notice requirements with regard to the denial of payment remedy.

Comment: A great many individuals and organizations commented upon the requirement at proposed § 488.212(b) which specifies that, although deficiencies with a scope and severity level of 1 are considered deficiencies, remedies or plans of correction are not required as long as corrections are achieved by the 90th day. Commenters' views varied widely as illustrated by the following—

- There should be no deficiency if the scope and severity level is 1;
- If no plan of correction is required there is no apparent reason for requiring correction in 90 days;
- A follow-up visit should not be required if the scope and severity level is 1;
- If deficiencies with a scope and severity level of 1 are to be treated differently than other deficiencies, then a new term should be used for them, such as findings;
- Deficiencies with a scope and severity level of 1 should be given to the facility on a separate document and not be disclosable to the public;
- Deficiencies with a scope and severity level of 1 should receive a plan of correction and be disclosable to the public;
- Deficiencies with a scope and severity level of 1 should not receive either a plan of correction or a remedy if substantial compliance is achieved;
- There is no such thing as an isolated problem. Excusing certain deficiencies as inconsequential sets a disturbing precedent for the health care industry;
- All deficiencies must be corrected;
- No deficiency should be found unless there is a quality of care issue;

- There doesn't appear to be a way for HCFA to track deficiencies with a scope and severity level of 1 without a follow-up visit;
- HCFA should clarify when a citation becomes a "repeat deficiency." Remedies should be imposed in cases of repeated noncompliance only after a facility is found, after three standard surveys, to have furnished substandard care;
- A recurrence of a deficiency with a scope and severity level of 1 should be upgraded to a scope and severity level of 2;
- The regulation at proposed § 488.212(b)(3) should specify continued noncompliance rather than recurrence;
- The regulation at proposed § 488.212(b)(1) should read "both the severity level and the scope level are 2" rather than 1;
- The regulation at proposed § 488.212(b)(3) should impose a civil monetary penalty and one or more other remedies;
- HCFA should provide guidelines regarding what is an acceptable plan of correction;
- If a deficiency with a scope and severity level of 1 recurs, HCFA or the State should impose a directed plan of correction or State monitoring; and
- The lack of appeal rights on recurring deficiencies with a scope and severity level of 1 will put the State at risk of increased informal administrative hearings, because of the requirement that remedies be imposed.

Response: The issue of deficiencies at a severity and scope level of 1 are discussed under § 488.408 of this preamble.

We are retaining the definition of deficiency at § 488.301. A deficiency is failure to meet a participation requirement. All deficiencies, with the exception of those isolated deficiencies that HCFA or the State determines constitute no actual harm with a potential for minimal harm, will be displayed on the HCFA–2567, Statement of Deficiencies and Plan of Correction, and will require a plan of correction to be tracked by the State survey agency. All deficiencies, including those isolated deficiencies that HCFA or the State determines constitute no actual harm with a potential for minimal harm, will be disclosable to the public. However, these low level deficiencies will not be recorded on the HCFA–2567 and will not precipitate any enforcement action. We conclude that this approach is reasonable and practical from both the provider's and the consumer's perspective. To react to low level deficiencies with the same degree of concern as to those that are more serious is not rational. We believe that providers and consumers will agree that deficiencies which constitute no actual harm with no more than a potential for minimal harm, and which bear no relationship to poor care or negative resident outcomes should not detract from actionable noncompliance.

Comment: Many commenters suggested modifications to the use of the scope and severity scales for selection of remedies at proposed § 488.412(c). The following comments and suggestions were made:

- Proposed paragraph (c)(3), (now paragraph (b)(3)), should read "If HCFA or the State determines the existence of substandard care, the State must notify * * *";
- Expand proposed paragraph (c)(3), to include deficiencies in quality of life, nurse staffing, and resident behavior and facility practices;
- For deficiencies with a severity level of 2, civil money penalties should be required using scope and severity to determine the size of the fine and other remedies should be applied according to § 488.408;
- Provision should be made for remedies for deficiencies not in the area of quality of care with a severity level of 2 and scope level of 3 or 4;
- A variety of specific schemes were proposed for correlating each of the scope and severity levels to specific types of remedies; and
- Non-life threatening deficiencies should be exempted from remedies and fines.

Response: As noted earlier, we addressed these issues under § 488.408 of this preamble. Also, in response to the many comments we received advocating a clearer correlation between levels of noncompliance and types of remedies imposed, we are making extensive revisions to the scope and severity grid published in the proposed rule. We are, in fact, correlating categories of remedies to various categories of noncompliance. A revised grid appears below.

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	Isolated	Pattern	Widespread
Immediate Jeopardy to Resident Health or Safety	PoC Required: Cat. 3 Optional: Cat. 1 Optional: Cat. 2	PoC Required: Cat. 3 Optional: Cat. 1 Optional: Cat. 2	PoC Required: Cat. 3 Optional: Cat. 2 Optional: Cat. 1
Actual Harm that is not Immediate Jeopardy	PoC Required* Cat. 2 Optional: Cat. 1	PoC Required* Cat. 2 Optional: Cat. 1	PoC Required* Cat. 2 Optional: Cat. 1 Optional: Temporary Mgmt.
No Actual Harm with Potential for More than Minimal Harm that is not Immediate Jeopardy	PoC Required* Cat. 1 Optional: Cat. 2	PoC Required* Cat. 1 Optional: Cat. 2	PoC Required* Cat. 2 Optional: Cat. 1
No Actual Harm with Potential for Minimal Harm	No PoC No Remedies Commitment to Correct Not on HCFA-2567	PoC	PoC

Substandard quality of care: any deficiency in §483.13 Resident Behavior and Facility Practices, §483.15 Quality of Life, or in §483.25, Quality of Care that constitutes: immediate jeopardy to resident health or safety; or, a pattern of or widespread actual harm that is not immediate jeopardy; or, a widespread potential for more than minimal harm that is not immediate jeopardy, with no actual harm.

Substantial compliance

REMEDY CATEGORIES

Category 1 (Cat.1)

Directed Plan of Correction
State Monitor; and/or
Directed In-Service Training

Category 2 (Cat.2)

Denial of Payment for New Admissions;
Denial of Payment for All Individuals; imposed by HCFA:
and/or
Civil Money Penalties:
$50 - $3,000/day

Category 3 (Cat.3)

Temporary Management
Termination

Optional:

Civil Money Penalties
$3,050 - $10,000/day

Denial of Payment for New Admissions must be imposed when a facility is not in substantial compliance within 3 months after being found out of compliance.

Denial of Payment and State Monitoring must be imposed when a facility has been found to have provided substandard quality of care on three consecutive standard surveys.

Note: Termination may be imposed by the State or HCFA at any time when appropriate.

* Required only when decision is

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Section 488.414 Action When There Is Repeated Substandard Quality of Care

While analyzing the comments for this section, we again reviewed the provisions of the Act to ensure conformance in the final regulation. Through this process, we noted that this section does not address the portions of the statutory provisions at sections 1819(h)(2)(E) and 1919(h)(2)(D) of the Act that specify that the denial of payment and monitoring must continue until the facility has demonstrated that it is in compliance and that it will remain in compliance. Accordingly, we are modifying this provision to specify that the mandatory denial of payment and State monitoring imposed for the finding of substandard quality of care on three consecutive standard surveys must continue until the facility has demonstrated that it has achieved substantial compliance and can maintain substantial compliance over the period of time specified by HCFA or the State.

We further noted that the remedy described in section 1819(h)(2)(B)(i) of

the Act can be either denial of payment for all Medicare residents or denial of payment for all new Medicare admissions in a facility. In recognition of this fact, the regulation is being amended to reflect this distinction.

Finally, because the provisions of the Act were in effect prior to the effective date of this regulation, we have had actual experience processing enforcement actions for facilities with substandard quality of care noted in three consecutive standard surveys. Our experience pointed out the need for further clarification in this section in two respects. One of these related to the handling of actions against facilities whose type of program participation changed during the period of time spanned by the three consecutive standard surveys, and the other related to whether remedies could be avoided through an allegation of compliance or actual corrections which followed the finding that there had been repeated substandard quality of care.

In reviewing actual cases, we concluded that the determination of repeat substandard quality of care in a certified facility should be made without regard to the type of program participation involved; that is, any standard surveys conducted in the facility for Medicare, Medicaid or both should be considered. Since the survey process is the same for both Medicare and Medicaid participating facilities, there is no reason to consider the facility's type of program participation in the determination of whether repeated substandard quality of care has occurred. These issues are being clarified in § 488.414.

We also concluded that sections 1819(h)(2)(E) and 1919(h)(2)(D) of the Act indicate statutory intent that specific remedies be imposed any time substandard quality of care is repeatedly noted. Further, the Congress specifically provided the authority for continuation of these remedies after compliance has been achieved. The Congress' specific description of how this type of noncompliance must be dealt with clearly sets it apart from the handling of other cases. Therefore, we have concluded that a facility's allegation of compliance or actual attainment of compliance following the third consecutive standard survey which found substandard quality of care will not stop the imposition of the denial of payment or State monitoring. The remedy may be lifted when the facility has demonstrated its ability to maintain substantial compliance to the satisfaction of HCFA or the State. This point is also being clarified in this section of the regulation.

Comment: A number of commenters asked for a clearer definition of "substandard care." Some asked whether substandard care and substandard quality of care are one and the same. Others pointed out that sections 1819(h)(2)(E) and 1919(h)(2)(D) of the Act specify that action is to be taken based on the provision of substandard quality of care.

Response: We are changing the regulation to match the Act and indicate that this provision will apply when substandard quality of care is identified. For the purpose of this provision, substandard quality of care is defined in § 488.301.

Comment: Several commenters requested that the word "standard" be inserted between "consecutive" and "surveys." They pointed out that the proposed regulation does not match the wording of the Act at sections 1819(h)(2)(E) and 1919(h)(2)(D), both of which specify that the substandard quality of care must be identified in three consecutive standard surveys.

Response: We agree with the commenters. We are amending this section to indicate that the repeated substandard quality of care must have been noted through three consecutive standard surveys. Standard surveys are those described in § 488.305.

Comment: Four commenters asked for a clearer definition of repeated noncompliance. Two commenters indicated that repeat noncompliance should be defined as actual repeats of the same problem and the content of the deficiency and not just a repeat of a deficiency at the same tag number.

Response: Sections 1819(h)(2)(E) and 1919(h)(2)(D) of the Act clearly indicate that action must be taken when repeat noncompliance in the form of substandard quality of care is identified. The Act does not narrow the scope to specify that the basis for finding substandard quality of care in a facility must be identical from one standard survey to the next or for all three of the consecutive standard surveys considered in making the determination that repeated substandard quality of care has occurred. Accordingly, we do not believe that the regulation should more narrowly define what constitutes substandard quality of care for the purpose of this provision.

The regulation is being modified to clarify that action must be taken any time any deficiencies which constitute substandard quality of care are identified in the last three consecutive standard surveys. This provision will be applied solely on the basis of the repeated finding of substandard quality of care, and no attempt will be made to determine whether the substance of the noncompliance or the exact tag numbers for deficiencies which constitute noncompliance were repeated.

Comment: One commenter stated that a facility's performance on surveys which were conducted prior to the effective date of this regulation should be counted in the determination of whether there is repeated noncompliance.

Response: We agree with this comment. The survey process specified in the OBRA '87 provisions was effective for all surveys conducted on or after October 1, 1990. Even though the implementation of the corresponding enforcement provisions was not concurrent, any standard survey completed on or after October 1, 1990 must be considered in the determination of whether there is repeated noncompliance that resulted in substandard quality of care.

Comment: One commenter suggested that to be consistent with the intent of the Act to have facilities maintain compliance, regulations should require that facilities maintain compliance with the deficient requirement after correction. The commenter recommended requiring termination if a facility corrects the deficiency, but then falls out of compliance with the same requirement during the same correction period.

Response: The Act provides that when a facility has had findings of substandard quality of care on three consecutive standard surveys, the Secretary or the State must impose a denial of payment and a State monitor. In addition, sections 1819(h)(2)(E) and 1919(h)(2)(D) of the Act require that the denial of payment for new admissions and State monitor remedies must remain in force until the facility not only achieves substantial compliance but demonstrates that it can maintain substantial compliance. As we have explained earlier, substantial compliance constitutes compliance for the purpose of imposing or lifting a remedy, as well as issuing a certification of compliance.

We do not foresee the situation described by the commenter as a problem. If a facility has corrected a deficiency, or is at least considered to be in substantial compliance, any remedy(ies) in effect would be lifted as well as compliance certified. We would not normally revisit a facility after compliance has been certified unless there is a complaint or some other impetus. If, at some later date after compliance has been certified, the facility is found to have a recurrence of the same deficiency that causes the

facility to be out of substantial compliance, either a new continuation of payment period would begin, or termination (or cessation of FFP payments) would occur, depending on the seriousness of the noncompliance. However, any termination would be based on the fact that the facility was not in substantial compliance with sections 1819 (b), (c), and (d) and 1919 (b), (c), and (d) of the Act by the end of the correction period, and not on the fact that the noncompliance was repeated. We have not adopted the commenter's suggestion to terminate a facility solely on the basis of repeated noncompliance.

Section 488.415 Temporary Management

Comment: One commenter asked that we clarify the term "disciplinary action" and state that the temporary manager must not have been found guilty of misconduct by any licensing board or professional society, and another commenter recommended that HCFA maintain a national registry of nursing home administrator disciplinary actions.

Response: To avoid confusion surrounding the interpretation of "disciplinary action," we will not use the term in the requirement at § 488.415(b)(2) as we did in § 488.215(b)(3) of the proposed rule. Instead, we are structuring the provision to read that the temporary manager must "not have been found guilty of misconduct by any licensing board or professional society in any State." We agree that it may be beneficial to have a misconduct registry for nursing home administrators, and we intend to examine the feasibility of developing one.

Comment: Many commenters recommended that we include requirements that the temporary manager must have had no adverse ties to the problem facility, and must not have been fired from the facility in the past. Another commenter proposed that we include a requirement that the temporary manager have had no business or professional relationship with the facility for a minimum of 3 years prior to his or her appointment to operate the facility.

Response: We agree with the commenters that the individual chosen to be temporary manager must not have been recently employed by the facility to be managed. We believe that an individual's previous employment relationship with a facility could positively or negatively prejudice that individual in his or her present dealings with the facility. Therefore, we are incorporating into the regulation, at § 488.415(b)(4), a requirement that the temporary manager must not currently serve, or, within the past 2 years, have served as a member of the staff of the noncompliant facility. This requirement is similar to the requirement for surveyors, which we believe is appropriate, since effective evaluation is a necessary tool of both surveyors and temporary managers and requires their objectivity.

Comment: One commenter asked how prior competency will be judged. Various commenters suggested that prior competency be defined by a minimum of one year of continuous experience as administrator of a long term care facility, by demonstrated expertise and experience in the operation of a nursing facility similar to the one the temporary manager is needed to manage, or by demonstrated experience in temporary management. Another commenter suggested that a measure of competency be whether the temporary manager served within the past 10 years as the administrator of a facility which furnished substandard quality of care.

Response: As explained below, we are no longer requiring that the temporary manager be a licensed nursing home administrator or demonstrate prior competency as one. Because the skills and experience a temporary manager must have to correct deficiencies will vary on a case by case basis, HCFA and the State need to have the flexibility to appoint whoever is most suitable without the constraints of overly prescriptive eligibility requirements.

When it happens that an individual interested in becoming a temporary manager is or has been a nursing home administrator, the compliance histories of the facilities managed by him or her will be reviewed. We will provide in manual instructions that there be such a review because we agree with the commenter that it would be inappropriate to appoint as a temporary manager an administrator who has had difficulty maintaining facility compliance in the past.

Comment: A number of commenters believed that the temporary manager should not be a current competitor of the facility, have ownership interest in a competitor, or have been recently employed by a competitor. Commenters were concerned that these individuals would gain an unfair competitive advantage if appointed temporary manager.

Response: We appreciate this concern, and we and the State will attempt to select temporary managers who are not affiliated with competitors of the facilities to be managed when the pool of temporary manager candidates allows. However, the purpose of imposing temporary management or any other remedy is to achieve and maintain substantial compliance with Federal requirements. When the only temporary manager candidate likely to accomplish this goal is affiliated with a competitor of the problem facility, HCFA and the State will necessarily consider that affiliation to be subordinate to the administrator's competency. If the facility feels more threatened by compromised competitiveness than it does by termination of its provider agreement, it has the right to refuse to relinquish control to the temporary manager selected by HCFA or the State, and subject itself to the possibility of termination instead.

Comment: One commenter was concerned that persons interested in acquiring a financial interest in a facility would be motivated to serve as that facility's temporary manager in order to gain a competitive edge in later negotiations. The commenter asked that we prevent this possibility by precluding through contract with the temporary manager the purchase or other acquisition of the facility for a fixed period of time after completion of the temporary manager's responsibilities.

Response: We do not have the authority to restrict a temporary manager's future business activities. If the facility to be managed has reason to believe that the temporary manager chosen by HCFA or the State would use the financial information he or she would acquire in the facility to the facility's disadvantage, the facility may raise this concern to HCFA or the State, and HCFA or the State may attempt to locate a temporary manager that is more acceptable to the facility. Should a temporary manager acceptable to the facility not be located, the facility may exercise its right to refuse to relinquish control to the temporary manager and face termination of its provider agreement.

Comment: One commenter proposed that the temporary manager should neither have been an employee of, nor have been associated with an employee of HCFA, the Department of Health and Human Services, or any State licensing or survey agency.

Response: We do not believe that a past affiliation with the aforementioned organizations would reduce a temporary manager's objectivity or effectiveness in any way. On the contrary, it is likely that the temporary manager would be more knowledgeable about Medicare and Medicaid participation

requirements after having had exposure to the agencies that set and enforce the Medicare and Medicaid requirements, and we expect that the facility at which the temporary manager is imposed would benefit from this knowledge.

Comment: A couple of commenters believed that the State must compile and update a list of people or organizations that meet the qualifications of temporary manager, and they asked that this list be available for public inspection. Another commenter proposed that the State or HCFA maintain a list of substantiated complaints or allegations concerning the performance of temporary managers.

Response: We will not require that States catalogue complaints made against temporary managers, but will allow them to process complaint information in the way that they determine is most effective. Neither will we require the States to compile, update, and release a list of those qualified to be temporary managers. Because we have no authority to require the release of individuals' qualifications or other assignments, a list of temporary managers would contain no criteria by which facilities would be able to evaluate the candidates, and would be of little value. Moreover, HCFA and the State are not obligated to seek facility approval of temporary managers. It is neither the facility's responsibility nor right to select a temporary manager. (See additional response below.)

Comment: A few commenters recommended that we allow a State or a team of people to qualify as a temporary manager. They believed that nursing guidance and expertise would be needed in addition to administrative supervision in order to remedy serious deficiencies.

Response: Because a temporary manager has the authority to hire additional staff, it is possible for him or her to assemble what would be in essence a temporary management team. When the temporary manager determines that successful correction of a facility's deficiencies requires knowledge and skills in addition to his or her own, he or she may engage the specialists necessary.

We have no statutory authority to require State survey agencies to make their staff available to function as temporary managers. Their role involves survey, certification, and monitoring, rather than the management (albeit temporary) of nursing homes.

Comment: Several commenters asked that facilities be able to participate in the selection of the temporary manager. One recommended that the governing board of the facility be responsible for placing the temporary manager at the facility, and others requested that facilities be able to object to a particular temporary manager once selected by HCFA or the State.

Response: The choice of a temporary manager will be made either by the State or by HCFA and will be based on the recommendation of the State survey agency. The State survey agency's geographic proximity to the providers it surveys and its knowledge of available and competent managers in the area place it in the best position to recommend a temporary manager. Because facilities have the right to refuse to relinquish control to the temporary manager, no facility will be forced to submit to a temporary manager that it objects to, and it may decide to subject itself to the possibility of termination instead.

Comment: Certain commenters were concerned that the qualifications for a temporary manager will be hard to meet. A few commenters suggested that HCFA and the State be given latitude to appoint as temporary manager any qualified person, such as a registered nurse with nursing home experience, instead of having to appoint a licensed nursing home administrator.

Response: We agree that a nursing home administrator's license is not the only valid indicator of an individual's fitness to serve as temporary manager. Certain combinations of educational and vocational achievement may also signify administrative competency. We are, therefore, amending paragraph (b)(1) and deleting paragraph (b)(2) of § 488.215 as they appeared in the proposed rule to allow an individual who does not hold a nursing home administrator's license to serve as temporary manager if the State determines that he or she is qualified to oversee correction of deficiencies on the basis of experience and education. Because this change should expand the pool of qualified temporary manager candidates, it should reduce the number of terminations caused by inability to locate a temporary manager, a clear benefit to both providers and residents.

Comment: One commenter believed that the State should be required to conduct an orientation session for people on the list of qualified temporary managers. That session would cover topics such as situations warranting the appointment of a temporary manager, and the responsibilities and authority of a temporary manager.

Response: We agree that a temporary manager would not be able to do his or her job effectively without being oriented to the task, and will direct the State survey agencies in our State Operations Manual to provide an orientation, the form of which shall be determined by them.

Comment: Many commenters requested that we impose an enforceable limit on the salary of the temporary manager, and a large number of those recommended that we use the prevailing salary limit set forth in the preamble to the NPRM. Other commenters proposed that we require compensation for the temporary manager to be set at a rate sufficient to attract people with the necessary qualifications, and they recommended that we not limit the salary of the temporary manager to the rate mentioned in the preamble. These commenters were concerned that it would be unlikely to draw the expertise needed.

A few commenters requested that we identify who will determine the salary of the temporary manager, and certain of those asked whether it will be negotiable. Another commenter asked if the facility will be obligated to provide benefits to the temporary manager.

Response: After reviewing the comments we received, we have concluded that the salary limit put forth in the preamble to the proposed rule would not be in the best interests of facilities or their residents because it would make it difficult to attract qualified temporary managers. The temporary managers that are available are sometimes located long distances from the facilities which need them, and unless the salary offered is sufficiently attractive, it will not induce individuals to temporarily upset their normal routines and accept the challenge of managing a severely deficient facility. If temporary managers cannot be secured, we will have no choice but to proceed with termination. In order to avoid this result and promote the use of temporary management as an alternative remedy, we will give facilities the flexibility to exceed the salary floor specified below if the State is otherwise unable to attract a qualified temporary manager and the facility considers a higher payment preferable to termination. The salary of the temporary manager must be at least equivalent to the prevailing salary paid by providers in the facility's geographic area for positions of this type, plus the prevailing cost of certain additional allowances. The additional allowances will include costs that would have reasonably been incurred by the provider if the temporary manager had been in an employment relationship, such as the cost of a benefits package, prorated for the amount of time the temporary manager is working in the facility. The facility will also be

responsible for any other costs incurred by the temporary manager in furnishing services under such an arrangement or as otherwise set by the State.

Because the State is in a better position than HCFA to determine the prevailing salary and other employment related costs of a nursing home administrator within what the State considers to be the facility's geographic area, it will be responsible for setting the salary/benefits floor of the temporary manager and for determining whether or not it is necessary to exceed it. The State may consult with a provider while it determines the appropriate salary, but we will not require that the salary of the temporary manager be negotiable.

Comment: One commenter asked what would happen if a facility agreed to temporary management, but then failed to pay the salary.

Response: We are considering requiring that facilities pay the salary of the temporary manager before the remedy begins, which would eliminate the need for a recoupment strategy. Until a decision is made, the mechanism that is currently used to recover Medicare and Medicaid funds from facilities which have been overpaid will be used to collect money from any facilities that owe the salary of the temporary manager. The amount owed would be withheld from future amounts due to the facility from HCFA or the State. Because Medicare and Medicaid payments may continue for up to 30 days after termination, salaries may be recouped even when they are owed by terminated facilities.

Comment: A large number of commenters disagreed with the provision that the temporary manager's salary be paid by the facility. A few commenters stated that the money spent on temporary management would be better spent by the facility on its own improvements. Certain commenters complained that a lack of sufficient funds is often what leads to noncompliance, and so they were concerned that this remedy would be worthless without additional funding. A number of commenters argued that a facility's inability to pay for temporary management should not preclude its use as a remedy.

Many commenters recommended that the temporary manager's salary be paid out of a fund composed of civil money penalties collected by the State, and certain commenters cited 42 U.S.C. 1396r(h)(2)(A)(ii) (section 1919(h)(2)(A)(ii) of the Act) as establishing the authority to do so. Other commenters believed that States should be required to use funds collected through imposition of civil money penalties to cover the costs of correcting deficiencies incurred by the temporary manager, but only if the facility cannot afford to pay these costs itself. Certain commenters believed that the facility and its operators should be liable to the fund for reimbursement of expenses. One commenter recommended that the States should be authorized to impose liens on the facility and other assets of the corporate entity until the facility reimburses the fund. Another commenter believed that the States should be charged with the duty of using all available collection methods afforded by law to recoup expenditures from the fund.

One commenter noted that 42 U.S.C. 1396r(h)(2)(E) (section 1919(h)(2)(e) of the Act) provides that temporary management costs are legitimately payable administrative expenses of the State. Therefore, this commenter and others believed that the temporary manager's salary and the costs that he or she incurs while managing the facility should be borne by the State and reimbursed under the State's Medicaid reimbursement system.

Other commenters were in favor of obligating facilities to bear the cost of temporary management, and several asked that we state that the cost of temporary management is not an allowable expense for Medicare or Medicaid reimbursement. One commenter recommended that the salary payment be funded by the facility but routed to the State which would deliver the payment to the temporary manager. The commenter was concerned that direct facility payment would undermine the objectivity of the temporary manager.

Response: We will continue to require that facilities pay the salary of the temporary manager, and we will not deem this cost to be an allowable expense for Medicare or Medicaid reimbursement. We believe that to do otherwise would undermine our enforcement efforts to motivate corrective action and encourage sustained substantial compliance. If we relieved facilities of their responsibility for bearing the costs of correcting serious deficiencies, we would be providing them with a clear disincentive to remain in substantial compliance. We also believe that providing the services of a temporary manager without charging for them would be an inappropriate response to a facility's failure to meet the responsibility it assumed upon entering the Medicare and/or Medicaid programs to meet participation requirements. A noncompliant facility must be held accountable for breaches of responsibility; therefore, it (and not HCFA or the State) should bear the cost of the temporary management it has incurred.

Because responsibility for paying for the cost of the temporary management is one condition of the remedy, a facility's unwillingness to pay will be considered a failure to relinquish control to the temporary manager, and will cause the facility to be subject to the possibility of termination instead. A facility's inability to pay for the cost of the temporary management will have the same result. A provision has been added at paragraph (c)(4) to indicate this. The conspicuous absence of consideration of a facility's financial condition as a statutory criterion for imposing temporary management (as opposed to its inclusion as a criterion for determining the amount of a civil money penalty) implies that the Congress did not intend for it to be a factor in imposition of the remedy. Consequently, we are also compelled to proceed with action to terminate those facilities that are unable to assume the cost of the temporary management.

We do not believe that our position conflicts with the statutory references cited by certain commenters. Section 1919(h)(2)(A)(ii) of the Act states that funds collected by a State as a result of imposition of civil money penalties shall be applied to the protection of the health or property of residents of nursing facilities that the State or the Secretary finds deficient, including maintenance of operation of a facility pending correction of deficiencies or closure. A temporary manager does not maintain operation of a facility. Rather, it is the facility ownership that is responsible for sustaining facility operations. If the State assumes control of a facility after it has been abandoned by its ownership, then it would be appropriate for the State to use civil money penalty funds to pay the expenses of maintaining the abandoned facility.

We also believe that commenters misinterpreted the provision of the Act found at section 1919(h)(2)(E). This section states that the reasonable expenditures of a State to provide for temporary management shall be considered for Federal payment purposes to be necessary for the proper and efficient administration of the State plan. We believe this refers to the resources necessary to locate, orient, guide, and monitor the temporary manager, and does not include the cost of the temporary manager's service itself. When a facility pays for the temporary manager, we believe that it

would be unnecessarily circuitous to route the salary payment to the State before delivering it to the temporary manager, and disagree that direct payment would compromise the temporary manager's objectivity. A facility would not be able to use the temporary manager's salary as leverage to influence his or her actions because a facility could not effectively keep the salary from the temporary manager. The temporary manager would be paid even if the facility attempted to withhold his or her salary because HCFA or the State could recoup the amount owed to the temporary manager from payments later made to the facility. Therefore, we are requiring that the facility pay the salary of the temporary manager directly, and are modifying the provision at § 488.415(c) to reflect this.

Comment: A large number of commenters believed that facilities should not be given the opportunity to refuse temporary management. Commenters were concerned that facilities would reject temporary management if given the choice, thereby subjecting residents to continued substandard quality of care, promoting facility terminations, and exposing residents to relocation trauma.

Commenters proposed various ways for HCFA and the State to obviate facility consent when appointing a temporary manager. One suggestion was that we appoint the temporary manager subject to court order. Another recommendation was that we administratively appoint the temporary manager in accordance with the State's police power. Additional commenters proposed that we set limits on the duration of the temporary management (for example, restricting the appointment to two weeks), the circumstances under which the manager would be appointed, and the funds that the manager could spend in order to make the administrative appointment binding.

Other commenters proposed not only that facilities be required to accept temporary management, but that HCFA and the State be required to impose temporary management in immediate jeopardy situations without a choice between it and termination.

Response: We agree that facilities should not be offered a formal choice of whether to accept or reject temporary management because we believe that more facilities will exercise the right to refuse if it is explicitly offered. Therefore, once HCFA or the State has determined that temporary management is the optimal enforcement response, we will expect the facility to accept it, and we will proceed with the appointment of the temporary manager without requesting facility consent to do so. However, facilities will have the right to refuse to relinquish control to the temporary manager since the administrative process precludes us from forcing providers to relinquish control. A facility's refusal will initiate termination. While we realize that, in effect, the right of refusing to relinquish control to the temporary manager is tantamount to the prerogative of rejecting temporary management, we believe that the new arrangement will encourage the use of the remedy. We are amending §§ 488.410, 488.415, and § 488.456 to delete references to a facility's choice of accepting or rejecting the remedy.

We cannot force a facility to relinquish control to a temporary manager because, ultimately, participation in the Medicare or Medicaid program is voluntary under the Act, and we have no authority to compel a facility to stay in the program should it, for its own reasons, choose to withdraw. We will not seek judicial action to impose temporary management because the Act does not require that judicial intervention be a prerequisite for imposing this remedy.

We do not believe it is appropriate to rest appointment of temporary managers upon the State's police power as described in State law. First, the Act does not suggest that this be the case. Second, this remedy is one imposed under the Act, not State law. Ultimate authority for this remedy lies, accordingly, in the Medicare and Medicaid laws and ought not look to State law without some indication by the Congress that it expected this to be the case.

A facility's refusal to relinquish control to the temporary manager will cause HCFA or the State to proceed with action to terminate the facility's program participation. We share commenter concern about the protection of the health and safety of residents when termination proceedings have been initiated. Consequently, we will allow a State monitor to be imposed at all facilities that have failed to relinquish control to a temporary manager in cases of immediate jeopardy, and also at those facilities for which no temporary manager could be located. The monitor will notify HCFA or the State when the absence of temporary management subjects residents to substantial risks, and HCFA and the State may then opt to take additional enforcement action.

We note that the Act does not require that temporary management be imposed when there is immediate jeopardy. Sections 1819(h)(2)(A)(i), 1919(h)(1)(A), and 1919(h)(5) of the Act give HCFA and the State the option of using temporary management and/or termination to respond to a situation that immediately jeopardizes the health or safety of residents. In certain cases, facility shortcomings may be so severe and the likelihood of a temporary manager being able to successfully remove them so small, that HCFA or the State may decide that resident interests would be better served by terminating the facility and relocating the residents than by continuing to subject the residents to substandard conditions that are unlikely to improve. Because we believe there are situations where termination is more appropriate than temporary management, we do not accept the suggestion that HCFA and the State be required to impose a temporary manager in lieu of termination in cases of immediate jeopardy.

Comment: Numerous commenters requested that we restructure the relationship between the facility and the temporary manager. Certain commenters believed that the temporary manager should act in a consultant capacity, and not as a replacement for the facility administrator. Others felt that the temporary manager should work under the control of the facility's governing body, and that we should require the temporary manager to consult with the governing body when developing the plan of correction. Another commenter favored giving the temporary manager legal but not financial control of the facility.

Many other limitations on the temporary manager's authority were proposed. A number of commenters believed that the temporary manager should not be able to make employment decisions, and they recommended that we require the temporary manager to obtain approval from HCFA, the State, or the facility's governing body before hiring or firing facility employees. Other commenters proposed that there be limits on the expenditures the temporary manager can make in order to correct deficiencies, and they suggested that the regulation require that the temporary manager obtain the consent of the provider to spend beyond those limits. Another group of commenters requested that we limit the time period for which the temporary manager may legally commit or obligate the facility, and asked that we require the temporary manager to seek facility approval before entering into long term contracts. A few commenters recommended that facility ownership be able to appeal to the State to stay the actions of the temporary manager, and another requested that the

facility have the right to object to the temporary manager's business practices.

Response: Sections 1819(h)(2)(B)(iii) and 1919(h)(2)(A)(iii) of the Act specifically provide that the temporary manager is to oversee the operation of the facility and assure the health and safety of the facility's residents while improvements are made to bring the facility into compliance. Further, once the facility relinquishes authority to the temporary manager, the Act prohibits the removal of the temporary manager until the Secretary or the State has determined that the facility has the management capability to ensure continued compliance, assuming that the Secretary or State does not decide to terminate the facility before that time. We believe that implicit in the reason that the Act authorizes temporary management is the assumption that the facility's management staff lacks the capability to bring the facility into compliance. Therefore, the temporary manager needs to have the authority to completely manage the entire facility with enough autonomy to remove any immediate jeopardy and/or correct deficiencies. Imposing the limits proposed by commenters would handicap the ability of the temporary manager to make the necessary corrections, and thus jeopardize the successful completion of the temporary manager's mission.

We believe that requiring that the governing body of the facility be allowed to become involved in the decision making process after it has demonstrated that its management skills are deficient would defeat the purpose of the remedy. The temporary manager may find it useful to consult with facility officials, but the extent to which the temporary manager interacts with the facility's management is at his or her discretion. This does not mean that we will deny the facility the opportunity to object to the actions of the temporary manager, or that we will force the facility to submit to the temporary manager's reform agenda against its will. At any time the governing body of the facility is not in agreement with the decisions or actions of the temporary manager, it may advise the owner or corporate official with appropriate authority to refuse to continue with the remedy. Such action would, of course, subject the facility to the possibility of termination instead.

Comment: Many commenters believed that facilities should have recourse to HCFA or the State to express concerns regarding the administrative competency of the temporary manager. One commenter was worried that providers would not have the opportunity to lodge a complaint about the temporary manager before his or her services ended.

Certain commenters proposed that HCFA and the State monitor the performance of the temporary manager and replace any manager whose performance is unsatisfactory. Another commenter asked that a provider be able to replace the temporary manager if the provider can demonstrate that the manager is incapable of correcting deficiencies or is jeopardizing or impairing the facility's continued operation.

Response: HCFA and the State survey agency will monitor the actions of the temporary manager, and we expect the facility to do the same. We encourage an open dialogue with providers and invite them to communicate to HCFA or the State on an ongoing basis any concerns that they have with the decisions of the temporary manager. If HCFA or the State is dissatisfied with the performance of the temporary manager, we may respond by providing the temporary manager with remedial guidance or by replacing him or her with an alternate. However, if these actions are not possible or prove unsuccessful, we will have no choice but to remove the temporary manager and proceed with termination of the facility's provider agreement. The most appropriate and practical response will vary, and it will depend upon factors such as the availability of an alternate or the amount of time remaining in the 23 days after the last day of the survey allotted for removal of the immediate jeopardy when the temporary manager is imposed in an immediate jeopardy situation.

Comment: One commenter asked that providers be allowed a time period to demonstrate an ability to correct deficiencies if, because of a temporary manager's incompetence, deficiencies have not been corrected timely.

Response: A temporary manager's failure to correct facility deficiencies does not absolve a facility of its responsibility for generating corrections to those deficiencies, and if deficiencies are not corrected or the immediate jeopardy is not removed timely, the facility will be terminated. HCFA and the State are not required to provide facilities with additional time to come back into substantial compliance, but we are obligated to ensure that Medicare beneficiaries and Medicaid recipients receive the quality care to which they are entitled.

Comment: Many commenters requested that we clarify the fiduciary responsibility of the temporary manager. One commenter asked that we designate the temporary manager as a fiduciary of the facility, and stated that by doing so we would empower the facility to protect its interests through established legal principles governing the relationship of fiduciaries to their charges. Other commenters believed we should stipulate that the temporary manager has a responsibility to maintain confidentiality of facility information, and obligations to act in the facility's best interests and ensure that the facility's financial resources are properly managed while he or she works to bring the facility into compliance. Additional commenters asked that we require the temporary manager to conduct himself or herself in a professional manner and to act in a manner reasonably calculated to correct deficiencies and protect the facility's residents.

Response: The temporary manager has a responsibility to further the enforcement efforts of HCFA or the State in an effort to protect the facility's residents, and not a duty to serve the facility. HCFA or the State commissions the temporary manager to correct deficiencies identified in the facility's operation, and we expect the temporary manager to exercise sound financial judgment and discretion while executing his or her duty. Likewise, we assume that the temporary manager will conduct himself or herself in a professional manner and act in the facility's best interests. However, we will not explicitly require these standards in the regulation. These terms could not be meaningfully defined because appropriate definitions for them would vary with the circumstances of each temporary management assignment.

Comment: A great number of commenters asked that the temporary manager be held liable to the owner or governing body of a facility for gross negligence, intentional acts and omissions, unexplained shortfalls in facility funds, and breaches of fiduciary duty. Certain commenters proposed that HCFA, the State, or the temporary manager be required to secure a bond before overseeing operation of a facility, and others requested that HCFA or the State indemnify the facility for harmful consequences arising from the temporary manager's actions or omissions. Another felt that HCFA or the State should be identified as the temporary manager's employer for liability purposes.

Response: We expect facilities to monitor the performance of the temporary manager, and if they have any apprehensions about his or her performance, they may have the remedy

discontinued. Neither HCFA nor the State can force a facility to relinquish control to the temporary manager. Because it is the facility that decides to continue to yield to the temporary manager, neither HCFA nor the State will assume liability for the facility's decision. However, the facility does have the right to seek from the temporary manager any redress available under State laws relating to liability and fiduciary responsibilities.

Comment: A few commenters asked whether the temporary manager will have a contract.

Response: All of the actions needed to remove immediate jeopardy and correct deficiencies at a facility may not be readily apparent at the outset of the temporary management; therefore, it would be imprudent to delineate the specific duties and authorities of the temporary manager in contract form. The temporary manager must have the autonomy to take whatever steps are necessary to bring the facility into substantial compliance and ensure resident health and safety. Shortsighted contract provisions could prove restrictive and thus impede the temporary manager's progress.

Comment: One commenter was concerned about the effect that the appointment of a temporary manager would have on a facility's liability insurance rates.

Response: It would be more appropriate for a facility's insurer to address this issue. Should a facility find that the imposition of a temporary manager will cause the cost of its liability insurance to rise, this increase would be one of the factors that the facility would have to consider when evaluating the benefits and costs of relinquishing control to a temporary manager.

Comment: One commenter asked that the temporary manager be authorized to not honor pre-existing leases, mortgages or contracts if their costs are excessive or if the contracts are otherwise unconscionable.

Response: The temporary manager does not have the authority to selectively meet the financial obligations of the nursing home. That is, the temporary manager can not choose to pay some bills and not others, because he or she disagrees with the wisdom of the permanent facility management having assumed those financial obligations previously. It is the temporary manager's role to manage all aspects of the facility's operation, including its finances.

Comment: One commenter believed that it would be problematic to bring temporary managers into county facilities because those facilities are subject to many restraints on hiring and the expenditure of funds set by county commissioners. Other commenters were concerned about whether the temporary manager would respect a facility's union agreements and contracts.

Response: We recognize that a temporary manager in a public facility may be constrained in ways that he or she would not be in other facilities. We expect the temporary manager to work within any limitations under which the facility operates and to abide by union agreements and contracts. (See above response.)

Comment: One commenter asked whether HCFA or the State would sanction a temporary manager who fails to rectify an immediate jeopardy situation within 23 days.

Response: A failure to rectify an immediate jeopardy situation may be more indicative of the magnitude of a facility's deficiencies than the competency of the temporary manager, and neither HCFA nor the State will penalize automatically a temporary manager when his or her efforts failed to remove the immediate jeopardy. However, if HCFA or the State believes that the temporary manager was deficient in his or her duty, then that individual may be penalized to the extent that he or she is excluded from consideration for future temporary management assignments.

Comment: Several commenters asked that we limit the duration of the temporary management. Many recommended that the temporary manager be discontinued when the immediate jeopardy is removed or when compliance with the requirements that triggered the temporary management is achieved.

Response: Temporary management will be removed when the facility is terminated, or when HCFA or the State has determined that the facility is in substantial compliance and has the management capability to sustain substantial compliance. The temporary management might end when the immediate jeopardy has been removed and deficiencies have been corrected, but it would not have to. It would be premature to discontinue the temporary management before HCFA or the State is confident that the facility will not relapse into noncompliance. Effective enforcement involves promoting sustained substantial compliance, and we are revising § 488.454, "Duration of remedies" to reflect this.

Comment: One commenter recommended that HCFA or the State be able to continue special actions taken by the temporary manager which are necessary to protect resident health, welfare or safety. Facility management would request termination of the special conditions once it could show that they are no longer necessary. The commenter believed that this policy would ensure that the facility doesn't deteriorate when the temporary management ends.

Response: Neither HCFA nor the State will discontinue temporary management and restore control of a facility to its own management unless it is convinced that the facility is capable of and committed to sustaining substantial compliance. We do not believe an additional regulatory provision is necessary to ensure this result.

Comment: Several commenters were opposed to the use of temporary management, and proposed alternatives to it. One commenter suggested that, instead of using temporary management in immediate jeopardy cases, HCFA require the non-compliant homes to hire consultants approved by HCFA to correct deficiencies. Another commenter proposed that HCFA itself create and train teams to act in an advisory capacity. A few commenters asked that temporary management be eliminated and replaced by State monitoring. Another commenter requested that we allow facilities to devise their own plans of correction to remove immediate jeopardy and have the State agency monitor implementation instead of imposing temporary management.

Response: Temporary management is authorized by sections 1819(h)(2)(B)(iii), 1919(h)(2)(A)(iii), and 1919(h)(3)(C)(iii) of the Act, and HCFA and the States are required to establish and implement it: we may not exclude it as an enforcement option. Sections 1819(h)(2)(A)(i), 1919(h)(1)(A), and 1919(h)(5) of the Act specifically require that temporary management be used in immediate jeopardy situations when provider agreement termination is not sought.

The Act provides that the temporary manager is to oversee the operation of a facility and assure the health and safety of the facility's residents while improvements are made to bring the facility into compliance. Therefore, we conclude that the Act intends the temporary manager's role to be more than that of just a monitor of the progress made by the facility or a consultant to management, and we believe that inherent in the Act's rationale for establishing temporary management is the assumption that the facility's management staff lacks the capability to bring the facility into compliance. It would be insufficient to substitute the use of a consultant or

monitor for the appointment of a temporary manager, because a consultant or monitor would not have the authority to completely manage the entire facility as a temporary manager does. Only a temporary manager has a role active enough to substitute for the facility management, whose deficient skills or practices would impede correction of deficiencies and protection of the residents' health or safety.

Comment: One commenter wondered how availability of temporary managers would affect the use of this remedy.

Response: In cases of immediate jeopardy, if a temporary manager cannot be located within 10 days of the last day of the survey, HCFA or the State is required to proceed with action to terminate the facility's program participation in order to protect the health or safety of the residents. To safeguard residents when this takes place, we will allow a State monitor to be imposed who will notify HCFA or the State if residents are being subjected to substantial risks and need to be transferred from the facility. If a temporary manager cannot be located for a situation which does not immediately jeopardize the health or safety of the residents, HCFA or the State has the flexibility to impose another type of remedy which it believes will best motivate the facility to achieve substantial compliance. However, if temporary management is the most logical alternative remedy, and a temporary manager cannot be located, HCFA or the State has the authority to terminate the provider agreement. We do not believe that the imposition of temporary management in lieu of termination is a provider right. Rather, it is an accommodation to the provider if, in the judgment of HCFA or the State, it will lead to substantial compliance and there are competent temporary managers available in the given geographic area.

Comment: A few commenters requested that States be able to appoint a trustee or a receiver in lieu of a temporary manager if they have State laws that provide for these enforcement actions.

Response: Many States have developed laws in accordance with State licensure authority that provide for sanctions similar to temporary management. The States use these sanctions, such as receivership and trusteeship, to enforce compliance with State licensure requirements. Section 1919(h)(2)(B)(ii) of the Act also gives the State the authority to use these measures when enforcing compliance with Federal Medicaid participation requirements, if the State can demonstrate to HCFA's satisfaction through a State plan amendment that trusteeship or receivership is as effective in deterring noncompliance and correcting deficiencies as the remedy of temporary management. Therefore, if HCFA approves the State plan amendment establishing trusteeship or receivership as a remedy, a trustee or receiver may be used by a State as an acceptable alternative to a temporary manager when the State takes the enforcement action. The State may use the alternative remedy both when a temporary manager is required in cases of immediate jeopardy, and when one is selected as the most appropriate enforcement response in non-jeopardy cases.

Comment: One commenter asked that we state the conditions under which temporary management will be imposed.

Response: Other than the provisions in the law requiring temporary management in situations that immediately jeopardize the health or safety of residents, specific criteria for imposing temporary management in other types of situations would be impossible to develop. The decision of HCFA or the State to impose a temporary manager will be based on the deficiencies found at the time of survey coupled with other factors that exist at the facility at that particular point in time. For example, a facility might identify a deficiency before the State survey agency does and attempt to correct it. Although we could not dismiss the facility's failure to prevent the deficiency, neither would we ignore the administrative competence that the facility demonstrated by identifying and attempting to address the deficiency on its own initiative. We would consider both factors when selecting the appropriate remedy.

Section 488.417 Denial of Payment for All New Admissions

Upon our review of comments and evaluation of the underlying statute, we noted that we did not make it clear in the proposed rule that the authority of the Secretary to deny payment to a facility is limited to Medicare facilities. In the case of Medicaid facilities, the State may deny payment to the facility and HCFA may deny payment to the State for all Medicaid residents in the facility. A related issue is the question of who must be satisfied that a facility has achieved and will remain in substantial compliance after the facility has been cited for repeated instances of substandard quality of care so that payments may resume. Section 1819(h)(2)(E) says that it is the Secretary for Medicare, and section 1919(h)(2)(D) says that it is the State for Medicaid.

Comment: One commenter said that this remedy should be imposed only in cases posing a hazard to the residents or in cases when their rights are compromised.

Response: We consider this remedy to be appropriate for both the cases in which we have designated it may be used and the cases in which we designate it must be used. We believe that it will be one of our most effective remedies because it will strongly motivate facilities to come into and remain in compliance.

Comment: Some commenters said that the denial of payment for certain diagnostic categories set forth at § 488.217(b) of the proposed rule would be ineffective, and lead to discrimination against individuals whose care may be more costly. This, they said, would be in violation of the Rehabilitation Act of 1974 and of the Americans with Disabilities Act of 1991.

Response: We believe that these arguments are convincing, and to prevent facilities from using the provision as a means to discriminate, we have deleted it in this final rule.

Comment: Many commenters said that this remedy as written is too broad and subject to too much interpretation, particularly with respect to the meaning of the terms "adequate care," "diagnostic categories," "certain specified diagnoses," "substandard quality of care," and "new admission." Some said that residents who go to the hospital, then directly back to the facility, should not be considered to be "new admissions."

Response: "Substandard quality of care" has been defined in § 488.301. "New admission" has been defined at § 488.401 and the definition already contained the statement that residents admitted before the effective date of the denial of payment and taking temporary leave are not considered new admissions, nor subject to the denial of payment. Since we have deleted the proposed § 488.417(b), no definitions for those terms need be provided. Finally, the term "adequate care" does not appear in the regulations text at § 488.417. When it appears elsewhere in this regulation, it has the ordinary dictionary meaning.

Comment: One facility offered criteria for imposing denial of payment for all new admissions based on a scope and severity scale of its own design, and suggested we say, at § 488.417, that denial of payment for all new admissions will be in effect only until the date the facility is certified to be in substantial compliance.

Response: We received several suggestions for revising our scope and severity scales, and the enforcement scheme that we have established at § 488.408 ("Selection of remedies.") reflects some of these suggestions. Neither a denial of payment nor any other remedy will be imposed at a facility in substantial compliance, as defined at § 488.401. Once a denial of payment is imposed, it will be lifted when the facility achieves substantial compliance (and is capable of maintaining it, if necessary). This policy is set forth at paragraphs (c) and (d) of this section, as well as at § 488.454 Duration of remedies.

Comment: One commenter, in setting forth regulation text for proposed § 488.217, said that—

- Denial of payment should be imposed, not only for any deficiency which remains uncorrected within 90 calendar days after the last day of survey identifying the deficiency, but for any deficiency which remains substantially uncorrected within that time period as well;
- If the facility can supply documentation that substantial compliance was attained on a date preceding that of the revisit of the survey team, the denial of payment only remains in effect until the date that substantial compliance was actually reached;
- Denial of payment for all new admissions should last only until the facility has "substantially corrected" the deficiencies;
- Denial of payment should not take effect until either HCFA or the State has provided notice to the facility and the public of the impending action. Public notice shall be provided by publication in a newspaper of general circulation in the county where the facility is located; (Another commenter agreed that denial of payment should not take effect until notice has been provided, and also said that HCFA should set forth regulations requiring States to give notice to facilities before denying payment for all new admissions.); and
- When payments resume, this too should be announced to the public in the same way as the denial notice.

Response: We agree that denial of payment for all new admissions should last only until the facility is in substantial compliance. Because the final rule reflects the adoption of a substantial compliance standard, a denial of payment for new admissions, like other sanctions, will only be applied should a facility fail to meet that standard. Thus, under sections 1819(h)(2)(d) or 1919(h)(2)(C) of the Act, that facility must face a denial of payments for new admissions. Similarly, if, within 3 months of the survey that first identified deficiencies, the facility is successful in achieving substantial compliance, the denial of payments will be lifted as required by sections 1819(h)(3) and 1919(h)(4) of the Act. If the facility does not come into substantial compliance by 3 months after the last day of the survey, denial of payment will be imposed until substantial compliance is achieved or until the facility is terminated.

We also agree that, except in the case of the mandatory denial of payment for substandard quality of care identified in three consecutive standard surveys, if the facility can supply documentation acceptable to HCFA or the State survey agency that it was in substantial compliance, and was capable of remaining in substantial compliance, if necessary, on a date preceding that of the revisit, the remedies terminate on the date that HCFA or the State can verify as the date that substantial compliance was achieved. (This is further discussed in connection with a comment on § 488.454.) In the case of repeated substandard quality of care, the Act requires that the denial of payment (and State monitor) remain in place until the facility is in compliance and can demonstrate that it will remain in compliance.

We agree that facilities should receive notice of remedies before they are imposed. Notification requirements are found at § 488.402(f), and need not appear again at § 488.417. The commenter cited section 1919(h)(2)(A)(i) of the Act as rationale for HCFA promulgating regulations setting forth procedures for States to use in informing the general public about remedies. We do not agree that the Act requires HCFA to promulgate regulations regarding how States must go about notifying the general public.

Comment: Some commenters said that the remedy denial of payment for specific categories of residents to be used if the surveyor finds that the facility is not currently able to provide adequate care for these individuals, or determines that caring for such individuals would adversely affect care provided to other residents, was not one of the remedies provided in OBRA '87.

Response: We are deleting the provisions for denial of payment for specific categories of residents from this final rule because, as we stated at the beginning of this section, we believe that this remedy could lead to inequities.

Comment: A number of commenters expressed concern over whether survey agency revisits would be timely enough to ensure the prompt resumption of payments as soon as the facility corrects its deficiencies.

Response: We are revising this final rule to state that deficiencies are considered to be corrected when a survey team revisit confirms that they have been corrected, or when a facility provides evidence satisfactory to HCFA or the State survey agency, which can be verified without an on-site visit, that the deficiencies have been corrected before the revisit or before the credible evidence was submitted. In addition, sections 1819(h)(3) and 1919(h)(4) of the Act allow for lifting the denial of payment for new admissions when the facility achieves substantial compliance. (Please see the discussion regarding substantial compliance under the comments pertaining to § 488.454 in this final rule, Duration of remedies.)

Comment: Two commenters suggested that, instead of denying payment for all new Medicare and/or Medicaid admissions when warranted, we impose a ban on all new admissions to a facility, regardless of the source of payment. They said that if we use this remedy, we should pair it with a directed plan of correction requiring the facility to take steps to restore capacity to provide a full range of NF/SNF services.

Response: We cannot accept this suggestion since the Act does not give us the authority to regulate payments that may be made to facilities by private paying residents.

Comment: Three commenters suggested that we add to proposed § 488.217 (a)(2) and (b)(2) a sentence stating, "No retroactive payments will be made when a ban on all new admissions is lifted." The rationale is that, if facilities know they will receive payments later, they may admit those residents they choose and thus cover the short term cash flow problem. They say that this would lessen the effectiveness of the sanction.

Response: We agree in principle, and, for purposes of clarification, we are revising the suggested sentence to state, at § 488.417(e), that no retroactive payments will be made for any new admissions to the facility for the period between the date the remedy was imposed and the date that HCFA or the State determines that the facility achieved substantial compliance.

Comment: One commenter suggested that § 488.417(a)(1)(i) be revised to state that HCFA or the State may impose a denial of payment for new admissions if a deficiency remains uncorrected after 90 calendar days (as opposed to within) of the last day of survey identifying the deficiency. As worded in the proposed

rule, the mandatory sanction would have been imposed if a deficiency had existed at any time during the 90 days.

Response: We agree with the intent of the comment, and although we are no longer referring to 90 days but to 3 months as the Act does, we are making this revision. (Please note that the proposed § 488.217(a)(1)(i) is now redesignated as § 488.417(b)(1).)

Comment: One commenter suggested that HCFA deny payment for all new admissions after the second consecutive survey which documents that substandard care is being provided. The rationale is that this would be more in keeping with the purpose of remedies, that is, encouraging rapid compliance with the program requirements. Another commenter suggested that denial of payment for new admissions be a mandatory remedy when there are widespread substandard quality of care violations or when there is a pattern of substandard quality of care violations.

Response: While the Act, at section 1819(h)(2)(E) *requires* denial of payment for new admissions or for all Medicare residents, and, at 1919(h)(2)(D) *requires* that denial of payment for new admissions be imposed after the third consecutive standard survey that shows substandard quality of care, it *permits* the imposition of this sanction anytime that noncompliance is found.

Comment: One commenter said that provisions should be made for the protection of Medicare beneficiaries or Medicaid recipients, or both, admitted to a facility while the payment ban on new admissions is in effect. To protect such individuals, the commenter said, providers should be prohibited from seeking payment from residents or third parties for any care furnished during a period in which the providers were denied payment for new admissions.

Response: This provision is already in the Act at section 1866(a)(1)(A) for Medicare and at section 1919(c)(5)(A) for Medicaid. Additionally, 42 CFR 447.15 obligates providers to accept Medicaid payments as payment in full.

Comment: One commenter said that, in order for this remedy to be effective, the duration must be such that there is some assurance that compliance will be sustained.

Response: In the strictest sense, regardless of the nature of the deficiency, and regardless of the remedy imposed, there can be no guarantee that substantial compliance will continue once the survey team leaves. We can only impose reasonable sanctions and make periodic on-site inspections to ensure compliance. However, when HCFA or the State denies payment for instances of repeated substandard quality of care, we do, at paragraph (c) of this section, state that the sanction is not lifted until—

- The facility is in substantial compliance; and
- HCFA or the State survey agency believes that it will remain in substantial compliance.

Comment: One commenter suggested we amend this section to state that a denial of payment for all new admissions will take effect on the date the facility receives the notice of the remedy.

Response: Notification requirements are at § 488.402(f). Section 488.402(f)(1) states that, except when the State is taking the action for a non-State operated NF, HCFA gives the provider notice of the reasons for, and the effective date of, the remedy. Paragraph (f)(2) states that, for all remedies specified in § 488.406, the notice must be given at least 2 calendar days before the effective date of the remedy in immediate jeopardy situations, and at least 15 calendar days before the effective date in non-immediate jeopardy situations. We believe that this is equitable. Nursing homes are businesses, some of them very large businesses. They have payrolls to meet, suppliers to pay, buildings and equipment to maintain, and similar overhead. An "effective immediately" notice would not be reasonable.

Comment: One commenter said that § 488.417(a)(1)(i) is inconsistent with § 488.412(b)(3). Section 488.417 says, at paragraph (a)(1), that HCFA or the State may deny payment for new admissions, and, at (a)(1)(i), that HCFA will and the State must deny payment for new admissions if any deficiency remains uncorrected within 90 calendar days after the last day of survey identifying the deficiencies. (Since § 488.412(b)(3) bears no direct relationship to § 488.417(a)(1)(i) and § 488.412(a)(3) does, we believe that the commenter meant to cite the latter, which says that if any deficiency remains uncorrected within 90 calendar days after the last day of survey, HCFA will and the State must deny payment for new admissions.)

Response: While §§ 488.417(a)(1)(i) and 488.412(a)(3) overlap, they are not inconsistent because a certain amount of overlapping has been purposely written into this final rule for ease of reference on the part of those who will use it. As previously, noted, we have amended the regulations text to reflect a 3 month timeframe to comport with the Act.

Comment: One commenter asked if there was any difference between "all new admissions" in § 488.417(a) and "new admissions" in § 488.417(a)(1).

Response: There is no difference. We are revising the regulations text to conform to the section's title.

Comment: Some general comments we received on the provisions in this section of the proposed rule were as follows:

- They are unjustifiably severe;
- Providers can not comply with them in all cases because some deficiencies take more than 90 days to correct; and
- They are unnecessary.

Response: At HCFA's request, the Institute of Medicine (IoM), which is part of the National Academy of Sciences, conducted a study of the policies and regulations governing the certification of nursing homes participating in Medicare and Medicaid. Its report, issued in March 1986, cited the urgent need for enacting statutory provisions extending the remedies available to HCFA and the States in enforcing compliance with nursing home regulations. A General Accounting Office (GAO) study ("Medicare and Medicaid: Stronger Enforcement of Nursing Home Requirements Needed" (July 1987)) also concluded that penalties short of decertification of nursing homes are needed to deter noncompliance. HCFA's operating experience also bears this out. Traditionally, if facilities were unable to correct deficiencies within 90 days of the survey date, their provider agreements would have been terminated by the 90th day. We, along with the IoM, GAO, and the Congress believe that these regulations are necessary, are not unduly harsh or severe, and that it is possible for providers to comply with them. Furthermore, the denial of payment for new admissions is not only authorized by the Act, but required by the Act in certain circumstances, such as when noncompliance remains after 3 months or when substandard quality of care has been cited in three consecutive standard surveys.

Section 488.418 Secretarial Authority to Deny All Payment

Upon our review of comments and evaluation of the underlying Act, we noted that we did not include a section in the proposed rule explicitly stating the Secretary's authority to deny all payment to a facility. Under section 1819(h)(2)(B) of the Act, if a facility has not met a requirement, the Secretary may deny payment for all Medicare residents. Under section 1819(h)(2)(E), the Secretary is required to deny payment for all current Medicare residents or for all Medicare new admissions if a SNF, on three consecutive standard surveys has been

found to have provided substandard quality of care.

Under section 1919(h)(3)(C)(i) of the Act, the Secretary may deny payments for all current Medicaid residents but this denial authority is exercised against the State, not the facility. Only with respect to State-operated facilities may the Secretary take action directly against a facility because section 1919(h)(3)(A) expressly provides such authority.

We are adding new § 488.418 to make explicit this authority. We provide that, if a facility has not met a requirement, in addition to the authority to deny payment for all new admissions as set forth at § 488.417(a), HCFA has the authority to deny any further payment to the facility for all Medicare residents and to deny further payment to the State for all Medicaid residents.

Under paragraph (b) of new § 488.418, if the facility achieves substantial compliance, HCFA resumes payment to the facility or the State prospectively from the date that it verifies as the date that substantial compliance has been achieved, except as provided in paragraphs (c), (d), and (e) of this section.

If payments to the facility or the State resume, no payments will be made for the period between the date the remedy was imposed and the date that HCFA verifies as the date that substantial compliance was achieved. This is the case with both denial of payment for all new admissions as well as with denial of payment for those already residing in the facility.

Should HCFA or the State find that the facility was in substantial compliance before the date of the revisit, or before HCFA or the survey agency receives the credible evidence of such compliance, the remedy must be lifted as of the date that substantial compliance was achieved, as determined by HCFA. The exceptions to this rule occur when the denial of payment remedy is imposed for repeat instances of substandard quality of care. The remedy is not lifted until substantial compliance is achieved and HCFA believes that the facility will remain in substantial compliance.

Section 488.422 State Monitoring

Comment: Some commenters expressed concern that the Act did not provide for State monitoring.

Response: We disagree. The statutory authority for State monitoring is implicit for cases of repeated noncompliance (see sections 1819(h)(2)(E)(ii) and 1919(h)(2)(D)(ii) of the Act with cross references to sections 1819(g)(4)(B) and 1919(g)(4)(B) of the Act for Medicare and Medicaid respectively).

Comment: Some commenters asked in what instances the remedy of State monitoring is to be applied.

Response: The Act requires State monitoring in cases of repeated noncompliance. That is, if a facility, on three consecutive standard surveys conducted under sections 1819(g)(2) and 1919(g)(2) of the Act has been found to have provided substandard quality of care, State monitoring is to be imposed. Otherwise, State monitoring may be considered as an optional remedy.

Comment: Several commenters raised questions as to how funding for State monitors would be met. Some suggested that costs for monitoring be borne by the facility and not be an allowable cost for reimbursement.

Response: We believe the costs of State monitoring should be part of the survey and certification process and, therefore, should be considered by the State survey agency in planning its annual Medicare and Medicaid workload. The budgeted amounts for these activities are approved by HCFA as part of the annual survey and certification budget process.

Comment: A few commenters suggested that we prescribe the role of the State monitor in the final rule.

Response: We do not wish to prescribe the role of the State monitor; however, we have clarified language in the final rule describing in general terms the purpose of the State monitor. The State monitor oversees the correction of cited deficiencies and ensures that residents are protected from harm. Any more specific description of State monitor roles and responsibilities will be addressed in manual instructions to the State survey agency.

Comment: Some commenters expressed concerns regarding the length of time State monitoring would continue. Several commenters suggested that the State survey agency retain the ability to monitor ongoing conditions in the facility until the State survey agency or HCFA determines the serious condition(s) have been corrected.

Response: We agree with the commenters. State monitoring remains in place at least until HCFA or the State survey agency determines that the provider is in substantial compliance with the requirements of participation. In the case of State monitoring imposed for repeated substandard quality of care, the sanction will stay in place until the facility has demonstrated to the Secretary or the State survey agency that it will stay in substantial compliance. At this time, any serious deficiencies must have been corrected to the point where the facility is in substantial compliance.

Comment: We received several comments suggesting we write qualifications for a State monitor in the final rule.

Response: Because of the broad spectrum of situations in which State monitoring might be used, we choose not to expand the current language in § 488.422(a).

Comment: Some commenters suggested we mandate State monitoring be used whenever a facility is undergoing termination or closure.

Response: While we agree with commenters that installing a State monitor would be appropriate in a termination or closure situation, we will not require the States to use this remedy in all such cases.

Section 488.421 Directed Plans of Correction

Comment: Some commenters wanted us to define a directed PoC as a facility-initiated PoC which the State or HCFA orders the facility to implement. Commenters reasoned that making this change would allow States to use directed PoC more efficiently and effectively since facilities' governing bodies will generally be more capable of drafting viable plans of correction based upon knowledge of facility resources. One commenter wanted to amend proposed § 488.224 to read as follows: "HCFA, or the State (or the temporary manager with HCFA or State approval) has the responsibility to develop a plan of correction * * *". Another commenter believed that when the State or HCFA orders (or directs) a facility to comply with the directed PoC, the State or HCFA have more authority to require the facility to revise any aspect of the PoC which is not acceptable. The commenter further suggested that the imposition of a governmentally created PoC on a facility raises questions of the government's and the facility's respective liabilities if the plan does not correct the deficiencies.

Response: Defining a directed PoC as a facility-initiated plan which HCFA or the State orders or directs a facility to implement would be virtually identical to the way we have always defined a traditional PoC. The traditional PoC is a requirement when any deficiency is cited, except for isolated deficiencies where no actual harm has occurred and there may be potential for minimal harm. The exception to this is if a directed PoC is used as a remedy. The directed PoC can be used by itself for deficiencies which cause no actual harm. We also disagree that a PoC developed by the facility would give the

State survey agency or HCFA any more authority than one developed by the State survey agency, HCFA, or a temporary manager. We do not believe that to say "HCFA * * * has the responsibility" adds anything to the meaning of this section. Although it may be true that the facility's governing body may be more familiar with a facility's resources, developing a directed PoC does not rest solely on this knowledge. For the reasons stated above, we are not accepting these suggestions.

With respect to the commenter's point that a governmentally-initiated PoC could raise a question about the State's or HCFA's liability if the directed PoC does not correct deficiencies, we do not guarantee that any remedy will necessarily result in facility compliance. The directed PoC, as well as other remedies prescribed, are developed and recommended based on the professional judgment of State or HCFA staff and their consideration of which remedy(ies) would promote prompt achievement of compliance. If a remedy does not result in a facility achieving compliance, another remedy may be imposed to safeguard the health or safety of nursing home residents. This other remedy could be an additional remedy from the same category, or, if the deficiencies have been exacerbated, a remedy or remedies from a higher category, including termination. However, HCFA and the State will usually impose alternative remedies prior to terminating a facility.

Comment: Other commenters wanted us to amend § 488.424 to specify situations where a directed PoC would be mandatory. These commenters asked that a directed PoC be used when the following deficiencies are identified.

- Violations of admission requirements;
- Violations of Sarrasat requirements concerning notice of Medicare coverage and rights to demand billing;
- Violations of transfer prohibitions and bed hold requirements;
- All cases of violations of individual rights; and
- Care problems of specific, identifiable individuals.

Commenters further suggested that the directed plans of correction must be developed by qualified health care professionals in consultation with the State survey agency.

Response: We are rejecting this suggestion for several reasons. Mandating a directed PoC for certain deficiencies would limit HCFA or the State's choice of remedies and would run counter to the thrust of the Act which encourages the flexible application of enforcement options. Also, requiring a remedy for specific deficiencies would be inconsistent with the requirements associated with other remedies. We also do not want to prescribe in regulations which staff people must develop the directed PoC, but opt to give HCFA or State the flexibility to decide who will carry out this function. We expect that the State survey agency would develop the directed PoC, but the State would be responsible for officially notifying the facility of the remedy. However, in manual instructions, we will provide guidance in this regard by including examples of deficiency situations and corresponding directed PoCs which are appropriate in terms of content and the staff person responsible for development.

Comment: One commenter urged HCFA to require that directed PoCs include specific corrective action to protect individual residents who suffered harm when those residents are clearly identifiable. Another commenter wanted the rule amended to provide that all PoCs are to make an injured resident or residents "whole," whenever possible, and that the facility be required to take specific steps to ensure future compliance. The commenters offered, as an example, a facility which improperly denies a resident his or her bed hold rights. The commenters believed that in this example the directed PoC must require that the facility honor the resident's statutory right to return to the next available bed. Commenters feared that without such a requirement, the directed PoC will be nothing more than a facility's promise not to do it again.

Response: Requiring in regulation that a facility make a resident whole whenever a resident has been injured or has been deprived of his or her rights would be virtually impossible. In many instances where irreparable harm has occurred this would be an unattainable goal. Although HCFA and the State survey agency consider the unique circumstances of a facility and the results on residents when developing a directed PoC, any PoC is based on prospective compliance. The principle behind a PoC is to ensure that the underlying cause of cited deficiencies does not recur. The purpose of the PoC is not, however, a checklist of past violations which must retroactively be corrected. In the example cited, if a facility denied a resident a bed through improper application of a bed hold policy, the resident would probably have to be admitted to another facility. Prescribing in the directed PoC that the resident would be eligible to be readmitted to the facility when the next bed became available would be pointless since he or she, being unable to wait, would probably already be placed in another home. We have not accepted this comment to mandate that the directed PoC include resident specific reparations.

Comment: One commenter recommended the use of a directed PoC for substandard quality of care findings with a scope of 3 or 4 and for repeat substandard quality of care findings at a scope of 1 or 2 and for all other repeated violations.

Response: We are not accepting this suggestion. Based on numerous public comments, we have reconfigured the scope and severity grid without numerical values, and are offering it in this preamble as one example of how a State could determine what remedies to impose in noncompliant facilities. Additionally, we have developed recommended categories of remedies for ranges of deficiencies. The directed PoC is a remedy which can be used for any deficiency and may be the only remedy used for lower level deficiencies. We do not intend to require a directed PoC for substandard quality of care findings but rather leave that option to the enforcing entity. Nor do we mandate the use of directed PoCs for repeat deficiencies. The law provides for denial of payment, State monitoring, and increased civil money penalties in certain cases of repeated noncompliance and those are the only enforcement actions related to repeat deficiencies that we have required in these regulations.

Section 488.425 Directed In-Service Training

On the basis of our review of issues raised by commenters and our reevaluation of our statutory authority, we are including in the final rule a provision for the imposition of a directed inservice training program. After several years of experience with implementing the OBRA '87 provisions, we have come to a greater realization that some compliance problems are a result of imperfect knowledge on the part of the health services staff relative to state-of-art practices and resident outcome expectations. For example, we know that incontinence and decubitus ulcers are not an inevitable result of old age and immobility. The incidence and/or prevalence of these conditions in a particular long-term care facility may be the result of general lack of knowledge about the prevention and treatment of these conditions, and a lasting change may be produced in that facility by a directed inservice training program.

We also believe that a directed inservice training program may be particularly effective in reducing reliance on chemical restraints. Two studies have been instructional on this point. The first, entitled "A Randomized Trial of a Program to Reduce the Use of Psychoactive Drugs in Nursing Homes" by Dr. Jerry Avorn and colleagues (*New England Journal of Medicine;* Vol. 327 No. 3; July 16, 1992, pages 168–173), demonstrates that a fairly intensive training program for the medical, as well as, all three shifts of the nursing staff (including aides) can bring a dramatic reduction in the use of psychoactive drugs without adversely affecting the overall behavior and level of functioning of the residents.

Another study was entitled, "Reducing Antipsychotic Drug Use in Nursing Homes: A Controlled Trial of Provider Education," by Dr. Wayne Ray and colleagues at Vanderbilt University School of Medicine published in the *Archives of Internal Medicine;* Vol. 153; March 22, 1993, pages 713–721. This study applied a formalized training program to teach nursing personnel how to manage the most prevalent behavioral symptoms experienced by aged individuals in nursing homes. Common behavioral symptoms such as catastrophic reaction, yelling and screaming, fighting, wandering, etc. are addressed in this study, and non-drug interventions are described. The training program led to a 59 percent reduction in the use of antipsychotic drugs over the control facility, and a 31 percent reduction in physical restraints over the control facility.

We would invite facilities to use inservice programs conducted by sources with an in-depth knowledge of the area(s) which require specific training so the positive change is achieved and maintained. We would also encourage facilities to use programs developed by well established centers of geriatric health services education and training. These centers include, but are not limited to, schools of medicine or nursing, Area Health Education Centers, and centers for aging. These centers should have established programs in geriatrics and geriatric psychiatry. We only recommend to the facility where it can obtain its inservice training program. The ultimate test of the training program will be in the outcome of care achieved by the facility after completion of the training program. If the resident's care circumstance has not improved after training, the facility, upon resurvey by the State agency, will be subject to stronger sanctions. We also require that the payment for the directed inservice training is the responsibility of the facility.

Section 488.426 Closure or Transfer of Residents, or Both

Comment: Several commenters said that HCFA should give more guidance on when closure of a facility and/or transfer of residents are appropriate. Others were concerned because the regulations did not set out procedures for State transfer of residents. A few commenters said that closures should be conducted in accordance with the provisions of the proposed § 488.240. Some commenters insisted that closing a facility should only be a last resort when alternative methods have failed or the physical plant is unsafe. Other commenters said HCFA should include a definition of the term "emergency" in the regulations.

Response: The closure of a facility and/or transfer of the residents are measures of last resort that are taken only in an emergency situation. These actions are rare, but most States have had experience with such actions. Most States have a relocation plan that outlines the circumstances under which the plan will be put into effect and the procedures to be followed. Because of this, we believe it would be unnecessary to mandate procedures for States to follow in cases of closure or transfer of residents. The Act places the responsibility for closure and/or transfer upon the States and proposed § 488.240, the content of which is now incorporated into § 488.426, requires any transfers to be orderly. We do not believe that any greater procedural specificity is required in Federal regulations. We also do not believe that it is necessary to define "emergency." We define words only if their definitions will have a narrower application than definitions commonly found in dictionaries. That is not the case for the use of the word "emergency" in this regulation.

Comment: Some commenters insisted that a temporary manager be appointed to oversee the transfers whenever large numbers of residents are involved. Other commenters believed that States should be required to get a court order before closing a facility or transferring residents.

Response: We do not agree with these comments. We believe the States should retain the flexibility to implement emergency relocation plans according to the circumstances of each case. The States have the knowledge and experience to choose the optimum combination of procedures to handle each unique situation. Obtaining a court order could delay the implementation of the relocation plan in an emergency situation and would add nothing to the process. The same can be said about the imposition of a temporary manager, because it is the State that is experienced in closure and/or transfer of residents' situations, not necessarily a temporary manager.

Comment: One commenter noted that the Act at section 1919(h)(5) cross references the transfer of residents to sections pertaining to facility-initiated transfers and discharges. Consequently, the final rule must require States to set up procedures which include written notice, involvement of ombudsmen and orientation procedures.

Response: Sections 1819(h)(4) and 1919(h)(5) of the Act, which make reference to a resident's rights upon transfer, speak to them as they relate to the "safe and orderly transfer of the residents * * *" We believe that whatever appeal rights individual residents have when the facility in which they reside faces termination bear only on the appropriateness of the transfer plans for those individuals and not the correctness of the government's decision to terminate the facility's provider agreement. For example, an individual may disagree with the nature or location of the facility to which he is slated for transfer and could challenge such a decision under the appeals process provided by sections 1819(e)(3) and 1919(e)(3) of the Act.

There is no evidence in the Act or the legislative history that the Congress intended to vest nursing home residents with the right to challenge the correctness of the decision to take enforcement measures against the facility. That decision lies with either the Secretary or the State and is subject to challenge by the facility, not the residents. There is no reason to believe that the Congress, in drafting these provisions, had as its objective the overturning of the Supreme Court's decision in *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773 (1980), and we cannot presume that *O'Bannon* has been overturned by indirection.

Moreover, the plain implication of the transfer and discharge provisions in sections 1819(c) and 1919(c) of the Act is that their focus is on actions that may face an individual resident of a facility rather than *all* of a facility's residents. Thus, subsection (c)(2)(A) speaks to a transfer or discharge for the *resident's* welfare or for the health of *individuals* in the facility. These imply individualized determinations, not the kind of facility determination that automatically subjects the entire Medicare or Medicaid patient

population to forced removal from the facility.

Additionally, when describing the documentation requirements for discharge or transfer, the Act (in the paragraph immediately following the listing of permissible grounds for such actions) speaks to the necessity for documentation to appear in the resident's clinical record and often times to be entered by the resident's physician. We know, however, that decisions to terminate a facility's provider agreement are made by either the Secretary or the State, not by residents' physicians. Thus, it would seem that the kind of transfer appeals referred to in sections 1819(c)(2) and 1919(c)(2) of the Act do not encompass issues that are central to the provider agreement termination, but rather decisions affecting the fate of an individual resident that may be made by his or her physician.

We believe that sections 1819(h)(4) and 1919(h)(5) of the Act give the Secretary and the States discretion in how to apply the transfer notice and appeal provisions of sections 1819(c)(2) and 1919(c)(2). The Act's enforcement provisions require that the transfer of residents whose facility faces termination be done in a manner "consistent with" the provisions of subsection (c)(2). Had the Congress intended that there be strict adherence to the Act's transfer provisions, it could easily have specified that they be followed precisely. Use of the phrase "consistent with," however, implies a less rigorous standard that permits the Secretary and the States to make judgments as to how to best accommodate the notice provisions, for example, while not compromising the effectiveness of the termination action. Thus we believe residents should receive as much notice as possible of their impending transfer as long as the notice period does not further compromise their quality of care.

Comment: A few commenters mentioned that the proposed regulation improperly references proposed § 488.206(c).

Response: The reference to proposed § 488.206(c) has not been included in the final rule as § 488.426 has been revised to include closure and transfer of residents in NFs and SNF/NFs.

Comment: One commenter suggested that the term "Medicaid facility" be changed to read "Medicaid certified facility " so as not to give the false impression that a facility must be 100 percent Medicaid in order for these provisions to apply.

Response: The term "Medicaid facility" is commonly used to designate Medicaid certification, regardless of whether or not the entire facility is occupied by Medicaid eligible patients.

Proposed § 488.228 Alternative or Additional State Remedies (now incorporated in § 488.406)

Proposed § 488.230 Civil Money Penalties

In the final rule, we are redesignating proposed § 488.230 as the following sections:

Redesignated Section	Proposed § 488.230
§ 488.430 CMP: Basis for imposing penalty.	(a)
§ 488.432 CMP: When penalty is collected.	(b)
§ 488.434 CMP: Notice of penalty.	(c), (d)
§ 488.436 CMP: Waiver of hearing, reduction of penalty amount.	(e)
§ 488.438 CMP: Amount of penalty.	(f), (g)
§ 488.440 CMP: Effective date and duration of penalty.	(h), (i)
§ 488.442 CMP: Due date for payment of penalty.	(j)
§ 488.444 CMP: Settlement of penalty.	(k)

Comment: We received many general comments regarding civil money penalties. A few commenters who supported this provision of the regulation stated they believed in a swift and certain fine structure which is mandatory in nature and imposed directly on ownership.

Response: We appreciate the support of these commenters who realize that civil money penalties can be an effective remedy to encourage prompt compliance with participation requirements as well as to promote the continued rendering of quality health care in a safe environment.

Comment: One commenter suggested that we prohibit the recoupment of fines through rate increases.

Response: We do not accept this suggestion. Incorporating provisions to address the facility's recoupment of penalties through rate increases is beyond the scope of this rule which addresses the survey, certification and enforcement for skilled nursing facilities and nursing facilities.

Comment: Several other commenters believed civil money penalties do not work, are not the answer, serve no purpose or are an insult to professionals.

Response: We do not agree with these comments. We have the statutory responsibility to do what is necessary to promote the continued health and safety of residents in long term care facilities. We cannot say at this point that civil money penalties do not work. We can say the Congress perceived the effectiveness of this remedy and included it among the other remedies established to encourage prompt compliance with participation requirements.

Comment: A few commenters stated that civil money penalties are not necessary, as there is an extensive list of available remedies.

Response: We agree that there are many available remedies that can be used. We are including at § 488.404 the factors to be considered when selecting the most effective enforcement remedy. OBRA '87 included revised and expanded authority for the enforcement of the Federal participation requirements for long-term care facilities which allow State and Federal governments to choose the most effective remedy to encourage rapid compliance with participation requirements. We do not agree with the statement that civil money penalties are not necessary, because using civil money penalties as a remedy provides another enforcement option for addressing the unique characteristics of each case of facility noncompliance.

Comment: A few commenters said that civil money penalties are not fair and must be reasonable and realistic.

Response: The ranges in the amounts of the civil money penalties are commensurate with the level of SNF or NF noncompliance and, we believe, permit penalties to be imposed in a fair, reasonable and realistic manner. In fact, the higher and wider range of fines ($3,050 to $10,000 per day) is reserved for immediate jeopardy deficiencies, even though these deficiencies account for a very small minority of the cases of noncompliance.

Comment: Several commenters expressed concern that civil money penalties will drive up the cost to the taxpayer and increase the government's debt.

Response: Increased cost to taxpayers as a result of civil money penalties is possible if civil money penalties are imposed on publicly funded facilities. To the extent that such a provider's operation is characterized by deficiencies, and costs are excessive, financial burdens are imposed on the taxpayers. However, the money collected from penalties does not increase the Federal debt as it is returned to the Medicare Trust Fund or is earmarked for the protection of the health or property of Medicaid residents. Therefore, money is indirectly returned to the taxpayers' benefit.

Comment: Several commenters expressed the concern that civil money penalties could cause small, independent, primarily Medicaid supported, rural facilities to be closed down, possibly displacing residents from their community home.

Response: We reject this argument. Sections 1819(h)(2)(B)(ii) and 1919(h)(3)(C)(ii) of the Act state that the Secretary or the State *may* (emphasis added) impose a civil money penalty. A civil money penalty need not be imposed in every situation. The Act provides the Secretary and the State the authority to choose a remedy which corresponds to the unique characteristics of each case. In addition, § 488.438 states that a facility's financial condition is a factor considered in determining the amount of the civil money penalty.

Comment: Several commenters are concerned that the imposition of civil money penalties could detract from resident care or redirect funds that could be used to continue to improve care.

Response: We do not accept this comment. First, the money that is collected from civil money penalties is either transferred into the Medicare Trust Fund or is earmarked for the protection of Medicaid residents' health or property. Second, as soon as substantial compliance is achieved, civil money penalties are discontinued. Therefore, the facility is in control of how much money it ultimately is responsible for paying; that is, the sooner it corrects deficiencies, the less penalties it will pay.

Comment: A professional organization commented that the proposed section on civil money penalties does not reflect all of the points discussed by the Institute of Medicine in its study, *Improving the Quality of Care in Nursing Homes* (1986). The Institute of Medicine envisioned civil money penalties as a valuable enforcement tool which could be applied in amounts appropriate to the seriousness, duration and repeat occurrence of the violation. It recommended prompt, short hearings on the imposition of the remedy, that fines be large enough to be more costly than the violation, and that fines be versatile enough to be used to correct minor violations, as well as to immediately punish life threatening violations.

Response: We believe the regulatory provisions for civil money penalties encompass the above referenced points from the Institute of Medicine. The only point of departure is the suggestion with regard to promptness. Section 1128A of the Act requires that a hearing be provided to a provider that properly requests one before HCFA collects a civil money penalty. Section 1919(h)(8) of the Act requires the State to offer a hearing before collecting a civil money penalty.

Comment: One commenter suggested that the civil money penalty system be changed to a monetary award program. Facilities in compliance with the regulations would be rewarded. This would lead to improved resident care and provide an incentive for the employees.

Response: We do not accept this comment. Provisions for civil money penalties are located in sections 1819(h)(2)(B)(ii), 1919(h)(2)(A)(ii) and 1919(h)(3)(C)(ii) of the Act as part of an enforcement process. They are options that the Secretary and the State may exercise when SNFs and NFs are not in substantial compliance with participation requirements. Removing civil money penalties as an enforcement option and substituting a monetary reward system would not reflect the law as written. For participants in the Medicaid program, the State may separately establish a program to reward, through public recognition or incentive payments, or both, providers that provide the highest quality care. This reward provision is specified at § 488.303 of this rule.

Comment: Several State civil monetary penalty systems were submitted with the comments on the proposed rule for review. Different commenters recommended that HCFA adopt and/or evaluate these civil money penalty systems.

Response: Before developing regulations for civil money penalties, we met with the nursing home industry, consumer groups and government entities to obtain input in the development of the proposed rule. In addition, we reviewed a variety of State civil money penalty systems. We do not believe we have sufficient data at this time to justify abandoning the system we developed in the proposed rule in favor of another or to cause us to consider any State's program to be more effective than the civil money penalty system in the regulation at this time.

Comment: One commenter suggested changing "HCFA or the State may impose * * *" to "HCFA or the State shall impose * * *" at proposed § 488.230(a)(1). The commenter's rationale is that if facilities are required to pay for every instance of noncompliance, compliance would be maintained and additional funds could be used to support critical areas, such as, Long Term Care Ombudsman Programs.

Response: The regulation reflects the corresponding provisions of the Act. The Act permits HCFA's and the States' discretion in the imposition of this enforcement remedy. The Federal government cannot require the States to use this remedy in every instance of noncompliance, nor must it choose this remedy itself in every instance of noncompliance.

Comment: Another commenter suggested that HCFA interpret its authority to include the delegation of the imposition of civil money penalties to the States for Medicare purposes when HCFA determines that it is appropriate. The commenter also suggested the State could recommend a civil money penalty, HCFA could monitor the State's performance in this area and funds collected could offset State costs in performing this task.

Response: The Act does not permit the Secretary to delegate the authority to impose a civil money penalty on a Medicare participating facility to the State. Section 1819(h)(2) of the Act charges the Secretary, upon the recommendation of the State, with the authority to impose remedies. HCFA's decision to monitor a State's performance does not hinge on the imposition of civil money penalties. Further, any civil money penalties collected under Medicare will be returned to the Medicare Trust Fund.

Comment: A few commenters are concerned that the proposed definition of deficiency will make any failure to comply, no matter how small, subject to a fine.

Response: We agree with the commenters' concern that, as described in the proposed rule, very minimal deficiencies could be subject to civil money penalties. As a result, we revised the rule and developed enforcement action categories which correspond to the seriousness of the deficiencies. These enforcement action categories are described at § 488.408, Selection of remedies.

Also, as discussed previously in this preamble, we are accepting the commenters' implicit suggestion to incorporate the concept of substantial compliance as a standard SNFs and NFs must meet to participate in the Medicare and Medicaid programs. Using the standard of performance of substantial compliance for these providers ensures virtual compliance with sections 1819(b), (c), and (d) and 1919(b), (c), and (d) of the Act because the type of deficiency tolerated under a substantial compliance standard is very limited. We are defining substantial compliance at § 488.301. We consider substantial compliance to satisfy a facility's

obligation to meet requirements. Therefore, facilities in substantial compliance adequately protect the health and safety of nursing home residents and will not be subject to a civil money penalty.

Section 488.430 Basis for Imposing Penalty

Comment: Several commenters were confused and requested that we clarify the number of days of noncompliance between two certifications of compliance at proposed § 488.230(a)(2).

Response: We revised this paragraph of the rule and redesignated it as § 488.430(b). It now provides that HCFA or the State may impose a civil money penalty for the number of days of past noncompliance since the last standard survey, including the days of immediate jeopardy. We believe that this revision implements sections 1819(h) and 1919(h) of the Act, which state that if a facility meets the requirements of subsections (b), (c), and (d), but as of a previous period did not meet such requirements, a civil money penalty could be imposed for the days in which the facility was not in compliance with the requirements. We believe this statutory provision permits a civil money penalty to be imposed whenever there is past noncompliance with the participation requirements between standard surveys. The following example illustrates one application of this provision: A facility had a survey on July 1, 1993, and it was in substantial compliance with all of the participation requirements. During the orientation tour at the next survey, June 15, 1994, surveyors observed questionable infection control procedures. This observation prompted the surveyors to further examine records and the facility's infection control program. This examination indicated that the facility was out of compliance with infection control requirements (§ 483.65) from October 15 to October 30, 1993. However, at the time of the June 15, 1994, survey, the facility was again in substantial compliance with participation requirements. The number of days of noncompliance would be 16, which is the number of days between (and including) October 15 and October 30. This noncompliance existed for 16 days, but it did not exist at the time of either survey.

Although we may have discretion with respect to the selection of remedies to address noncompliance that is corrected by the time of a survey, it is likely that we would give serious consideration to civil money penalties in such cases. The Act, at sections 1819(h)(1) and 1919(h) (1) and (3), expressly authorizes the impositions of these sanctions even if, at the time of the survey, the facility is in substantial compliance.

Comment: Another commenter suggested incorporating language which says, "HCFA or the State may impose a civil money penalty for the number of days of noncompliance between two certifications of compliance if the deficiency was at a severity level of 4 and the facility could have prevented it."

Response: We do not accept this suggestion. Adding this language narrows the authority of the Secretary and the State. Limiting this enforcement authority could allow noncompliance to go unsanctioned. We see no justification for narrowing this authority.

Comment: A consumer organization specifically recommended we clarify proposed § 488.230(a)(2) to say, "the penalty accrues as of the first day that noncompliance existed in a previous period." Resident records or resident witnesses with corroboration would be sufficient evidence to determine noncompliance.

Response: In this final rule, we are revising this paragraph to provide that HCFA or the State may impose a civil money penalty for the number of days of past noncompliance since the last standard survey, including the number of days of immediate jeopardy. It is evident in this situation the civil money penalty could be imposed for all of the days of noncompliance. We do not accept the suggestion to incorporate into the regulation what specific evidence must be used to determine noncompliance, as each situation of noncompliance is unique.

Comment: Several commenters recommended that the word "impose" be changed to "collect" at proposed § 488.230(a)(2), since the Act authorizes the use of civil money penalties for past noncompliance that has been corrected.

Response: While it is true that the Act specifies that a civil money penalty may be imposed for past noncompliance that has been corrected, it is not necessarily true that a civil money penalty will be collected in every case. For instance, if a facility prevails at a hearing, a civil money penalty will not be collected. Accordingly, we are not adopting this recommendation.

Comment: A provider organization suggested that we expand proposed § 488.230(b) by adding, "(2) HCFA will not and the State may not impose a civil money penalty on a facility that is being terminated or is under temporary management or a denial of payment for all new admissions, except for a denial of payment under paragraph (a)(1) of [proposed] § 488.217."

Response: The purpose of all remedies is to protect residents against inadequate care and to motivate providers to promptly comply with the participation requirements so they may continue to provide quality services. Sections 1819(h) and 1919(h) of the Act specify that the State or HCFA may impose multiple sanctions to achieve these purposes. Limiting the authority of the Secretary and the State, as suggested by this comment, would reduce the ability of the Secretary and the State to tailor remedies to fit each unique situation of noncompliance, particularly those situations in which multiple remedies are warranted. If HCFA or the State chooses to impose a remedy, the procedures set forth in §§ 488.404 and 488.408 of this rule are followed to determine the most appropriate remedy or remedies.

Section 488.432 When Penalty Is Collected

Comment: Many commenters questioned the proposed provisions of § 488.230(b) which stated that HCFA will not and the State may not impose a civil money penalty while the facility has a hearing pending on the imposition of a remedy. A few commenters recommended that the word "impose" be changed to "collect" at § 488.230(b). Commenters wanted more information about:

- When a fine begins;
- Whether a fine is assessed for the days between the survey date and the hearing date, or only for days after the hearing date;
- Whether there is a conflict between § 488.230(b) and § 488.230(i) of the proposed rule.

The commenters' recommendations included:

- Stop the assessment of civil money penalties on the date that a formal hearing is requested. If the appeal outcome upholds the remedy then the civil money penalty is imposed retroactive to the date that the appeal was requested.
- Permit the States and HCFA to impose but not collect a civil money penalty during the pendency of any hearing. The penalty would accumulate during the appeal until the deficiency is corrected or the appeal is decided; and
- Do not stop the clock from running on a civil money penalty while the appeal is pending, as this can insulate noncompliant facilities against the imposition of these penalties.

Response: We are revising redesignated § 488.432 to be more specific and discuss when penalties are

collected. We say that, when a facility requests a hearing on the noncompliance which led to the imposition of the civil money penalty, HCFA or the State will not initiate collection of the penalty until a final administrative decision is rendered which upholds the determination of noncompliance.

If a facility does not request a hearing within the time period for requesting a hearing, collection of the penalty will begin when the facility achieves substantial compliance or is terminated. If a facility waives its right to a hearing in writing within 60 days of the date of the notice of intent to impose the penalty, collection is initiated when the facility achieves substantial compliance with the participation requirements or is terminated. This section now references § 488.440, which discusses the accrual of the civil money penalty and computation and notice of the amount due, and § 488.442, which discusses when payments for civil money penalties are due.

Comment: A commenter stated the proposed regulation does not permit the survey agency to impose a remedy for a second deficiency found as a result of a complaint survey until a pending hearing on a deficiency cited from a previous survey is concluded.

Response: This regulatory provision does not compromise the ability of the Secretary or the State to impose another remedy if one is warranted for a second situation of noncompliance before a final administrative decision is concluded on the first situation of noncompliance which has led to the pending imposition of a civil money penalty. However, if a civil money penalty is the preferred remedy for the second instance of noncompliance, as it was for the first, it will not be collected until the final administrative decision supporting its imposition is concluded. In this case, the State or HCFA could increase the civil money penalty amount if the noncompliance found later creates a situation of immediate jeopardy. If the second situation of noncompliance results from repeated deficiencies, HCFA or the State would increase the civil money penalty. However, the noncompliance found at a later time may warrant a remedy other than a civil money penalty which could be imposed before there is a final administrative decision on the first situation of noncompliance.

Comment: We received many comments stating that the proposed process will precipitate prolonged appeals without civil money penalties ever being assessed.

Response: The Act requires that an administrative appeal be provided before civil money penalties are collected. Even a prolonged appeals process does not eliminate the civil money penalty unless the facility prevails at the hearing. For example, if a provider achieves substantial compliance by the time of the appeal, the correction is only relevant from the standpoint of the number of days the penalty applies. The fact that a facility achieves substantial compliance before the hearing does not eliminate the need for the hearing. If the facility does not prevail in the hearing, the civil money penalty is collectible for each day of noncompliance.

Comment: Commenters endorsed incorporating a variety of ideas into the final rule to discourage frivolous appeals, including the following: provide for the accrual of interest pending appeal at a rate fixed by the State, stipulate that attorney fees will not be paid and are not an allowable cost if the appeal is unsuccessful, and, as stated in the Institute of Medicine Report, deny payment of provider fees for unsuccessful appeals of survey related costs. Another commenter requested the rule be revised to include that facilities not be allowed to claim on State or Federal income taxes civil money penalties and legal expenses upheld on appeal.

Response: We do not support these revisions. It would not be fair practice to assess interest on a civil money penalty before the provider knows the outcome of the hearing on the imposition of that penalty. To charge interest for the time period during which a hearing is pending would be tantamount to punishing the provider for exercising its right to have an administrative hearing, as provided for in sections 1128A(c)(2) and 1919(h)(8) of the Act. Regarding the comments about attorney fees, other provider costs and income taxes, these payment issues are not addressed in the Act and are beyond the scope of this regulation.

Section 488.434 Notice of Penalty

Comment: One commenter asked for further clarification of HCFA notice of penalty and State notice of penalty provisions of the regulation.

Response: We revised the content of § 488.434 to be more specific regarding the notice of intent to impose the penalty. The rule now states that, when HCFA proposes to impose a civil money penalty, it would deliver or send to the provider written notice of its intent to impose the penalty. The notice would include reference to the statutory basis for the penalty; the nature of the noncompliance; the amount of the penalty per day of noncompliance; any factors specified in § 488.438(f) that were considered when determining the amount per day of the proposed penalty; the date the penalty starts accruing; when the penalty will stop accruing; when collection of the penalty will be made; and instructions for responding to the notice. These instructions would include a specific statement of the facility's right to a hearing and the implications of waiving a hearing.

The rule now states that, when the State imposes a civil money penalty in the case of any non-State operated nursing facility, the State must notify the facility in accordance with State procedures; however, the State's notice must be written and it must include, at a minimum, the information specified in the HCFA notice of penalty as stated above.

Comment: A few commenters were concerned about implementation of civil money penalties if HCFA could not issue the notice in a timely manner.

Response: Although HCFA and the State will proceed quickly to issue notice of the imposition of the civil money penalty, its imposition does not hinge on specified notification timeframes. The notice of the imposition of the penalty is not required before a civil money penalty can start to accrue, since the Act permits the imposition of civil money penalties for past violations that have been corrected, and the penalty may start accruing as early as the date the facility was first out of compliance. For these reasons, in § 488.402, we exclude the civil money penalty remedy in the discussion of the notification requirements when remedies are imposed.

Comment: One provider organization recommended revising the notice of penalty section to specify that the State sends the notice via certified mail in all cases except State operated facilities and other facilities when HCFA is imposing the penalty based on a validation survey. This comment also listed specifics to be included in the notice.

Another commenter recommended that the notification requirements HCFA uses when it imposes the civil money penalty must also be the minimal standards applied to the State, instead of allowing the State's notice to be prepared in accordance with State's procedures.

Response: We are not accepting the suggestion that the notice be sent via certified mail because this would preclude sending a valid notice via other means, such as telefax, telegram, commercial overnight delivery services,

or other means that may be faster. In fact, for these reasons we are revising this section of the rule to eliminate the requirement that the notice be sent by mail with a return receipt requested. Also, to have the State send the penalty notice to Medicare participating facilities and to dually participating facilities, as the commenter suggests, would be inappropriate as HCFA provides notices for Medicare facilities.

We accept the comment to require that the contents included in the HCFA notice of penalty be contained in the State notice of penalty. Accordingly, as stated in a previous response, we are revising redesignated § 488.434 to provide that the State must notify the facility in accordance with State procedures for all non-State operated NFs when the State takes the action; however, the State's notice must be written and must include, at a minimum, the information specified in redesignated § 488.434(a). This revision is consistent with existing policy in prescribing the content of State notices in Medicaid provider termination cases and other Medicaid and AFDC matters.

Section 488.436 Waiver of Hearing; Reduction of Penalty Amount

Comment: We received many comments opposing the facility's opportunity to have a 35 percent reduction in the civil money penalty if the facility waived its right to a hearing. Commenters said that this provision is inappropriate in the regulatory process, not reflective of Congressional intent, insulting, tantamount to blackmail and plea bargaining and without statutory basis for offering a bonus to providers who waive their appeal rights. Some commenters objected to the 35 percent reduction if a facility waives its right to a hearing because they felt a justified penalty should be imposed without any compromise or reduction. Another commenter stated that, if the penalties reflect the deficiencies, then reducing the penalty amount makes the penalty lose some of its deterrent value. One commenter was concerned that the waiver of hearing provision, as written, may induce HCFA or the State to inflate the penalty. Then, if the penalty is reduced 35 percent because of the waiver, the fine amount is the amount it would have been before the reduction.

A commenter agreed with this regulatory provision on waiver of a hearing and stated that this is appropriate since informal conflict resolution can be used to eliminate misunderstandings or deficiencies that are not supported by the evidence.

Response: The 35 percent reduction in the civil money penalty afforded providers for waiver of right to appeal is based on a State model (§ 488.436). Providers are free to reject the option to waive the right to a hearing. The intent behind this regulatory provision is to encourage facilities to carefully consider their position in terms of substantial compliance, as well as the costs they will incur in litigating the matter, before tying up already overburdened hearing resources.

Also, if we are not confronted with the administrative costs of litigation, we believe we should consider offsetting civil money penalty amounts accordingly. On its face, these waiver provisions could seem to lessen the deterrent value of the civil money penalty. However, a 35 percent reduction of a $10,000 per day civil money penalty leaves a penalty amount of $6,500 per each day of noncompliance, and this is a significant deterrent to continued noncompliance.

We disagree with the comment that the waiver provision may induce HCFA or the State to inflate the penalty because the per day amount of the civil money penalty will be determined before the facility would have the opportunity to exercise its option to waive a hearing. This is because the notice of the intent to impose the penalty includes the amount of the penalty per day of noncompliance, as well as the option to waive the hearing.

Regarding dispute resolution, we appreciate the support of this commenter and agree that dispute resolution is an appropriate vehicle afforded the provider to address survey finding issues.

Comment: One commenter stated that the waiver should not permit the facility to deny the existence of the deficiency for the purpose of determining whether repeat violations exist.

Response: The opportunity to waive the right to a hearing and consequently receive a 35 percent reduction in the amount of the civil money penalty does not permit the facility to deny the existence of deficiencies for any purpose, nor will waiver of the right to a hearing remove the deficiencies from the facility's record. When a facility waives its right to a hearing, it is in effect not contesting the deficiency.

Comment: One commenter suggested replacing *may* with *must* as alternative language indicating that, "HCFA or the State *must* reduce the civil money penalty." A few commenters stated that the language used in the preamble regarding proposed § 488.230(e) renders the reduction in the penalty mandatory, and the language used in the regulation text is permissive.

Response: We erred in the proposed text. We accept the suggestion and intended to require that, when a facility requests a waiver of a hearing in writing, within the 60 day timeframe, HCFA or the State reduces the civil money penalty amount by 35 percent, and we are revising the final rule accordingly. We are also adding a paragraph to specify that, if the facility does not waive its right to a hearing, in writing, within 60 days from the date of the notice of intent to impose the penalty, the civil money penalty is not reduced. We believe the specified timeframe gives the provider ample opportunity to decide whether or not to exercise its option to waive a hearing.

Comment: One commenter stated that allowing a reduction in the amount of the civil money penalty will necessitate that States develop and implement complicated and costly accounting systems for recordkeeping and reporting purposes. Another commenter suggested that the collection of civil money penalties will be very confusing and they would rather have lower penalty amounts than the opportunity for a 35 percent reduction.

Response: Less litigation as a result of the waiver of hearing provision more than compensates for the recordkeeping and reporting necessary to implement the 35 percent reductions in civil money penalties. We are striving not only to reduce litigation costs but also to reduce the considerable investment of time necessary to prepare for and participate in a hearing. Imposing lower fine amounts instead of allowing the 35 percent reduction for a waiver is not in keeping with the reasons, as stated above, for having this provision.

Comment: A few commenters requested that the reduction of the civil money penalty amount when a facility waives its right to a hearing be 50 percent. Another suggestion was permitting a reduction of up to 35 percent. One commenter recommended the percent reduction be 10 percent and only available upon prompt payment.

Response: We believe that 35 percent is reasonable and appropriate, based on our review of an existing State model, and it approximates the savings we believe are possible by not litigating these cases.

Comment: One commenter suggested that the waiver of appeal rights submitted be written and that 50 percent of the civil money penalty be paid within 15 days from the date of notification.

Response: We accept the suggestion that the waiver be in writing and have made this revision in the final rule. We do not accept the suggestion that 50

percent of the penalty be paid within 15 days from the date of the receipt of a request to waive appeal rights. If a facility waives its right to request a hearing in accordance with the provisions specified in § 488.436, and subsequently receives a 35 percent reduction in the amount of the penalty owed, we do not believe it is necessary to also offer the facility the opportunity to pay only 50 percent of the civil money penalty at that time. To accept partial payments of a civil money penalty creates an unnecessary recordkeeping system and detracts from the financial incentive to motivate compliance which civil money penalties were intended to create. Also, we specified in the regulation that the entire penalty is payable on the due date, and that date would be 15 days after receipt of the waiver request if the facility has achieved substantial compliance with the requirements or the facility has been terminated. However, if the facility has not achieved substantial compliance or been terminated when the waiver request is received, the civil money penalty would continue to accrue until the facility achieves substantial compliance or is terminated. The due dates for civil money penalties are specified in § 488.442.

Comment: A few commenters proposed that the number of days in which a facility may request, or waive the right to, a hearing be changed. The alternatives were 10, 20 or 30 days.

Response: We do not accept the commenters' recommendations to change the number of days in which a facility may request or waive its right to a hearing. The existing 60 day timeframe to request a hearing has been effective in accommodating the needs of the government to move quickly in situations of noncompliance without unduly compromising the due process considerations of the provider. It often provides sufficient time to the facility to resolve disagreements prior to the initiation of costly litigation or, failing resolution of disagreements, adequate time to prepare for a hearing. To adopt a shorter timeframe, as suggested by the commenters, could compromise these opportunities.

Comment: A couple of the commenters offered the following alternative text for proposed § 488.230(e): "The facility must pay the civil money penalty that was imposed, less 35 percent, and correct the deficiencies for which the civil money was imposed, within 10 days of receipt of the notice. This waiver of hearing is called settlement."

Response: We do not accept these comments. We believe these suggestions do not allow a facility enough time to make a decision regarding whether to waive or request a hearing.

Section 488.438 Amount of Penalty

Comment: Several commenters supported the "two tier" civil money penalty system as enunciated in proposed § 488.230(f)(1).

Response: We appreciate the support of these commenters for this regulatory provision.

Comment: Many commenters believed that the civil money penalty fines of up to $10,000 a day are excessive and exorbitant. A few comments stated that the range is too broad and would create inconsistency on a national level. Some commenters said that imposing civil money penalties for non-immediate jeopardy deficiencies is severely punitive and "overreacting" and they should only be imposed in severe, life threatening or repeated situations.

Response: The Act allows a maximum civil money penalty of $10,000 per day of noncompliance. By designating the highest two thirds of the civil money penalties as the immediate jeopardy range, we believe we have developed a system for the States to use under which relatively few facilities will be subject to a maximum penalty. We expect that the higher penalties will seldom be imposed, because situations involving immediate jeopardy occur far less frequently than those with no immediate jeopardy. Furthermore, the range of civil money penalties for immediate jeopardy cases is broad enough to allow us the flexibility to impose the maximum civil money penalty in only the most egregious cases and some lower amount within the range for other situations of immediate jeopardy. We believe penalties imposed in the immediate jeopardy range are justified because residents are in life threatening situations, and we want to motivate the facility to immediately correct deficiencies. We set the amounts of the penalties within the two ranges to allow consideration of the unique characteristics of each situation of noncompliance. It is inappropriate to refer to a "consistent" application of civil money penalties because each situation of noncompliance and the factors that affect the amount of the civil money penalty are unique for each facility.

Comment: Several commenters stated that the civil money penalty system appears to duplicate existing State systems and doubled fines could financially destroy facilities. A few commenters asked that the proposed rule be amended to allow States to use their civil money penalty system when they have demonstrated that their system is effective.

Response: The Medicare and Medicaid programs are separate and distinct from State licensure programs. It is possible that a civil money penalty could be imposed under the State licensure program as well as under the Medicare and Medicaid programs; however, there is no reason to assume that the penalties would be doubled.

A State can use its licensure civil money penalty system for Medicaid purposes when it has demonstrated its effectiveness in accordance with § 488.406. These provisions state that alternative State remedies for facilities participating in Medicaid may be imposed if the State demonstrates to HCFA's satisfaction that the alternative remedies are as effective in deterring noncompliance and correcting deficiencies as the HCFA remedies.

Comment: A few commenters recommended that civil money penalties be significantly reduced, because if a facility receives a civil money penalty of $5,000 or more, that facility loses its ability to train nurse aides.

Response: As stated above, the $10,000 per day civil money penalty limit is established in the Act. While the Act gives the State and the Secretary the discretion to impose a penalty as high as the limit, we will not, as a matter of policy, lower civil money penalty amounts in specific cases to preclude facilities from losing their ability to train nurse aides. If a civil money penalty of $5,000 or more is imposed on a facility, it is indicative of the fact that an egregious situation of immediate jeopardy exists. In this case, we believe the facility's ability to continue to train nurse aides is compromised and the facility should lose approval of its nurse aide training and competency evaluation program. However, as we have already stated, we anticipate that the higher penalties will seldom be imposed, as situations involving immediate jeopardy occur far less frequently than those with no immediate jeopardy.

Comment: One commenter recommended revising proposed § 488.230(f)(2) to specify that a civil money penalty may not be one of the alternative remedies imposed when a facility does not meet the eligibility criteria for continuation of payment and HCFA will or the State must terminate a provider's agreement. Also, the commenter recommended that neither HCFA nor the State may impose more than four penalties against a facility on

the basis of a single survey and the maximum total penalty amount that may be imposed against a facility during any twelve-month period is five hundred dollars per licensed or certified bed.

Response: The Act does not preclude the imposition of a civil money penalty remedy as an enforcement option when the facility does not meet the eligibility criteria for continuation of payment or is terminated. In fact, section 1919(h)(7) of the Act discusses the special rules applicable when other remedies additional or alternative to termination are imposed. Concerning the specified amount of the penalty that can be imposed per licensed or certified bed during a specific time period, the Act does not specify such a limitation, and utilizing these limitations would unnecessarily restrict the authority of the Secretary and the State to tailor a civil money penalty remedy to the specific situation of noncompliance. However, the Act does set dollar limitations for each day of noncompliance. Therefore, the Act contemplates that all deficiencies will be aggregated for the purposes of determining the number of days of noncompliance (as opposed to the number of deficiencies).

Comment: A few commenters requested that we clarify if survey agencies may exceed the specified penalty ranges when a facility alleges compliance but a revisit by HCFA or the State finds noncompliance. One commenter recommended that the penalty be doubled in this situation even if it exceeds the penalty limit. Another commenter suggested replacing *may* with *shall* at proposed § 488.230(f)(3) so that this section reads, "HCFA or the State shall increase the daily penalty if the facility alleges compliance * * *."

One commenter disagreed with § 488.230(f)(3) concerning HCFA's or the State's ability to increase the daily penalty if the facility alleges compliance but a revisit finds noncompliance. The commenter recommended including an objective and quantifiable basis for increasing such penalties or deleting this regulatory provision. Another commenter suggested increasing the civil money penalty when a facility alleges completion of its plan of correction, but a revisit finds the facility has not completed its plan.

Response: As noted above, we are revising redesignated § 488.438 to provide that a civil money penalty would be decreased to the lower range of penalty amounts if a revisit determines that the immediate jeopardy is removed but the noncompliance continues. However, if the noncompliance, that continues constitutes repeated deficiencies in the same regulatory grouping of requirements, the civil money penalty would be increased, as specified in sections 1819(h)(2)(B) and 1919(h)(2)(A) and (h)(3)(C) of the Act. A civil money penalty could be increased to the upper range of penalty amounts if deficiencies for which a lower level penalty amount was imposed have become sufficiently serious to pose immediate jeopardy. We are also revising § 488.438 to provide that civil money penalties are increased, even if a new penalty amount exceeds the range for nonimmediate jeopardy, when deficiencies in the same regulatory grouping of requirements for which a civil money penalty was imposed are repeated.

We cannot accept the suggestion to increase a civil money penalty if a facility does not follow its plan of correction. When a remedy is lifted for a facility, it is based on that facility's substantial compliance with the requirements, not on the facility's adherence to its plan of correction. The health or safety of a resident could be jeopardized by a situation in which a plan of correction was followed but the facility was still not in substantial compliance with the participation requirements.

Comment: One commenter stated that there is no provision in the regulation which would prohibit daily penalties from mounting. This commenter added that this is not reflective of the Congressional intent behind sections 1819(h)(3) and 1919(h)(4) of the Act, which says that a finding to deny payment terminates when the State or Secretary finds that the facility is in substantial compliance with the requirements of subsections (b), (c), and (d).

Response: A facility can always stop the accrual of a civil money penalty by correcting the situation that caused the noncompliance. With regard to all remedies, we received many comments recommending that the standard of substantial compliance with sections 1819(b), (c), and (d) and 1919(b), (c), and (d) of the Act be incorporated into the rule as an acceptable measure of compliance. As discussed previously in this preamble, we accept this comment and we will lift remedies imposed for noncompliance when a facility is in substantial compliance with sections 1819(b), (c), and (d) and 1919(b), (c), and (d) of the Act.

Comment: A few commenters requested we add, at proposed § 488.230(f), that interest accrues on all penalties not settled, at the credit card rate, from the date of citation.

Response: We do not accept this comment. Redesignated § 488.438 discusses the base amount of the civil money penalties. We do not think it is appropriate to incorporate the interest rate in this section. A discussion of interest follows in redesignated § 488.442.

Comment: One commenter suggested that when noncompliance could financially benefit a facility, the amount of the penalty should never be less than twice what the State or HCFA can reasonably assume to have been the savings to the facility, as a facility should never believe it is in its financial self-interest to violate the law. This commenter also said that HCFA and the State should have access to any data (employee salaries, fees, supply costs, etc.) that will provide necessary information to determine the amount of the penalty.

Response: We do not agree. First, it would be beyond the scope of this rule to require the State to determine or for HCFA to try to determine when noncompliance would financially benefit a facility. Moreover, to provide that civil money penalties be twice the presumed savings incurred by the facility would be to establish an arbitrary requirement that would unnecessarily complicate using civil money penalties as an enforcement option.

A facility that perceives it is in its financial self interest to violate the law commits a grave error as it could face termination of its provider agreement for noncompliance.

Comment: A few commenters recommended that all minimum penalty amounts specified at proposed § 488.230(f) and the "per day" modifiers in the regulation be deleted to permit the Secretary or the State more discretion when imposing civil money penalty amounts.

Response: We do not accept these comments. The minimum penalty amount is set at $50 because we believe that any lesser amount would not be a remedy for any provider. The $50 minimum penalty amount also corresponds to the imposition of civil money penalties in increments of $50; this process was designed for purposes of simplicity of implementation.

The Act specifies that a civil money penalty may be imposed for each day of noncompliance. We believe that removing references to "per day" alters the clear instructions specified in the Act. Furthermore, the Secretary and the State always have discretion to impose or not to impose a civil money penalty,

since the law states that a civil money penalty *may* be imposed for each day of noncompliance.

Comment: Many commenters responded that the factors used to determine the amount of the civil money penalty are too broad and will promote inconsistency. A commenter posed that these factors are subjective, not uniform, and therefore, are challengeable in a court of law. A few commenters suggested removing the factors used to determine the amount of the civil money penalty from the final regulation while a few said that HCFA and the State should be required to give due consideration to the information provided by the facility.

Many commenters were generally negative in response to using the facility's financial condition as a factor affecting the amount of penalty and offered the following arguments about this policy:

- It is not equitable;
- It would result in inconsistent civil money penalties for the same deficiency;
- Poorly managed and/or not-for-profit facilities should not be excused or pay a lower civil money penalty;
- It discriminates against facilities that are more solvent;
- It is inappropriate if the facility can not appeal the amount of the penalty;
- Neither the Secretary nor the States have adequate information to evaluate a facility's financial condition;
- It would be difficult to apply objectively and would require an audit of the facility; and
- The regulation does not clarify how financial information is obtained, who evaluates this information and if it will be available promptly.

Another commenter requested that we remove a facility's financial condition as a factor and consider instead the location of the facility and the percent of Medicaid or Medicare patient days relative to the total patient days of the facility.

A few commenters suggested including the facility's degree of culpability as a factor in determining the amount of the civil money penalty as mentioned in the preamble of the proposed rule.

Response: In determining the amount of the penalty, section 1128A of the Act, which is incorporated by reference into sections 1819(h) and 1919(h) of the Act, requires the Secretary to consider specific matters and also provides authority to take into account any other items relevant to the penalty determination. We are requiring the State to also consider these specific matters to make Medicare and Medicaid requirements equivalent for SNFs and NFs. The specific matters the Secretary and the State must take into account, as stipulated in section 1128A of the Act, include the facility's degree of culpability, history of prior offenses and financial condition. Therefore, we cannot remove financial condition as the commenters suggested, and we are revising redesignated § 488.438(f) to include the facility's degree of culpability, which was inadvertently omitted from the proposed regulatory text.

We explain in § 488.438 what we mean by "culpability" in the context of provider certification. Section 1128A authorizes civil money penalties for criminal or quasi-criminal acts, such as, false claims or claims for charges in excess of those permitted by law. The intent of the individual who commits one of these acts plays a prominent role in determining the amount of the civil money penalty. For example, if this individual submits a false claim while under the influence of drugs or the individual has a psychiatric condition, that person's culpability for submitting false claims may be reduced.

The enforcement provisions for civil money penalties in sections 1819(h) and 1919(h) incorporate section 1128A of the Act and require a consideration of a facility's culpability in determining the amount of the civil money penalty. However, this consideration is not limited to situations in which a provider "intends" for a situation of noncompliance to exist. In fact, a facility is culpable if noncompliance causing harm or placing a resident at risk of harm is intentional or is a product of neglect, indifference or disregard. While a facility's culpability for serious noncompliance is a factor in the determination of the amount of the civil money penalty, the absence of culpability is not a factor, as a facility is always fully responsible for the health and safety of its residents.

Comment: One commenter asked that we specifically define "history" as used at proposed § 488.230(g)(1). Another commenter suggested that the facility's history of prior compliance only include the period of operation under the current owners.

Response: Information concerning a facility's history of noncompliance, as discussed with regard to § 488.438(f)(1) of the final rule, is maintained in the State survey agency, the HCFA regional office and the Online Survey Certification and Reporting system (OSCAR). The OSCAR system can provide facility specific reports from the four most recent surveys. We do not accept the comment that the facility's history of prior noncompliance only include that of the current owner because when a change of ownership occurs, all Medicare penalties and sanctions are automatically assigned to the new owner or owners with the exception of the two year restriction on Nurse Aide Training and Competency Evaluation Programs (which is explained later in this preamble).

Comment: Several commenters suggested that we provide that if a facility wants its financial condition considered it must fully disclose all financial information.

Response: As stated above, it is a statutory requirement that a facility's financial condition be considered as a factor to determine the amount of the civil money penalty. We do not specify in the regulation what we will examine in determining the facility's financial condition, because these factors are unique for each facility. Therefore, it is the responsibility of the facility to furnish the information it believes appropriately represents its financial status. We consider a facility's financial condition in conjunction with the other factors specified in the rule when determining the amount of a civil money penalty, because it is not our intent to put facilities out of business, and the amount of the civil money penalty is determined on a case by case basis.

Comment: We received a suggestion to remove the facility's financial condition as a factor in determining the amount of the civil money penalty but to permit the facility an opportunity to negotiate a payment schedule if it can demonstrate that the civil money penalty would cause financial hardship after the assessment and final adjudication of a civil money penalty.

Response: We do not accept this comment. First, as previously stated, it is a statutory requirement to consider a facility's financial condition as a factor in determining the amount of the penalty. Second, to negotiate a payment schedule based on the facility's financial condition after the assessment and final adjudication of a civil money penalty would not be necessary since the facility's financial condition has already been considered in the determination of the penalty amount.

Comment: Many commenters submitted examples of existing State civil money penalty systems which assigned a specific dollar amount per bed to each scope and severity level or assigned a maximum daily fine amount for each scope and severity level. Another commenter asked that we clarify that there will not be a correlation between the number of beds

and the amount of the civil money penalty.

Response: We are revising §§ 488.404 and 488.408 to correlate the seriousness of the deficiencies with the selection of remedies when HCFA or the State chooses to impose a remedy. (See explanation at § 488.404, Factors to be considered in selecting remedies and § 488.408, Selection of remedies.) Civil money penalties may be used for deficiencies constituting immediate jeopardy. Civil money penalties may also be used for deficiencies which constitute no actual harm but have a potential for more than minimal harm; or for deficiencies that constitute actual harm.

We do not accept the comment suggesting assigning a dollar amount per bed because the regulation, in accordance with section 1128A of the Act, requires a consideration of a facility's financial condition in the determination of the civil money penalty amount. We assume that a primary reason some States compute civil money penalty amounts based on the number of beds is to take into account the financial condition of facilities, that is, the larger facilities would be presumed to have a greater availability of cash than the smaller facilities. This is not necessarily the case, and even if it were a valid consideration in some cases, to take this relationship into account would be to consider financial condition twice. Nor have we assigned a specific dollar amount for each degree of seriousness.

While we have assigned ranges of penalties to immediate jeopardy and non-immediate jeopardy, we have not refined the figures further. We believe that this allows for the additional discretion on the part of HCFA or the State to assign a penalty amount once the facility's financial condition and other factors have been considered.

Comment: A commenter asked how the terms scope, severity and duration of noncompliance used at proposed § 488.230(g)(3) will be defined.

Response: In response to the concern raised by this commenter, we are revising redesignated § 488.438(f). We are replacing the phrase, "The scope, severity, and duration of the noncompliance" with, "The factors in section 488.404." The factors specified in § 488.404 address the assessment of the seriousness of deficiencies and include assessing the scope, severity and duration of the noncompliance in more specific terms.

Comment: A commenter suggested the specific category of the unmet requirement be a factor in determining the amount of the penalty. Another commenter asked that we explain the difference between "health and safety requirements" and "administrative requirements" as stated in § 488.230(g)(4) of the proposed regulation. We also received many recommendations to revise this regulatory provision to require that HCFA or the State consider whether the requirements with which the facility is out of compliance are health and safety requirements, residents' rights, quality of life or failure to attain the highest practicable functioning or administrative requirements when determining the amount of the civil money penalty.

Response: After considering the above comments, we are eliminating this provision because we believe that the factors inherent in this provision are reflected in revised § 488.438(f), which now requires the consideration of the factors contained in § 488.404 when determining the amount of the penalty. These factors include consideration of whether the facilities' deficiencies constitute: no actual harm, with a potential for minimal harm; no actual harm, with the potential for more than minimal harm that is not immediate jeopardy; actual harm that is not immediate jeopardy; or immediate jeopardy to resident health or safety. These factors also require considering whether the deficiencies are isolated, constitute a pattern or are widespread. A consideration of these factors includes considering the specific type of unmet requirement.

Comment: A few commenters recommended that civil money penalties be mandatory for all substandard quality of care deficiencies, immediate jeopardy situations and repeated deficiencies at their proposed severity level 1 and scope of 3 or 4. A few other commenters who proposed a new scope and severity grid suggested that we modify the civil money penalty provisions to reflect the grid that they proposed. One commenter suggested doubling the civil money penalty for repeated deficiencies, and another suggested simply increasing the penalty for repeated deficiencies. Other commenters requested that we add a description of civil money penalties that would include a flat, one time fine for:

- Single deficiencies regardless of the severity;
- Deficiencies with a starting point that cannot be determined;
- Repeated deficiencies; and
- Deficiencies where the State finds it more difficult to document continuous noncompliance.

Many commenters suggested requiring that civil money penalties be imposed at specific scope and severity levels.

Response: We do not accept these recommendations. Requiring that civil money penalties be imposed for specific types of deficiencies would be inconsistent with the Act which provides that civil money penalties *may* (emphasis added) be imposed for each day of noncompliance. The Secretary does not have the authority to require the States to impose civil money penalties where the Act gives States' discretion. While the Secretary could implement a policy by which each specific degree of seriousness would automatically precipitate civil money penalties at specific amounts, such a policy would undermine the Secretary's flexibility to tailor enforcement action to the exact nature of deficiencies in specific facilities. As a matter of policy, we will limit the use of civil money penalties to more serious deficiencies. Civil money penalties are included as a remedy choice when the seriousness of the deficiencies is such that Category 2 or Category 3 remedies would be applicable, as specified in § 488.408, Selection of remedies.

In cases of repeated or uncorrected deficiencies, imposing a flat, one time civil money penalty for these deficiencies would ignore the statutory requirement to provide for the imposition of incrementally more severe fines for repeated or uncorrected deficiencies as specified in sections 1819(h)(2)(B), 1919(h)(2)(A), and 1919(h)(3)(C) of the Act. While we are providing in redesignated § 488.438 that penalties are increased for repeated deficiencies in the same regulatory grouping of requirements, we do not accept the recommendation to double the fines because mandating the magnitude of the increase would detract from the kind of flexibility the Congress gave to the Secretary and the States. With regard to uncorrected deficiencies, we may propose to increase a civil money penalty for those cases in which a lower level penalty amount was imposed should those uncorrected deficiencies become sufficiently serious to pose immediate jeopardy.

To assign a flat, one time fine to a single deficiency regardless of its seriousness does not take into consideration the factors included in section 1128A of the Act and specified in § 488.438 of this final rule, and ignores the fact that the Act mandates that a civil money penalty, when imposed, be computed for each day of noncompliance. The Act contemplates the imposition of civil money penalties

for whatever period HCFA or the State determines the noncompliance exists.

Comment: A commenter asked if the hearing officer makes the assessment decision on the amount of the civil money penalty.

Response: As previously stated, when a facility requests a hearing on the noncompliance which led to the imposition of the civil money penalty, HCFA or the State will not initiate collection of the penalty until a final administrative decision is rendered which upholds the determination of noncompliance. Upon further analysis, we are adding a paragraph to redesignated § 488.438 to explain the reviewability of the civil money penalty that is imposed on a SNF or NF for noncompliance with participation requirements. We now specify that in any case in which an administrative law judge or State hearing officer (or higher administrative review authority) finds that the basis for imposing a civil money penalty exists, as described in § 488.430, the administrative law judge or State hearing officer (or higher administrative review authority) may not: set a penalty of zero or reduce a penalty to zero; review the exercise of discretion by the Secretary or the State to impose a civil money penalty; or consider any factors in reviewing the amount of the penalty other than those specified at § 488.438(f). In other words, when the administrative law judge or State hearing officer (or higher administrative review authority) finds noncompliance supporting the imposition of the civil money penalty, he or she must remedy it with some amount of penalty consistent with the ranges of penalty amounts established in § 488.438. This provision is consistent with other provisions specified in this rule to motivate a SNF's and NF's compliance with participation requirements in which we state that these providers have the opportunity to appeal certifications of noncompliance leading to an enforcement remedy. This provision is also consistent with section 1128A(d) of the Act, which requires that specific factors be considered in determining the amount of any penalty.

Section 488.440 Effective Date and Duration of Penalty

Comment: We received many comments on the effective date of the civil money penalty. Some commenters recommended that the effective date:

- Be stayed if a hearing is requested;
- Begin on the date an appeals decision is issued; or
- Begin on the date the facility receives notice of the proposed penalty.

A commenter recommended that no civil money penalty be imposed if the facility is in compliance by the effective date of the notice.

Many commenters advocated that this regulatory section be changed to require that the effective date of the civil money penalty be the date when the deficiency began as can be documented by the surveyors. They said that the effective date provision of the proposed rule:

- Implies a "grace period" for providers to correct deficiencies;
- Is inconsistent with OBRA '87;
- Contradicts § 488.230(a)(2) of the proposed rule;
- Undermines the States' ability to use civil money penalties; and
- Defeats the deterrent effect of this remedy and the goal of encouraging prompt compliance.

Response: We are revising redesignated § 488.440 after thoughtful consideration of the many comments received. We are changing the heading of paragraph (a) to read, "When penalty begins to accrue." This phrase is more appropriate in the context of a civil money penalty since this penalty cannot be collected until the provider has an opportunity for a hearing if one is requested; however, it can begin to accrue before the hearing. Also, this revision includes the accrual of the civil money penalty for past days of noncompliance since the last standard survey which are corrected by the time of the current survey as provided in the Act at sections 1819(h) and 1919(h). Revised paragraph (a) now provides that the civil money penalty may start accruing as early as the date that the facility was first out of compliance, as determined by HCFA or the State. To stay the accrual of the penalty if a hearing is requested, to start the accrual when a hearing decision is made, or to begin the accrual on the date of the notice, as the commenters suggest, would allow noncompliance to continue without a remedy being imposed and would not be implementing the remedy as the Congress intended. This intent is clearly stated in the Committee report that accompanied OBRA '87:

> * * * the Committee amendment would expressly allow a State to impose civil money penalties for each day in which a facility was found out of compliance with one or more of the requirements of participation, even if the facility subsequently corrected its deficiencies and brought itself into full compliance. This, in the Committee's view, is essential to creating a financial incentive for facilities to maintain compliance with the requirements for participation. The Committee amendment would set no upper limit on the amount of these penalties and would allow States to increase the amounts in cases of repeated noncompliance. States could impose civil money penalties prior to a hearing.
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> * * * the Committee amendment would create an incentive for facilities to maintain compliance with all of the requirements of participation by authorizing the Secretary to impose and collect civil money penalties for each day a facility is out of compliance even though the facility may subsequently bring itself back into full compliance. (H.R. Report No. 391, 100th Cong., 1st Sess., 473–6 (1987)).

Moving the date when the penalty can accrue to be as early as the date of the noncompliance permits noncompliance to be sanctioned promptly and addresses the concerns of the commenters who said that the effective date in the proposed rule implied a "grace period" for providers to correct deficiencies before a civil money penalty was imposed and undermined the States' abilities to use this remedy. We expect that in virtually all cases, the civil money penalty would start accruing from the date of the noncompliance. The only exception could be those cases in which the survey identifies the noncompliance but there is undue delay before HCFA or the State notifies the provider of the imposition of the penalty. However, the provider would receive a second notice before the collection of the civil money penalty, as explained in § 488.440.

Comment: A commenter recommended deleting proposed § 488.230(i)(6) (redesignated as § 488.440(g)), which provides that, in the case of immediate and serious threat deficiencies, HCFA will or the State must terminate the provider agreement on the 23rd day after the appointment of temporary management if the threat remains.

Response: We do not accept the suggestion to delete this provision because we believe it is important to specify the situations that affect the accrual of civil money penalties. However, we are revising redesignated § 488.440(g) to specify that termination occurs within 23 days after the last day of the survey if immediate jeopardy remains, and the daily accrual of civil money penalties stops on that day.

Comment: Many commenters suggested that the regulation incorporate a provision assuring prompt revisits by HCFA or the States to evaluate compliance based upon a facility's allegation of compliance, because several commenters stated that survey teams often are not prompt in the follow-up process. Others asked if civil money penalties accrue when a revisit is not timely. Several commenters asked that we clarify if there must be on-site revisits by the State to verify reports by

facilities. One commenter requested revisits be within a specified timeframe and another specified a 10 day timeframe in which revisits must be conducted. One commenter recommended that civil money penalties be suspended immediately (until the survey team can revisit) when authorities receive notification through certified mail that deficiencies have been corrected.

Response: While we understand the concern expressed by the commenters that surveyors conduct prompt revisits to confirm substantial compliance, the fact remains that when a SNF or NF participates in the Medicare and/or Medicaid program, that facility agrees to maintain substantial compliance with the participation requirements. When a civil money penalty or any other remedy is imposed upon a SNF or NF, it is because it has not maintained substantial compliance with these requirements, and we want to motivate corrective action. While HCFA and the States will try to revisit the facility in as timely a fashion as possible, when a revisit is necessary to verify substantial compliance, neither HCFA nor the States will be constrained by a specified timeframe in which to conduct these revisits. Nor will HCFA or the States suspend a penalty until a revisit can be conducted. The revisit would not be necessary if the SNF or NF had met its commitment to remain in substantial compliance with the participation requirements. Therefore, it is the provider's poor performance that has generated the need for a revisit. Moreover, timeframes for revisits can vary from State to State and within a State due to geographical variations and available personnel.

Hence, in those cases in which an on-site revisit is determined necessary to verify that the SNF or NF has come back into substantial compliance with participation requirements, civil money penalties may accrue from as early as the date the facility was first out of compliance, as determined by HCFA or the State, until the date of the revisit which finds substantial compliance. Or, the civil money penalty may accrue from as early as the date the facility was first out of compliance, as determined by HCFA or the State, until the date substantial compliance was achieved as documented by written credible evidence submitted to, and accepted by, HCFA or the State before an on-site revisit, but which, in certain situations, must be confirmed by an on-site revisit.

Sometimes an on-site revisit is not necessary to establish that a facility has come back into substantial compliance; in those cases, the civil money penalty may accrue from as early as the date the facility was first out of compliance, as determined by HCFA or the State, until the date for which there is written credible evidence of substantial compliance which is acceptable to HCFA or the State without the on-site visit. In these cases, there is no reason to "assure" the timeframe of a revisit as stated by a commenter. In response to the concerns and questions of the commenters, we are revising § 488.438(h) to provide for the policies expressed above.

Comment: Several commenters asked what documentation will be acceptable to HCFA or the State as credible evidence as stated in proposed § 488.230(i)(7) (redesignated as § 488.440(h)).

Response: In order to appropriately respond to each unique situation of noncompliance, HCFA or the State will evaluate written credible evidence on a case by case basis. HCFA and the State have the discretion to determine what constitutes written credible evidence. For example, a survey may determine that a facility's furnace is broken constituting a deficiency for violating a Physical Environment requirement by its failure to maintain all essential mechanical, electrical and patient care equipment in safe operating condition (§ 488.70(c)(2)). In such a case, the facility may buy a new furnace, have it installed, and submit the receipt to the State or HCFA as written credible evidence of substantial compliance. If this written credible evidence is accepted by HCFA or the State, the accrual of the civil money penalty would stop as of the date substantial compliance was achieved.

Sometimes substantial compliance can be achieved before an on-site revisit and the retroactive substantial compliance date can be verified with an on-site revisit. For example, during a closed record review (which is an examination of the records of discharged, transferred or deceased residents), it may be determined that a facility was not recording the reason for transfer or discharge in the residents' clinical records. This would be a violation of a requirement under Admission, Transfer and Discharge Rights set forth at 42 CFR 483.12. Since it would be inappropriate to send residents' records in the mail as evidence of correction, a revisit would be necessary. During the revisit on May 30, 1994, documentation confirms that the facility came into compliance with this requirement on May 10, 1994, 20 days before the revisit. Since the revisit confirms compliance with this requirement as having occurred on May 10, 1994, the accrual of the civil money penalty for the facility could be from as early as the date the facility was first out of compliance as determined by HCFA or the State until the date for which the revisit established that substantial compliance was achieved, which would be May 10, 1994 in this example.

There are other cases in which documentation cannot confirm the correction of noncompliance, and in these cases an on-site revisit is necessary. For example, one of the requirements for Infection Control is that personnel must handle, store, process and transport linens so as to prevent the spread of infection as specified in § 483.65. If a deficiency is cited for a violation of this requirement and a civil money penalty is imposed, submitting written documentation would not confirm the correction of the violation. An on-site revisit to observe personnel behavior is necessary in this case to confirm that the facility is, in fact, back in substantial compliance with this regulatory provision.

Comment: One commenter stated that fines should accrue until a follow-up survey confirms compliance. This commenter said proposed § 488.230(i)(7) should be revised because it rests on a clause rejected by OBRA '87 that paper review cannot adequately determine compliance. The commenter also said that if a facility requests a survey and is found out of compliance, the facility would be held liable for the costs of the survey.

Response: We do not accept this comment. First, we are not suggesting that written credible evidence submitted to HCFA or the State can confirm substantial compliance in every situation. We are well aware that not every deficiency can be determined to be corrected by written evidence as not every requirement is related to a written record. OBRA '87 did increase the number of outcome oriented requirements and reduce the number of paper compliance requirements; however, it did not eliminate all paper compliance requirements. The examples used in the discussion of the comment above describe situations in which written credible evidence can confirm substantial compliance. When we can confirm substantial compliance without an on-site revisit, valuable resources can be conserved, creating a savings for the taxpayer.

We do not accept the comment to charge the facility for the costs of the survey when it alleges substantial compliance but is found to be noncompliant at a revisit. The Act does not include the imposition of a survey charge as an available remedy.

Comment: A commenter asked how a facility will notify the State when it has corrected the noncompliance.

Response: When a facility has corrected the noncompliance, it may notify the State in whatever manner it feels is most appropriate. For instance, in certain situations written credible evidence sent through the mail will be the best method of notification. In other cases a telephone call to request an on-site revisit will be the most appropriate method of notification.

Comment: A commenter asked how penalties will be computed during the interim when a facility believes it is in compliance and a survey team, upon revisit, disagrees.

Response: While a revisit is pending, the penalties continue to accrue at the rate originally specified by HCFA or the State. However, HCFA or the State may propose to increase the daily penalty if a facility with nonimmediate jeopardy deficiencies alleges compliance, but on a revisit, HCFA or the State finds that the facility's deficiencies have become sufficiently serious to pose immediate jeopardy.

When a facility disagrees with the decision made at the time of the revisit, this disagreement could be resolved through the administrative hearing process. HCFA has authority to settle cases at any time prior to a final administrative decision for facilities in which HCFA's enforcement action prevails. The State has authority to settle cases at any time prior to the evidentiary hearing decision for all cases in which the State's enforcement action prevails. These provisions are specified in redesignated § 488.444. However, a civil money penalty would not be computed and collected until substantial compliance is verified. HCFA's or the State's decision of noncompliance is upheld after a final administrative decision, the facility waives its right to a hearing, or the facility is terminated.

Comment: One commenter suggested adding a new provision to require that follow-up surveys be conducted within 10 days of the facility notifying the State or HCFA that it has substantially corrected deficiencies. The penalty is terminated on the date the facility provided the notice if the deficiencies are substantially corrected at the time of the revisit or the 10 day period for a revisit has elapsed and the revisit has not occurred. If a revisit determines the scope and severity of the deficiencies has changed, the penalty amount is adjusted and the penalty is effective on the date of the facility's notice.

Response: We cannot accept this comment in total. However, as previously explained in this preamble, we are accepting the commenters' suggestion to incorporate the concept of substantial compliance into the regulation as the standard providers must meet to participate in the Medicare and Medicaid programs as SNFs or NFs. Consequently, a remedy is lifted when deficiencies lessen to the point that the facility is in substantial compliance.

The amount of the civil money penalty is increased to reflect repeated deficiencies in the same regulatory grouping of requirements. The civil money penalty may be increased for a facility that has deficiencies, which, after imposition of a lower level penalty amount remain uncorrected and, in fact, become sufficiently serious to pose immediate jeopardy. The civil money penalty would be shifted to the lower range of penalty amounts for a facility which had immediate jeopardy deficiencies if the immediate jeopardy is removed. However, if the noncompliance that continues after the immediate jeopardy is removed constitutes repeated deficiencies in the same regulatory grouping of requirements, the civil money penalty would be increased in accordance with § 488.438(d)(2) of this final rule. In a previous discussion, we clarified the reasons why we will not be constrained by a specified timeframe to conduct on-site revisits or suspend a penalty until we can revisit and the date when the penalty begins to accrue.

Comment: One commenter suggested that at proposed § 488.230(i) we provide for the accrual of interest.

Response: We are revising redesignated § 488.440 to require that the notice of the penalty amount due include a statement of the interest rate so that a provider is aware of the interest rate applicable if the penalty is not paid on the due date. Redesignated § 488.442(c), which discusses the collection procedures for civil money penalties, specifies how the rate of interest is computed. Redesignated § 488.442 Due date for payment of penalty.

Comment: Several commenters proposed changing the date when civil money penalties are due as stipulated at § 488.230(j)(1) of the proposed rule to one of the following:

- 30 days everywhere the proposed rule specifies 15 days, as 30 days is more commonly used in commerce;
- 30 days from the date of notification or any earlier period as provided for by State law; or
- Within 10 days of receipt of notice of penalty or within 10 days of receipt of the final hearing decision unless the decision is appealed.

Response: We do not accept the recommendations of the commenters to change the due date. The due date proposed (now in redesignated § 488.442) is consistent with existing HCFA notification procedures in which we give the provider a 15 day notice before a remedy begins, such as, in the case of the denial of payment for new admissions or termination in nonimmediate jeopardy situations. Because we have no compelling reason to conclude that reducing the 15 days to 10 days or increasing the 15 days to 30 days would result in a more effective enforcement process, we are not changing this policy.

However, while reviewing these comments, we realized that we did not include all of the provisions explaining when the civil money penalty can be collected. Consequently, we are adding these provisions to redesignated § 488.442(a).

Comment: One commenter said that a facility should not have to pay any penalty until it has fully exhausted its appeal rights, including appeals to the appropriate State or Federal court.

Response: We do not accept this recommendation. We are revising redesignated § 488.442(a) to make clear that the civil money penalty is collectible when a final administrative decision is issued upholding the imposition of the penalty. This position is in accordance with the intent of section 1128A(e) of the Act, as stated in the conference agreement. The conference agreement provides that no penalties will be assessed nor payment prohibited until all administrative remedies have been exhausted. (See H.R. Rept. 97–208, 97 Cong., 1st Sess. Book 2 (Conference Report) p. 950. (1981)).

Comment: Many commenters supported the provision that allows the civil money penalty to be deducted from any sum then or later owing to the facility by HCFA or the State. The commenters believe that this provision is time saving and cost effective.

A few commenters recommended only deducting the civil money penalty from any sum then or later owing by HCFA or the State if the penalty payment is not received in full within 30 days from the date of notification. A commenter asked if HCFA or the State will notify the facility when they plan to deduct the penalty from future monies that HCFA or the State owe the facility.

Response: We appreciate the support of the commenters who agree that the amount of the penalty when determined, may be deducted from any sum then or later that HCFA or the State

owe to the facility as specified in redesignated § 488.442(b). This provision implements section 1128A(f) of the Act.

The comments to only deduct the penalty if the facility has not paid in full within 30 days and the question about notifying a facility of a deduction are concerns that will be addressed in forthcoming manual instructions. However, a facility is not precluded from paying the civil money penalty, when it is collectible, at any time prior to the time when the penalty would be deducted from sums then or later owing to the facility.

Comment: A commenter stated that HCFA and/or the State should collect the civil money penalty after all appeal rights are exhausted because the ability to deduct a civil money penalty, when determined, from any sum then or later owing, is unfair and could financially cripple the facility.

Response: We do not accept the comment. First, a civil money penalty is not collectible until, as explained in a previous comment, a final administrative decision is made that supports the imposition of the penalty. Second, a facility's financial condition is one of the many factors considered in determining the amount of the penalty. It is not our intent to cause a facility undue hardship; however, if the penalty imposed is in the upper limit of the immediate jeopardy range, we believe it is justified, because residents are in life threatening situations and we want to motivate the facility to immediately correct deficiencies. Finally, the Act permits that civil money penalties may be deducted from any sum that HCFA or the State owes or will owe the facility, and since a provider has ample notice of the due date, the option exists to pay the civil money penalty on or before the due date as opposed to the money being deducted from sums owed or owing.

Comment: Another commenter said more consistency between regulatory requirements and enforcement practice would be demonstrated by requiring the agreement of the patient and his or her attending physician with the monetary penalty to be imposed prior to the withholding of monies from the patient's funding source.

Response: To solicit the agreement of each and every resident and his or her attending physician before the imposition of a civil money penalty would unnecessarily delay the imposition of the civil money penalty. Also, if a facility is not motivated to promptly correct noncompliance, due to the lengthy delay created by seeking resident and physician approval, the health and safety of residents could be compromised for an even longer period of time. Furthermore, when a provider enters into an agreement with HCFA or the State, or both, to participate in the Medicare and/or Medicaid programs, it is responsible for providing the agreed upon level of care to the residents. There is no justification for asking each resident and his or her attending physician for permission to impose a civil money penalty since the resident is the recipient and/or the beneficiary of the program and not a party to the agreement.

Comment: Many commenters suggested that the rate of interest not be negotiable as stated in the proposed rule's preamble. The commenters said this can promote inconsistency, is unworkable and inequitable. Commenters wanted to know how the rate will be negotiated (as stated in the proposed preamble) and who will determine this rate.

Many commenters offered alternative language for this regulatory provision which included the following:

- Interest accrues at the credit card rate from the date of citation on all penalties not paid prior to a request for a hearing;
- Interest is assessed at an annual rate which is 2 percent above the prime rate on the unpaid balance of the civil money penalty beginning on the due date;
- Interest accrues from the date of the violation at the highest rate permitted by State usury laws;
- Interest is based on a national index (for example, 6-month Treasury bills); and
- The interest rate must be placed in regulation.

Response: We agree that the interest rate should not be negotiable and we are revising redesignated § 488.442(c) to specify the interest rate applicable to the collection of civil money penalties. For Medicare, the interest rate is the rate fixed by the Secretary of the Treasury and used by the Department of Health and Human Services. The rule now states that the interest rate is the higher of either—(1) the rate fixed by the Secretary of the Treasury after taking into consideration private consumer rates of interest prevailing on the date of the notice of the penalty amount due (this rate is published quarterly in the **Federal Register** by the Department under 45 CFR 30.13(a)); or (2) the current value of funds rate (this rate is published annually in the **Federal Register** by the Secretary of the Treasury, subject to quarterly revisions). For Medicaid, the interest rate is determined by the State.

Comment: We received many comments on the collection of civil money penalties from dually participating facilities. A few commenters were confused and asked for clarification of this regulatory provision. Commenters suggested amending the language of the proposed rule, which says, "the relative proportions of Medicare and Medicaid beds at the facility actually in use" by adding "by residents covered by the respective programs * * *" to this sentence. Another commenter recommended the regulation say, "the relative proportions of Medicare and Medicaid residents in the facility at the time the facility receives notice of the imposition of the civil money penalty."

Response: We are revising redesignated § 488.442(e) to include the phrase "by residents covered by the respective programs on the date the civil money penalty begins to accrue." By including this phrase, we require that civil money penalties collected from dually participating facilities be apportioned to the Medicare and Medicaid programs, not according to the proportionate number of beds but proportionate to the number of residents in each program on the date the civil money penalty begins to accrue. For example, a facility has the capacity and is certified to provide care for 50 Medicare beneficiaries and 50 Medicaid recipients. On the date the penalty begins to accrue, 15 Medicare beneficiaries and 45 Medicaid recipients are residing in the facility and 40 beds of the 100 beds are empty. The amount of the civil money penalty is apportioned as follows: 25 percent (15/60) of the civil money penalty would be apportioned to the Medicare Trust Fund for Medicare beneficiaries and 75 percent (45/60) of the civil money penalty would be applied to the protection of the health and property of Medicaid residents of facilities that the State or HCFA finds deficient.

Comment: Many commenters suggested alternative uses for the civil money penalties collected by HCFA or the State. Many suggested using the civil money penalty amount to address the situation which led to the deficiency so as to protect the health of the residents as OBRA requires. Other commenters suggested that civil money penalties collected be used to:

- Fund the State incentive program;
- Offer financial improvement grants to needy facilities;

Other commenters suggested:

- Placing the monies collected into a fund to be used by HCFA or the appropriate State agency, rather than

placing them in the State's general revenue fund;

- Depositing the monies with the State Treasurer into the Long Term Care Monitor/Receiver Fund; and
- Not using the monies to fund government administrative activities or those activities not related to resident care.

Response: We cannot accept the above suggestions for the disposition of a civil money penalty imposed in accordance with sections 1819(h)(2)(B)(ii), 1919(h)(3)(C)(ii) or 1919(h)(2)(A)(ii) of the Act. If the civil money penalty is used by the facility to correct the noncompliance which led to its imposition, it is, in effect, not a remedy. While the use of the civil money penalty to fund the State incentive program, to finance grants for needy facilities or to deposit into the Long Term Care Monitor/Receiver Fund would be beneficial uses, the Congress has directed the use of the civil money penalty amounts collected as specified in section 1128(A)(f) of the Act. Civil money penalties collected from Medicare facilities are returned to the Medicare Trust Fund and, as specified at section 1919(h)(2)(A)(ii) of the Act and redesignated § 488.442(e). Civil money penalties collected by the Medicaid State agency, in accordance with section 1919(h)(2)(A)(ii) of the Act, are applied to the protection of the health or property of residents of nursing facilities that the State or the Secretary finds deficient, including payment for the costs of relocation of residents to other facilities, maintenance of operation of a facility pending correction of deficiencies or closure, and reimbursement of residents for personal funds or property lost (redesignated § 488.442(f)). The law does not require that the money received through civil money penalties be spent on direct patient care. In fact, the Act suggests that those funds will be spent on administrative expenses, such as those incurred in moving patients to other facilities.

Comment: Many commenters support the use of civil money penalties by the State for the protection of the health and property of the residents. A few commenters raised questions, such as:

- How the disposition of civil money penalties will be implemented to assure that money collected by the State is used appropriately;
- What State costs are included at proposed § 488.230(j)(6)(ii);
- Whether a priority would be assigned to the items included in the State's use of civil money penalties (such as, relocation of residents and resident reimbursement); and
- How resident reimbursement would be accomplished.

Response: These questions raised by the commenters are issues that need not be addressed through the Federal regulatory process. The Act permits each State to implement its own procedures.

Comment: A commenter supported the application of civil money penalties as specified in the regulation; however, the commenter was concerned that this provision conflicts with this party's State constitution which requires all civil forfeitures to be placed in the State's school fund. The commenter asked which provision takes precedence.

Response: Medicare and Medicaid are Federal programs, so when a civil money penalty is collected as an enforcement action because a participating SNF or NF is out of compliance with the Medicare or Medicaid requirements, the Federal regulation takes precedence.

Comment: A few commenters recommended amending proposed § 488.230(j)(6)(iii) to include the reimbursement of lost resident property. A few commenters suggested replacing "including" at § 488.230(j)(6) with the words "such as."

Response: Section 1919(h)(2)(A) of the Act specifies that civil money penalties collected by the State be applied to the protection of the health or property of residents of nursing facilities that the State or Secretary finds deficient. We believe the Congress intended that this include the State reimbursement of a resident for personal property and funds lost at the facility as a result of actions by the facility or by individuals used by the facility to provide services to residents. We are revising the rule accordingly.

We accept the suggestion to replace the word "including" with the word "such as" in the paragraph that discusses the use of civil money penalties collected by the State. This revision does not alter the meaning of the provision, but does provide needed clarity. The Act, as referenced above, enumerates certain specified activities for which a collected civil money penalty may be used; however, it is not an exhaustive list. As long as the intended use of the funds may be said to relate to protecting resident health or property, it is not necessary that each use of the civil money penalty be expressly stated in the regulation. Using the words "such as" more precisely conveys the intent of this provision and allows the State to have flexibility in determining what activities relate to protecting residents' health or property.

Section 488.444 Settlement of Penalties

Comment: A few commenters said that the regulatory provision at proposed § 488.230(k) does not offer guidelines on how civil money penalties may be settled and that there is no control over the States' or Secretary's discretion.

A consumer organization commented that granting States complete discretion to settle cases whenever and however they choose undermines the effectiveness of civil money penalties. They added that this regulatory provision opens the door too wide for parties interested in not paying fines to make inappropriate deals with decision-makers and avoid responsibility for their noncompliance.

Several commenters suggested deleting this regulatory provision, and a few commenters specifically suggested that this section be deleted in accordance with their changes proposed at § 488.230(e) which provide for settlement in which a facility pays the civil money penalty that was imposed (less the 35 percent), and corrects the deficiencies which led to the penalty, within 10 days of receipt of the notice.

Response: We cannot accept these comments. The authority provided HCFA or the State to settle any case at any time prior to a final administrative decision, as specified at redesignated § 488.444, is consistent with other regulatory provisions pertaining to civil money penalties. Regarding the comment that this provision opens the door for decision makers to make deals with providers, we contend that the survey, certification and enforcement process is built on a system of integrity and implements the necessary controls to assure that this integrity is maintained. To remove this provision, as suggested by a few commenters, would deny providers the opportunity to promptly settle their cases. We believe that the suggestion to settle by deducting 35 percent from the civil money penalty if the deficiencies which led to the penalty are corrected within 10 days does not allow a facility enough time to make a decision regarding whether to waive or request a hearing. Moreover, the provision in redesignated § 488.436 deals specifically with a provider waiving its right to a hearing. Redesignated § 488.444 provides the opportunity to settle a case, even if the hearing right was not previously waived. This provision was incorporated into the regulation in the interest of resolving disagreements at the stage in the process before sizeable expenditures of time and money are

devoted to hearing procedures. Even if a hearing had been requested, if, before the proceeding, all parties can reach agreement over the deficiencies to be corrected and the penalty to be paid until corrections are made, costly hearings procedures can be avoided.

Comment: A commenter requested that press releases and a notice to the long term care ombudsman accompany settlement, and if the civil money penalty was imposed as a result of a complaint investigation, notice should be given to the complainant.

Response: We do not accept this comment. Sections 1819(g)(5) and 1919(g)(5) of the Act provide for the disclosure of information regarding inspections and other activities of skilled nursing facilities and nursing facilities. Survey and certification information, which includes but is not limited to statements of deficiencies, plans of correction and appeal results, is available to the public. The regulation at § 488.325 expands disclosure to include among other things, notice of SNF or NF noncompliance and adverse action(s) imposed to the long term care ombudsman. Existing State survey agency procedures require that a notice be sent to the complainant informing him or her of the disposition of the allegation. We maintain that the present methods of disclosure used for all noncompliance situations provide ample opportunity for public awareness, and we do not believe that any additional benefit is derived by having separate disclosure procedures for those cases in which civil money penalties are used as a remedy (see discussion for § 488.325 Disclosure of results of surveys and activities).

Comment: A provider organization recommended that issues that may be resolved at settlement include citation of a deficiency; severity and scope of the deficiency; the remedy imposed; exclusion of the deficiency as the basis for increased sanctions in the future; and exclusion of the deficiency or deficiencies cited on the HCFA Form-2567 as the basis for further enforcement action by any other agency or office of the Department of Health and Human Services (HHS).

Response: We do not accept the suggestion to include in the regulation specific deficiency related issues that may be discussed at settlement. Providers have many opportunities to discuss and resolve the deficiency-related issues raised by the commenter before the settlement of the civil money penalty would occur. Providers have the opportunity to question survey findings during the survey, at the exit conference, while awaiting receipt of the official deficiency statement, upon receipt of same, and through ongoing dialogue with the State and HCFA regional offices. Also, all States must have a dispute resolution process as required by § 488.331 of this rule to enable providers to discuss perceived discrepancies in the survey process. While the existence of a deficiency may arise at settlement discussions, it is unnecessary to mention it or any other of the above issues which are predicated on the existence of deficiencies and which may arise. Moreover, we have no authority, as the commenter suggests, to exclude a deficiency in the present but increase the enforcement action if it is repeated in the future.

Section 488.450 Continuation of Payments to a Facility With Deficiencies

Virtually everyone who commented vehemently disagrees with this proposed section. Consumer groups oppose this section because, they believe, it forces HCFA or the State to terminate a facility's provider agreement rather than to impose alternative remedies. State organizations disagree with the provision that the State must agree to repay FFP for Medicaid facilities rather than the facility agreeing to repay (as stipulated for Medicare). Providers argue that the proposed rule is too strict, because repayment of Federal funding would begin the day that the State survey agency identifies deficiencies rather than when HCFA or the State imposes remedies when facilities do not correct deficiencies. Providers also believe that asking for an agreement to repay Federal funds for deficiencies at low scope and severity levels is harsh.

Comment: Several commenters believed that proposed § 488.232, as redesignated at § 488.450, will force States to impose termination instead of alternative remedies for all instances of noncompliance in NFs. They based their belief on the provision that says that, when the State survey agency prefers an alternative remedy in lieu of termination, the State must agree to repay FFP. If the NF fails to correct the deficiencies during the correction period, the State would be liable. These commenters said, that because many States have no intention of entering into an agreement to repay FFP, the State must start termination. One commenter stated that if the provision remains as a prerequisite to the use of alternative remedies, reliance on termination procedures will continue. In the commenter's view, the end result will be more litigation, because providers will be placed in the unenviable position of having to respond to potential decertification for relatively minor infractions.

Other commenters criticized HCFA's proposed rule because it denies the intent of OBRA to make available to States a range of remedies to be used as alternatives to termination for deficiencies of lesser severity and places NFs in the undesirable position of having to respond to decertification actions for relatively minor violations.

Response: We are aware of the difficulties posed by the repayment provisions of sections 1819(h)(2)(C) and 1919(h)(3)(D) of the Act. As almost all commenters noted, these requirements constitute a significant disincentive to impose alternative remedies because the Act requires that either the facility (under Medicare) or the State (under Medicaid) repay the Federal government should the facility fail to correct identified deficiencies.

We note, however, that sections 1819(h)(2)(C) and 1919(h)(3)(D) of the Act specify the rules that must apply to SNFs and NFs when the *only* course chosen to respond to the violation of certification requirements is through alternative remedies. We reach this conclusion because of the literal language of both of the provisions of the Act, which specifies that these remediation provisions apply when the State survey agency determines that it would be more appropriate to employ alternative means to assure compliance than to seek a provider agreement termination. Thus, the commenters are quite right that when an alternative remedy only is being sought, the repayment provisions of the Act for SNFs and NFs are inescapable.

While we see the desirability of being able to pursue only alternative remedies in many cases of facility noncompliance, the fact is that section 1919(h)(7) of the Act offers the availability of alternative remedies when coupled with an action to terminate a provider agreement when there would be no repayment consequences for either the facility or the State. In these cases, when HCFA agrees with the State's assessment that a provider agreement termination should be sought, the State's timing for the termination controls. If the State opts for one or more alternative remedies in addition to termination, those remedies would be applied unless the Secretary chooses to impose an alternative remedy. When both the State and the Secretary choose to impose one or more alternative remedies, section 1919(h)(7)(B)(ii) of the Act specifies that only the Secretary's remedies are imposed. As already discussed, when the State's decision to terminate the

provider agreement as well as impose alternative remedies prevails, we do not believe the rules of section 1919(h)(3)(D) of the Act would govern the imposition of the alternative remedy.

Thus, where a SNF's or NF's deficiencies do not pose an immediate jeopardy to resident health or safety, HCFA or the State may opt for a "slow-track" termination and apply one or more alternative remedies in the interim period. Should the facility achieve substantial compliance before the effective date of the termination, as we would expect to occur in almost every case, the termination action would be rescinded. Should the facility fail to correct deficiencies by the effective date of the termination, the termination would proceed, but neither the State nor the facility would be liable to us for a repayment of funds for the time following the identification of deficiencies. While we are not suggesting that States or HCFA make a decision to terminate a provider agreement in all cases where facility deficiencies have been identified, we believe it is important that States, and all others affected by these provisions, be clear as to the consequences of using the various provisions of the Act.

We have concluded that the approach we have described above can be applied to SNFs as well as to NFs and dually-participating facilities. When we have identified deficiencies for SNFs and seek provider agreement termination in accordance with section 1866(b) of the Act, we would not be seeking only an alternative remedy. In such cases, we believe the rules of section 1819(h)(2)(C) would not apply since the State's recommendation is for a termination and alternative remedies.

We believe proceeding in the fashion we have described relative to all nursing homes may strike the kind of balance that the Congress was seeking through its placing of alternative remedies in greater prominence than had been the case before nursing home reform. Most importantly, nursing home residents would be protected, because the facilities in which they reside would have every incentive to comply quickly in order to have alternative remedies lifted. With that incentive, residents would face the unsatisfactory care that gave rise to the enforcement action for only short periods of time without facing the specter of relocating were termination the first remedy of choice. Second, States would have considerably more flexibility to impose alternative remedies knowing that neither they nor the facility will be liable to us for the repayment of funds should a facility, in fact, fail to achieve substantial compliance by the time that the termination action is effective. Of course, the mandatory denial of payment which the State or the Secretary is required to impose after the third month of noncompliance would not require the State for Medicaid or the facility for Medicare to sign an agreement to repay Federal funds if substantial compliance is not achieved.

Comment: One commenter believed that the continuation of payments pending remediation provision should only be applied in situations where the Secretary and the State disagree about whether to terminate and the Secretary believes that termination should occur but the State believes that the facility can correct the problems. The commenter states:

> This interpretation flows very logically from the wording of section 1919(h)(3)(D), which gives the Secretary permission to continue payments ("The Secretary *may* continue payments * * *" emphasis added). Since the Secretary has ample authority elsewhere in the Act to pay facilities, he does not need this "permission" and therefore the provision would appear to be redundant. It acquires meaning only if it is understood as making an exception to a situation where the Secretary would otherwise be barred from making payment.

One commenter believes that sections 1919(h)(3)(D) and1819(h)(2)(D) of the Act, if not redundant, were incorporated into the Act to constitute guidance in a situation that otherwise would make it unclear as to whether or not payment should continue, that is, disagreement between HCFA and the State.

Other commenters noted that, "A reasonable reading of the statute does not require the Secretary to second-guess every determination by a State that intermediate sanctions should be attempted before resorting to termination." The commenters assert that the statutory provision should only apply in those very rare circumstances where the Secretary concludes that termination is necessary, but yields to the State's recommendation that intermediate remedies be imposed instead.

Response: While we agree that the Secretary has the authority to pay Medicare facilities and pay States for Medicaid facilities in accordance with sections 1861(v)(1) and 1903 of the Act, respectively, the provisions of sections 1819(h)(2)(C) and 1919(h)(3)(D) limit the Secretary's authority to make payments for Medicare providers and States (for Medicaid providers), respectively. However, that is not the only situation in which there would be lack of clarity as to whether or not payment should continue. The clearer reading and the one we have adopted is that, without this provision, a lack of clarity would exist over whether or not payments should continue despite noncompliance with the statutory participation requirements. Further, we do not agree that the Act provides for the scheme offered by the commenter (that is, that we only invoke section 1919(h)(3)(D) of the Act if there is disagreement about termination). Such disagreements between the State and the Secretary over termination and establishing remedies are addressed at section 1919(h)(7) of the Act.

Comment: One commenter expressed the opinion that there is almost universal agreement that terminating nursing homes from Medicare and Medicaid is harmful to residents. The commenter believed that in most terminations, residents are transferred to other substandard nursing homes farther away from family and friends. The end result of most provider terminations is to expose residents to relocation trauma without getting better care. Other commenters also expressed concern over the resident's reaction to a potential termination. Commenters believed that even when a facility has come into compliance, residents suffer from the uncertainty of their situations. Although commenters agreed with our statement in the preamble that we see provider agreement terminations generally to be the enforcement response to the most serious deficiencies, they believed the proposed regulation allows almost unrestricted use of termination as a sanction.

Response: We disagree with the commenter, who gave no evidence to support the contention that most provider terminations expose residents to relocation trauma without getting better care. We acknowledge that there are instances in which termination will cause some hardship to residents, but the advantages of removing residents from a noncompliant nursing home could outweigh any disadvantages. Usually, HCFA and the State will impose alternative remedies prior to terminating or in addition to terminating a facility in hopes that a facility will achieve substantial compliance. We believe that in those cases in which termination becomes necessary, the termination is for the ultimate benefit of the residents to assure that they receive the care to which they are entitled.

Comment: One commenter stated that section 1919(h)(3)(D) of the Act requires the Secretary to establish guidelines for the approval of corrective actions requested by the States. The commenter

pointed out there are no proposed rules that address this statutory requirement.

Response: We will issue these guidelines in manual instructions. We do not believe including them in regulations is required or necessary.

Comment: Many commenters believed that the proposed rule was so broadly worded that it could be understood to apply to every situation where the extra time and the intermediate sanctions did not produce compliance. These commenters asked that we revise the regulation to use the continuation of payment during remediation provision in only in the most egregious situations where the Secretary disagrees with the State survey agency regarding termination.

Response: Sections 1819(h)(2)(C) and 1919(h)(3)(D) of the Act do not provide any flexibility about the seriousness of a deficiency in applying the continuation of payment during remediation provision. Indeed because the statute in both places makes reference to the payment limitations being triggered if a facility is "not in compliance with *a* requirement of subsections (b), (c), or (d)" (emphasis added), we believe that the Congress was focusing on any deficiency that might cause a facility to not be in substantial compliance, not just cases of egregious noncompliance. Therefore, we cannot accept the commenter's request.

Comment: One commenter recommended that we add the following sentence at the end of proposed § 488.232(a)(1)(i): "In considering whether it is more appropriate to impose alternative remedies than to terminate the facility, the State shall take into account the relative effects on the facility's residents of relocation and remaining in the facility, including the availability of suitable alternative placements for them."

Response: We are not adopting this recommendation because there may be instances when termination is necessary despite the fact that it will cause some hardship to residents. As noted earlier, usually, HCFA and the State will impose alternative remedies prior to terminating a facility; however, there may be instances where this is not possible. For example, a facility could refuse to allow access to the surveyors, or could refuse to submit a plan of correction. A facility might also remain out of substantial compliance with requirements after an up to 6-month period allowed for correction, at which time the Act would require termination despite hardships to the residents.

Comment: Several commenters urged us to delete the provision at paragraph (a)(2) that HCFA or the State may terminate the SNF or NF agreement before the end of a 6-month correction period if the criteria in paragraph (a)(1) of this section are not met. Commenters believed that the Act does not authorize HCFA or the State to terminate a provider agreement if a facility does not meet the threshold criteria (that is, the State survey agency finds that it is more appropriate to impose an alternative remedy than to terminate the facility; the State has submitted a plan and timetable for correction approved by HCFA; and the facility, in the case of a Medicare SNF, or the State, in the case of a Medicaid NF, agrees to repay the Federal government payments received if corrective action is not taken in accordance with the approved plan of correction). Commenters believed that once a determination is made to invoke the continuation of payment provision, a facility should not be terminated or have its Federal funding discontinued unless it is found on a subsequent survey to present immediate jeopardy, or the 6 months expire and the originally cited deficiencies have not been corrected. On the other hand, a few commenters recommended that we change the section to read "HCFA or the State must terminate" rather than "may terminate" as it was proposed.

Response: We disagree with these commenters. First, on its face, the statute does not limit the authority of the Secretary to deny further payments to facilities or States under these provisions to only those cases where deficiencies pose immediate jeopardy. Rather, the statute speaks to all providers which do not meet "a" requirement of the Act. Second, the States and the Secretary have plenary authority to terminate provider agreements any time there is facility noncompliance, and sections 1819(h)(2)(C) and 1919(h)(3)((D) pose no limitation on that authority. If the State survey agency does not prefer an alternative remedy in lieu of termination to remedy noncompliance, the Act compels the Secretary to cease payments to the facility under Medicare or the State under Medicaid. If the State survey agency prefers an alternative remedy in lieu of termination and the other two criteria are not met, the Secretary does not have authority to continue payments under either program. However, if the State survey agency prefers termination, we cannot preclude a State from imposing additional remedies while the termination is pending, which can be up to six months from the last day of the survey. Therefore, we are not accepting the commenter's suggestion that we should continue Federal funding unless we found on a subsequent survey that deficiencies present immediate jeopardy, or the 6 months have expired and the facility has not corrected the originally cited deficiencies. To do so would be clearly inconsistent with the Act, as we have discussed above. Neither immediate jeopardy nor a full 6 months of noncompliance have to have occurred in order for the State or HCFA to terminate a provider agreement.

We are also not accepting the suggestion to change HCFA or the State "may" to HCFA or the State "must," since the text of the regulations mirrors the Act, which affords States and HCFA discretion in these matters.

Comment: Many commenters suggested that we delete the requirement that States submit the plan of correction to HCFA for approval in every case for which alternative remedies are to be imposed. Some commenters assert that this provision, as written, provides strong incentives to using termination rather than alternative remedies. They point out that if a State survey agency wants to impose any remedy other than termination, it must submit a plan of correction to HCFA. The commenters believed that this will encourage States to terminate a provider agreement rather than to impose an alternative remedy because the requirement that HCFA approve plans of correction under the continuation of payment provision will be administratively burdensome.

Response: The requirement that State survey agencies submit a plan of correction to HCFA as part of the continuation of payment provision is statutory. Sections 1819(h)(2)(C) and 1919(h)(3)(D) of the Act provide that, "the State has submitted a plan and timetable for corrective action to the Secretary for approval and the Secretary approves the plan of corrective action." We do not have the authority to delegate this function to the State. However, we may, through manual instruction provide for a mechanism whereby, if the State survey agency has not received approval or disapproval from HCFA within a prescribed amount of time, we would deem the plan and timetable for corrective action approved.

Comment: One commenter believed that the Secretary should require States to seek HCFA approval for all plans of correction involving use of alternative remedies only if the review will be done for the purpose of determining whether the State has chosen its remedy strategically to achieve the appropriate change in facility behavior toward residents.

Response: Sections 1819(h)(2)(C)(ii) and 1919(h)(3)(D)(ii) of the Act require that the Secretary approve all plans of corrective action. Moreover, the Act does not delve into the purpose behind approving the plans of corrective action (that is only reviewing the plan of correction to determine whether the State imposed the best remedy for a given situation of noncompliance.) Adding such a requirement to the regulation would inappropriately limit the authority of the Secretary. For this reason, we are not accepting this suggestion.

Comment: One commenter believed that alternatives to termination should be allowed to be imposed because, without a distinction between level and type of deficiency, even minor noncompliance becomes grounds for withholding of Medicaid funds.

Response: We assume the commenter means that HCFA should not use the continuation of payment provision for minor noncompliance. As we have explained before, the Act makes no such distinction for minor deficiencies. Therefore, we have no basis to revise the rule. If the commenter is urging the use of remedies instead of termination, we believe that the enforcement scheme we have designed and in § 488.408, which correlates specific enforcement responses to specific levels of noncompliance, provides for incrementally more severe remedies for more serious deficiencies. Also, as discussed elsewhere in this final rule, while all facility noncompliance will be identified, the enforcement response can range from a provider's commitment to correct with no remedies imposed, to termination of the provider agreement. Providers found to be in substantial compliance will not have remedies imposed.

Comment: The majority of commenters who responded to this section asked that we take out paragraph (a)(1)(iii), which requires that States repay Federal funds paid to a nursing facility when alternative remedies are used. One organization stated that they believe HCFA is basing the regulation on a specific statutory requirement but they believe that this issue should be discussed before implementation of its provision in the enforcement rules. They said that they believe that a stronger public policy rests on the use of the alternative remedies and that a facility's failure to comply should not create a financial threat to the State.

Response: First, we must point out that the repayment provision in redesignated § 488.450(a)(1)(iii) is based on the Act and pertains to facilities, in the case of Medicare SNFs, as well as to the State, for NFs, that are not in substantial compliance. Second, we recognize that the statutory requirement for State agreement to repay FFP for NFs if facilities do not achieve substantial compliance can be a barrier for a State survey agency choosing to impose an alternative remedy in lieu of termination. We understand the commenters' concern that many States will not agree to repay because a NF's achievement of substantial compliance is not wholly within the State's control. We have been studying the repayment issue and hope to develop a legislative proposal to remedy the inherent barriers in the Act. Absent a legislative change, we cannot eliminate the requirement that States agree to repay Federal funds in accordance with section 1919(h)(3)(D) of the Act. Neither do we have the authority to delay the implementation of this provision without legislative intervention. However, the Act does not prevent States from obtaining a repayment agreement from a facility. The State could obtain the facility's repayment agreement either before or after it enters into a repayment agreement with the Secretary. Nor does the Act require that repayment of Federal funds be made if a facility is not in compliance with Federal requirements. If the facility does not take corrective action in accordance with its approved plan and timetable and is not in substantial compliance at the end of the correction period, the facility (for Medicare) or the State (for Medicaid) would be responsible for repaying Federal payments for the correction period and HCFA would stop any further payment to the facility (for Medicare) or the State (for Medicaid) for nursing home services. If the facility followed its approved plan and timetable, but was not able to achieve substantial compliance at the end of the correction period, the facility or State would not be responsible for repayment of Federal funds, but HCFA would stop further payment to the facility or State for nursing home services. If a facility does not take action in accordance with its approved plan or correction and timetable, but is able to achieve substantial compliance, the facility or State would not be responsible for repaying Federal funds for the correction period, and the facility could continue in the Medicare and Medicaid programs. Section 1919(h)(3)(D) of the Act provide that the State agrees to repay "if corrective action is not taken in accordance with the approved plan and timetable" that was approved by the Secretary. Furthermore, we have explained above that alternative remedies can be imposed in addition to termination, and in such cases they would not be subject to the requirements of section 1919(h)(3)(D) of the Act.

Comment: Many commenters urged HCFA to delay the requirement for the State to indemnify HCFA for FFP repayment until day 90 if a facility is not in compliance with the requirements. Some commenters believed that the proposed rule eliminates any incentive for State survey agencies to recommend alternative remedies by imposing a requirement to indemnify HCFA for FFP from day one. Others wanted to modify the regulations so that States would not be required to guarantee repayment until day 90. One commenter believed that such a policy would be consistent with the Act and would ensure that facilities have the opportunity to make corrections.

Response: Sections 1819(h)(2)(C) and 1919(h)(3)(D) of the Act specify that the Secretary may continue payments over a period of not longer than 6 months after the effective date of the findings. To read "the effective date of the findings" to mean the 90th day would extend the correction period from up to six months and up to nine months. Moreover, it would greatly distort the intent and clear meaning of the phrase "effective date of the findings" to designate the 90th day after the findings were first cited as the effective date. Therefore, the period covered by the sections 1819(h)(3)(C) and 1919(h)(3)(D) of the Act is a maximum of six months, starting with the last day of the survey. Sections 1819(h)(3)(C)(iii) and 1919(h)(3)(D)(iii) of the Act provides that the facility (for Medicare) and the State (for Medicaid) agree to repay the Federal government payments received under these subparagraphs if the corrective action is not taken in accordance with the approved plan and time period. Therefore, if the facility or the State must agree to repay money received for the period covered by section 1819(h)(3)(C) or 1919(h)(3)(D), they must agree to repay money received since the last day of the survey. Therefore, when the State or a facility enters into a repayment agreement and the facility does not take action in accordance with its approved plan and timetable for corrective action or does not achieve substantial compliance, the State or facility would be held financially accountable for the period covered by the repayment agreement.

We also disagree with the commenter's assertion that the repayment period should not start until the 90th day in order to give facilities

more time to correct deficiencies. The facility is notified of its deficiencies during the survey, at the exit conference and then formally through the Statement of Deficiencies shortly after the completion of the survey. We believe that the beginning of the repayment period is irrelevant to the correction period. The facility has up to 6 months to take corrective action in accordance with its approved plan and timetable for corrective action or achieve substantial compliance, or both. If the facility does not meet that goal, the State or the facility will be expected to pay back the Federal funding for the period covered by the repayment agreement.

Comment: Many commenters recommended that we delete redesignated § 488.450(a)(1)(iii). Their comments included the following:

- It is unrealistic that a State will agree to repay the Federal government payments received if corrective action is not taken in accordance with a facility's plan of correction;
- The language does not fit within the concept of enforcement as envisioned in the Act;
- This provision is a heavy disincentive to use intermediate remedies;
- A State should not be monetarily penalized for a facility's failure to comply with regulations when an alternative remedy is chosen over termination;
- To put the State at risk for something that is ultimately out of the State's control does not make for good public policy; and
- The provision is beyond statutory authority and should be left to the States as to whether or not they wish to recover reimbursement from the facilities for noncompliant actions.

A number of commenters asked that we amend this subsection to explicitly permit States to enter into agreements with facilities to repay Medicaid funds if deficiencies are not corrected according to the approved plan of correction. Other commenters suggested that we only hold a State liable for repayment of Federal Medicaid payments to a noncompliant facility if the facility remains out of compliance and the State has not made full use of available intermediate remedies. One commenter wanted us to broaden the rule used for Medicare (that is, that the facility agree to repay) to apply to Medicaid as well.

Response: Absent a legislative change, we have limited choices when a State survey agency finds a facility out of substantial compliance with Federal requirements and alternative remedies only are the recommended enforcement response. For Medicare, we must obtain an agreement to repay from the facility or cease making payment to the facility. For Medicaid, we either obtain a repayment agreement from the State or stop Federal financial participation to the State for that facility. In addition, the State may terminate a NF. In response to the commenter who worried about the State's liability for up to six months of FFP, the Act does not prevent States from securing an agreement to repay from the facility before agreeing to repay monies to the Federal government. In fact, during the transition period between when the new nursing home requirements became effective and the effective date of the final survey process and enforcement rules, some States have obtained agreements to repay from facilities before signing agreements to repay to HCFA. However, we will not explicitly include in regulation that States are permitted to enter into repayment agreements with facilities, nor will we broaden the rule for Medicare to apply to Medicaid. The State has the discretion to determine whether repayment agreements between it and the Medicaid facilities would be beneficial.

We also are not accepting the recommendation to only hold a State liable for the repayment of Federal funds if the State had not made full use of available alternative remedies. Accepting this recommendation would limit the Secretary's ability to implement the provisions of section 1919(h)(3)(D) of the Act.

Comment: One commenter suggested that we replace "of the determination of noncompliance by" with "that the facility's provider agreement is terminated by" at § 488.432(b).

Response: The amended language suggested by the commenter substantially alters the meaning of this section and, if accepted, would be contrary to the Act. Sections 1819(h)(2)(C) and 1919(h)(3)(D) of the Act permit the Secretary to continue payments pending remediation if the State, for Medicaid, and the facility, for Medicare, meet certain criteria. If the State agency prefers alternative remedies rather than termination and the criteria of section 1819(h)(2)(C) and 1919(h)(3)(D) of the Act are not met, the Secretary has no authority to make any payments to the facility from the "effective date of the findings," that is, from the last day of the survey that found the facility was not in substantial compliance with the requirements of section 1819 (b), (c) or (d) or 1919 (b), (c) or (d) of the Act, or both. If termination of a facility's provider agreement is sought, payments continue until the effective date of termination, which may not be more than 6 months after the last day of the survey. Substituting "that the facility's provider agreement is terminated by" would permit more payments to the State or the facility than the Act allows. In fact, such a policy would be no different than pre-existing policies to stop Federal payments on the effective date of termination. For these reasons, we have not accepted this comment.

Comment: One commenter pointed out that § 488.432(c) allows continuation of payments for up to 6 months from the last day of survey. The commenter further stated that if HCFA intends that the government can decide to give a facility less than 6 months of continued payments, HCFA should specify clear criteria in the regulations to guide this decision. Because the proposed regulations do not contain any such criteria, the commenter suggests that we delete the words "up to."

Response: We are not accepting the commenter's suggestion, and we have not specified criteria as to when HCFA or the State would allow continued payments for less than 6 months. We do not want to in any way restrict HCFA's or the State's ability to decide, on a case-by-case basis, the optimal amount of time for continuation of payment for a particular facility.

Comment: One commenter offered alternative language for § 488.432(d) to insert "substantially" before "correct."

Response: We are accepting the spirit of the commenter's alternate language, and are revising redesignated § 488.450 to say "If the facility does not * * * achieve substantial compliance".

Comment: One commenter stated the Act does not require that a facility correct all deficiencies; rather, the Act requires that a facility must have taken corrective action in accordance with the approved plan and timetable.

Response: While we believe that a provider must be in substantial compliance by the end of the allotted correction period to avoid a loss of Federal payments or termination, we agree with the commenter that our language could be more precise and are revising § 488.450(d) to delete the section title "Deficiencies not corrected" and renaming it "Action not taken in accordance with approved plan and timetable for corrective action."

Comment: Several commenters wanted to expand the period for providing notice of payment cutoff under the six month rule from 15 to 60 days. Commenters asserted that 15 days is insufficient time for the facility to

correct any remaining problems and obtain a follow-up survey. They contend it is even less sufficient if the facility disputes the continued existence of the deficiencies and desires a hearing on the matter.

Response: We are not expanding the notice period from 15 days to 60 days nor do we agree that the 15-day notice period is inadequate. We base the 15-day notice period prior to termination on our experience with § 489.53(c)(1), which sets forth notice requirements for other providers and suppliers. Moreover, the purpose of the notice is not for a facility to make last minute corrections, but for the government to help fulfill its duty to provide due process to facilities before termination. Facilities generally have had notice of their noncompliance long before the 15 days prior to termination.

Comment: One commenter recommended that, unless HCFA is the only party acting (that is, the State does not terminate Medicaid participation), the State should provide the hearing and final decision. The commenter believed that if HCFA subsequently disagrees with the State's decision, the facility should not be affected. HCFA's action would be against the State alone, for recoupment of Federal financial participation, and should be appealed through the normal Departmental Appeals Board (DAB) process.

Response: We assume this commenter is referring to a NF. When a NF's provider agreement is terminated, the appeal procedures which apply depend on who is taking the enforcement action. If the State is terminating a NF and the Secretary is taking no action, the appeal procedures at 42 CFR part 431 apply. If the Secretary exercises her authority, finds noncompliance, and terminates the NF, the appeal procedures at 42 CFR part 498 apply. If a NF is a State-operated entity, the Secretary always takes the enforcement action, and the appeal procedures at 42 CFR part 498 would apply. In the case of facilities which participate as a NF and a SNF (dually participating facilities), where both the State and the Secretary are making enforcement decisions on the Medicaid and Medicare agreements respectively, the appeal procedures at 42 CFR part 498 apply. Since nearly 80% of all nursing homes are dually participating, the majority of NFs will appeal their enforcement actions through the Federal appeal procedures at 42 CFR part 498. The appeals mechanism for providers adversely affected by the repayment provision would be the same as an appeal of noncompliance which led to termination or other enforcement remedies, except that a State can also appeal the recoupment of FFP under a DAB hearing in accordance with 45 CFR part 16. The recoupment of Federal funds will be one of the results of the termination; however, the noncompliance which led to termination remains the initial determination which is at issue at the hearing, and is the action on which the recoupment of funds is predicated.

Section 488.452 State and Federal Disagreements Involving Findings Not in Agreement in Situations When There Is No Immediate Jeopardy

Many commenters were not aware that most of the provisions in this section are required by the Act. Most of the comments we received concerned proposed § 488.234 as a whole; therefore, we have grouped the comments under generic headings, rather than under specific subsections.

HCFA's Role in Enforcement Decisions.

Comment: Some commenters stated that the proposed regulations give HCFA too large of a role in enforcement decisions.

Response: The regulations reflect the statutory role given to the Secretary by the Congress in the enforcement provisions of the Act. Specifically, sections 1919(h) (5), (6), and (7) require the Secretary's involvement in enforcement decisions with respect to Medicaid NFs should the Secretary find facility noncompliance and seek to impose either alternative sanctions or termination or both.

Comment: Several commenters stated that the Congress did not intend HCFA to make all compliance decisions on dually certified SNF/NFs.

Response: HCFA does not make "all the decisions" on a dually certified SNF/NF. The Act itself prescribes that a finding of noncompliance, by either the State or the Secretary, will prevail over the other agency's finding of compliance. Therefore, the Congress decided that in cases where the agencies disagree, the finding of noncompliance becomes the effective finding regardless of whether it is the Secretary or the State that has made the finding. In addition, the Act provides that a State's decision to terminate prevails over HCFA's decision not to terminate, and the State's timing of a termination also prevails over HCFA's.

Comment: Some commenters stated that the Congress did not intend that HCFA "second guess" States' decisions on every survey.

Response: We have no intention of second guessing the results of every State survey. Sections 1819(g)(3) and 1919(g)(3) of the Act, however, require the Secretary to conduct validation surveys of a representative sample of SNFs and NFs in each State within 2 months of surveys by the State survey agency. Section 1919(h)(3)(B) of the Act provides for the Secretary's general validation authority exclusive of actual on-site validation surveys. As we stated in the proposed rule, prior to the effective date of OBRA '87, HCFA, acting for the Secretary, monitored State surveys. OBRA '87 formalized this process. The Congress also made explicit provision for whose enforcement approach would prevail in the case of a disagreement between the State and HCFA. Sections 1919(h) (6) and (7) of the Act, as implemented by redesignated § 488.452, specify situations in which the State rather than the Federal government prevails, with regard to the choice of a remedy or the timing of an enforcement action.

Comment: A few commenters stated that HCFA should take enforcement action against a Medicaid provider only after a validation survey or other on-site survey. Some wanted to change the above regulation by inserting the phrase: "on the basis of a validation survey" after "HCFA finds." Some commenters wanted a State's enforcement decision to be the controlling decision because the States understand local conditions better than HCFA does.

Response: We are not adopting these proposals to act only on the basis of an on-site validation survey, because they would limit HCFA's oversight responsibility and limit HCFA's ability to protect residents' health, safety and rights. Federal surveyors are able to review a State-prepared Statement of Deficiencies and come to an independent conclusion about whether the deficiencies cited indicate substantial compliance or noncompliance with the statutory and regulatory requirements. This has been a routine part of HCFA's monitoring of State survey agencies in the past. We do not think the Congress intended to reduce these monitoring responsibilities.

Federal-State Disagreement

Comment: One commenter noted that under § 488.452, if a State and HCFA have a difference of opinion on the deficiencies cited, the one that finds noncompliance prevails. The commenter wondered how an administrator of the facility could understand how to comply, if the State and HCFA could not agree on compliance/noncompliance.

Response: The Act mandates that the finding of noncompliance prevails over the finding of compliance. All facility

administrators can read the Act, the regulations and the detailed guidelines that have been issued to implement the regulations. We believe that facilities have a duty to operate in compliance at all times, regardless of whether the State and Secretary agree that a noncompliance exists. Disagreements between the State and Secretary could be a result of different findings between Federal and State surveys from different observations at different times, and not necessarily a disagreement about the same set of facts. The surveys could occur 2 months apart, for example, during which time conditions at the facility could change.

Comment: One commenter stated that § 488.452(d)(1) appears to pose double jeopardy for nursing facilities in that compounded remedies may be applied by both HCFA and the State agency. The commenter did not think that providers should have to face corrective action from both agencies. Another commenter noted that in case of a Federal survey following a State survey, two different remedies could apply; for example a State could terminate an agreement and the Secretary could impose additional civil monetary penalties. The commenter stated that the one-time Federal survey could not consistently or fairly evaluate the facility, and double sanctions from both agencies would not improve quality of care. The commenter suggested that only one type of sanction be applied "after" the Federal and State surveyors concur on the findings.

Response: Section 1919(h)(7) of the Act, specifically envisions cases where a facility may face remedies at the hands of both a State and HCFA. Section 1919(h)(7)(B) of the Act expressly sets forth the rules as to whose remedies will apply when either or both parties are seeking to impose alternative sanctions in addition to a provider agreement termination.

We do not accept the implication that one-time Federal surveys cannot fairly evaluate a facility. Federal surveyors are trained, just as State surveyors are, in the requirements of the Act and the regulations. Federal surveyors have always conducted Federal monitoring surveys to monitor State survey agency performance; therefore these, statutory requirements formalize long-standing agency practice.

Comment: One commenter stated that the net effect of the regulations is that facilities will be assumed to be out of compliance. This commenter stated that historically, facilities were deemed to be in compliance unless there were allegations to the contrary, and that if Federal and State surveyors disagreed, another survey should be required.

Response: We do not agree that another survey should be conducted whenever there is disagreement between Federal and State surveyors. Whatever the commenter may think of the wisdom of the Act's "tie-breaker" rule, the Congress has been quite clear in directing which survey decision applies when HCFA and the State disagree about compliance and remedies. We also do not agree that facilities will be assumed to be out of compliance. Facilities are required to meet all the requirements at all times. When a facility signs a provider agreement, the facility is agreeing to maintain compliance. The surveyors' job is to verify that compliance. If either a Federal or State survey finds the facility to be out of compliance with program requirements, deference must be given to that certification of noncompliance in the interest of the protection of resident health and safety.

Preference for Intermediate Sanctions Rather than Termination

Comment: Several commenters stated that the proposed regulations allow almost unrestricted use of terminations and do not promote the use of intermediate sanctions. They wanted HCFA to revise the proposed rules to encourage and promote the use of intermediate sanctions rather than terminations.

Some commenters said that intermediate sanctions enable States and HCFA to promote correction of deficiencies with incentives and pressures different from those imposed by termination or the threat of termination. They enable the State and HCFA to move quickly against facilities with deficiencies and to target their enforcement actions to the nature, character, and extent of the deficiencies. They quoted House Report No. 100–391(I) at 451–452, 470–497, as reprinted in 4 U.S. Code and Cong. & Ad. News, 100th Cong. 1st Sess. at 2313–271 through 2313–272, 2313–290 through 2313–296; IOM at Chapter 5 (pp. 146–170); General Accounting Office, "Medicare and Medicaid Requirements: Stronger Enforcement of Nursing Home Requirements Needed" (July 1987).

Some stated that the regulations place roadblocks to the use of intermediate sanctions. They commented that § 488.456 allows termination if a facility fails to submit a plan of correction, or fails to comply with a plan of correction. They also noted that § 488.406 describes other remedies as being "in addition to termination of the provider agreement." They stated that this wording makes it appear as if termination is the preferred or most common remedy. They were also concerned that §§ 488.410 and 488.415 make termination mandatory if a facility refuses the appointment of a temporary manager, despite the fact that temporary management "is not an optional remedy under the reform law."

These commenters were concerned that nursing home residents would be subjected to harm because of actual or threatened terminations of their nursing homes. They stated that language in the preamble, indicating that terminations were an enforcement response of last resort, was not reflected in the language of the regulations themselves.

Some commenters recommended that the regulations prohibit use of termination as a remedy, except in those circumstances required under OBRA '87 or when alternative remedies have failed and the condition of the building is unsafe. They wanted State regulators to find ways to use alternative remedies to protect residents, rather than making them homeless, or subjecting them to the trauma of threatened termination, stating that "If the building is safe but care is bad, the operator should be evicted rather than the residents. Used properly, alternative remedies can be used to force a substandard provider to sell the facility."

Response: We agree that the use of alternative remedies should be encouraged. However, if a facility chooses not to submit a plan of correction, neither HCFA nor the State survey agency has any means to determine how the facility intends to improve conditions of inadequate care and, therefore, no clear picture for how residents will be protected. In such a case, failure to terminate the provider agreement would be irresponsible on the part of HCFA or the State. However, if the facility fails to comply with a plan of correction but achieves substantial compliance, we would not terminate the facility's provider agreement. Allowing a nursing home to participate with deficiencies and with a plan of correction represents a certain degree of risk. The nursing home's lack of success in making corrections could indicate that the risk to the residents has not dissipated. Moreover, facilities that had a civil money penalty imposed could face an increase in their penalty because the noncompliance was uncorrected. The responsible exercise of certification duties requires that residents be protected, even if termination is necessary to achieve that protection.

We disagree that temporary management "is not an optional remedy." It is the State's or HCFA's decision as to whether or not to impose temporary management, whether in

immediate jeopardy or non-immediate jeopardy situations. In the former cases, there is a choice between temporary management and immediate termination. If temporary management is not imposed, either because HCFA or the State considers that action inappropriate or because the facility refuses to relinquish management control to the temporary manager, the Act requires that the facility's provider agreement be terminated. We have no authority to ignore this explicit statutory requirement. In the latter cases, temporary management is an optional remedy when facilities are found to have widespread actual harm.

We note that we have no authority to evict non-complying officers or staff of the provider, as the commenter suggests, or to force the sale of substandard facilities.

Comment: Some commenters stated that we had not presented a coherent scheme for choosing remedies which are tailored to fit the desired corrective action.

Response: It is our intent that both HCFA and the State apply remedies tailored to fit specific problems. We have developed an enforcement model which correlates categories of remedies to the seriousness of noncompliance. However, with approximately 16,000 nursing homes in the United States, it is impossible to specify in regulations precise remedies to fit every particular problem in facilities. The seriousness of the noncompliance dictate the category of minimum enforcement action to be taken. The exact choice of a remedy or remedies from that category should be based on an evaluation of the nature of the situation in a particular nursing home and the course of action most likely to precipitate the rapid correction of the noncompliance.

"Pay Back Provisions"

Comment: Some commenters proposed interpreting the "pay back" provisions in section 1919(h)(3)(D) of the Act as applying only to those rare situations in which the Secretary concludes that termination is necessary, but yields to the State's recommendation that intermediate sanctions be imposed instead. In situations in which the Secretary does yield to the State, that action could properly be contingent on the State's promise to repay Federal funds if the intermediate sanctions do not succeed in bringing the facility into compliance. These commenters wanted HCFA to add language giving guidance to the States on the corrective action plans mentioned in the Act.

Response: We believe that the Congress intended to give facilities the chance to come into substantial compliance during a period when only limited, alternative remedies are imposed, but that in return for this grace period, during which Federal money is expended on noncompliant facilities, the facilities (and the State) must agree to repay the Federal money if substantial compliance is not achieved. Because of the procedural specificity of preparing corrective action plans, we have decided to incorporate such guidance in manual instructions.

Other Comments

Comment: Several commenters suggested that the State be designated the primary enforcement agency, with authority to select and carry out remedies prior to HCFA review. They feared that enforcement would be delayed if the survey agency only recommended to HCFA, and waited for HCFA's determination on what remedies to apply. Several commenters suggested that we delete the requirement that State survey agencies submit the plan of correction along with suggested intermediate sanctions, to HCFA for approval prior to imposing the intermediate sanctions.

Response: The Act is quite clear in its division of responsibilities between the States and the Federal government when it comes to the enforcement of Federal certification requirements. Under the Medicare program, the State has no authority to impose remedies as the commenter suggests. Section 1819(h) of the Act reserves all enforcement decisions to the Secretary and permits States to make recommendations only on the basis of the surveys they do under their section 1864 agreements with the Secretary.

Under the Medicaid program, however, we agree with the commenter that in most cases it is the States in the first instance that are responsible for enforcement decisions affecting providers of services. In either case, we believe we have designed an enforcement model that will place a premium on swift action once noncompliance is identified by either the State or the Secretary, and we do not anticipate delay in the implementation of decisions.

Comment: A few commenters wanted to add provisions that would require HCFA and the State to consider the availability of other nursing home beds, when a termination action is considered. They wanted HCFA and the State to consider the relative effects on the facility's residents of relocation compared to remaining in the facility.

Response: We are not adopting this recommendation because we believe that there may be instances in which termination is necessary despite the fact that it may cause hardship to residents. Usually, HCFA and the State will impose alternative remedies prior to terminating a facility, including a mandatory denial of payment for new admissions remedy imposed at the 3rd month; however, there may be instances when this is not possible. For example, a facility could refuse to allow access to the surveyors, or could refuse to submit a plan of correction. A facility might also remain out of substantial compliance with requirements after a 6-month period of correction, at which time the Act would no longer authorize continued payment, despite hardships to the residents. We believe that in those cases in which termination becomes necessary, the termination is for the ultimate benefit of the residents to assure that they receive the care to which they are entitled.

Comment: A few commenters suggested that States should be allowed the discretion to develop their own enforcement systems.

Response: The enforcement scheme delineated at § 488.408, Selection of Remedies, is a model that States must adopt. States have the authority granted them under section 1919(h)(2)(A) of the Act to specify their own criteria as to when and how to apply each of the remedies provided by the Act. Moreover, States are authorized to develop alternative remedies, in accordance with section 1919(h)(2)(B)(ii) of the Act, and we encourage them to do so.

Section 488.454 Duration of Remedies

Comment: In the proposed rule, we said that alternative remedies would continue until HCFA or the State determines that the facility has corrected all deficiencies, until HCFA or the State terminates the provider agreement, *and* until HCFA discontinues FFP. This statement included a typographical error ("and" was used instead of "or") that changed the meaning of the statement. We meant to say that alternative remedies would continue until HCFA or the State determines that the facility has corrected all deficiencies, until HCFA or the State terminates the provider agreement, *or* until HCFA discontinues FFP.

Some commenters expressed concern over when deficiencies are considered to be corrected:

- One said that it is not clear whether compliance is considered achieved when procedures for alleviating the

problem are in place, or when the actual problem no longer exists.

• One said that once the facility has notified HCFA that a deficiency has been corrected, penalties should be suspended immediately until the survey team is able to return to the facility to alleviate a possible financial burden on the facility.

• Another said that the State should be required to do a follow-up within a specified period of time, and, if it fails to do so, the remedy should be lifted automatically.

A number of commenters said that the duration of alternative remedies should be linked solely to the deficiencies that led to their imposition, not to the correction of all deficiencies. They said that consideration should be given for significant progress and substantial compliance, suggesting that remedies should be lifted as soon as the facility corrects all deficiencies that led to the imposition of the remedy. One commenter suggested that even if a deficiency remains uncorrected, the remedy should be lifted if the scope and severity combination is brought down to a level that does not authorize the remedy.

Response: Sections 1819(h)(3) and 1919(h)(4) of the Act specifically state that the denial of payment sanction ends when HCFA or the State determines that the facility is in "substantial compliance" with program requirements. In this final rule, we are extending this principle to all other alternative remedies as well. The determination that the facility is in substantial compliance may be made either through a survey team's revisit, or, through some other review, if HCFA or the State, based on credible evidence which can be verified without an on-site visit, determines that at least substantial compliance has been achieved.

However, the Act, at sections 1819(h)(2)(E) and 1919(h)(2)(D), and at sections 1819(h)(2)(B) and 1919(h)(2)(A)(iii) provides for certain additional qualifications as to when remedies are lifted, and we are incorporating them in the regulation as follows:

• In the case of temporary management, and in the cases of denial of payment and State monitoring imposed because of repeated substandard quality of care, the remedy continues in effect until the facility has demonstrated, to the satisfaction of the State or HCFA, that it is in substantial compliance, and that it is capable of remaining in substantial compliance. (See § 488.414)

In addition, with respect to the duration of all other remedies, we state in this final regulation they remain in effect until—

• A revisit confirms that the facility has achieved substantial compliance;

• The date HCFA or the State, based on credible written evidence which can be verified without an on-site visit, determines that the facility has achieved substantial compliance; or

• HCFA or the State terminates the provider agreement.

In accordance with § 488.430(i)(7), if a facility can show that substantial compliance was achieved on a date earlier than a revisit by a survey team or before the State or HCFA receives or examines acceptable credible evidence, the remedies cease to apply as of that date.

Comment: One commenter said that no alternative remedies should be imposed on facilities because it would hamper their efforts in correcting their deficiencies.

Response: The Congress enacted the various types of alternative sanctions that appear at sections 1819(h) and 1919(h) of the Act with the expectation that they would be used. Drawing from the IoM study on nursing homes, which criticized the large numbers of facilities that fluctuated between compliance and noncompliance, the Act is designed to impose alternative sanctions swiftly once noncompliance is identified as a means of spurring facilities to correct deficiencies more rapidly than might otherwise be the case. While this may prove costly to those facilities that find themselves subject to such sanctions, this is a cost that the Congress obviously anticipated and concluded was necessary to assure high quality care for program beneficiaries.

Section 488.456 Termination of Provider Agreement

Comment: Several commenters argued that the proposed regulations rely too heavily upon termination as a remedy. These commenters feel that termination should be used as a last resort and only where other remedies have failed or where the building is unsafe. In addition, some of these commenters want to consider the effect of termination on residents (transfer trauma) and a few of them go further to recommend that the regulations prohibit the use of termination unless immediate jeopardy to residents is present and only after everything else has failed.

Response: One of the main goals of the proposed enforcement regulations was to increase the number of remedies available to HCFA and the States in order to ensure compliance with the health and safety requirements. We believe that implementation of these final regulations will accomplish that goal. While we will encourage the use of alternative sanctions, we firmly believe that provider agreement terminations may be appropriate in certain cases of noncompliance whether or not deficiencies pose immediate jeopardy to residents. We, too, are concerned about the potential harm to residents when they are required to move from a facility. For this reason, the regulations are designed to provide HCFA and the State survey agency with the ability to target noncompliance with appropriate remedies to assure compliance with the least disruption to residents and the facility. We cannot, however, restrict the use of termination to immediate jeopardy situations. Sections 1819(a)(3) and 1919(a)(3) of the Act require that a facility meet all of the statutory participation requirements to be considered a SNF or a NF, respectively (in other words, participate in either Medicare or Medicaid). While we have explained elsewhere why it is justifiable to consider substantial compliance as acceptable, the Act does not limit the above provisions by allowing indefinite noncompliance in non-immediate jeopardy situations. Indeed, sections 1819(h)(2)(C) and 1919(h)(3)(D) of the Act only permit continuation of Federal payments to facilities with non-immediate jeopardy deficiencies for a maximum of 6 months, and then only if certain criteria are met. Continuation of payment after 6 months is only permissible if substantial compliance has been achieved. Further, section 1919(h)(7)(A)(i) reinforces the 6 months maximum for participation for a noncompliant SNF.

Comment: One commenter recommended that HCFA create a conditional waiver, not to exceed two years, that would apply to all physical environment requirements. The commenter recognized that no period of correction may exceed the 6-month limitation but pointed out that it may be physically impossible to correct structural deficiencies within that timeframe. Such correction may necessitate applications for bank loans and certificate of need approval; moreover, the construction season is limited by geographical location. The commenter believed that creation of conditional waiver not to exceed two years, for physical environment requirements, would allow facilities to continue to participate legitimately while correcting problems that the facility cannot correct within the 6-month period.

Response: We agree that some physical environment deficiencies may

take longer to correct than others and that these deficiencies may not be wholly corrected within 6 months of the last day of the survey. However, as we have discussed previously, facilities must meet the standard of "substantial compliance" in order to continue participation in the Medicare and Medicaid programs. To meet the standard of "substantial compliance", deficiencies must be such that they cause no harm or potential for more than minimal harm. Although we have no desire to terminate facilities that are otherwise providing good quality of care, we believe that facilities have had ample time to comply with these requirements. Physical environment requirements have been in place since October 1990. Moreover, this regulation will not become effective until 6 months after the first day of the month after the regulation is published in the **Federal Register**, so facilities will have even more time to comply.

Comment: A few commenters stated that the termination notice period of 2 days was inadequate to allow a fair opportunity for elimination of jeopardy. These commenters and others mentioned that the 2-day notice period was inconsistent with the 23-day termination process outlined at § 488.410. One commenter proposed a termination notice of 60 days for cases not involving immediate jeopardy. The same commenter said the time period should start when the facility receives notice of the remedies being proposed. One commenter asked how the public was to be notified of a termination action and another felt a notice should be posted on the front door of the facility.

Response: We are not accepting these comments, although we believe that there may be some misunderstanding among commenters as to the workings of the fast track termination cycle and the notice provisions applicable to facilities facing adverse action. In describing these procedures in the proposed rule, we were stressing the paramount significance of protecting resident health or safety in cases where immediate jeopardy is identified during the survey process. In such cases, the overriding concern is the removal of the threat either through immediate correction by the facility or by the transfer of residents to other more qualified facilities following the termination of the deficient facility's provider agreement.

We continue to believe that the 2-day prior notice provision of the proposed rule is necessary to protect these resident interests and we are retaining it for this reason in this final rule. Past experience with this notice provision in the case of Medicare SNFs has demonstrated to us that it is effective. Having said this, however, we want to dispel those fears about this provision that in all cases a provider will never have more than 2 days' notice before having its provider agreement terminated. As described in the proposed rule, we will have in place a 23-day termination cycle in immediate jeopardy cases. This time frame spans the maximum period of time between the last day of the survey that identified immediate jeopardy and the effective date of the termination. Thus, in many cases, providers, which will have been advised of the survey findings during the survey or at the exit conference, will often have ample time to remove the conditions that gave rise to the immediate jeopardy finding. The prior notice must be given early enough so that the termination date does not extend beyond the 23-day period should the facility fail to remove the immediate jeopardy.

Facilities facing adverse action in these cases will not be guaranteed the maximum amount of time provided by these regulations. For those facilities whose substandard conditions warrant the quickest possible response, it is entirely possible that the effective date of the termination action will occur sooner than the 23rd day after the survey; and it is these facilities that will likely receive notice of the impending action against them as quickly as administratively feasible following the survey.

Extensive experience has demonstrated that it is possible to schedule revisits in a short time frame to verify that the immediate jeopardy has been removed. Because of our experience that the 23-day process works, we will continue to start the clock on the last day of the survey to ensure that jeopardy situations do not remain long uncorrected. We see no justification for facilities to receive additional time to correct instances of immediate jeopardy. In the same vein, we will continue to give a 15-day notice to the public and the facility in non-immediate jeopardy cases, and a maximum of 6 months from the last day of the survey to reach substantial compliance before termination is effective. A 15-day notice in nonimmediate jeopardy cases is a well established practice for all provider types. For both immediate jeopardy and non-immediate jeopardy situations, the public will be notified of terminations by a variety of means; in most instances, this will be accomplished by a newspaper notice, as is the predominant present practice. We believe that a public notice posted on the front door of the facility would be an unnecessary affront to the facility when Federal requirements stipulate that the survey results be made available to residents for examination in a place readily accessible to residents and a notice of their availability must be posted (see § 483.10(g)).

Comment: A few commenters felt that termination should not be applied if deficiencies were corrected within the delineated timeframes. One commenter said that the timeframe for termination should be no shorter than 6 months in cases that do not constitute immediate jeopardy. One commenter suggested that the regulation require an "acceptable plan of correction" from the facility.

Response: Current practice and the final regulations assure that termination will not be applied if noncompliance has been corrected within the designated timeframes. Redesignated § 488.456(b)(1) states that the facility's provider agreement may be terminated if the facility—

- Is not in substantial compliance with the requirements of participation; or
- Fails to submit a plan of correction with the time specified by HCFA or the State.

Section 488.456(b)(2) states that HCFA and the State will terminate a facility's provider agreement if a facility—

- Fails to relinquish control to the temporary manager, if that remedy is imposed by HCFA or the State; or
- Does not meet the eligibility criteria for continuation of payment as set forth in § 488.412(a)(1).

However, the Act does not mandate an automatic 6 month period for the correction of all deficiencies; 6 months is the outside limit permitted for correction of deficiencies that constitute noncompliance and then only when specific statutory criteria are met. The States and HCFA must have the flexibility to choose appropriate remedies, including termination, and timeframes appropriate to the noncompliance identified. We agree with the suggestion to revise redesignated § 488.456(b)(1)(ii) to read "an acceptable plan of correction." This change is in line with our current practice.

Comment: A few commenters were concerned that the proposed regulations were unreasonable and that HCFA and the States should have an objective, measurable mechanism to govern the enforcement procedures. Another commenter felt the new regulations would inflate termination actions

tenfold and increase the State agency workload.

Response: We do not agree with these comments. These regulations are designed to encourage the selection of a particular remedy based on the nature of the noncompliance and the likelihood of immediate and sustained compliance. It was the intent of the Act that the availability of additional remedies will mean that HCFA and the States will use termination as a remedy less frequently. The use of these regulations for the selection of remedies will help ensure that the selection of remedies is consistent and appropriate. We expect that these new regulations will not cause greater expenditures for the State agencies. However, as we said in the proposed rule, a reallocation of resources, particularly geared to more intensive monitoring of marginal facilities may well occur.

Comment: One commenter recommended amending the regulations to permit the survey agency to initiate termination actions based upon poor compliance history.

Response: The Act provides the States and HCFA with the authority to terminate facilities with poor compliance histories. Specifically, sections 1819(h)(2)(C) and 1919(h)(3)(D) of the Act provide for State and Federal discretion as to whether or not termination is preferable to the imposition of alternative remedies in the case of noncompliance that constitutes non-immediate jeopardy. We expect that a facility's previous history will be a significant factor in the determination of whether termination or an alternative remedy is preferred. However, poor history in and of itself can not warrant termination if the noncompliance has not persisted. That is, if the provider has indicated poor performance in the past but is in compliance in the present, there would be no basis for termination.

Section 488.426 Transfer of Residents

After considering comments we received on proposed § 488.226 and § 488.240, we have decided to combine both sections in a new § 488.426. We believe this change will be less confusing as transfers for all nursing homes can be referenced in one place.

Comment: One commenter asked the following questions: If a facility is terminated, who will be responsible for placing the residents elsewhere? If no bed is available, who will pay for the residents' care in the facility until a bed is found? The commenter stated that the State should have the responsibilities regarding transfer and discharge (in other words, tour of the new facility, counseling, orientation to the new facility, etc.), to avoid transfer trauma.

Response: Proposed § 488.240, now incorporated into § 488.426, stated that the State must arrange for the orderly transfer of residents when a facility is closed or its provider agreement is terminated. Further protection for residents is available in regulation. Section 489.55 provides that payment is available for up to 30 days after the effective date of termination for eligible residents and § 441.11(a)(2) states that, in the case of continuation of FFP for Medicaid, the Medicaid agency must make reasonable efforts to transfer recipients to other facilities. The regulation clearly gives the responsibility for orderly transfer of residents to the State. Each case involving the transfer of residents could potentially be different. We are, therefore, leaving it up to the State to decide, on a case-by-case basis, what steps need to be taken to reduce the risk of transfer trauma, understanding that the State's responsibility is to minimize the period of time during which residents are receiving less than adequate care.

Comment: One commenter stated that a finding of immediate jeopardy will result in the facility's emergency closure and transfer of the residents. This commenter asked where residents would be transferred if a county or particular area had too few available beds?

Response: The finding of immediate jeopardy will not, in and of itself, require States to close a facility and transfer Medicare and Medicaid residents. In an emergency, the State could transfer Medicare and Medicaid residents to another facility or facilities. There could be situations, such as an earthquake or other natural disaster, where the State would temporarily transfer residents to another facility until the facility can adequately care for its residents. In this case, the facility did nothing wrong. However, in the case of immediate jeopardy, the facility failed to protect the health or safety of its residents. For immediate jeopardy situations, the statute at sections 1819(h)(4) and 1919(h)(5) of the Act provides for immediate termination if the jeopardy is not removed, but it does not require the State to close the facility. However, when a facility is terminated for immediate jeopardy, the State has up to 30 days to transfer the facility's Medicare and Medicaid residents. Most States have a relocation plan that outlines the circumstances under which the plan will be put into effect and the procedures to be followed. These plans usually provide for first attempting to place residents in the closest facility or facilities and then attempting placement at increasingly distant facilities until available beds are found. We believe it is unnecessary to mandate procedures for States to follow in cases of closure or transfer of residents, and that no greater procedural specificity is required in regulations.

Comment: One commenter expressed concern that after coming to a nursing home with the expectation of living out the rest of one's life there, a resident may be forced to move to another location because of some technicality.

Response: Termination and closure of a facility are among several remedies available to protect the health and safety of Medicare and Medicaid residents. Although it is possible that a noncompliant facility could be terminated for not submitting to a plan of correction, as is required for continuing participation in the Medicare or Medicaid program, it is not likely. Most nursing homes are interested in participating in the Medicare and Medicaid programs and will not risk termination based on such noncompliance.

Comment: Several commenters requested that we place more requirements upon the States to assist residents, should a facility lose its Medicare or Medicaid certification. Two of the commenters, representing consumer organizations, believe proposed § 488.240 is inadequate in terms of requirement specificity, and they provided a complete and detailed rewrite of the section. Their experience with closures and decertifications in the last 5 years has led them to believe that providers and regulators cannot be trusted to provide a "safe and orderly" transfer process. As a result, their rewrite focuses on the recommendation that HCFA mandate the States to develop plans that provide requirements for the "safe and orderly" transfer of all residents when the State closes a facility.

Included in the rewrite are provisions that outline specific residents' rights in the transfer process such as, determining the location of the transfer, availability of counseling and support, and the transferring of residents' possessions and trust funds. The commenters also address requirements for the new admitting facility, as well as requirements for the coordination among appropriate agencies, organizations and ombudsmen involved in the transfer process.

To ensure proper development and execution of the plan, the commenters recommend that we require the State to submit its transfer plan to HCFA for

approval. HCFA, in turn, should assess performance under the transfer plan annually, during the review of the State's enforcement performance. The commenters end their rewrite of proposed § 488.240 with an enforcement recommendation that if the State's transfer plan is found inadequate, HCFA should take actions as described in proposed § 488.243 (b) and (c). They also recommend that immediate implementation of the plan be waived during a crisis or disaster which makes it impossible to fully implement a State's transfer plan.

In addition to the detailed rewrite of the section, the commenters recommend that the term "all residents" be defined, because the amount of assistance residents receive in the transfer process is directly related to their Medicaid, Medicare, or private payment status. For example, Medicaid residents receive services such as notice of closing, information about care options, counseling, transportation, and other types of relocation assistance. Medicare residents are often not offered any of these services, and private pay residents usually receive no help whatsoever. One commenter suggested that it is inappropriate to "require" the transfer of residents if the facility has not been delicensed by the State and the residents choose to remain at the facility.

Further, one of the commenters states that the preamble and the text of the proposed regulation differ as to which agency has the responsibility for transferring residents, with the preamble stating that the State agency must arrange for transfer, proposed § 488.240 stating that the State has the responsibility, and § 441.11(a)(2) stating that the Medicaid agency does.

Response: We believe the commenters inadvertently transposed proposed section numbers § 488.234 (b) and (c) as there are no proposed sections § 488.243 (b) and (c). We appreciate these very thorough and specific comments and the amount of effort that went into them. Although there are valid considerations in the suggested rewrite of this section, some of them may be impossible for the States to implement. We, therefore, choose not to impose such stringent requirements on the States. Existing regulations at § 483.12(a) provide numerous procedural safeguards regarding the transfer and discharge of residents. In addition, the States are already required by sections 1819(h)(4) and 1919(h)(5) of the Act to provide for the orderly transfer of residents when a facility is terminated or closed, and at sections 1819(c)(2) and 1919(c)(2) of the Act, to provide notice of transfer at least 30 days in advance in most cases. We agree that proposed § 488.240, now incorporated into § 488.426, which uses the words "all residents," may be overly broad and we are revising that section to specify that only Medicare and Medicaid residents are affected by this section. We accept the suggestion that the term "orderly transfer" be amended to "safe and orderly transfer" to maintain consistency with the language of sections 1819(h)(4) and 1919(h)(5) of the Act. Since sections 1819(h)(4) and 1919(h)(5) address immediate jeopardy terminations, we cannot accept the comment that it is appropriate to allow any Medicare or Medicaid residents to remain in a facility that is being terminated for such serious situations. To do so, would put these residents in jeopardy and would be clearly contrary to sections 1819(h)(4) and 1919(h)(5) of the Act.

The following addresses what one of the commenters perceives as conflicting information regarding responsibility for the orderly transfer of residents. The preamble did indeed state that the survey agency is responsible for arranging for transfers, while proposed § 488.240 (now incorporated into § 488.426) is taken directly from sections 1819(h) and 1919(h) of the Act and places the responsibility generally on the State. We wish to give the States the greatest latitude in determining which State agencies they will use. Therefore, it is our intent to rely on the broader interpretation in proposed § 488.240 and place the responsibility on the State as required by the Act. Although the commenter has correctly pointed out that § 441.11(a)(2) places the responsibility on the Medicaid agency, we believe that each State should be given the flexibility to select the appropriate agency under its particular governmental structure. Therefore, we are revising § 441.11(a)(2) accordingly.

Comment: This commenter stated that, in the past, the responsibility for arranging for the orderly transfer of residents to another facility whenever a provider agreement is terminated has been placed on the facility operator subject to the State's oversight. This commenter stated that the proposed regulations would impose substantial costs and uncertain legal liabilities upon the State.

Response: According to existing regulations at § 483.12(a), the State, not the facility, has had the responsibility in the past for numerous procedural safeguards regarding the transfer and discharge of residents and has funded such costs. Sometimes the facilities cooperate in the transfer of residents and sometimes they do not. Sometimes they have no resources with which to help. Therefore, the ultimate responsibility for all aspects relative to transfer of residents in the case of a facility closure lies with the State to ensure that the well-being of residents is protected.

Comment: Another commenter agreed with the regulatory text but wanted us to require, in the case of provider agreement termination, that the State permit a resident to remain in a terminated facility provided the resident arranges to pay for his or her care and the facility does not close.

Response: It is not necessary to require States to allow residents to remain in terminated facilities because they already have that right. If a resident prefers to remain in a terminated facility that is still operating, and is able to pay for his or her own care, that resident has every right to do so. The government has fulfilled its obligation by providing notice to residents that the facility's provider agreement has been terminated. This applies whether or not immediate jeopardy exists. The State is the only entity that has the authority to close or delicense a facility.

Comment: One commenter suggested that if residents are transferred because a facility is terminated, we should require that the State provide for such transfer, at its own expense, and that it be held liable for its action during such action.

Response: We already require the State to transfer Medicare and Medicaid residents to another facility or facilities in immediate jeopardy terminations. In fact, for Medicaid residents, the State is paid up to 30 days of FFP for the safe and orderly transfer to another facility or facilities after termination. We have not accepted the comment that the State be held liable for its action during such transfer. A State's liability should come under the purview of State law. We have no statutory basis to hold States liable for such actions. Therefore, we have not included this provision in the regulation.

Comment: One commenter, representing a State Department of Aging, stated that the language in the proposed rule regarding transfer of residents is inadequate and provided a list of minimum requirements for States. The twelve requirements listed have all been covered by the preceding commenters except for the following two instances. The commenter recommends that a facility that is being terminated be monitored daily and also recommends that ongoing counseling

for residents include follow-up post-transfer counseling.

Response: Although the suggestion that facilities in the process of being terminated be monitored daily is well-intentioned, the specifics of transfer plans are under the purview of the States. We are not mandating that the States take specific action other than that already required and it is unlikely they could implement this suggestion given the uncertainty of how long the process will take and how much funding they will have available. Regarding the suggestion that follow-up post-transfer counseling be provided to residents, again it is the State that determines which services are provided for transfer of residents.

Informal Dispute Resolution (§ 488.331)

In the preamble to the proposed rule, we specifically asked for public comment about the desirability and feasibility of establishing a formal conflict resolution process whereby providers dissatisfied with survey findings could request a review of the deficiencies after the survey and prior to the formal administrative and judicial review processes. We also acknowledged the existence of the numerous informal opportunities providers currently have throughout the survey process to challenge survey findings: during the survey, at the exit conference, while awaiting receipt of the official deficiency statement, through dialogue with State and regional officials, and upon receiving the official deficiency statement.

The term "conflict" resolution has been changed to "dispute" resolution in this final rule to be consistent with terminology used in the Administrative Dispute Resolution Act (ADRA) of 1990 and Executive Order 12778, which encourage such a process.

Many commenters believe that a dispute resolution process is necessary. A few do not.

Comment: The majority of commenters in favor of a dispute resolution process contend that there is currently no means for providers to resolve conflicts with survey findings short of costly litigation. Most say that they are either not afforded the informal opportunities to resolve conflicts to which we referred in the preamble to the proposed rule, or that the outcome of those opportunities is predetermined and, therefore, of little value. Also, many cite the ADRA of 1990 and Executive Order 12778 which (they claim) direct Federal agencies to develop dispute resolution mechanisms in an effort to reduce costly and lengthy litigation. A few commenters believe such a process could also serve as a means to measure surveyor quality assurance.

The majority of comments supporting a process suggested that HCFA mandate an informal dispute resolution process, while less than one-third preferred that HCFA mandate a formal one. Several commenters suggested that HCFA adopt the current dispute resolution process of a specific State, for example, Ohio or Louisiana. These commenters contend that existing programs in specific States have been successful in resolving conflicts about survey findings. Others suggested that HCFA require that each State establish a State-specific process, in order to give States the flexibility to work within their existing administrative framework. Commenters proposed that since most States already have some type of dispute resolution process, we need only to require that it be formalized; in other words, in written form and publicly recognized. Commenters also suggested that HCFA establish one process to be used by all States. These comments were presumably based on the belief that a single process mandated by HCFA is the most effective means to ensure that consistent opportunities are offered in a consistent manner to all nursing home providers dissatisfied with survey findings. The proposals we received for a single process varied in extent and sophistication and included suggestions that the dispute resolution process:

- Offer resolution opportunities at specific times during the survey (for example, conduct daily exit conferences or communicate at the time a deficiency is identified), and cease offering opportunities beyond specific events (for example, after the exit conference or after the issuance of the deficiency statement);
- Provide multi-tiered opportunities that could include monitoring of corrections and mandatory revisits;
- Be limited to deficiencies at specific scope and severity levels;
- Offer opportunities proportionate to the noncompliance;
- Allow incorrectly cited deficiencies and scope and severity scale levels to be removed from the deficiency statement;
- Require that another survey be conducted by different surveyors;
- Establish local or national advisory councils, arbitration panels, or quality assurance committees, etc., comprised of specific types of individuals not previously directly involved in the dispute; and
- Involve consumers and ombudsmen.

Conversely, other commenters did not believe that a dispute resolution process is necessary. They said that providers already have numerous opportunities to refute survey findings throughout the survey process. Some alleged that an additional process would only serve to delay the enforcement process which would be contrary to the OBRA '87 mandate to minimize the time between the identification of violations and final imposition of enforcement remedies. Some also believed that if such a process were in place, deficiencies may not be cited or, at a minimum, they would be cited at lower scope and severity scale levels to reduce the universe for challenges.

One consumer organization argued that the regulatory system is not a two-party system in which the facilities and the State negotiate. Rather, it is a contractual arrangement in which the State holds the public's trust and acts as the public's agent to ensure that the contractees satisfy the arrangement. They believed that if any party should have "appeal" rights, it is the residents who should be able to contest survey findings that do not require facilities to comply with the law. They submitted, therefore, that instead of establishing a dispute resolution process for providers, HCFA should build mechanisms into the survey procedures to notify residents, families, ombudsmen and others when surveyors, during the course of the survey, have not yet been able to substantiate suspected problems. These procedures would provide an opportunity for residents and families to provide additional information to surveyors.

One commenter, opposed to a dispute resolution process, remarked that there is currently so much interaction between surveyors and providers during the survey process that providers are actually interfering with the performance of the survey. This commenter suggested that a sanction be imposed against providers when this occurs.

Overall, most commenters, including States, offered strong support for a dispute resolution process. These commenters were interested in resolving conflicts as early in the survey process as possible and prior to litigation. They prefer to minimize the number of issues that could advance to formal litigation by resolving early those conflicts caused by misunderstandings, miscommunication, oversights, etc. However, the consumer advocacy groups were adamant in their opposition, arguing that any additional process will delay the enforcement process against noncompliant facilities and shift focus away from resident care. These commenters believe that the

perceived need by providers for a dispute resolution process must be secondary to the responsibility HCFA, the States, and facilities have to provide for the health and well-being of nursing home residents.

Response: We recognize the validity of both major points of view and have concluded that both perspectives must be addressed.

In the Fall of 1992, we asked the States to provide us with a description of existing dispute resolution processes offered to providers who disagree with survey findings. All States responded. Washington, DC, Puerto Rico, and Guam were not asked to provide their comments due to the small number of facilities surveyed. We discovered that all States currently have a dispute resolution process. Nevada's system of due process is required by State law. The other States' processes, although not legally mandated, are reflective of State policy and not legislation. The policies vary among States, and there are numerous differences in the details of the processes of individual States.

Overall, the opportunities offered to providers by States to challenge survey findings can be divided into two basic stages: during and after the survey. All States offer the providers a chance for rebuttal during at least one of these stages; half of the States include both in the process. During the survey, the opportunities afforded providers include the chance for the provider's staff to interact with the survey team throughout the process and the specific opportunity to discuss survey findings at the exit conference. After the survey, many States allow the providers to elevate unresolved issues to survey agency management and/or the HCFA regional office for resolution. Moreover, providers in all States may record their disagreement with survey findings on the Statement of Deficiencies HCFA–2567.

Our State Operations Manual currently requires that States allow facilities to interact with the survey team during the survey, to discuss findings at an exit conference, to raise unresolved issues to the survey agency and/or to the HCFA regional office and to record their disagreements with survey findings on the HCFA–2567.

As we reviewed all of the comments supporting a dispute resolution process, it became apparent that, while the words "informal" and "formal" were used to distinguish the type of process a specific commenter preferred, many commenters, regardless of which word was used, preferred the same process. The majority of those in favor of a dispute resolution process have asked that it be required by HCFA. Since many believe that a process can be required only through rulemaking, most commenters, therefore, prefer a regulatory process.

We note that the Administrative Dispute Resolution Act of 1990 and the Executive Order 12778 of October 23, 1991, Civil Justice Reform (56 FR 55195), encourage, but do not direct dispute resolution, as some commenters have claimed.

We are not accepting those comments proposing that we adopt a specific State's process on a national level, nor those suggesting that each State be permitted to design its own process in its entirety. While we have concluded that all States offer some opportunity to resolve disputes, we have no evidence that suggests that any particular State's process is more successful or effective than that of another State.

However, we are accepting, with modification, the suggestion that HCFA adopt one process to be used by all States. Just as participation requirements and the survey and certification process for nursing homes are consistent from State to State, so should the opportunity for providers to challenge survey findings. In § 488.331, we are requiring several core elements that all informal dispute resolution processes must include as a minimum:

- The entity conducting the survey must offer nursing home providers the opportunity, if they request it, to refute survey findings beginning with their receipt of the official HCFA–2567 with which they disagree;
- Providers must be able to advance their disagreements to survey agency or HCFA regional office officials, or both;
- In no case, will dispute resolution delay the effective date of an enforcement action;
- The dispute resolution process (whether or not it exceeds the minimum requirements specified in this final rule) must be available to providers, upon their request, in written form. HCFA regional offices provide dispute resolution to providers upon request, relative to Federal surveys.

We believe that specific procedural requirements that determine the manner in which dispute resolution proceeds, for example, such things as how the request is made, the method by which the process is conducted, and who may participate in the process, should be left to the individual States. Upon the facility's request, the State will provide a written summary of that State's procedures relative to the informal dispute resolution process. Any attempt on our part to codify procedural aspects of dispute resolution that would be applicable to all States would limit States' as well as providers' flexibility in utilizing and refining the process, as necessary, to satisfy their needs.

To allay commenters' fears that dispute resolution would stall the survey process and delay enforcement action, we are providing in § 488.331 the opportunity for providers to dispute survey findings upon receipt of the official HCFA–2567 with which they disagree, while prohibiting challenges by providers from postponing or otherwise delaying the enforcement process. In no case will dispute resolution delay the effective date of an enforcement action. Thus, while it is our hope that dispute resolution procedures could be completed in all cases before the effective date of the enforcement action, we wish to make it clear that where the completion of these procedures does not occur by that time, this will not be grounds to either delay the enforcement action or give providers a right to challenge the inadequacy of these procedures. We believe that to have a process that would allow for enforcement to be deferred pending the scheduling and completion of this informal appeals process is far outweighed by the needs of residents to face a minimum of time during which they receive care that does not meet the requisite health and safety standards. We also believe that not delaying the effective date of the enforcement action until the conclusion of the dispute resolution process will encourage facilities to make the kind of swift corrections the Congress obviously intended when it enacted nursing home reform. If a provider is subsequently successful, during the dispute resolution process, at demonstrating that deficiencies should not have been cited, the deficiencies are removed from the HCFA–2567 and any enforcement actions that had been imposed as a result of those cited deficiencies are lifted.

This dispute resolution system does not introduce additional requirements into the survey process; rather, it reinforces instructions that already exist but which have been applied inconsistently up to this point. Because we are formalizing this element of the appeals process, we are amending the appeals procedures at 42 CFR parts 431 and 498 to eliminate the reconsideration process for SNFs and NFs, respectively. Informal dispute resolution will duplicate, in every pertinent way, this element of the process since it will provide the opportunity for providers to contest survey findings informally just as reconsiderations currently are designed to do. Accordingly, we have

concluded that retaining the reconsideration process for SNFs and NFs would create redundant procedures and are amending it so that it applies only to other provider and supplier types.

Regarding the comment to use dispute resolution as a means to measure surveyor consistency, accuracy, and decision-making, section 1819(g)(2)(D) of the Act requires the Secretary and the States, and section 1919(g)(2)(D) of the Act requires that States, implement programs to measure and reduce inconsistency in the application of survey results among surveyors. HCFA and the States will develop their own mechanisms to satisfy this requirement and may choose to use the dispute resolution process as a means to evaluate surveyor performance in this area.

We do not agree with some commenters' characterization of dispute resolution as negotiation between providers and the survey agency, nor do we agree that a process should be established to notify residents and their families when surveyors require additional information in identifying deficiencies. First, dispute resolution as required in this final rule does not contemplate bargaining between providers and the survey agency; rather, it is a preliminary opportunity for providers to refute survey findings that they believe are inaccurate and to present evidence to support their belief. The purpose of this informal process is to clarify, if not eliminate, the issues that might otherwise lead to needless litigation and to sharpen the issues for an administrative law judge or State hearing official so that litigation, should it occur, may be less burdensome and costly. This may work in two ways. It may convince the State or HCFA officials that erroneous deficiencies have been cited, or it may convince providers that, because the State and HCFA have ample support for their conclusions, it would be unwise for providers to pursue litigation.

Second, States enter into an agreement with the Secretary (HCFA), in accordance with section 1864 of the Act, to act as HCFA's agent for the purpose, (among others), of determining if a facility meets participation requirements. After following the survey protocol, which includes interviews with residents, and family members or legal representatives, surveyors may find that they do not have sufficient information to cite a deficiency. However, we note that whenever nursing home residents or their families believe that a deficient or otherwise inappropriate practice exists in the facility, regardless of whether a survey is in process, they should contact the State ombudsman, request a complaint investigation, or both.

Some commenters believe that a dispute resolution mechanism may impact on how surveyors recognize deficiencies as well as how they assign scope and severity scale levels to cited deficiencies. First, it is important that commenters be absolutely clear that neither the enforcement scheme presented in the proposed rule nor the modified model in this final rule was developed for the purpose of identifying deficiencies. Rather, the assessment factors discussed under "Factors to be Considered in Selecting Remedies" of this preamble and codified at § 488.404 of this final rule will be used (as the former scope and severity scale was to be used) to evaluate the seriousness of deficiencies already identified in order to determine what, if any, enforcement action is appropriate. Second, in response to public comment, this final rule has incorporated the concept of substantial compliance. This concept, which is discussed in detail under "Certification of Compliance" of this preamble, provides that not all deficiencies will result in enforcement action and should, therefore, eliminate resistance or hesitation of surveyors to cite deficiencies that they have identified for fear of provider disputes of lower-level assessment determinations. As we have stated elsewhere in this preamble, the survey process provides several opportunities for deficient practices or otherwise inadequate performance on the part of the State to be identified and sanctioned. Therefore, if the situation described by the commenters should occur, there are adequate statutory and regulatory mechanisms to respond to it.

We do not accept the comment that we should sanction a provider for interfering in the performance of a survey. We believe that this situation is adequately addressed in section 2713 of the State Operations Manual, which provides that surveyors may allow, or refuse to allow, facility personnel to accompany them during a survey. Each case is at the surveyors' discretion and is to be worked out with facility management. If it cannot be worked out, surveyors should contact their supervisors.

Determination of a Deficiency

Many commenters responded to our request in the proposed rule for recommendations for a regulatory design that could accommodate the use of scope and severity scales for determining deficiencies.

Comment: A large number of commenters recommended that we adopt a system for determining deficiencies similar to that used by the State of Ohio. The Ohio system employs the use of a worksheet that must be completed for each violation of a requirement. The worksheet evaluates violations against criteria such as preventability and resident choice, and then classifies violations based on ratings of scope and severity into two types. The first type is called a deficiency and the second, lesser violation, is called a finding. Both a deficiency and a finding are recorded on the statement of deficiencies and are disclosable to the public, but only a deficiency would require a remedy. To the extent that the State of Ohio does not use scope and severity scales to determine whether a violation should appear on the statement of deficiencies but rather to determine appropriate enforcement action, the Ohio enforcement system is similar to the one that we proposed.

Another model proposed requires a mathematical weight for each tag number identified in the interpretive guidelines. Individual data elements would be ranked in descending order according to their importance in a regulation. The model then calls for a statistical computation incorporating scope to determine whether a deficiency exists.

A third model submitted involves two factors in determining whether an observation is a deficiency. The first factor is preventability. Under this proposal, if either the negative outcome could not have reasonably been foreseen or if the facility could foresee the negative outcome and did everything reasonably possible to prevent its occurrence but it occurred nonetheless, a deficiency would not be cited, regardless of scope and severity. The second factor is substantiality. If a facility were determined to be in substantial compliance with a requirement, a deficiency would not exist. Scope and severity would be used to determine if the requirement were met.

Other models that incorporate the concept of substantial compliance into the determination of deficiencies but that do not involve the use of scope and severity scales were also recommended. One commenter suggested that we create an audit form outlining the minimum requirements for long term care facilities, and then rate each item either a "pass" or a "fail" depending upon whether the requirement was substantially met. Another suggestion was that we calculate a percentage of

error rate for each requirement and evaluate the rating against a tolerable threshold of compliance. Certain commenters believed that for resident outcomes to have significance in the survey process, negative findings which have no adverse impact upon the care being received by residents should not constitute citable deficiencies. One commenter recommended that we adopt the Joint Commission on the Accreditation of Healthcare Organizations' accreditation system which places any minor deficiencies that do not meet substandard care criteria on a recommendation report and reserves the official citations for substandard care. Other commenters believed that guidelines should express a standard of "practicably met compliance with requirements" which they asserted would be comparable to the "highest practicable" language applied to facility responsibility for resident care.

Although the majority of commenters (mostly from the provider community) favored the use of scope and severity scales to determine deficiencies, a significant number of commenters did oppose it. Many of these were concerned that the use of scope and severity scales to determine deficiencies would violate the intent of the Act that all requirements be met and enforced. One commenter noted that the intent of the Act is to ensure that each individual's needs are met "at the highest practicable level," not just at minimum standards. Others asserted that for enforcement to be resident centered, residents' individual problems must matter, and that using scope and severity scales to determine deficiencies would force residents to put up with a certain amount of misery before the facility would be required to address their problems.

Response: We are not adopting the use of scope and severity scales to identify deficiencies because, as described below, the Act imposes limitations that make it impractical. However, we are adopting substantial compliance as the standard of performance to which providers will be held. This is consistent with the intent of the Act, and will accomplish much of what the advocates of scope and severity scales claimed that the scales would accomplish. Although the thrust of nursing home reform was to codify a system of nursing home regulation that is outcome oriented, the Congress enacted a number of requirements that simply do not lend themselves to an outcome analysis. Moreover, the Act does not always lend itself to an analysis of whether the resident population as a whole was treated properly which, in our view, would be essential to a workable scope index.

For example, section 1919(b)(3)(C)(i)(I) of the Act requires facilities to conduct a resident assessment no later than 14 days after admission. Whether a facility complies with this obligation, which the Act makes applicable to each resident, rests only on whether the assessment was in fact done by the date prescribed in the Act. Should a facility conduct an assessment on the 15th day after a resident's admission, that facility will have failed to comply with the requirement, notwithstanding the fact that it may have conducted timely assessments on all other residents, and notwithstanding the fact that there may have been no negative outcome for the resident who received the untimely assessment. In the same fashion, section 1919(b)(7) of the Act requires that facilities having more than 120 beds employ a full-time social worker. Should a facility having 121 beds not have such an employee, that failure is a clear violation of the statutory standard regardless of whether there are any documented negative outcomes that resulted from this failure. There are numerous other examples of this type of requirement in the Act.

Other requirements in the Act, as some commenters pointed out, focus on a facility's duty with respect to each resident and not its duty to perform in a certain fashion for the bulk of all individuals in residence. Other than the resident assessment requirement discussed above, section 1919(c)(1)(A) of the Act requires facilities to protect and promote the rights of each resident. Should a facility, therefore, not perform in such a manner (as further described in the Act and implementing regulations) even for one resident, it cannot be said that the facility was not deficient in this area notwithstanding the fact that the failure was an isolated one. In the same way, section 1919(b)(6) of the Act requires that the health care of every resident be under the supervision of a physician (or, at the State's option, other specified health care professionals). Here, too, a facility may not be determined to meet this requirement if it has successfully provided for such supervision for most of its residents as long as even one of its residents has not had the benefit of such supervision.

This is not to say that any violation of these or other similar requirements ought to result in the imposition of sanctions of consequence. As we suggested in the proposed rule, and as we require in this final rule, the degree of seriousness of a deficiency looms large in determining the appropriateness of a remedy. In some of the hypothetical situations cited above, there may be nothing more than a plan of correction that is called for. The point is, however, that the kind of analysis that allows for the consideration of a deficiency's seriousness in determining an appropriate remedy will not always work when seriousness is considered to determine whether a deficiency exists. None of the commenters who sought the use of scales in this context acknowledged these issues squarely or made suggestions that would allow us to address this matter in a way that comports with the structure of the Act.

The substantial compliance standard that we are adopting tolerates a reasonable degree of imperfection. Even though deficiencies will be cited for violations that constitute no actual harm and a potential for no more than minimal harm, these deficiencies, due to their negligible seriousness, will not deny a provider a certification of compliance nor subject a provider to a remedy. The substantial compliance standard should also insulate providers from the uneven enforcement that may result from inconsistent surveyor behavior, because the marginal deficiencies that surveyors are likely to be the most uncertain about citing are liable to be the deficiencies that fall into the substantial compliance range, and, consequently, neither a facility in which a situation constituting no actual harm and a potential for no more than minimal harm was cited as a deficiency nor a facility in which the same situation was not cited as a deficiency will be penalized.

Comment: One commenter was concerned that a formal scope and severity scheme to determine deficiencies would add issues to hearings.

Response: Providers have the opportunity to appeal certifications of noncompliance leading to an enforcement remedy, and if we adopted scope and severity scales for determining deficiencies, the commenter is correct that scope and severity assignments would be an integral part of the determination of noncompliance, and would therefore be subject to challenge if the deficiency led to the imposition of an enforcement remedy.

Comment: Many commenters requested that we incorporate the survey guidelines into the body of survey and enforcement regulations. Certain commenters believed that a failure to do so would violate the Federal Administrative Procedure Act, 5

U.S.C. 553, which requires that general notice of proposed rulemaking be published in the **Federal Register** when the rulemaking is substantive.

Response: We do not believe that the current survey materials are subject to the notice and comment procedures of the Administrative Procedure Act. As a result of OBRA '87, the Medicare and Medicaid law and regulations now contain comprehensive, detailed criteria for assessing the quality of care provided to Medicare and Medicaid residents, as well as the standards and methodology for determining deficiencies. The survey forms, procedures and guidelines merely enable surveyors to certify whether facilities are, in fact, complying with these binding statutory and regulatory requirements. These materials do not, in any way, add to or change these requirements and thus cannot be characterized as "substantive" rules; rather, they are a mixture of "interpretive rules," "general statements of policy," and "rules of agency procedure" within the meaning of 5 U.S.C. 553(b)(A) which excludes such rules from the notice and comment requirements.

Comment: In the course of reviewing comments, it became apparent that many commenters associated the use of scope and severity scales to determine deficiencies with results that do not depend on using scope and severity scales in this way. Many commenters were concerned that surveyors would not investigate extenuating circumstances surrounding violations of requirements unless they were required to use scope and severity scales for determining deficiencies.

Response: This is not the case. The surveyor guidelines provide surveyors with a consistent structure to evaluate situations and analyze information prior to making compliance decisions. One such evaluation that surveyors are directed to make under certain requirements is the assessment of a facility's responsibility for a certain situation. For example, survey guidelines list situations where pressure sores may be unavoidable and aid surveyors in determining whether a resident's pressure sore was preventable or not. This type of guidance is provided for many of the resident-centered requirements. In addition, surveyor training courses stress ways to arrive at consistent and accurate conclusions as to facility responsibility.

Comment: A number of commenters requested that we require surveyors to consider, when identifying deficiencies, whether or not the facility identified a violation before the survey and attempted to correct it.

Response: We believe that it would be inappropriate to ignore a failure to prevent a negative outcome, but the regulation does allow the competence that the facility demonstrated by identifying and addressing the deficiency on its own initiative to be considered when enforcement action is selected.

Comment: Certain commenters asked that we direct surveyors to determine whether a negative outcome is the result of a resident's refusal of treatment, which is a resident's right.

Response: Whenever there appears to be a conflict between a resident's right and the resident's health or safety, we do direct the surveyor in the guidance to surveyors to determine if the facility attempted to accommodate both the exercise of the resident's right and the resident's health, including exploration of care alternatives through a thorough planning process in which the resident may participate.

Comment: An additional factor that commenters believed surveyors should take into consideration when determining deficiencies is whether the noncompliance occurred because the facility was following a physician's orders.

Response: We cannot allow this to be considered in the deficiency determination. The facility is accountable for providing to the resident the medical services to which he or she is entitled as a Medicare or Medicaid beneficiary, and it is the facility's responsibility to ensure that the services provided by physicians will satisfy the facility's obligations under the Act and regulations. The statute specifically contemplates a relationship between a facility and either the Secretary or the State in which the facility, in exchange for certification and payments for the care of program beneficiaries, commits to provide care in a manner consistent with statutory requirements. A facility cannot excuse itself from this obligation by deferring responsibility to an individual (the physician) with whom neither the State nor the Secretary has any statutory relationship for the purpose of maintaining compliance with facility health and safety standards.

Comment: Many commenters were also very concerned that we correlate the stringency of the enforcement action with the seriousness of the deficiency.

Response: It is not necessary to use scope and severity scales when determining deficiencies to ensure this result. We establish criteria for determining remedies in § 488.408, Selection of remedies, and we link infractions with specific categories of remedial action. Under this scheme, a facility with a single deficiency that caused no harm is not treated the same as a facility with on-going, widespread problems that threaten resident lives.

Comment: Certain commenters requested that we give facilities with a good history of patient care the opportunity to correct occasional isolated problems before the end of the survey so as to avoid deficiency citations for these problems.

Response: Any violation of Federal participation requirements must be noted and we cannot direct surveyors to ignore violations on account of a facility's past compliance record. If violations of participation requirements are corrected during the survey, surveyors will note the correction along with the citation on the statement of deficiencies, and this information will be considered when enforcement action is selected.

Comment: Certain commenters believed that all deficiency citations made by surveyors should include what the negative outcome is.

Response: A violation of any participation requirement must be considered a deficiency, even if the violation caused no negative outcome to occur. As discussed earlier, there are a number of requirements in the Act for which questions of outcomes are irrelevant. The deficiency citation will in all cases clearly identify how or why the requirement is or was not met and the extent of the deficient practice, but will only detail the impact or potential impact of the facility's non-compliance on the resident when it is appropriate.

Comment: A great number of commenters complained that facilities do not know what is required of them until they are cited for deficiencies at the time of survey. They requested that we inform providers of the Medicare or Medicaid participation requirements, or both, to which they will be held accountable. Certain commenters specifically requested that we provide copies of those standards to facilities at no cost.

Response: There is no reason why any Medicare or Medicaid provider should be unaware of program participation requirements. The requirements are public knowledge, and it is incumbent upon facilities that enter into Medicare and Medicaid agreements to familiarize themselves with the requirements with which they have voluntarily agreed to comply. Moreover, copies of the State Operations Manual Transmittal No. 250, which contains the interpretive guidelines, procedures, and forms used

by surveyors to assess facility compliance, are available to the public for purchase from the National Technical Information Service. The address is: National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161, (703) 487–4600. The document publication order number is PB–92–950003.

Comment: One commenter recommended that violations of requirements be cited as they are discovered so that the facility can act upon them immediately. The commenter believed that correction should not be delayed until after the exit conference.

Response: Because we direct surveyors to maintain an ongoing dialogue with facility staff, there should be few instances where the facility is not aware of surveyors' most serious concerns prior to the exit conference. We do expect surveyors to immediately communicate to the facility staff any findings that jeopardize the health or safety of residents, but it would be impractical for surveyors to advise the facility of each and every violation as it is identified. It could also be misleading because the deficiencies cited on the HCFA–2567 are not official until they are reviewed by supervisory personnel and the State or HCFA. This review could invalidate or alter some of the deficiencies cited by surveyors while onsite at the facility.

Comment: Certain commenters asked that we recognize that a facility's failure to comply with participation requirements does not always occur at the time of the survey visit. These commenters requested that we empower surveyors to write citations for deficiencies that occurred before the survey, even if they were corrected prior to it.

Response: If surveyors determine that a facility did not meet one or more participation requirements during a period preceding the survey, they may cite the deficiency, which may be sanctionable despite its correction prior to the survey. The Congress intended for past deficiencies to be identified and addressed. Sections 1819(h)(2)(A) and 1919(h)(1) of the Act provide that if the Secretary or the State finds that a facility meets participation requirements, but as of a previous period did not meet such requirements, then the Secretary or the State may provide for a civil money penalty for the days for which it finds that the facility was not in compliance.

Comment: Certain individuals believed that State survey agency supervisors should review the survey results and make the compliance determinations instead of the surveyors. These commenters believed that this measure would enhance consistent decisionmaking.

Response: Surveyors do not make the ultimate compliance decision, which is why only a draft of the statement of deficiencies is available to the facility at the time of the exit conference, if at all. The statement of deficiencies is reviewed by the State survey agency which makes the final compliance decision.

Scope and Severity Scales

In the preamble to the proposed rule, we requested general public comment about how the severity scale levels were described as well as assigned. We specifically asked for comments on the proposed construction of the severity scale whereby deficiencies at a severity of 3 or 4 can result in the same sanctions.

All comments received in response to this section have been included and addressed under § 488.404 of this preamble.

Nurse Aide Training and Competency Evaluation Programs

Comment: As mentioned elsewhere in this document, a number of commenters expressed concern that HCFA or the survey agency may decide to conduct an extended survey at any time for any reason. One of the reasons for this concern is that, under regulations at § 483.151(b)(2)(iii), which expressly reflect the statutory requirement, when a facility undergoes an extended (or a partial extended) survey, it automatically loses approval of its Nurse Aide Training and Competency Evaluation Program (NATCEP) for 2 years.

Response: Our response to that particular comment was stated earlier in this preamble under our discussion of extended surveys. However, there is a closely related policy we would like to address here that goes beyond NATCEP rescission as a result of an extended survey. There are other circumstances described at § 483.151(b)(2) that also trigger a 2-year prohibition on NATCEP. It has been our policy that the remainder (if any) of a 2-year prohibition on NATCEPs also applies to a new owner when the provider undergoes a change of ownership as defined in § 489.18(a), Change of ownership or leasing: Effect on provider agreement. The implicit basis for this policy has been paragraph (d) of § 489.18, which states that an "assigned agreement is subject to all applicable statutes and regulations and to the terms and conditions under which it was originally issued * * *."

This policy was explicitly set forth in the **Federal Register** (56 FR 48894) on September 26, 1991, as well as in State Operations Letter 91–75. The latter reads in part that, "a facility subject to the prohibition on [NATCEP] training remains subject for two years after the event triggering the prohibition regardless of the change of ownership." While we have been consistent in this policy, we have been reexamining it within the larger context of drafting these regulations. We have been reexamining all of our policies and regulations concerning remedies to ensure that they are consonant with the fundamental purpose of remedies, which is to motivate providers to come quickly into compliance with program requirements.

In the proposed rule, we spoke to the purpose of sanctions, saying in part that our intent is to "deter violations as well as encourage *immediate* (emphasis added) response and sustained compliance." If the new owner of a provider must wait for the expiration of the remainder of a 2-year prohibition of NATCEP that was imposed on a previous owner, regardless of any action he or she may take to correct the deficiencies that triggered the prohibition, the 2-year prohibition on NATCEP would be unlike other remedies. As soon as a new owner corrects the noncompliance that led to the imposition of any other remedy, the remedy can be lifted. The exception to this is that when a facility has had a denial of payment imposed against it for repeated substandard quality of care or has been placed under temporary management, in addition to achieving substantial compliance, it must demonstrate to HCFA's or the State's satisfaction that it will remain in substantial compliance.

However, it is not just the inconsistency with the other remedies which has led us to reexamine our policy on this issue. In addition, HCFA does not want to discourage new, capable ownership interests from improving the quality of care that residents receive. Investing in a NATCEP may enhance quality of care; to prohibit a new owner from having such a program would be counterproductive with the larger purposes of the programs. Therefore, under this regulation, we are changing our policy on transfer of the prohibition of NATCEP to a new owner to bring it into line with the workings of other remedies. The 2-year restriction of NATCEP will not apply to the new owner of a provider unless that new

owner or organization has been the subject of an extended (or partial extended) survey, or is otherwise subject to the terms of § 483.151, under its tenure. If all other requirements for the approval of NATCEP are met, including substantial compliance with all program requirements, the new owner may provide NATCEP.

We have received numerous inquiries from providers as well as their attorneys asking what appeal rights are available when approval of a facility's NATCEP has been denied or withdrawn. While the Act does not provide for any formal appeals for denial or withdrawal of a NATCEP, we believe that providers ought to have some opportunity to challenge this disapproval. Therefore, we expect providers to appeal their NATCEP disapproval within the timeframes established for dispute resolution, as described in § 488.331 of this final rule.

We have reached this result because, notwithstanding the fact that the Act permits us and the State survey agencies to conduct extended (or partial extended) surveys for any reason, we are nevertheless under this regulation choosing to conduct such surveys only when we or a State survey agency determines that substandard quality of care exists. Just as we believe a provider ought to have access to an informal dispute resolution mechanism to challenge what it perceives to be inaccurate survey findings, we believe that it ought to be able to challenge the correctness of the State survey agency's or HCFA's determination that substandard quality of care existed. If successful in that challenge, then the factual basis for doing the extended survey will have been removed, and, in such cases, it would be inequitable to saddle the provider with the loss of its NATCEP when there was no factual basis for doing so.

We are limiting the appeals of these matters to the informal dispute resolution process because we do not believe the loss of a NATCEP is a remedy of the same magnitude or type as other statutory remedies for which a more formal appeals mechanism is available. Unlike the case with other remedies, a facility losing its NATCEP will not, on that basis alone, face exclusion from the Medicare or Medicaid programs, nor will it face the same kind of deprivation that is arguably the case with respect to civil money penalties, denial of payment, or the imposition of temporary management. We believe the informal dispute resolution process satisfies essential elements of due process here, since a provider will have notice of the intended denial of its NATCEP and the opportunity to meet with agency officials to challenge the findings that gave rise to the denial.

Comment: One commenter believed that every State should implement the same penalty system.

Response: The Act permits the States to elect alternative remedies if they can demonstrate that the alternative remedies are as effective as the remedies specified by the Act.

V. Additional Conforming Changes.

In addition to change to our regulations identified above, it is necessary that we make minor, technical, editorial or cross reference changes to several other regulation sections. We are making conforming changes to:

- Part 401 (§§ 401.130, and 401.133), part 431 (§§ 431.115, 431.151, 431.152, 431.153, 431.154, 431.221, and 431.610);
- Part 435 (§ 435.1009);
- Part 440 (§ 440.40, 440.140, 440.150); we recodified § 440.150 to separate NFs and ICFs/MR to make it clear which provisions apply to each. No substantive changes have been made as a result of this new section.
- Part 441 (§ 441.11);
- Part 442 (§§ 442.1, 442.12, 442.14, 442.15, 442.16, 442.20, 442.30, 442.40, 442.42, 442.101, 442.105, 442.109, 442.110, 442.111, 442.117, 442.118, and 442.119);
- Part 488 (§§ 488.8, 488.11, 488.14, 488.18, 488.20, 488.24, 488.26, 488.28, and 488.50);
- Part 489 (§§ 489.3, 489.11, 489.12, 489.15, 489.16, 489.18, 489.53, 489.60, 489.62, and 489.64); and
- Part 498 (§§ 498.1, 498.2, 498.3, and 498.5).
- Part 498 (§§ 498.1, 498.2, 498.3, and 498.5); we revised § 498.3(b)(7) to exclude SNF and NF terminations. SNFs and NFs may appeal the noncompliance that led to a termination under § 498.3(b)(13).

VI. Regulatory Impact Analysis

A. Introduction

We generally prepare a regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612), unless the Secretary certifies that a regulation will not have a significant economic impact on a substantial number of small entities. For purposes of the RFA, all long term care facilities are considered small entities. However, individuals and States are not included in the definition of a small entity.

Also, section 1102(b) of the Act requires the Secretary to prepare a regulatory impact analysis for any final rule that may have a significant impact on the operations of a substantial number of small rural hospitals. Such an analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside a metropolitan statistical area and has fewer than 50 beds.

As described earlier in the preamble, OBRA '87 mandated extensive revisions to the Medicare and Medicaid requirements for nursing facilities. Under the previous system, long term care facilities were required to meet a set of requirements called conditions of participation. Each condition of participation included groups of standards, and standards were made up of separate elements. Enforcement was based on the level of the requirement for which a deficiency was cited. For example, condition-level deficiencies in a SNF resulted in the initiation of termination procedures and/or a denial of payment for new admissions. However, if only standard-level deficiencies were found, a plan of correction was required with no further immediate sanctions. Conditions of participation later became Level A requirements, and standards and elements became Level B requirements, as the result of a preliminary effort to dismantle the hierarchy of requirements as mandated by OBRA '87. We revised the requirements that long term care facilities must meet in order to participate in the Medicare and Medicaid programs on September 26, 1991 (56 FR 48826). These requirements focus generally on actual facility performance in meeting residents' needs in a safe and healthy environment, as compared to prior requirements which focused on the capacity of the facility to provide appropriate care.

As of October 1993, there were 10,512 facilities certified for both Medicare and Medicaid (dually participating), 939 SNFs certified only for Medicare, and 4,974 NFs certified only for Medicaid. HCFA data indicate that 7.3 percent (1,141) of all long term care facilities surveyed in 1992 were found to be deficiency-free. Facilities in full compliance with the participation requirements would not, of course, be subject to the enforcement remedies contained in this final rule. Six and one-half percent (1,021) of the surveyed facilities were found to have at least one Level A deficiency and would have been subject to denial of payment for new admissions and/or termination under the former enforcement rules. However, the number of involuntary

terminations of long term care facilities for calendar year 1992 was 53 (29 SNFs/NFs and 24 NFs), less than one-half of one percent of all participating facilities. This figure demonstrates that most of the facilities identified during a survey to have at least one serious deficiency can and do correct deficiencies to avoid termination. The majority of the facilities surveyed (86.2 percent) were determined to have no Level A but at least one Level B deficiency, a finding that usually would allow the facility to continue to participate for a longer period of time while taking corrective action.

The intent of the OBRA '87 legislation was to provide the Secretary and States with the authority to impose timely, alternative remedies on noncompliant facilities that, under the previous enforcement process, had no incentive to promptly correct deficiencies and maintain lasting compliance. Our proposed rule (57 FR 39278, August 28, 1992) delineated the process we would use to survey, assess, and enforce facility compliance with all participation requirements.

It is clear that a large number of small entities will be affected by adoption of these procedures, and, as intended by OBRA '87, a substantial number of those entities are at risk of some remedy if they are noncompliant until they make changes in their operations to meet certification requirements. Therefore, we have prepared the following analysis which, in combination with the rest of the preamble, is intended to conform to the objectives of the RFA. We are not preparing a rural impact statement since we have determined, and the Secretary certifies, that this final rule will not have a significant impact on the operations of substantial number of small rural hospitals.

B. Affected Entities

We expect that the implementation of these final regulations will significantly influence facilities to conform quickly with the Federal participation requirements in order to avoid remedies. We recognize that not all of the potential effects of this final rule can be definitely anticipated, especially in view of their interaction with other Federal, State, and local activities regarding adherence to requirements for participation in Medicare and Medicaid. In particular, considering the effects of our efforts to improve survey and certification activities, through both new survey procedures and instruments and the promulgation of regulations, it is impossible to quantify precisely the future effect of all of these regulations on facilities' compliance activities or costs. We also are unable to accurately project the frequency with which enforcement proceedings may occur in light of the options to apply a host of remedies short of termination.

As a result of the 27,900 comments received in response to our proposed rule, virtually every aspect of the regulation was re-evaluated. Where warranted, changes were made and the details of those changes were discussed in detail in the preceding section of the preamble to this rule. In response to our proposed revisions to part 431, most of the negative comments concerned the effect on ICFs/MR of withdrawing FFP during appeals. Some commenters noted that OBRA '87 specifically exempted ICFs/MR from its scope, and stated that it is not appropriate to change the ICF/MR rules in implementing a law that applies to other facilities. We agree that it would be preferable to include the provisions applicable to ICFs/MR at a later date in rulemaking focused on ICFs/MR. Therefore, we are adopting the commenters' proposals that the 120 days of FFP continue for ICFs/MR until such rulemaking is carried out, and are leaving the existing appeals system in place for ICFs/MR. Thus, neither ICFs/MR nor their residents will experience any impact from this final rule.

Also based on commenters' suggestions, we incorporate in this final rule the concept of substantial compliance as the standard that prospective providers and existing providers must meet in order to begin or continue to participate in the Medicare and Medicaid programs. After evaluation of the comments received, and in consideration of the fact that, as noted earlier, only 7.3 percent of all nursing homes surveyed in 1992 were deficiency-free, we believe that total compliance with all requirements is unrealistic and, in fact, a standard that many providers or prospective providers would find impossible to meet. We note that the statute now sets forth more than 100 requirements that facilities have to meet in order to participate in the Medicare or Medicaid programs, whereas before OBRA '87, facilities had to comply with approximately 15. With the seven-fold increase in statutory requirements, there is a greater likelihood that facilities will be found not to meet the statutory definition of a SNF or NF. We are convinced, however, based on experience and commenters' views, that many statutory deficiencies do not result in actual harm to residents, nor do they constitute the potential for anything more than minimal harm. We realized that under the provisions of our proposed rule, a facility could have been subject to the most severe remedies, including denial of payment for new admissions, termination of the provider agreement for SNFs and discontinuation of FFP for NFs, if any deficiency, no matter how minor, was identified at the time of the survey. We recognized that imposing a remedy in all cases would be contrary to our intention to correlate the severity of the remedy to the seriousness of the deficiency, and would have a negative effect on facilities and residents. Instead, this final rule provides that remedies will not be imposed when a facility is in substantial compliance with all participation requirements.

We are removing the scope and severity scales from the regulation and are, instead, providing assessment factors which consider scope and severity to be used in evaluating the seriousness of deficiencies and determining whether an enforcement response is required. We continue to believe, as we proposed, that because remedies are tailored to reflect the seriousness of the violations, the use of the assessment factors will provide consistent remedy recommendations and enforcement actions among all facilities. Since facilities will be aware of the correlation between the seriousness of the noncompliance and the penalty imposed, we anticipate that remedies applied in this manner will deter violations and encourage immediate response and sustained compliance. Based on the large number of comments we received expressing concern over the imposition of civil money penalties, which can be imposed for past periods of noncompliance, we expect that the regulations will have the desired effect of motivating facilities to remain in substantial compliance at all times.

Under these final rules, a facility with isolated deficiencies that constitute no actual harm with potential for minimal harm will be expected to correct the deficiencies and maintain compliance. However, a formal plan of correction is required for deficiencies that constitute no actual harm with potential for minimal harm if the deficiencies are widespread or if they constitute a pattern. A formal plan of correction is also required for all deficiencies that constitute noncompliance. Facilities with deficiencies that constitute no actual harm with potential for no more than minimal harm will be considered in substantial compliance with the participation requirements and will have no remedy applied. We believe that the majority of the 86 percent of the facilities cited in 1992 with at least one

Level B deficiency would fall within this range. We note, however, that some noncompliance categorized previously as Level B deficiencies could now result in remedies because of their effect on the residents.

In response to commenters, we are requiring that States provide an opportunity for informal dispute resolution whereby providers dissatisfied with survey findings can request a review of the deficiencies upon receipt of the official HCFA–2567. Dispute resolution augments the various other opportunities facilities have during and after the survey to challenge the surveyors' findings, including during the survey, at the exit conference, while awaiting receipt of the official deficiency statement, through dialogue with State and regional officials, and upon receipt of the official statement of deficiencies. The process we are requiring generally reflects current practice and guidance we have consistently given States, except that here it is formally adopted as a rule. While we believe that many formal hearings will be avoided by utilizing dispute resolution, the regulations provide facilities with the opportunity to appeal certifications of noncompliance leading to an enforcement remedy, and specify the formal administrative and judicial review processes. However, because the Act mandates that enforcement systems minimize the time between identification of violations and the imposition of remedies, we are not requiring that hearings be held before the effective date of the enforcement action, except in the case of civil money penalties. Facilities facing civil money penalties may also appeal the level of noncompliance but only where a successful challenge would affect the amount of the civil money penalty that HCFA or the State could collect.

Because of the variety of alternative remedies now available, we believe termination will be the enforcement response to the most serious noncompliance, and it can be avoided by facilities that are willing and able to effectively allocate their resources to ensure substantial compliance. To the extent that those marginal facilities that are most at risk from these provisions are able to come into substantial compliance, there may even be a reduction in the frequency of enforcement actions. Of course, facilities will ordinarily incur some costs associated with compliance efforts. Those costs could be significant if they necessitate substantial staffing increases or alterations to a physical plant. Our elimination of FFP after termination of the provider agreement during the administrative hearing process provides an incentive for facilities to comply promptly with enforcement actions, but could also add to the impact on facilities.

C. Effect on State Survey Process

The impact that this final rule will have on State survey agencies' surveys must be viewed in the context of other ongoing activities related to survey and certification.

On October 1, 1986, HCFA implemented its new long term care outcome-oriented survey process (formerly called PACs: Patient Care and Services Survey Process). This system shifted the emphasis away from the facility's capacity to provide adequate care to the facility's success in providing such care. On October 1, 1990, HCFA implemented a revised outcome-oriented survey process that includes the OBRA provision of resident rights review. Because the effective date of this rule is July 1, 1995, training courses can be designed and offered timely to provide the State agency surveyors and other staff with information on assessing the seriousness of deficiencies. The knowledge they gain in applying Federal survey requirements in an accurate, consistent, and time efficient manner, should lead to improved surveys at no increase in costs. We do not expect that assessing the seriousness of the deficiencies will add to the time needed to conduct a survey since this process is one that surveyors have essentially engaged in for years. We do not expect these regulations to necessitate greater expenditures on the part of State survey agencies; however, they probably will result in a reallocation of resources, particularly geared to more intensive monitoring of marginal facilities. Further, these regulatory changes will contribute to a shift toward more enforcement-oriented roles for State survey agencies and surveyors. Although States will have an expanded role and increased responsibility as a result of this final rule, they will also be given increased flexibility in carrying out their responsibilities.

We expect some incremental costs to facilities and to States as a result of facility appeals of termination and alternative remedies. Although we have no experience on which to predict increases in volume or cost, we believe that the increase will be offset somewhat as some hearings will be avoided as a result of dispute resolution. The appeals process has been thoroughly explained elsewhere in this preamble. The responses to comments illustrate the thoughtful approach taken, with a view to minimizing burden in implementing statutory requirements.

D. Effect on Residents

We expect this final rule to result in improved quality of life and care for residents of long term care facilities. Because of the various enforcement tools provided by this regulation, facilities will have more of an incentive to remain in compliance with participation requirements. This sustained compliance will provide residents with consistent, high quality health care. Because quality of life can be affected by a resident's sense of satisfaction with his or her environment, the quality of care received, and the extent of control over his or her life, heightened facility interest in maintaining substantial compliance should be perceived by residents and their families as improved care.

While termination of SNFs and NFs could have a significant impact on residents, especially those living in rural areas, this final rule provides a variety of alternatives to termination for those facilities that are able to come into compliance. To the extent that termination occurs less frequently, there would be less disruption to nursing home residents and ensured access to needed services. In those cases in which termination becomes necessary, the termination is for the ultimate benefit of the residents to assure that they receive the quality care to which they are entitled.

VII. Information Collection Requirements

Sections 4204(b) and 4214(d) of OBRA '87 provide a waiver of Office of Management and Budget review of information collection requirements for the purpose of implementing the nursing home reform amendments.

List of Subjects

42 CFR Part 401

Claims, Freedom of information, Health facilities, Medicare, Privacy.

42 CFR Part 431

Grant programs–health, Health facilities, Medicaid, Privacy, Reporting and recordkeeping requirements.

42 CFR Part 435

Aid to Families with Dependent Children, Grant programs–health, Medicaid, Reporting and recordkeeping requirements, Supplemental Security Income (SSI), Wages.

42 CFR Part 440

Grant programs–health, Medicaid.

42 CFR Part 441

Family planning, Grant programs–health, Infants and children, Medicaid, Penalties, Reporting and recordkeeping requirements.

42 CFR Part 442

Grant programs–health, Health facilities, Health professions, Health records, Medicaid, Nursing homes, Nutrition, Reporting and recordkeeping requirements; Safety.

42 CFR Part 447

Accounting, Administrative practice and procedure, Drugs, Grant programs–health, Health facilities, Health professions, Medicaid, Reporting and recordkeeping requirements, Rural areas.

42 CFR Part 483

Grant programs–health , Health facilities, Health professions, Health records, Medicaid, Medicare, Nursing homes, Nutrition, Reporting and recordkeeping requirements, Safety.

42 CFR Part 488

Health facilities, Survey and certification, Forms and guidelines.

42 CFR Part 489

Health facilities, Medicare.

42 CFR Part 498

Administrative practice and procedure, Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

42 CFR Chapter IV is amended as set forth below:

A. Part 401 is amended as follows:

PART 401—GENERAL ADMINISTRATIVE REQUIREMENTS

1. The authority citation for part 401 is revised to read as follows:

Authority: Secs. 205, 1102, 1106, 1819, 1871, and 1919(g) and (h) of the Social Security Act (42 U.S.C. 405, 1302, 1306, 1395i-3, 1395hh, and 1396r(g) and (h)); the Freedom of Information Act (5 U.S.C. 552); and the Privacy Act (5 U.S.C. 552a).

2. Section 401.130 is amended by revising paragraph (b) (17) to read as follows:

§ 401.130 Materials available at social security district offices and branch offices.

* * * * *

(b) *Materials available for inspection and copying.*

* * * * *

(17) Statements of deficiencies based upon survey reports of health care institutions or facilities prepared after January 31, 1973, by a State agency, and such reports (including pertinent written statements furnished by such institution or facility on such statements of deficiencies), as set forth in § 401.133(a). Except as otherwise provided for at §§ 401.133 and 488.325 of this chapter for SNFs, such statements of deficiencies, reports, and pertinent written statements shall be available or made available only at the social security district office and regional office servicing the area in which the institution or facility is located, except that such statements of deficiencies and pertinent written statements shall also be available at the local public assistance offices servicing such area.

* * * * *

3. Section 401.133 is amended by revising the introductory text to read as follows:

§ 401.133 Availability of official reports on providers and suppliers of services, State agencies, intermediaries, and carriers under Medicare.

Except as otherwise provided for in § 488.325 of this chapter for SNFs, the following must be made available to the public under the conditions specified:

* * * * *

B. Part 431 is amended as follows:

PART 431—STATE ORGANIZATION AND GENERAL ADMINISTRATION

1. The authority citation for part 431 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

2. Section 431.115 is amended by revising paragraph (c) to read as follows:

§ 431.115 Disclosure of survey information and provider or contractor evaluation.

* * * * *

(c) *State plan requirements.* A State plan must provide that the requirements of this section and § 488.325 of this chapter are met.

* * * * *

3. The heading for subpart D is revised to read as follows:

Subpart D—Appeals Process for NFs and ICFs/MR

4. Section 431.151 is revised to read as follows:

§ 431.151 Scope and applicability.

(a) This subpart specifies the appeal procedures the State must make available to a nursing facility (NF) or intermediate care facility for the mentally retarded (ICF/MR), when the State's finding of noncompliance leads to a denial or termination of a provider agreement under the Medicaid program or nonrenewal of an agreement in the case of an ICF/MR.

(b) This subpart also specifies the appeal procedures for NFs which disagree with a certification of noncompliance which led to the imposition of a remedy.

(c) The choice of remedy is not appealable.

(d) A NF may not challenge the level of noncompliance found by the State, except that in the case of a civil money penalty, a NF may challenge the level of noncompliance found by the State only if a successful challenge on this issue would affect the range of civil money penalty amounts that the State could collect.

(e) For a NF, the scope of review on the imposition of a civil money penalty is specified in § 488.438(e) of this chapter.

5. Section 431.152 is revised to read as follows:

§ 431.152 State plan requirements.

The State plan must provide for appeals procedures that, as a minimum, satisfy the requirements of §§ 431.153 through 431.154.

6. Section 431.153 is revised to read as follows:

§ 431.153 Evidentiary hearing.

(a) For actions specified in § 431.151, the Medicaid agency must give a provider the opportunity for a full evidentiary hearing.

(b) When a NF requests a hearing. Except when a civil money penalty is imposed, when a NF requests a hearing, the hearing need not be completed before the proposed effective date of the denial or termination of participation, or imposition of any remedy.

(c) When an ICF/MR requests a hearing. When an ICF/MR requests a hearing, it must be completed—

(1) Before the effective date of the denial, termination or nonrenewal of participation; or

(2) Within 120 days after that date.

(d) Time period for request of hearing. The affected NF or ICF/MR, or its legal representative or other authorized official, must file the request for hearing in writing within 60 days from receipt of the notice of the proposed denial, termination, or nonrenewal of participation, or imposition of a civil money penalty or other remedies.

(e) When remedies are imposed. (1) Notwithstanding any provision of State law, the State must impose all remedies timely on any provider of services participating in the Medicaid program—

(i) After notifying the facility timely of the deficiencies and impending remedies; and

(ii) Except as specified in paragraph (e)(2) of this section, during any pending hearing that may be requested by the provider of services, as provided in paragraph (b) of this section.

(2) The State must not collect a civil money penalty until a final administrative decision is made that supports the imposition of the penalty.

(f) Non-State operated NF. In the case of a non-State operated NF upon which remedies have been imposed, the State must give the facility—

(1) Notice, as specified in paragraph (h) of this section; and

(2) An opportunity for a full evidentiary hearing on the issue of the noncompliance that led to the imposition of enforcement actions, except for State monitoring and loss of nurse aide training, as provided in § 488.406 of this chapter.

(g) Remedies imposed during pending hearing. Except for the collection of civil money penalties, the State must impose all such remedies during any pending hearing.

(h) Contents of notice. The notice to the facility must include—

(1) The basis for the decision; and

(2) A statement of deficiencies on which the decision is based.

(i) Required elements of hearing. The hearing must, at a minimum, include—

(1) An opportunity for the facility to appear before an impartial decision maker to refute the certification of noncompliance upon which the denial, termination, nonrenewal of participation for ICFs/MR, or upon which the denial, termination, or imposition of other remedies for NFs are based;

(2) An opportunity for the facility to be represented by counsel or another representative;

(3) An opportunity for the facility or its representatives to be heard in person, to call witnesses, and to present documentary evidence; and

(4) A written decision by the impartial decision maker, setting forth the reasons for the decision and the evidence upon which the decision is based.

(j) In civil money penalty cases, a State's conclusion about a NF's level of noncompliance must be upheld unless clearly erroneous.

(k) Dually participating facilities. If a NF is also participating or seeking to participate in Medicare as a SNF, and the basis for the State's denial or termination of participation in Medicaid is also a basis for denial or termination of participation in Medicare, the State must advise the facility that—

(1) The appeal procedures specified for Medicare facilities in part 498 of this chapter apply; and

(2) A final decision entered under the Medicare review procedures is binding for the purposes of Medicaid participation and Medicare participation in a dually participating facility or a facility seeking to participate in Medicare and Medicaid.

(l) If HCFA determines that a NF is not in substantial compliance with participation requirements, thereby resulting in HCFA's imposition of alternative remedies, or if HCFA denies, or terminates the provider agreement(s) of such a facility, and the findings and proposed remedies of HCFA prevail in accordance with § 488.452 of this chapter, the facility is entitled only to the review procedures specified in part 498 of this chapter, in lieu of the procedures specified in this subpart.

7. Section 431.154 is amended by revising the section heading and paragraph (a) to read as follows:

§ 431.154 Informal reconsideration for ICFs/MR.

(a) If the State decides to provide the opportunity for an evidentiary hearing required by § 431.153(a) only after the effective date of a denial, or nonrenewal of participation, the State must offer the facility an informal reconsideration, to be completed before the effective date.

* * * * *

8. Section 431.610 is amended by adding a new paragraph (a)(3), revising the introductory text in paragraph (g), and revising paragraphs (g)(2) to read as follows:

§ 431.610 Relations with standard-setting and survey agencies.

(a) * * *

(3) Section 1919(g)(1)(A) of the Act, concerning responsibilities of the State for certifying the compliance of non-State operated NFs with requirements of participation in the State's Medicaid program.

* * * * *

(g) *Responsibilities of survey agency.* The plan must provide that, in certifying NFs and ICFs/MR, the survey agency designated under paragraph (e) of this section will—

* * * * *

(2) Have qualified personnel perform on-site inspections periodically as appropriate based on the timeframes in the correction plan and—

(i) At least once during each certification period or more frequently if there is a compliance question; and

(ii) For non-State operated NFs, within the timeframes specified in § 488.308 of this chapter.

* * * * *

C. Part 435 is amended as follows:

PART 435—ELIGIBILITY IN THE STATES, DISTRICT OF COLUMBIA, THE NORTHERN MARIANA ISLANDS, AND AMERICAN SAMOA

1. The authority citation for part 435 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

2. Section 435.1009 is amended by revising in the definition of *Publicly operated community residence that serves no more than 16 residents* the introductory text of the definition, paragraph (b) introductory text, and paragrapgh (b)(4) and removing the definition of *Resident of an intermediate care facility* to read as follows:

§ 435.1009 Definitions relating to institutional status.

* * * * *

Publicly operated community residence that serves no more than 16 residents is defined in 20 CFR 416.231(b)(6)(i). A summary of that definition is repeated here for the information of readers.

* * * * *

(b) A publicly operated community residence does not include the following facilities, even though they accommodate 16 or fewer residents:

* * * * *

(4) Hospitals, nursing facilities, and intermediate care facilities for the mentally retarded.

* * * * *

D. Part 440 is amended as follows:

PART 440—SERVICES: GENERAL PROVISIONS

1. The authority citation for part 441 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

2. Section 440.40 is revised to read as follows:

§ 440.40 Nursing facility services for individuals age 21 or older (other than services in an institution for mental diseases). EPSDT, and family planning services and supplies.

(a) *Nursing facility services.* (1) "Nursing facility services for individuals age 21 or older, other than services in an institution for mental diseases", means services that are—

(i) Needed on a daily basis and required to be provided on an inpatient

basis under §§ 409.31 through 409.35 of this chapter.

(ii) Provided by—

(A) A facility or distinct part of a facility that is certified to meet the requirements for participation under subpart C of part 442 of this chapter, as evidenced by a valid agreement between the Medicaid agency and the facility for providing nursing facility services and making payments for services under the plan; or

(B) If specified in the State plan, a swing-bed hospital that has an approval from HCFA to furnish skilled nursing facility services in the Medicare program; and

(iii) Ordered by and provided under the direction of a physician.

(2) Nursing facility services includes services provided by any facility located on an Indian reservation and certified by the Secretary as meeting the requirements of subpart B of part 483 of this chapter.

(b) *EPSDT.* "Early and periodic screening and diagnosis and treatment" means—

(1) Screening and diagnostic services to determine physical or mental defects in recipients under age 21; and

(2) Health care, treatment, and other measures to correct or ameliorate any defects and chronic conditions discovered. (See subpart B of part 441 of this chapter.)

3. Section 440.140 is revised to read as follows:

§ 440.140 Inpatient hospital services, nursing facility services, and intermediate care facility services for individuals age 65 or older in institutions for mental diseases.

(a) *Inpatient hospital services.* "Inpatient hospital services for individuals age 65 or older in institutions for mental diseases" means services provided under the direction of a physician for the care and treatment of recipients in an institution for mental diseases that meets the requirements specified in § 482.60(b), (c), and (e) of this chapter and—

(1) Meets the requirements for utilization review in § 482.30(a), (b), (d), and (e) of this chapter; or

(2) Has been granted a waiver of those utilization review requirements under section 1903(i)(4) of the Act and Subpart H of Part 456 of this chapter.

(b) *Nursing facility services.* "Nursing facility services for individuals age 65 or older in institutions for mental diseases" means nursing facility services as defined in § 440.40 and in subpart B of part 483 of this chapter that are provided in institutions for mental diseases, as defined in § 435.1009 of this chapter.

4. Section 440.150 is revised to read as follows:

§ 440.150 Intermediate care facility (ICF/MR) services.

(a) "ICF/MR services" means those items and services furnished in an intermediate care facility for the mentally retarded if the following conditions are met:

(1) The facility fully meets the requirements for a State license to provide services that are above the level of room and board;

(2) The primary purpose of the ICF/MR is to furnish health or rehabilitative services to persons with mental retardation or persons with related conditions;

(3) The ICF/MR meets the standards specified in subpart I of part 483 of this chapter.

(4) The recipient with mental retardation for whom payment is requested is receiving active treatment, as specified in § 483.440 of this chapter.

(5) The ICF/MR has been certified to meet the requirements of subpart C of part 442 of this chapter, as evidenced by a valid agreement between the Medicaid agency and the facility for furnishing ICF/MR services and making payments for these services under the plan.

(b) ICF/MR services may be furnished in a distinct part of a facility other than an ICF/MR if the distinct part—

(1) Meets all requirements for an ICF/MR, as specified in subpart I of part 483 of this chapter;

(2) Is clearly an identifiable living unit, such as an entire ward, wing, floor or building;

(3) Consists of all beds and related services in the unit;

(4) Houses all recipients for whom payment is being made for ICF/MR services; and

(5) Is approved in writing by the survey agency.

5. A new § 440.155 is added to read as follows:

§ 440.155 Nursing facility services, other than in institutions for mental diseases.

(a) "Nursing facility services, other than in an institution for mental diseases" means services provided in a facility that—

(1) Fully meets the requirements for a State license to provide, on a regular basis, health-related services to individuals who do not require hospital care, but whose mental or physical condition requires services that—

(i) Are above the level of room and board; and

(ii) Can be made available only through institutional facilities;

(2) Has been certified to meet the requirements of subpart C of part 442 of this chapter as evidenced by a valid agreement between the Medicaid agency and the facility for providing nursing facility services and making payments for services under the plan; and

(b) "Nursing facility services" include services—

(1) Considered appropriate by the State and provided by a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Mass.; or

(2) Provided by a facility located on an Indian reservation that—

(i) Furnishes, on a regular basis, health-related services; and

(ii) Is certified by the Secretary to meet the standards in Subpart E of Part 442 of this chapter.

(c) "Nursing facility services" may include services provided in a distinct part of a facility other than a nursing facility if the distinct part—

(1) Meets all requirements for a nursing facility;

(2) Is an identifiable unit, such as an entire ward or contiguous ward, a wing, floor, or building;

(3) Consists of all beds and related facilities in the unit;

(4) Houses all recipients for whom payment is being made for nursing facility services, except as provided in paragraph (d) of this section;

(5) Is clearly identified; and

(6) Is approved in writing by the survey agency.

(d) If a State includes as nursing facility services those services provided by a distinct part of a facility other than a nursing facility, it may not require transfer of a recipient within or between facilities if, in the opinion of the attending physician, it might be harmful to the physical or mental health of the recipient.

(e) Nursing facility services may include services provided in a swing-bed hospital that has an approval to furnish nursing facility services.

E. Part 441 is amended as follows:

PART 441—SERVICES: REQUIREMENTS AND LIMITS APPLICABLE TO SPECIFIC SERVICES

1. The authority citation for part 441 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

2. Section 441.11 is revised to read as follows:

§ 441.11 Continuation of FFP for institutional services.

(a) *Basic conditions for continuation of FFP.* FFP may be continued for up to 30 days after the effective date of termination or expiration of a provider

agreement, if the following conditions are met:

(1) The Medicaid payments are for recipients admitted to the facility before the effective date of termination or expiration.

(2) The State agency is making reasonable efforts to transfer those recipients to other facilities or to alternate care.

(b) *When the 30-day period begins.* The 30-day period begins on one of the following:

(1) The effective date of termination of the facility's provider agreement by HCFA;

(2) The effective date of termination of the facility's Medicaid provider agreement by the Medicaid agency on its own volition; or

(3) In the case of an ICF/MR, the later of—

(i) The effective date of termination or nonrenewal of the facility's provider agreement by the Medicaid agency on its own volition; or

(ii) The date of issuance of an administrative hearing decision that upholds the agency's termination or nonrenewal action.

(c) *Services for which FFP may be continued.* FFP may be continued for any of the following services, as defined in subpart A of part 440 of this chapter:

(1) Inpatient hospital services.

(2) Inpatient hospital services for individuals age 65 or older in an institution for mental diseases.

(3) Nursing facility services for individuals age 21 or older.

(4) Nursing facility services for individuals age 65 or older in an institution for mental diseases.

(5) Inpatient psychiatric services for individuals under age 21.

(6) Nursing facility services for individuals under 21.

(7) Intermediate care facility services for the mentally retarded.

F. Part 442 is amended as follows:

PART 442—STANDARDS FOR PAYMENT FOR NURSING FACILITIES AND INTERMEDIATE CARE FACILITIES FOR THE MENTALLY RETARDED

1. The authority citation for part 442 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302) unless otherwise indicated.

2. The heading for part 442 is revised as set forth above.

3. Section 442.1 is amended by revising paragraph (a) to read as follows:

§ 442.1 Basis and purpose.

(a) This part states requirements for provider agreements for facility certification relating to the provision of services furnished by nursing facilities and intermediate care facilities for the mentally retarded. This part is based on the following sections of the Act:

Section 1902(a)(4), administrative methods for proper and efficient operation of the State plan;

Section 1902(a)(27), provider agreements;

Section 1902(a)(28), nursing facility standards;

Section 1902(a)(33)(B), State survey agency functions; Section 1902(j), circumstances and procedures for denial of payment and termination of provider agreements in certain cases;

Section 1905(c), definition of nursing facility;

Section 1905(d), definition of intermediate care facility for the mentally retarded;

Section 1905 (f), definition of nursing facility services;

Section 1910, certification and approval of ICFs/MR and of RHCs;

Section 1913, hospital providers of nursing facility services;

Section 1919 (g) and (h), survey, certification and enforcement of nursing facilities; and

Section 1922, correction and reduction plans for intermediate care facilities for the mentally retarded.

* * * * *

4. Section 442.2 is amended by removing the definition *Immediate jeopardy or immediate threat* and adding in alphabetical order the definition of *Immediate jeopardy* to read as follows:

§ 442.2 Terms.

* * * * *

Immediate jeopardy means a situation in which immediate corrective action is necessary because the provider's noncompliance with one or more requirements of participation or conditions of participation has caused, or is likely to cause, serious injury, harm, impairment, or death to an individual receiving care in a facility.

* * * * *

5. Section 442.12 is amended by revising paragraph (c) to read as follows:

§ 442.12 Provider agreement: General requirements.

* * * * *

(c) *Conformance with certification condition.* An agreement must be in accordance with the certification provisions set by the Secretary or the survey agency under subpart C of this part for ICFs/MR or subpart E of part 488 of this chapter for NFs.

* * * * *

6. Section 442.13 is amended by revising paragraphs (b) and (c) to read as follows:

§ 442.13 Effective date of agreement.

* * * * *

(b) *All Federal requirements are met on the date of the survey.* The agreement must be effective on the date the on-site survey is completed (or on the day following the expiration of a current agreement) if, on the date of the survey the provider meets all Federal health and safety conditions of participation or requirements for NFs and any other requirements imposed by the Medicaid agency.

(c) *All Federal requirements are not met on the date of the survey.* If the provider fails to meet any of the requirements specified in paragraph (b) of this section, the agreement must be effective on the earlier of the following dates:

(1) The date on which the provider meets all requirements.

(2) The date on which an ICF/MR—

(i) Is found to meet all conditions of participation; and

(ii) The facility submits an acceptable plan of correction for lower level deficiencies, or an approvable waiver request, or both.

(3) The date on which a NF—

(i) Is in substantial compliance, as defined in § 488.301 of this title; and

(ii) Submits an acceptable plan of correction, if applicable, or an approvable waiver request, or both.

7. Section 442.14 is amended by revising paragraph (b)(2) to read as follows:

§ 442.14 Effect of change of ownership.

* * * * *

(b) * * *

(2) Any expiration date for ICFs/MR.

* * * * *

8. Section 442.15 is amended by removing paragraph (d) and revising the section heading to read as follows:

§ 442.15 Duration of agreement for ICFs/MR.

* * * * *

9. Section 442.16 is amended by revising the section heading to read as follows:

§ 442.16 Extension of agreement for ICFs/MR.

* * * * *

10. Section 442.30 is amended by revising paragraphs (a)(1), (a)(2), (a)(4), and (a)(7) to read as follows:

§ 442.30 Agreement as evidence of certification.

(a) * * *

(1) The survey agency failed to apply the applicable requirements under subpart B of part 483 of this chapter for NFs or subpart I of part 483 of this

chapter, which set forth the conditions of participation for ICFs/MR.

(2) The survey agency failed to follow the rules and procedures for certification set forth in subpart C of this part, subpart E of part 488, and § 431.610 of this subchapter;

* * * * *

(4) The agency failed to use the Federal standards, and the forms, methods and procedures prescribed by HCFA as required under § 431.610(f)(1) or § 488.318(b) of this chapter, for determining the qualifications of providers; or

* * * * *

(7) Required elements of the NF survey process fails to include all of the following:

* * * * *

11. Section 442.40 is amended by revising the section heading and paragraphs (b)(1), (b)(2)(ii), and (c)(1) to read as follows:

§ 442.40 Availability of FFP during appeals for ICFs/MR.

* * * * *

(b) *Scope, applicability, and effective date.* (1) *Scope.* This section sets forth the extent of FFP in State Medicaid payments to an ICF/MR after its provider agreement has been terminated or has expired and not been renewed.

(2) * * *

(ii) When the State acts under instructions from HCFA, FFP ends on the date specified by HCFA (HCFA instructs the State to terminate the Medicaid provider agreement when HCFA in validating a State survey agency certification, determines that an ICF/MR does not meet the requirements for participation.)

* * * * *

(c) *Basic rules.* (1) Except as provided in paragraphs (d) and (e) of this section, FFP in payments to an ICF/MR ends on the effective date of termination of the facility's provider agreement, or if the agreement is not terminated, on the effective date of expiration.

* * * * *

12. Section 442.42 is amended by revising paragraph (a) to read as follows:

§ 442.42 FFP under a retroactive provider agreement following appeal.

(a) *Basic rule.* Except as specified in paragraph (b) of this section, if an NF or ICF/MR prevails on appeal from termination or, in the case of an ICF/MR, nonrenewal of a provider agreement, and the State issues a retroactive agreement, FFP is available beginning with the retroactive effective date, which must be determined in accordance with § 442.13.

* * * * *

13. The heading for subpart C is revised to read as follows:

Subpart C—Certification of ICFs/MR

§ 442.101 [Amended]

14. Section 442.101(d) is amended as follows:

a. In paragraph (d)(1), "subpart D" is removed and "subpart I" is added.

b. In paragraph (d)(2), "subpart D." is removed and "subpart I of part 483 of this chapter." is added.

15. Section 442.105 is amended by revising the section heading, the introductory text, and paragraphs (c)(1), and (d)(1) to read as follows:

§ 442.105 Certification of ICFs/MR with deficiencies: General provisions.

If a survey agency finds a facility deficient in meeting the standards for ICFs/MR, as specified under subpart I of part 483 of this chapter, the agency may certify the facility for Medicaid purposes under the following conditions:

* * * * *

(c) * * *

(1) Was unable to stay in compliance with the standard for ICFs/MR for reasons beyond its control, or despite intensive efforts to comply; and

* * * * *

(d) * * *

(1) Did achieve compliance with the standard for ICFs/MR at some time during the prior certification period;

* * * * *

16. The heading for § 442.109 is revised to read as follows:

§ 442.109 Certification period for ICFs/MR: General provisions.

* * * * *

17. The heading for § 442.110 and paragraph (a) are revised to read as follows:

§ 442.110 Certification period for ICFs/MR with standard-level deficiencies.

(a) Facilities with deficiencies may be certified under § 442.105 for the period specified in either paragraph (b) or (c) of this section.

* * * * *

§ 442.116 [Removed]

18. Section 442.116 is removed.

19. Section 442.117 is amended by revising the section heading and paragraph (a) to read as follows:

§ 442.117 Termination of certification for ICFs/MR whose deficiencies pose immediate jeopardy.

(a) A survey agency must terminate a facility's certification if it determines that—

(1) The facility no longer meets conditions of participation for ICFs/MR as specified in subpart I of part 483 of this chapter.

(2) The facility's deficiencies pose immediate jeopardy to residents' health and safety.

* * * * *

20. Section 442.118 is amended by removing paragraph (c) and revising the section heading, paragraphs (a), (b)(1) and (b)(3)(i) to read as follows:

§ 442.118 Denial of payments for new admissions to an ICF/MR.

(a) *Basis for denial of payments.* The Medicaid agency may deny payment for new admissions to an ICF/MR that no longer meets the applicable conditions of participation specified under subpart I of part 483 of this chapter.

(b) * * *

(1) Provide the facility up to 60 days to correct the cited deficiencies and comply with conditions of participation for ICFs/MR.

* * * * *

(3) * * *

(i) The opportunity for the facility to present, before a State Medicaid official who was not involved in making the initial determination, evidence or documentation, in writing or in person, to refute the decision that the facility is out of compliance with the conditions of participation for ICFs/MR.

* * * * *

21. Section 442.119 is amended by revising the section heading, paragraph (a)(1) and (b)(1) to read as follows:

§ 442.119 Duration of denial of payments and subsequent termination of an ICF/MR.

(a) * * *

(1) The facility has corrected the deficiencies or is making a good faith effort to achieve compliance with the conditions of participation for ICFs/MR; or

* * * * *

(b) * * *

(1) Upon the agency's finding that the facility has been unable to achieve compliance with the conditions of participation for ICFs/MR during the period that payments for new admissions have been denied;

* * * * *

G. Part 447 is amended as follows:

PART 447—PAYMENTS FOR SERVICES

1. The authority citation for part 447 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

2. Section 447.280 is revised to read as follows:

§ 447.280 Hospital providers of NF services (swing-bed hospitals).

(a) *General rule.* If the State plan provides for NF services furnished by a swing-bed hospital, as specified in §§ 440.40(a) and 440.150(f) of this chapter, the methods and standards used to determine payment rates for routine NF services must—

(1) Provide for payment at the average rate per patient day paid to NFs, as applicable, for routine services furnished during the previous calendar year; or

(2) Meet the State plan and payment requirements described in this subpart, as applicable.

(b) *Application of the rule.* The payment methodology used by a State to set payment rates for routine NF services must apply to all swing-bed hospitals in the State.

H. Part 483 is amended as follows:

PART 483—REQUIREMENTS FOR STATES AND LONG TERM CARE FACILITIES

1. The authority citation for part 483 is revised to read as follows:

Authority: Secs. 1102, 1819(a)–(h), 1861 (j) and (l), 1863, 1871, 1902(a)(28), 1905 (a), (c) and (d), and 1919(a)–(h) of the Social Security Act (42 U.S.C. 1302, 1395i–3(a)–(h), 1395x (j) and (l), 1395z, 1395hh, 1396a(a)(28), and 1396d (a), (c) and (d), and 1396r(a)–(h)), unless otherwise noted.

2. Section 483.75 is amended by revising the heading to read as follows:

§ 483.75 Administration.

* * * * *

I. Part 488 is amended as follows:

PART 488—SURVEY, CERTIFICATION, AND ENFORCEMENT PROCEDURES

1. The heading for part 488 is revised as set forth above.

2. The authority citation for part 488 is revised to read as follows:

Authority: Secs. 1102, 1128, 1128A, 1814, 1819, 1861, 1863, 1864, 1865, 1866, 1871, 1880, 1881, 1883, 1902, and 1919 of the Social Security Act (42 U.S.C. 1302, 1320a–7, 1320a–7a, 1395f, 1395i–3, 1395x, 1395z, 1395aa, 1395bb, 1395cc, 1395hh, 1395qq, 1395rr, 1395tt, 1396a, and 1396r).

3. Section 488.11 is amended by revising paragraph (b) to read as follows:

§ 488.11 State survey agency functions.

* * * * *

(b) Conduct validation surveys of accredited facilities as provided in § 488.6; and

* * * * *

5. Section 488.14 is revised to read as follows:

§ 488.14 Effect of PRO review.

When a PRO is conducting review activities under section 1154 of the Act and Part 466 of this chapter, its activities are in lieu of the utilization review and evaluation activities required of health care institutions under sections 1861(e)(6), and 1861(k) of the Act.

6. Section 488.18 is amended by revising paragraphs (a) and (b) to read as follows:

§ 488.18 Documentation of findings.

(a) The findings of the State agency with respect to each of the conditions of participation, requirements (for SNFs and NFs), or conditions for coverage must be adequately documented. When the State agency certifies to the Secretary that a provider or supplier is not in compliance with the conditions or requirements (for SNFs and NFs), and therefore not eligible to participate in the program, such documentation includes, in addition to the description of the specific deficiencies which resulted in the agency's recommendation, any provider or supplier response.

(b) If a provider or supplier is certified by the State agency as in compliance with the conditions or participation requirements (for SNFs and NFs) or as meeting the requirements for special certification (see § 488.54), with deficiencies not adversely affecting the health and safety of patients, the following information will be incorporated into the finding:

(1) A statement of the deficiencies that were found.

(2) A description of further action that is required to remove the deficiencies.

(3) A time-phased plan of correction developed by the provider and supplier and concurred with by the State agency.

(4) A scheduled time for a resurvey of the institution or agency to be conducted by the State agency within 90 days following the completion of the survey.

* * * * *

7. Section 488.20 is amended by revising paragraph (a) to read as follows:

§ 488.20 Periodic review of compliance and approval.

(a) Determinations by HCFA to the effect that a provider or supplier is in compliance with the conditions of participation, or requirements (for SNFs and NFs), or the conditions for coverage are made as often as HCFA deems necessary and may be more or less than a 12-month period, except for SNFs, NFs and HHAs. (See § 488.308 for special rules for SNFs and NFs.)

* * * * *

8. Section 488.24 is revised to read as follows:

§ 488.24 Certification of noncompliance.

(a) Special rules for certification of noncompliance for SNFs and NFs are set forth in § 488.330.

(b) The State agency will certify that a provider or supplier is not or is no longer in compliance with the conditions of participation or conditions for coverage where the deficiencies are of such character as to substantially limit the provider's or supplier's capacity to furnish adequate care or which adversely affect the health and safety of patients; or

(c) If HCFA determines that an institution or agency does not qualify for participation or coverage because it is not in compliance with the conditions of participation or conditions for coverage, or if a provider's agreement is terminated for that reason, the institution or agency has the right to request that the determination be reviewed. (Appeals procedures are set forth in Part 498 of this chapter.)

9. Section 488.26 is revised to read as follows:

§ 488.26 Determining compliance.

(a) Additional rules for certification of compliance for SNFs and NFs are set forth in § 488.330.

(b) The decision as to whether there is compliance with a particular requirement, condition of participation, or condition for coverage depends upon the manner and degree to which the provider or supplier satisfies the various standards within each condition. Evaluation of a provider's or supplier's performance against these standards enables the State survey agency to document the nature and extent of deficiencies, if any, with respect to a particular function, and to assess the need for improvement in relation to the prescribed conditions.

(c) The State survey agency must adhere to the following principles in determining compliance with participation requirements:

(1) The survey process is the means to assess compliance with Federal health, safety and quality standards;

(2) The survey process uses resident outcomes as the primary means to establish the compliance status of facilities. Specifically surveyors will directly observe the actual provision of care and services to residents, and the effects of that care, to assess whether the care provided meets the needs of individual residents;

(3) Surveyors are professionals who use their judgment, in concert with

Federal forms and procedures, to determine compliance;

(4) Federal procedures are used by all surveyors to ensure uniform and consistent application and interpretation of Federal requirements;

(5) Federal forms are used by all surveyors to ensure proper recording of findings and to document the basis for the findings.

(d) The State survey agency must use the survey methods, procedures, and forms that are prescribed by HCFA.

(e) The State survey agency must ensure that a facility's actual provision of care and services to residents and the effects of that care on residents are assessed in a systematic manner.

10. Section 488.28 is revised to read as follows:

§ 488.28 Providers or suppliers, other than SNFs and NFs, with deficiencies.

(a) If a provider or supplier is found to be deficient with respect to one or more of the standards in the conditions of participation or conditions for coverage, it may participate in or be covered under the Health Insurance for the Aged and Disabled Program only if the facility has submitted an acceptable plan of correction for achieving compliance within a reasonable period of time acceptable to the Secretary.

(b) The existing deficiencies noted either individually or in combination neither jeopardize the health and safety of patients nor are of such character as to seriously limit the provider's capacity to render adequate care.

(c)(1) If it is determined during a survey that a provider or supplier is not in compliance with one or more of the standards, it is granted a reasonable time to achieve compliance.

(2) The amount of time depends upon the—

(i) Nature of the deficiency; and

(ii) State survey agency's judgment as to the capabilities of the facility to provide adequate and safe care.

(d) Ordinarily a provider or supplier is expected to take the steps needed to achieve compliance within 60 days of being notified of the deficiencies but the State survey agency may recommend that additional time be granted by the Secretary in individual situations, if in its judgment, it is not reasonable to expect compliance within 60 days, for example, a facility must obtain the approval of its governing body, or engage in competitive bidding.

§ 488.50 [Removed]

11. Section 488.50 is removed.

4. A new subpart E is added to read as follows:

Subpart E—Survey and Certification of Long-Term Care Facilities

Sec.

488.300 Statutory basis.
488.301 Definitions.
488.303 State plan requirement.
488.305 Standard surveys.
488.307 Unannounced surveys.
488.308 Survey frequency.
488.310 Extended survey.
488.312 Consistency of survey results.
488.314 Survey teams.
488.318 Inadequate survey performance.
488.320 Sanctions for inadequate survey performance.
488.325 Disclosure of results of surveys and activities.
488.330 Certification of compliance and noncompliance.
488.331 Informal dispute resolution.
488.332 Investigation of complaints of violations and monitoring of compliance.
488.334 Educational programs.
488.335 Action on complaints of resident neglect and abuse, and misappropriation of resident property.

Subpart E—Survey and Certification of Long-Term Care Facilities

§ 488.300 Statutory basis.

Sections 1819 and 1919 of the Act establish requirements for surveying SNFs and NFs to determine whether they meet the requirements for participation in the Medicare and Medicaid programs.

§ 488.301 Definitions.

As used in this subpart—

Abbreviated standard survey means a survey other than a standard survey that gathers information primarily through resident-centered techniques on facility compliance with the requirements for participation. An abbreviated standard survey may be premised on complaints received; a change of ownership, management, or director of nursing; or other indicators of specific concern.

Abuse means the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish.

Deficiency means a SNF's or NF's failure to meet a participation requirement specified in the Act or in part 483, subpart B of this chapter.

Dually participating facility means a facility that has a provider agreement in both the Medicare and Medicaid programs.

Extended survey means a survey that evaluates additional participation requirements subsequent to finding substandard quality of care during a standard survey.

Facility means a SNF or NF, or a distinct part SNF or NF, in accordance with § 483.5 of this chapter.

Immediate family means husband or wife; natural or adoptive parent, child or sibling; stepparent, stepchild, stepbrother, or stepsister; father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law; grandparent or grandchild.

Immediate jeopardy means a situation in which the provider's noncompliance with one or more requirements of participation has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident.

Misappropriation of resident property means the deliberate misplacement, exploitation, or wrongful, temporary or permanent use of a resident's belongings or money without the resident's consent.

Neglect means failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness.

Noncompliance means any deficiency that causes a facility to not be in substantial compliance.

Nurse aide means an individual, as defined in § 483.75(e)(1) of this chapter.

Nursing facility (NF) means a Medicaid nursing facility.

Partial extended survey means a survey that evaluates additional participation requirements subsequent to finding substandard quality of care during an abbreviated standard survey.

Skilled nursing facility (SNF) means a Medicare nursing facility.

Standard survey means a periodic, resident-centered inspection which gathers information about the quality of service furnished in a facility to determine compliance with the requirements for participation.

Substandard quality of care means one or more deficiencies related to participation requirements under § 483.13, Resident behavior and facility practices, § 483.15, Quality of life, or § 483.25, Quality of care of this chapter, which constitute either immediate jeopardy to resident health or safety; a pattern of or widespread actual harm that is not immediate jeopardy; or a widespread potential for more than minimal harm, but less than immediate jeopardy, with no actual harm.

Substantial compliance means a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm.

Validation survey means a survey conducted by the Secretary within 2 months following a standard survey, abbreviated standard survey, partial extended survey, or extended survey for the purpose of monitoring State survey agency performance.

§ 488.303 State plan requirement.

(a) A State plan must provide that the requirements of this subpart and subpart F of this part are met, to the extent that those requirements apply to the Medicaid program.

(b) A State may establish a program to reward, through public recognition, incentive payments, or both, nursing facilities that provide the highest quality care to Medicaid residents. For purposes of section 1903(a)(7) of the Social Security Act, proper expenses incurred by a State in carrying out such a program are considered to be expenses necessary for the proper and efficient administration of the State plan.

(c) A State must conduct periodic educational programs for the staff and residents (and their representatives) of NFs in order to present current regulations, procedures, and policies under this subpart and subpart F of this part.

(d) Required remedies for a non-State operated NF. A State must establish the following remedies or an approved alternative to the following remedies for imposition against a non-State operated NF:

(1) Termination of the provider agreement.

(2) Temporary management.

(3) Denial of payment for new admissions.

(4) Civil money penalties.

(5) Closure of the facility in emergency situations or transfer of residents, or both.

(6) State monitoring.

(e) Optional remedies for a non-State operated NF. A State may establish the following remedies for imposition against a non-State operated NF:

(1) Directed plan of correction.

(2) Directed in-service training.

(3) Alternative or additional State remedies.

(f) Alternative or additional State remedies. If a State uses remedies that are in addition to those specified in paragraph (d) or (e) of this section, or alternative to those specified in paragraph (d) of this section (other than termination of participation), it must—

(1) Specify those remedies in the State plan; and

(2) Demonstrate to HCFA's satisfaction that those alternative remedies are as effective in deterring noncompliance and correcting deficiencies as the remedies listed in paragraphs (d) and (e) of this section.

§ 488.305 Standard surveys.

(a) For each SNF and NF, the State survey agency must conduct standard surveys that include all of the following:

(1) A case-mix stratified sample of residents;

(2) A survey of the quality of care furnished, as measured by indicators of medical, nursing, and rehabilitative care, dietary and nutrition services, activities and social participation, and sanitation, infection control, and the physical environment;

(3) An audit of written plans of care and residents' assessments to determine the accuracy of such assessments and the adequacy of such plans of care; and

(4) A review of compliance with residents' rights requirements set forth in sections 1819(c) and 1919(c) of the Act.

(b) The State survey agency's failure to follow the procedures set forth in this section will not invalidate otherwise legitimate determinations that a facility's deficiencies exist.

§ 488.307 Unannounced surveys.

(a) *Basic rule.* All standard surveys must be unannounced.

(b) *Review of survey agency's scheduling and surveying procedures.* (1) HCFA reviews on an annual basis each State survey agency's scheduling and surveying procedures and practices to ensure that survey agencies avoid giving notice of a survey through the scheduling procedures and the conduct of the surveys.

(2) HCFA takes corrective action in accordance with the nature and complexity of the problem when survey agencies are found to have notified a SNF or NF through their scheduling or procedural policies. Sanctions for inadequate survey performance are in accordance with § 488.320.

(c) *Civil money penalties.* An individual who notifies a SNF or NF, or causes a SNF or NF to be notified, of the time or date on which a standard survey is scheduled to be conducted is subject to a Federal civil money penalty not to exceed $2,000.

§ 488.308 Survey frequency.

(a) *Basic period.* The survey agency must conduct a standard survey of each SNF and NF not later than 15 months after the last day of the previous standard survey.

(b) *Statewide average interval.* (1) The statewide average interval between standard surveys must be 12 months or less, computed in accordance with paragraph (d) of this section.

(2) HCFA takes corrective action in accordance with the nature of the State survey agency's failure to ensure that the 12-month statewide average interval requirement is met. HCFA's corrective action is in accordance with § 488.320.

(c) *Other surveys.* The survey agency may conduct a survey as frequently as necessary to—

(1) Determine whether a facility complies with the participation requirements; and

(2) Confirm that the facility has corrected deficiencies previously cited.

(d) *Computation of statewide average interval.* The statewide average interval is computed at the end of each Federal fiscal year by comparing the last day of the most recent standard survey for each participating facility to the last day of each facility's previous standard survey.

(e) *Special surveys.* (1) The survey agency may conduct a standard or an abbreviated standard survey to determine whether certain changes have caused a decline in the quality of care furnished by a SNF or a NF, within 60 days of a change in the following:

(i) Ownership;

(ii) Entity responsible for management of a facility (management firm);

(iii) Nursing home administrator; or

(iv) Director of nursing.

(2) The survey agency must review all complaint allegations and conduct a standard or an abbreviated standard survey to investigate complaints of violations of requirements by SNFs and NFs if its review of the allegation concludes that—

(i) A deficiency in one or more of the requirements may have occurred; and

(ii) Only a survey can determine whether a deficiency or deficiencies exist.

(3) The survey agency does not conduct a survey if the complaint raises issues that are outside the purview of Federal participation requirements.

§ 488.310 Extended survey.

(a) *Purpose of survey.* The purpose of an extended survey is to identify the policies and procedures that caused the facility to furnish substandard quality of care.

(b) *Scope of extended survey.* An extended survey includes all of the following:

(1) Review of a larger sample of resident assessments than the sample used in a standard survey.

(2) Review of the staffing and in-service training.

(3) If appropriate, examination of the contracts with consultants.

(4) A review of the policies and procedures related to the requirements for which deficiencies exist.

(5) Investigation of any participation requirement at the discretion of the survey agency.

(c) *Timing and basis for survey.* The survey agency must conduct an extended survey not later than 14 calendar days after completion of a standard survey which found that the facility had furnished substandard quality of care.

§ 488.312 Consistency of survey results.

HCFA does and the survey agency must implement programs to measure accuracy and improve consistency in the application of survey results and enforcement remedies.

§ 488.314 Survey teams.

(a) *Team composition.* (1) Surveys must be conducted by a multidisciplinary team of professionals, which must include a registered nurse.

(2) Examples of professionals include, but are not limited to, physicians, physician assistants, nurse practitioners, physical, speech, or occupational therapists, registered professional nurses, dieticians, sanitarians, engineers, licensed practical nurses, or social workers.

(3) The State determines what constitutes a professional, subject to HCFA approval.

(4) Any of the following circumstances disqualifies a surveyor for surveying a particular facility:

(i) The surveyor currently works, or, within the past two years, has worked as an employee, as employment agency staff at the facility, or as an officer, consultant, or agent for the facility to be surveyed.

(ii) The surveyor has any financial interest or any ownership interest in the facility.

(iii) The surveyor has an immediate family member who has a relationship with a facility described in paragraphs (a)(2) (i) or (ii) of this section.

(iv) The surveyor has an immediate family member who is a resident in the facility to be surveyed. For purposes of this section, an immediate family member is defined at § 488.301 of this part.

(b) *HCFA training.* HCFA provides comprehensive training to surveyors, including at least the following:

(1) Application and interpretation of regulations for SNFs and NFs.

(2) Techniques and survey procedures for conducting standard and extended surveys.

(3) Techniques for auditing resident assessments and plans of care.

(c) *Required surveyor training.* (1) Except as specified in paragraph (c)(3) of this section, the survey agency may not permit an individual to serve as a member of a survey team unless the individual has successfully completed a training and testing program prescribed by the Secretary.

(2) The survey agency must have a mechanism to identify and respond to in-service training needs of the surveyors.

(3) The survey agency may permit an individual who has not completed a training program to participate in a survey as a trainee if accompanied on-site by a surveyor who has successfully completed the required training and testing program.

§ 488.318 Inadequate survey performance.

(a) HCFA considers survey performance to be inadequate if the State survey agency—

(1) Indicates a pattern of failure to—

(i) Identify deficiencies and the failure cannot be explained by changed conditions in the facility or other case specific factors;

(ii) Cite only valid deficiencies;

(iii) Conduct surveys in accordance with the requirements of this subpart; or

(iv) Use Federal standards, protocols, and the forms, methods and procedures specified by HCFA in manual instructions; or

(2) Fails to identify an immediate jeopardy situation.

(b) Inadequate survey performance does not—

(1) Relieve a SNF or NF of its obligation to meet all requirements for program participation; or

(2) Invalidate adequately documented deficiencies.

§ 488.320 Sanctions for inadequate survey performance.

(a) *Annual assessment of survey performance.* HCFA assesses the performance of the State's survey and certification program annually.

(b) *Sanctions for inadequate survey performance.* When a State demonstrates inadequate survey performance, as specified in § 488.318, HCFA notifies the survey agency of the inadequacy and takes action in accordance with paragraphs (c) and (d) of this section.

(c) *Medicaid facilities.* (1) For a pattern of failure to identify deficiencies in Medicaid facilities, HCFA—

(i) Reduces FFP, as specified in paragraph (e) of this section, and if appropriate;

(ii) Provides for training of survey teams.

(2) For other survey inadequacies in Medicaid facilities, HCFA provides for training of survey teams.

(d) *Medicare facilities.* For all survey inadequacies in Medicare facilities, HCFA—

(1) Requires that the State survey agency submit a plan of correction;

(2) Provides for training of survey teams;

(3) Provides technical assistance on scheduling and procedural policies;

(4) Provides HCFA-directed scheduling; or

(5) Initiates action to terminate the agreement between the Secretary and the State under section 1864 of the Act, either in whole or in part.

(e) *Reduction of FFP.* In reducing FFP for inadequate survey performance, HCFA uses the formula specified in section 1919(g)(3)(C) of the Act, that is 33 percent multiplied by a fraction—

(1) The numerator of which is equal to the total number of residents in the NFs that HCFA found to be noncompliant during validation surveys for that quarter; and

(2) The denominator of which is equal to the total number of residents in the NFs in which HCFA conducted validation surveys during that quarter.

(f) *Appeal of FFP reduction.* When a State is dissatisfied with HCFA's determination to reduce FFP, the State may appeal the determination to the Departmental Appeals Board, using the procedures specified in 45 CFR part 16.

§ 488.325 Disclosure of results of surveys and activities.

(a) *Information which must be provided to public.* As provided in sections 1819(g)(5) and 1919(g)(5) of the Act, the following information must be made available to the public, upon the public's request, by the State or HCFA for all surveys and certifications of SNFs and NFs:

(1) Statements of deficiencies and providers' comments.

(2) A list of isolated deficiencies that constitute no actual harm, with the potential for minimal harm.

(3) Approved plans of correction.

(4) Statements that the facility did not submit an acceptable plan of correction or failed to comply with the conditions of imposed remedies.

(5) Final appeal results.

(6) Notice of termination of a facility.

(7) Medicare and Medicaid cost reports.

(8) Names of individuals with direct or indirect ownership interest in a SNF or NF, as defined in § 420.201 of this chapter.

(9) Names of individuals with direct or indirect ownership interest in a SNF or NF, as defined in § 420.201 of this chapter, who have been found guilty by a court of law of a criminal offense in violation of Medicare or Medicaid law.

(b) *Charge to public for information.* HCFA and the State may charge the public for specified services with respect to requests for information in accordance with—

(1) Section 401.140 of this chapter, for Medicare; or

(2) State procedures, for Medicaid.

(c) *How public can request information.* The public may request information in accordance with disclosure procedures specified in 45 CFR part 5.

(d) *When information must be disclosed.* The disclosing agency must make available to the public, upon the public's request, information concerning all surveys and certifications of SNFs and NFs, including statements of deficiencies, separate listings of any isolated deficiencies that constitute no actual harm, with the potential for minimal harm, and plans of correction (which contain any provider response to the deficiency statement) within 14 calendar days after each item is made available to the facility.

(e) *Procedures for responding to requests.* The procedures and time periods for responding to requests are in accordance with—

(1) Section 401.136 of this chapter for documents maintained by HCFA; and

(2) State procedures for documents maintained by the State.

(f) *Information that must be provided to the State's long-term care ombudsman.* The State must provide the State's long-term care ombudsman with the following:

(1) A statement of deficiencies reflecting facility noncompliance, including a separate list of isolated deficiencies that constitute no harm with the potential for minimal harm.

(2) Reports of adverse actions specified at § 488.206 imposed on a facility.

(3) Written response by the provider.

(4) A provider's request for an appeal and the results of any appeal.

(g) *Information which must be provided to State by a facility with substandard quality of care.* (1) To provide for the notice to physicians required under sections 1819(g)(5)(C) and 1919(g)(5)(C) of the Act, not later than 10 working days after receiving a notice of substandard quality of care, a SNF or NF must provide the State with a list of—

(i) Each resident in the facility with respect to which such finding was made; and

(ii) The name and address of his or her attending physician.

(2) Failure to disclose the information timely will result in termination of participation or imposition of alternative remedies.

(h) *Information the State must provide to attending physician and State board.* Not later than 20 calendar days after a SNF or NF complies with paragraph (g) of this section, the State must provide written notice of the noncompliance to—

(1) The attending physician of each resident in the facility with respect to which a finding of substandard quality of care was made; and

(2) The State board responsible for licensing the facility's administrator.

(i) *Access to information by State Medicaid fraud control unit.* The State must provide access to any survey and certification information incidental to a SNF's or NF's participation in Medicare or Medicaid upon written request by the State Medicaid fraud control unit established under part 1002, subpart C, of this title, consistent with current State laws.

§ 488.330 Certification of compliance or noncompliance.

(a) *General rules*—(1) *Responsibility for certification.* (i) The State survey agency surveys all facilities for compliance or noncompliance with requirements for long term care facilities. The survey by the State survey agency may be followed by a Federal validation survey.

(A) The State certifies the compliance or noncompliance of non-State operated NFs. Regardless of the State entity doing the certification, it is final, except in the case of a complaint or validation survey conducted by HCFA, or HCFA review of the State's findings.

(B) HCFA certifies the compliance or noncompliance of all State-operated facilities.

(C) The State survey agency certifies the compliance or noncompliance of a non-State operated SNF, subject to the approval of HCFA.

(D) The State survey agency certifies compliance or noncompliance for a dually participating SNF/NF. In the case of a disagreement between HCFA and the State survey agency, a finding of noncompliance takes precedence over that of compliance.

(ii) In the case of a validation survey, the Secretary's determination as to the facility's noncompliance is binding, and takes precedence over a certification of compliance resulting from the State survey.

(2) *Basis for certification.* (i) Certification by the State is based on the survey agency findings.

(ii) Certification by HCFA is based on either the survey agency findings (in the case of State-operated facilities), or, in the case of a validation survey, on HCFA's own survey findings.

(b) *Effect of certification*—(1) *Certification of compliance.* A certification of compliance constitutes a determination that the facility is in substantial compliance and is eligible to participate in Medicaid as a NF, or in Medicare as a SNF, or in Medicare and Medicaid as a dually participating facility.

(2) *Certification of noncompliance.* A certification of noncompliance requires denial of participation for prospective providers and enforcement action for current providers in accordance with subpart F of this part. Enforcement action must include one of the following:

(i) Termination of any Medicare or Medicaid provider agreements that are in effect.

(ii) Application of alternative remedies instead of, or in addition to, termination procedures.

(c) *Notice of certification of noncompliance and resulting action.* The notice of certification of noncompliance is sent in accordance with the timeframes specified in § 488.402(f), and resulting action is issued by HCFA, except when the State is taking the action for a non-State operated NF.

(d) *Content of notice of certification of noncompliance.* The notice of certification of noncompliance is sent in accordance with the timeframes specified in § 488.402(f) and includes information on all of the following:

(1) Nature of noncompliance.

(2) Any alternative remedies to be imposed under subpart F of this part.

(3) Any termination or denial of participation action to be taken under this part.

(4) The appeal rights available to the facility under this part.

(5) Timeframes to be met by the provider and certifying agency with regard to each of the enforcement actions or appeal procedures addressed in the notice.

(e) *Appeals.* (1) Notwithstanding any provision of State law, the State must impose remedies promptly on any provider of services participating in the Medicaid program—

(i) After promptly notifying the facility of the deficiencies and impending remedy or remedies; and

(ii) Except for civil money penalties, during the pendency of any hearing that may be requested by the provider of services.

(2) HCFA imposes remedies promptly on any provider of services participating in the Medicare or Medicaid program or any provider of services participating in both the Medicare and Medicaid programs—

(i) After promptly notifying the facility of the deficiencies and impending remedy or remedies; and

(ii) Except for civil money penalties, during any pending hearing that may be requested by the provider of services.

(3) The provisions of part 498 of this chapter apply when the following providers request a hearing on a denial of participation, or certification of noncompliance leading to an

enforcement remedy (including termination of the provider agreement), except State monitoring:

(i) All State-operated facilities;

(ii) SNFs and dually participating SNF/NFs; and

(iii) Any other facilities subject to a HCFA validation survey or HCFA review of the State's findings.

(4) The provisions of part 431 of this chapter apply when a non-State operated Medicaid NF, which has not received a HCFA validation survey or HCFA review of the State's findings, requests a hearing on the State's denial of participation, termination of provider agreement, or certification of noncompliance leading to an alternative remedy, except State monitoring.

(f) *Provider agreements.* HCFA or the Medicaid agency may execute a provider agreement when a prospective provider is in substantial compliance with all the requirements for participation for a SNF or NF, respectively.

(g) *Special rules for Federal validation surveys.* (1) HCFA may make independent certifications of a NF's, SNF's, or dually participating facility's noncompliance based on a HCFA validation survey.

(2) HCFA issues the notice of actions affecting facilities for which HCFA did validation surveys.

(3) For non-State-operated NFs and non-State-operated dually participating facilities, any disagreement between HCFA and the State regarding the timing and choice of remedies is resolved in accordance with § 488.452.

(4) Either HCFA or the survey agency, at HCFA's option, may revisit the facility to ensure that corrections are made.

§ 488.331 Informal dispute resolution.

(a) *Opportunity to refute survey findings.* (1) For non-Federal surveys, the State must offer a facility an informal opportunity, at the facility's request, to dispute survey findings upon the facility's receipt of the official statement of deficiencies.

(2) For Federal surveys, HCFA offers a facility an informal opportunity, at the facility's request, to dispute survey findings upon the facility's receipt of the official statement of deficiencies.

(b)(1) Failure of the State or HCFA, as appropriate, to complete informal dispute resolution timely cannot delay the effective date of any enforcement action against the facility.

(2) A facility may not seek a delay of any enforcement action against it on the grounds that informal dispute resolution has not been completed before the effective date of the enforcement action.

(c) If a provider is subsequently successful, during the informal dispute resolution process, at demonstrating that deficiencies should not have been cited, the deficiencies are removed from the statement of deficiencies and any enforcement actions imposed solely as a result of those cited deficiencies are rescinded.

(d) *Notification.* Upon request, HCFA does and the State must provide the facility with written notification of the informal dispute resolution process.

§ 488.332 Investigation of complaints of violations and monitoring of compliance.

(a) *Investigation of complaints.* (1) The State survey agency must establish procedures and maintain adequate staff to investigate complaints of violations of participation requirements.

(2) The State survey agency takes appropriate precautions to protect a complainant's anonymity and privacy, if possible.

(3) If arrangements have been made with other State components for investigation of complaints, the State must have a means of communicating information among appropriate entities, and the State survey agency retains responsibility for the investigation process.

(4) If, after investigating a complaint, the State has reason to believe that an identifiable individual neglected or abused a resident, or misappropriated a resident's property, the State survey agency must act on the complaint in accordance with § 488.335.

(b) *On-site monitoring.* The State survey agency conducts on-site monitoring on an as necessary basis when—

(1) A facility is not in substantial compliance with the requirements and is in the process of correcting deficiencies;

(2) A facility has corrected deficiencies and verification of continued substantial compliance is needed; or

(3) The survey agency has reason to question the substantial compliance of the facility with a requirement of participation.

(c) *Composition of the investigative team.* A State may use a specialized team, which may include an attorney, auditor and appropriate health professionals, to identify, survey, gather and preserve evidence, and administer remedies to noncompliant facilities.

§ 488.334 Educational programs.

A State must conduct periodic educational programs for the staff and residents (and their representatives) of SNFs and NFs in order to present current regulations, procedures, and policies on the survey, certification and enforcement process under this subpart and subpart F of this part.

§ 488.335 Action on complaints of resident neglect and abuse, and misappropriation of resident property.

(a) *Investigation.* (1) The State must review all allegations of resident neglect and abuse, and misappropriation of resident property and follow procedures specified in § 488.332.

(2) If there is reason to believe, either through oral or written evidence that an individual used by a facility to provide services to residents could have abused or neglected a resident or misappropriated a resident's property, the State must investigate the allegation.

(3) The State must have written procedures for the timely review and investigation of allegations of resident abuse and neglect, and misappropriation of resident property.

(b) *Source of complaints.* The State must review all allegations regardless of their source.

(c) *Notification*—(1) *Individuals to be notified.* If the State makes a preliminary determination, based on oral or written evidence and its investigation, that the abuse, neglect or misappropriation of property occurred, it must notify in writing—

(i) The individuals implicated in the investigation; and

(ii) The current administrator of the facility in which the incident occurred.

(2) *Timing of the notice.* The State must notify the individuals specified in paragraph (c)(1) of this section in writing within 10 working days of the State's investigation.

(3) *Contents of the notice.* The notice must include the—

(i) Nature of the allegation(s);

(ii) Date and time of the occurrence;

(iii) Right to a hearing;

(iv) Survey agency's intent to report the substantiated findings in writing, once the individual has had the opportunity for a hearing, to the nurse aide registry or appropriate licensure authority;

(v) Fact that the individual's failure to request a hearing in writing within 30 days from the date of the notice will result in the survey agency reporting the substantiated findings to the nurse aide registry or appropriate licensure authority.

(vi) Consequences of waiving the right to a hearing;

(vii) Consequences of a finding through the hearing process that the alleged resident abuse or neglect, or misappropriation of resident property did occur; and

(viii) Fact that the individual has the right to be represented by an attorney at the individual's own expense.

(d) *Conduct of hearing.* (1) The State must complete the hearing and the hearing record within 120 days from the day it receives the request for a hearing.

(2) The State must hold the hearing at a reasonable place and time convenient for the individual.

(e) *Factors beyond the individual's control.* A State must not make a finding that an individual has neglected a resident if the individual demonstrates that such neglect was caused by factors beyond the control of the individual.

(f) *Report of findings.* If the finding is that the individual has neglected or abused a resident or misappropriated resident property or if the individual waives the right to a hearing, the State survey agency, which may not delegate this responsibility, must report the findings in writing within 10 working days to—

(1) The individual;

(2) The current administrator of the facility in which the incident occurred; and

(3) The administrator of the facility that currently employs the individual, if different than the facility in which the incident occurred;

(4) The licensing authority for individuals used by the facility other than nurse aides, if applicable; and

(5) The nurse aide registry for nurse aides. The findings must be included in the registry within 10 working days of the findings, in accordance with § 483.156(c) of this chapter.

(g) *Contents and retention of report of finding to the nurse aide registry.* (1) The report of finding must include information in accordance with § 483.156(c) of this chapter.

(2) The survey agency must retain the information as specified in paragraph (g)(1) of this section, in accordance with the procedures specified in § 483.156(c) of this chapter.

(h) *Survey agency responsibility.* (1) The survey agency must promptly review the results of all complaint investigations and determine whether or not a facility has violated any requirements in part 483, subpart B of this chapter.

(2) If a facility is not in substantial compliance with the requirements in part 483, subpart B of this chapter, the survey agency initiates appropriate actions, as specified in subpart F of this part.

5. A new subpart F is added to read as follows:

Subpart F— Enforcement of Compliance For Long-Term Care Facilities with Deficiencies

Sec.

488.400 Statutory basis.
488.401 Definitions.
488.402 General provisions.
488.404 Factors to be considered in selecting remedies.
488.406 Available remedies.
488.408 Selection of remedies.
488.410 Action when there is immediate jeopardy.
488.412 Action when there is no immediate jeopardy.
488.414 Action when there is repeated substandard quality of care.
488.415 Temporary management.
488.417 Denial of payment for all new admissions.
488.418 Secretarial authority to deny all payments.
488.422 State monitoring.
488.424 Directed plan of correction.
488.425 Directed inservice training.
488.426 Closure of a facility or transfer of residents, or both.
488.430 Civil money penalties: Basis for imposing penalty.
488.432 Civil money penalties: When penalty is collected.
488.434 Civil money penalties: Notice of penalty.
488.436 Civil money penalties: Waiver of hearing, reduction of penalty amount.
488.438 Civil money penalties: Amount of penalty.
488.440 Civil money penalties: Effective date and duration of penalty.
488.442 Civil money penalties: Due date for payment of penalty.
488.444 Civil money penalties: Settlement of penalties.
488.450 Continuation of payments to a facility with deficiencies.
488.452 State and Federal disagreements involving findings not in agreement in non-State operated NFs and dually participating facilities when there is no immediate jeopardy.
488.454 Duration of remedies.
488.456 Termination of provider agreement.

Subpart F—Enforcement of Compliance for Long-Term Care Facilities with Deficiencies

§ 488.400 Statutory basis.

Sections 1819(h) and 1919(h) of the Act specify remedies that may be used by the Secretary or the State respectively when a SNF or a NF is not in substantial compliance with the requirements for participation in the Medicare and Medicaid programs. These sections also provide for ensuring prompt compliance and specify that these remedies are in addition to any others available under State or Federal law, and, except for civil money penalties, are imposed prior to the conduct of a hearing.

§ 488.401 Definitions.

As used in this subpart—

New admission means a resident who is admitted to the facility on or after the effective date of a denial of payment remedy and, if previously admitted, has been discharged before that effective date. Residents admitted before the effective date of the denial of payment, and taking temporary leave, are not considered new admissions, nor subject to the denial of payment.

Plan of correction means a plan developed by the facility and approved by the certifying agency which describes the actions the facility will take to correct deficiencies and specifies the date by which those deficiencies will be corrected.

§ 488.402 General provisions.

(a) *Purpose of remedies.* The purpose of remedies is to ensure prompt compliance with program requirements.

(b) *Basis for imposition and duration of remedies.* When HCFA or the State chooses to apply one or more remedies specified in § 488.406, the remedies are applied on the basis of noncompliance found during surveys conducted by HCFA or by the survey agency.

(c) *Number of remedies.* HCFA or the State may apply one or more remedies for each deficiency constituting noncompliance or for all deficiencies constituting noncompliance.

(d) *Plan of correction requirement.* (1) Except as specified in paragraph (d)(2) of this section, regardless of which remedy is applied, each facility that has deficiencies with respect to program requirements must submit a plan of correction for approval by HCFA or the survey agency.

(2) *Isolated deficiencies.* A facility is not required to submit a plan of correction when it has deficiencies that are isolated and have a potential for minimal harm, but no actual harm has occurred.

(e) *Disagreement regarding remedies.* If the State and HCFA disagree on the decision to impose a remedy, the disagreement is resolved in accordance with § 488.452.

(f) *Notification requirements*—(1) *All facilities other than non-State operated NFs.* Except when the State is taking action against a non-State operated NF, HCFA gives the provider notice of the remedy, including the—

(i) Nature of the noncompliance;

(ii) Which remedy is imposed;

(iii) Effective date of the remedy; and

(iv) Right to appeal the determination leading to the remedy.

(2) *Non-State operated NF.* When a State is taking action against a non-State operated NF, the State's notice must

include the same information required by HCFA in paragraph (f)(1) of this section.

(3) *Immediate jeopardy—2 day notice.* Except for civil money penalties and State monitoring imposed when there is immediate jeopardy, for all remedies specified in § 488.406 imposed when there is immediate jeopardy, the notice must be given at least 2 calendar days before the effective date of the enforcement action.

(4) *No immediate jeopardy—15 day notice.* Except for civil money penalties and State monitoring, notice must be given at least 15 calendar days before the effective date of the enforcement action in situations in which there is no immediate jeopardy.

(5) *Latest date of enforcement action.* The 2 and 15-day notice periods begin when the facility receives the notice, but, in no event will the effective date of the enforcement action be later than 20 calendar days after the notice is sent.

(6) *Civil money penalties.* For civil money penalties, the notices must be given in accordance with the provisions of §§ 488.434 and 488.440.

(7) *State monitoring—immediate jeopardy.* For State monitoring imposed when there is immediate jeopardy, no prior notice is required.

§ 488.404 Factors to be considered in selecting remedies.

(a) *Initial assessment.* In order to select the appropriate remedy, if any, to apply to a facility with deficiencies, HCFA and the State determine the seriousness of the deficiencies.

(b) *Determining seriousness of deficiencies.* To determine the seriousness of the deficiency, HCFA considers and the State must consider at least the following factors:

(1) Whether a facility's deficiencies constitute—

(i) No actual harm with a potential for minimal harm;

(ii) No actual harm with a potential for more than minimal harm, but not immediate jeopardy;

(iii) Actual harm that is not immediate jeopardy; or

(iv) Immediate jeopardy to resident health or safety.

(2) Whether the deficiencies—

(i) Are isolated;

(ii) Constitute a pattern; or

(iii) Are widespread.

(c) *Other factors which may be considered in choosing a remedy within a remedy category.* Following the initial assessment, HCFA and the State may consider other factors, which may include, but are not limited to the following:

(1) The relationship of the one deficiency to other deficiencies resulting in noncompliance.

(2) The facility's prior history of noncompliance in general and specifically with reference to the cited deficiencies.

§ 488.406 Available remedies.

(a) *General.* In addition to the remedy of termination of the provider agreement, the following remedies are available:

(1) Temporary management;

(2) Denial of payment including—

(i) Denial of payment for all individuals, imposed by HCFA, to a—

(A) Skilled nursing facility, for Medicare;

(B) State, for Medicaid; or

(ii) Denial of payment for all new admissions;

(3) Civil money penalties;

(4) State monitoring;

(5) Closure of the facility by the State in emergency situations or transfer of residents, or both;

(6) Directed plan of correction;

(7) Directed in-service training; and

(8) Alternative or additional State remedies approved by HCFA.

(b) *Remedies that must be established.* At a minimum, the State must establish the following remedies or approved alternatives to the following remedies:

(1) Termination of the provider agreement.

(2) Temporary management.

(3) Denial of payment for new admissions.

(4) Civil money penalties.

(5) Closure of the facility in emergency situations or transfer of residents, or both.

(6) State monitoring.

(c) *State plan requirement.* If a State wishes to use remedies for noncompliance that are either additional or alternative to those specified in paragraphs (a) or (b) of this section, it must—

(1) Specify those remedies in the State plan; and

(2) Demonstrate to HCFA's satisfaction that those remedies are as effective as the remedies listed in paragraph (a) of this section, for deterring noncompliance and correcting deficiencies.

(d) *State remedies in dually participating facilities.* If the State's remedy is unique to the State plan and has been approved by HCFA, then that remedy, as imposed by the State under its Medicaid authority, may be imposed by HCFA against the Medicare provider agreement of a dually participating facility.

§ 488.408 Selection of remedies.

(a) *Categories of remedies.* In this section, the remedies specified in § 488.406(a) are grouped into categories and applied to deficiencies according to how serious the noncompliance is.

(b) *Application of remedies.* After considering the factors specified in § 488.404, as applicable, if HCFA and the State choose to impose remedies, as provided in paragraphs (c)(1), (d)(1) and (e)(1) of this section, for facility noncompliance, instead of, or in addition to, termination of the provider agreement, HCFA does and the State must follow the criteria set forth paragraphs (c)(2), (d)(2), and (e)(2) of this section, as applicable.

(c) *Category 1.* (1) Category 1 remedies include the following:

(i) Directed plan of correction.

(ii) State monitoring.

(iii) Directed in-service training.

(2) HCFA or the State must apply one or more of the remedies in Category 1 when there—

(i) Are isolated deficiencies that constitute no actual harm with a potential for more than minimal harm but not immediate jeopardy; or

(ii) Is a pattern of deficiencies that constitutes no actual harm with a potential for more than minimal harm but not immediate jeopardy.

(3) Except when the facility is in substantial compliance, HCFA or the State may apply one or more of the remedies in Category 1 to any deficiency.

(d) *Category 2.* (1) Category 2 remedies include the following:

(i) Denial of payment for new admissions.

(ii) Denial of payment for all individuals imposed only by HCFA.

(iii) Civil money penalties of $50–3,000 per day.

(2) HCFA applies one or more of the remedies in Category 2, or, except for denial of payment for all individuals, the State must apply one or more of the remedies in Category 2 when there are—

(i) Widespread deficiencies that constitute no actual harm with a potential for more than minimal harm but not immediate jeopardy; or

(ii) One or more deficiencies that constitute actual harm that is not immediate jeopardy.

(3) Except when the facility is in substantial compliance, HCFA or the State may apply one or more of the remedies in Category 2 to any deficiency.

(e) *Category 3.* (1) Category 3 remedies include the following:

(i) Temporary management.

(ii) Immediate termination.

(iii) Civil money penalties of $3,050–$10,000 per day.

(2) When there are one or more deficiencies that constitute immediate jeopardy to resident health or safety—

(i) HCFA does and the State must do one or both of the following:

(A) Impose temporary management; or

(B) Terminate the provider agreement;

(ii) HCFA and the State may impose a civil money penalty of $3,050–$10,000 per day, in addition to imposing the remedies specified in paragraph (e)(2)(i) of this section.

(3) When there are widespread deficiencies that constitute actual harm that is not immediate jeopardy, HCFA and the State may impose temporary management, in addition to Category 2 remedies.

(f) *Plan of correction.* (1) Except as specified in paragraph (F)(2) of this section, each facility that has a deficiency with regard to a requirement for long term care facilities must submit a plan of correction for approval by HCFA or the State, regardless of—

(i) Which remedies are imposed; or

(ii) The seriousness of the deficiencies.

(2) When there are only isolated deficiencies that HCFA or the State determines constitute no actual harm with a potential for minimal harm, the facility need not submit a plan of correction.

(g) *Appeal of a certification of noncompliance.* (1) A facility may appeal a certification of noncompliance leading to an enforcement remedy.

(2) A facility may not appeal the choice of remedy, including the factors considered by HCFA or the State in selecting the remedy, specified in § 488.404.

§ 488.410 Action when there is immediate jeopardy.

(a) If there is immediate jeopardy to resident health or safety, the State must (and HCFA does) either terminate the provider agreement within 23 calendar days of the last date of the survey or appoint a temporary manager to remove the immediate jeopardy. The rules for appointment of a temporary manager in an immediate jeopardy situation are as follows:

(1) HCFA does and the State must notify the facility that a temporary manager is being appointed.

(2) If the facility fails to relinquish control to the temporary manager, HCFA does and the State must terminate the provider agreement within 23 calendar days of the last day of the survey, if the immediate jeopardy is not removed. In these cases, State monitoring may be imposed pending termination.

(3) If the facility relinquishes control to the temporary manager, the State must (and HCFA does) notify the facility that, unless it removes the immediate jeopardy, its provider agreement will be terminated within 23 calendar days of the last day of the survey.

(4) HCFA does and the State must terminate the provider agreement within 23 calendar days of the last day of survey if the immediate jeopardy has not been removed.

(b) HCFA or the State may also impose other remedies, as appropriate.

(c)(1) In a NF or dually participating facility, if either HCFA or the State finds that a facility's noncompliance poses immediate jeopardy to resident health or safety, HCFA or the State must notify the other of such a finding.

(2) HCFA will or the State must—

(i) Take immediate action to remove the jeopardy and correct the noncompliance through temporary management; or

(ii) Terminate the facility's participation under the State plan. If this is done, HCFA will also terminate the facility's participation in Medicare if it is a dually participating facility.

(d) The State must provide for the safe and orderly transfer of residents when the facility is terminated.

(e) If the immediate jeopardy is also substandard quality of care, the State survey agency must notify attending physicians and the State board responsible for licensing the facility administrator of the finding of substandard quality of care, as specified in § 488.325(h).

§ 488.412 Action when there is no immediate jeopardy.

(a) If a facility's deficiencies do not pose immediate jeopardy to residents' health or safety, and the facility is not in substantial compliance, HCFA or the State may terminate the facility's provider agreement or may allow the facility to continue to participate for no longer than 6 months from the last day of the survey if—

(1) The State survey agency finds that it is more appropriate to impose alternative remedies than to terminate the facility's provider agreement;

(2) The State survey agency has submitted a plan of correction approved by HCFA; and

(3) The facility in the case of a Medicare SNF or the State in the case of a Medicaid NF agrees to repay to the Federal government payments received after the last day of the survey that first identified the deficiencies if corrective action is not taken in accordance with the approved plan of correction.

(b) If a facility does not meet the criteria for continuation of payment under paragraph (a) of this section, HCFA will and the State must terminate the facility's provider agreement.

(c) HCFA does and the State must deny payment for new admissions when a facility is not in substantial compliance 3 months after the last day of the survey.

(d) HCFA terminates the provider agreement for SNFs and NFs, and stops FFP to a State for a NF for which participation was continued under paragraph (a) of this section, if the facility is not in substantial compliance within 6 months of the last day of the survey.

§ 488.414 Action when there is repeated substandard quality of care.

(a) *General.* If a facility has been found to have provided substandard quality of care on the last three consecutive standard surveys, as defined in § 488.305, regardless of other remedies provided—

(1) HCFA imposes denial of payment for all new admissions, as specified in § 488.417, or denial of all payments, as specified in § 488.418;

(2) The State must impose denial of payment for all new admissions, as specified in § 488.417; and

(3) HCFA does and the State survey agency must impose State monitoring, as specified in § 488.422, until the facility has demonstrated to the satisfaction of HCFA or the State, that it is in substantial compliance with all requirements and will remain in substantial compliance with all requirements.

(b) *Repeated noncompliance.* For purposes of this section, repeated noncompliance is based on the repeated finding of substandard quality of care and not on the basis that the substance of the deficiency or the exact tag number for the deficiency was repeated.

(c) *Standard surveys to which this provision applies.* Standard surveys completed by the State survey agency on or after October 1, 1990, are used to determine whether the threshold of three consecutive standard surveys is met.

(d) *Program participation.* (1) The determination that a certified facility has repeated instances of substandard quality of care is made without regard to any variances in the facility's program participation (that is, any standard survey completed for Medicare, Medicaid or both programs will be considered).

(2) Termination would allow the count of repeated substandard quality of care surveys to start over.

(3) Change of ownership. (i) A facility may not avoid a remedy on the basis

that it underwent a change of ownership.

(ii) In a facility that has undergone a change of ownership, HCFA does not and the State may not restart the count of repeated substandard quality of care surveys unless the new owner can demonstrate to the satisfaction of HCFA or the State that the poor past performance no longer is a factor due to the change in ownership.

(e) *Facility alleges corrections or achieves compliance after repeated substandard quality of care is identified.* (1) If a penalty is imposed for repeated substandard quality of care, it will continue until the facility has demonstrated to the satisfaction of HCFA or the State that it is in substantial compliance with the requirements and that it will remain in substantial compliance with the requirements for a period of time specified by HCFA or the State.

(2) A facility will not avoid the imposition of remedies or the obligation to demonstrate that it will remain in compliance when it—

(i) Alleges correction of the deficiencies cited in the most recent standard survey; or

(ii) Achieves compliance before the effective date of the remedies.

§ 488.415 Temporary management.

(a) *Definition.* Temporary management means the temporary appointment by HCFA or the State of a substitute facility manager or administrator with authority to hire, terminate or reassign staff, obligate facility funds, alter facility procedures, and manage the facility to correct deficiencies identified in the facility's operation.

(b) *Qualifications.* The temporary manager must—

(1) Be qualified to oversee correction of deficiencies on the basis of experience and education, as determined by the State;

(2) Not have been found guilty of misconduct by any licensing board or professional society in any State;

(3) Have, or a member of his or her immediate family have, no financial ownership interest in the facility; and

(4) Not currently serve or, within the past 2 years, have served as a member of the staff of the facility.

(c) *Payment of salary.* The temporary manager's salary—

(1) Is paid directly by the facility while the temporary manager is assigned to that facility; and

(2) Must be at least equivalent to the sum of the following—

(i) The prevailing salary paid by providers for positions of this type in what the State considers to be the facility's geographic area;

(ii) Additional costs that would have reasonably been incurred by the provider if such person had been in an employment relationship; and

(iii) Any other costs incurred by such a person in furnishing services under such an arrangement or as otherwise set by the State.

(3) May exceed the amount specified in paragraph (c)(2) of this section if the State is otherwise unable to attract a qualified temporary manager.

(d) *Failure to relinquish authority to temporary management*—(1) *Termination of provider agreement.* If a facility fails to relinquish authority to the temporary manager as described in this section, HCFA will or the State must terminate the provider agreement in accordance with § 488.456.

(2) *Failure to pay salary of temporary manager.* A facility's failure to pay the salary of the temporary manager is considered a failure to relinquish authority to temporary management.

(e) *Duration of temporary management.* Temporary management ends when the facility meets any of the conditions specified in § 488.454(c).

§ 488.417 Denial of payment for all new admissions.

(a) *Optional denial of payment.* Except as specified in paragraph (b) of this section, HCFA or the State may deny payment for all new admissions when a facility is not in substantial compliance with the requirements, as defined in § 488.401, as follows:

(1) *Medicare facilities.* In the case of Medicare facilities, HCFA may deny payment to the facility.

(2) *Medicaid facilities.* In the case of Medicaid facilities—

(i) The State may deny payment to the facility; and

(ii) HCFA may deny payment to the State for all new Medicaid admissions to the facility.

(b) *Required denial of payment.* HCFA does or the State must deny payment for all new admissions when—

(1) The facility is not in substantial compliance, as defined in § 488.401, 3 months after the last day of the survey identifying the noncompliance; or

(2) The State survey agency has cited a facility with substandard quality of care on the last three consecutive standard surveys.

(c) *Resumption of payments: Repeated instances of substandard quality of care.* When a facility has repeated instances of substandard quality of care, payments to the facility or, under Medicaid, HCFA payments to the State on behalf of the facility, resume on the date that—

(1) The facility achieves substantial compliance as indicated by a revisit or written credible evidence acceptable to HCFA (under Medicare) or the State (under Medicaid); and

(2) HCFA (under Medicare) or the State (under Medicaid) believes that the facility is capable of remaining in substantial compliance.

(d) *Resumption of payments: No repeated instances of substandard quality of care.* When a facility does not have repeated instances of substandard quality of care, payments to the facility or, under Medicaid, HCFA payments to the State on behalf of the facility, resume prospectively on the date that the facility achieves substantial compliance, as indicated by a revisit or written credible evidence acceptable to HCFA (under Medicare) or the State (under Medicaid).

(e) *Restriction.* No payments to a facility or, under Medicaid, HCFA payments to the State on behalf of the facility, are made for the period between the date that the—

(1) Denial of payment remedy is imposed; and

(2) Facility achieves substantial compliance, as determined by HCFA or the State.

§ 488.418 Secretarial authority to deny all payments.

(a) *HCFA option to deny all payment.* If a facility has not met a requirement, in addition to the authority to deny payment for all new admissions as specified in § 488.417, HCFA may deny any further payment for all Medicare residents in the facility and to the State for all Medicaid residents in the facility.

(b) *Prospective resumption of payment.* Except as provided in paragraphs (d) and (e) of this section, if the facility achieves substantial compliance, HCFA resumes payment prospectively from the date that it verifies as the date that the facility achieved substantial compliance.

(c) *Restriction on payment after denial of payment is imposed.* If payment to the facility or to the State resumes after denial of payment for all residents, no payment is made for the period between the date that—

(1) Denial of payment was imposed; and

(2) HCFA verifies as the date that the facility achieved substantial compliance.

(d) *Retroactive resumption of payment.* Except when a facility has repeated instances of substandard quality of care, as specified in paragraph (e) of this section, when HCFA or the State finds that the facility was in substantial compliance before the date

of the revisit, or before HCFA or the survey agency received credible evidence of such compliance, payment is resumed on the date that substantial compliance was achieved, as determined by HCFA.

(e) *Resumption of payment—repeated instances of substandard care.* When HCFA denies payment for all Medicare residents for repeated instances of substandard quality of care, payment is resumed when—

(1) The facility achieved substantial compliance, as indicated by a revisit or written credible evidence acceptable to HCFA; and

(2) HCFA believes that the facility will remain in substantial compliance.

§ 488.422 State monitoring.

(a) A State monitor—

(1) Oversees the correction of deficiencies specified by HCFA or the State survey agency at the facility site and protects the facility's residents from harm;

(2) Is an employee or a contractor of the survey agency;

(3) Is identified by the State as an appropriate professional to monitor cited deficiencies;

(4) Is not an employee of the facility;

(5) Does not function as a consultant to the facility; and

(6) Does not have an immediate family member who is a resident of the facility to be monitored.

(b) A State monitor must be used when a survey agency has cited a facility with substandard quality of care deficiencies on the last 3 consecutive standard surveys.

(c) State monitoring is discontinued when—

(1) The facility has demonstrated that it is in substantial compliance with the requirements, and it will remain in compliance for a period of time specified by HCFA or the State; or

(2) Termination procedures are completed.

§ 488.424 Directed plan of correction.

HCFA, the State survey agency, or the temporary manager (with HCFA or State approval) may develop a plan of correction and HCFA, the State, or the temporary manager require a facility to take action within specified timeframes.

§ 488.425 Directed inservice training.

(a) *Required training.* HCFA or the State agency may require the staff of a facility to attend an inservice training program if—

(1) The facility has a pattern of deficiencies that indicate noncompliance; and

(2) Education is likely to correct the deficiencies.

(b) *Action following training.* After the staff has received inservice training, if the facility has not achieved substantial compliance, HCFA or the State may impose one or more other remedies specified in § 488.206.

(c) *Payment.* The facility pays for directed inservice training.

§ 488.426 Closure of a facility or transfer of residents, or both.

(a) *Closure of facility or transfer of residents, or both, during an emergency.* In an emergency, the State has the authority to—

(1) Transfer Medicaid and Medicare residents to another facility; or

(2) Close the facility and transfer the Medicaid and Medicare residents to another facility.

(b) *Required transfer in immediate jeopardy situations.* When the State or HCFA terminates a facility's provider agreement ~~for a deficiency that constitutes immediate jeopardy~~, the State arranges for the safe and orderly transfer of all Medicare and Medicaid residents to another facility.

(c) *All other situations.* Except for immediate jeopardy situations, as specified in paragraph (b) of this section, when the State or HCFA terminates a facility's provider agreement, the State arranges for the safe and orderly transfer of all Medicare and Medicaid residents to another facility.

§ 488.430 Civil money penalties: Basis for imposing penalty.

(a) HCFA or the State may impose a civil money penalty for the number of days a facility is not in substantial compliance with one or more participation requirements, regardless of whether or not the deficiencies constitute immediate jeopardy.

(b) HCFA or the State may impose a civil money penalty for the number of days of past noncompliance since the last standard survey, including the number of days of immediate jeopardy.

§ 488.432 Civil money penalties: When penalty is collected.

(a) *When facility requests a hearing.* (1) A facility must request a hearing on the determination of the noncompliance that is the basis for imposition of the civil money penalty within the time specified in—

(i) Section 498.40 of this chapter for a

(A) SNF;

(B) Dually participating facility; or

(C) State-operated NF.

(ii) Section 431.153 of this chapter for a non-State operated NF.

(2) If a facility requests a hearing within the time specified in paragraph (a)(1) of this section, HCFA or the State initiates collection of the penalty when there is a final administrative decision that upholds HCFA's or the State's determination of noncompliance after the facility achieves substantial compliance or is terminated.

(b) *When facility does not request a hearing.* If a facility does not request a hearing, in accordance with paragraph (a) of this section, HCFA or the State initiates collection of the penalty when the facility—

(1) Achieves substantial compliance; or

(2) Is terminated.

(c) *When facility waives a hearing.* If a facility waives its right to a hearing in writing, as specified in § 488.436, HCFA or the State initiates collection of the penalty when the facility—

(1) Achieves substantial compliance; or

(2) Is terminated.

(d) Accrual and computation of penalties for a facility that—

(1) Requests a hearing or does not request a hearing are specified in § 488.440;

(2) Waives its right to a hearing in writing, are specified in §§ 488.436(b) and 488.440.

(e) The collection of civil money penalties is made as provided in § 488.442.

§ 488.434 Civil money penalties: Notice of penalty.

(a) *HCFA notice of penalty.* (1) HCFA sends a written notice of intent to impose the penalty to the facility for all facilities except non-State operated NFs when the State is imposing the penalty.

(2) *Content of notice.* The notice that HCFA sends includes—

(i) The nature of the noncompliance;

(ii) The statutory basis for the penalty;

(iii) The amount of penalty per day of noncompliance;

(iv) Any factors specified in § 488.438(f) that were considered when determining the amount of the penalty;

(v) The date on which the penalty begins to accrue;

(vi) When the penalty stops accruing;

(vii) When the penalty is collected; and

(viii) Instructions for responding to the notice, including a statement of the facility's right to a hearing, and the implication of waiving a hearing, as provided in § 488.436.

(b) *State notice of penalty.*

(1) The State must notify the facility in accordance with State procedures for all non-State operated NFs when the State takes the action.

(2) The State's notice must—

(i) Be in writing; and

(ii) Include, at a minimum, the information specified in paragraph (a)(2) of this section.

§ 488.436 Civil money penalties: Waiver of hearing, reduction of penalty amount.

(a) *Waiver of a hearing.* The facility may waive the right to a hearing, in writing, within 60 days from the date of the notice of intent to impose the civil money penalty.

(b) *Reduction of penalty amount.* (1) If the facility waives its right to a hearing in accordance with the procedures specified in paragraph (a) of this section, HCFA or the State reduces the civil money penalty amount by 35 percent.

(2) If the facility does not waive its right to a hearing in accordance with the procedures specified in paragraph (a) of this section, the civil money penalty is not reduced by 35 percent.

§ 488.438 Civil money penalties: Amount of penalty.

(a) *Amount of penalty.* The penalties are within the following ranges, set at $50 increments:

(1) *Upper range—$3,050–$10,000.* Penalties in the range of $3,050–$10,000 per day are imposed for deficiencies constituting immediate jeopardy, and as specified in paragraph (d)(2) of this section.

(2) *Lower range—$50–$3,000.* Penalties in the range of $50–$3,000 per day are imposed for deficiencies that do not constitute immediate jeopardy, but either caused actual harm, or caused no actual harm, but have the potential for more than minimal harm.

(b) *Basis for penalty amount.* The amount of penalty is based on HCFA's or the State's assessment of factors listed in paragraph (f) of this section.

(c) *Decreased penalty amounts.* Except as specified in paragraph (d)(2) of this section, if immediate jeopardy is removed, but the noncompliance continues, HCFA or the State will shift the penalty amount to the lower range.

(d) *Increased penalty amounts.* (1) Before the hearing, HCFA or the State may propose to increase the penalty amount for facility noncompliance which, after imposition of a lower level penalty amount, becomes sufficiently serious to pose immediate jeopardy.

(2) HCFA does and the State must increase the penalty amount for any repeated deficiencies for which a lower level penalty amount was previously imposed, regardless of whether the increased penalty amount would exceed the range otherwise reserved for nonimmediate jeopardy deficiencies.

(3) Repeated deficiencies are deficiencies in the same regulatory grouping of requirements found at the last survey, subsequently corrected, and found again at the next survey.

(e) *Review of the penalty.* When an administrative law judge or State hearing officer (or higher administrative review authority) finds that the basis for imposing a civil money penalty exists, as specified in § 488.430, the administrative law judge or State hearing officer (or higher administrative review authority) may not—

(1) Set a penalty of zero or reduce a penalty to zero;

(2) Review the exercise of discretion by HCFA or the State to impose a civil money penalty; and

(3) Consider any factors in reviewing the amount of the penalty other than those specified in paragraph (f) of this section.

(f) *Factors affecting the amount of penalty.* In determining the amount of penalty, HCFA does or the State must take into account the following factors:

(1) The facility's history of noncompliance, including repeated deficiencies.

(2) The facility's financial condition.

(3) The factors specified in § 488.404.

(4) *The facility's degree of culpability. Culpability* for purposes of this paragraph includes, but is not limited to, neglect, indifference, or disregard for resident care, comfort or safety. The absence of culpability is not a mitigating circumstance in reducing the amount of the penalty.

§ 488.440 Civil money penalties: Effective date and duration of penalty.

(a) *When penalty begins to accrue.* The civil money penalty may start accruing as early as the date that the facility was first out of compliance, as determined by HCFA or the State.

(b) *Duration of penalty.* The civil money penalty is computed and collectible, as specified in §§ 488.432 and 488.442, for the number of days of noncompliance until the date the facility achieves substantial compliance, or, if applicable, the date of termination when—

(1) HCFA's or the State's decision of noncompliance is upheld after a final administrative decision;

(2) The facility waives its right to a hearing in accordance with § 488.436; or

(3) The time for requesting a hearing has expired and HCFA or the State has not received a hearing request from the facility.

(c) The entire accrued penalty is due and collectible, as specified in the notice sent to the provider under paragraphs (d) and (e) of this section.

(d) When a facility achieves substantial compliance, HCFA does or the State must send a separate notice to the facility containing—

(1) The amount of penalty per day;

(2) The number of days involved;

(3) The total amount due;

(4) The due date of the penalty; and

(5) The rate of interest assessed on the unpaid balance beginning on the due date, as provided in § 488.442.

(e) In the case of a terminated facility, HCFA does or the State must send this penalty information after the—

(1) Final administrative decision is made;

(2) Facility has waived its right to a hearing in accordance with § 488.436; or

(3) Time for requesting a hearing has expired and HCFA or the state has not received a hearing request from the facility.

(f) *Accrual of penalties when there is no immediate jeopardy.* (1) In the case of noncompliance that does not pose immediate jeopardy, the daily accrual of civil money penalties is imposed for the days of noncompliance prior to the notice specified in § 488.434 and an additional period of no longer than 6 months following the last day of the survey.

(2) After the period specified in paragraph (f)(1) of this section, if the facility has not achieved substantial compliance, HCFA terminates the provider agreement and the State may terminate the provider agreement.

(g) *Accrual of penalties when there is immediate jeopardy.* (1) When a facility has deficiencies that pose immediate jeopardy, HCFA does or the State must terminate the provider agreement within 23 calendar days after the last day of the survey if the immediate jeopardy remains.

(2) The accrual of the civil money penalty stops on the day the provider agreement is terminated.

(h) *Documenting substantial compliance.* (1) If an on-site revisit is necessary to confirm substantial compliance and the provider can supply documentation acceptable to HCFA or the State agency that substantial compliance was achieved on a date preceding the revisit, penalties only accrue until that date of correction for which there is written credible evidence.

(2) If an on-site revisit is not necessary to confirm substantial compliance, penalties only accrue until the date of correction for which HCFA or the State receives and accepts written credible evidence.

§ 488.442 Civil money penalties: Due date for payment of penalty.

(a) *When payments are due—*(1) *After a final administrative decision.* A civil

money penalty payment is due 15 days after a final administrative decision is made when—

(i) The facility achieves substantial compliance before the final administrative decision; or

(ii) The effective date of termination occurs before the final administrative decision.

(2) *When no hearing was requested.* A civil money penalty payment is due 15 days after the time period for requesting a hearing has expired and a hearing request was not received when—

(i) The facility achieved substantial compliance before the hearing request was due; or

(ii) The effective date of termination occurs before the hearing request was due.

(3) *After a request to waive a hearing.* A civil money penalty payment is due 15 days after receipt of the written request to waive a hearing when—

(i) The facility achieved substantial compliance before HCFA or the State received the written waiver of hearing; or

(ii) The effective date of termination occurs before HCFA or the State received the written waiver of hearing.

(4) *After substantial compliance is achieved.* A civil money penalty payment is due 15 days after substantial compliance is achieved when—

(i) The final administrative decision is made before the facility came into substantial compliance;

(ii) The facility did not file a timely hearing request before it came into substantial compliance; or

(iii) The facility waived its right to a hearing before it came into substantial compliance;

(5) *After the effective date of termination.* A civil money penalty payment is due 15 days after the effective date of termination, if before the effective date of termination—

(i) The final administrative decision was made;

(ii) The time for requesting a hearing has expired and the facility did not request a hearing; or

(iii) The facility waived its right to a hearing.

(6) In the cases specified in paragraph (a)(4) of this section, the period of noncompliance may not extend beyond 6 months from the last day of the survey.

(b) *Deduction of penalty from amount owed.* The amount of the penalty, when determined, may be deducted from any sum then or later owing by HCFA or the State to the facility.

(c) *Interest*—(1) *Assessment.* Interest is assessed on the unpaid balance of the penalty, beginning on the due date.

(2) *Medicare interest.* Medicare rate of interest is—

(i) Fixed by the Secretary of the Treasury after taking into consideration private consumer rates of interest prevailing on the date of the notice of the penalty amount due (published quarterly in the **Federal Register** by HHS under 45 CFR 30.13(a)); or

(ii) The current value of funds (published annually in the **Federal Register** by the Secretary of the Treasury, subject to quarterly revisions).

(3) *Medicaid interest.* The interest rate for Medicaid is determined by the State.

(d) Civil money penalties and corresponding interest collected by HCFA or the State from Medicare and Medicaid facilities must be returned to the Medicare Trust Fund or the State, respectively.

(e) *Collection from dually participating facilities.* Civil money penalties collected from dually participating facilities are returned to the Medicare Trust Fund and the State in proportion commensurate with the relative proportions of Medicare and Medicaid beds at the facility actually in use by residents covered by the respective programs on the date the civil money penalty begins to accrue.

(f) *Penalties collected by the State.* Civil money penalties collected by the State must be applied to the protection of the health or property of residents of facilities that the State or HCFA finds deficient, such as—

(1) Payment for the cost of relocating residents to other facilities;

(2) State costs related to the operation of a facility pending correction of deficiencies or closure; and

(3) Reimbursement of residents for personal funds or property lost at a facility as a result of actions by the facility or by individuals used by the facility to provide services to residents.

§ 488.444 Civil money penalties: Settlement of penalties.

(a) HCFA has authority to settle cases at any time prior to a final administrative decision for Medicare-only SNFs, State-operated facilities, or other facilities for which HCFA's enforcement action prevails, in accordance with § 488.330.

(b) The State has the authority to settle cases at any time prior to the evidentiary hearing decision for all cases in which the State's enforcement action prevails.

§ 488.450 Continuation of payments to a facility with deficiencies.

(a) *Criteria.* (1) HCFA may continue payments to a facility not in substantial compliance for the periods specified in paragraph (c) of this section if the following criteria are met:

(i) The State survey agency finds that it is more appropriate to impose alternative remedies than to terminate the facility;

(ii) The State has submitted a plan and timetable for corrective action approved by HCFA; and

(iii) The facility, in the case of a Medicare SNF, or the State, in the case of a Medicaid NF, agrees to repay the Federal government payments received under this provision if corrective action is not taken in accordance with the approved plan and timetable for corrective action.

(2) HCFA or the State may terminate the SNF or NF agreement before the end of the correction period if the criteria in paragraph (a)(1) of this section are not met.

(b) *Cessation of payments.* If termination is not sought, either by itself or along with another remedy or remedies, or any of the criteria set forth in paragraph (a)(1) if this section are not met or agreed to by either the facility or the State, the facility or State will receive no Medicare or Federal Medicaid payments, as applicable, from the last day of the survey.

(c) *Period of continued payments.* If the conditions in paragraph (a)(1) of this section are met, HCFA may continue payments to a Medicare facility or to the State for a Medicaid facility with noncompliance that does not constitute immediate jeopardy for up to 6 months from the last day of the survey.

(d) *Failure to achieve substantial compliance.* If the facility does not achieve substantial compliance by the end of the period specified in paragraph (c) of this section,

(1) HCFA will—

(i) Terminate the provider agreement of the Medicare SNF in accordance with § 488.456; or

(ii) Discontinue Federal funding to the SNF for Medicare; and

(iii) Discontinue FFP to the State for the Medicaid NF.

(2) The State may terminate the provider agreement for the NF.

§ 488.452 State and Federal disagreements involving findings not in agreement in non-State operated NFs and dually participating facilities when there is no immediate jeopardy.

The following rules apply when HCFA and the State disagree over findings of noncompliance or application of remedies in a non-State operated NF or dually participating facility:

(a) *Disagreement over whether facility has met requirements.* (1) The State's

finding of noncompliance takes precedence when—

(i) HCFA finds that a NF or a dually participating facility is in substantial compliance with the participation requirements; and

(ii) The State finds that a NF or dually participating facility has not achieved substantial compliance.

(2) HCFA's findings of noncompliance take precedence when—

(i) HCFA finds that a NF or a dually participating facility has not achieved substantial compliance; and

(ii) The State finds that a NF or a dually participating facility is in substantial compliance with the participation requirements.

(3) When HCFA's survey findings take precedence, HCFA may—

(i) Impose any of the alternative remedies specified in § 488.406;

(ii) Terminate the provider agreement subject to the applicable conditions of § 488.450; and

(iii) Stop FFP to the State for a NF.

(b) *Disagreement over decision to terminate.* (1) HCFA's decision to terminate the participation of a facility takes precedence when—

(i) Both HCFA and the State find that the facility has not achieved substantial compliance; and

(ii) HCFA, but not the State, finds that the facility's participation should be terminated. HCFA will permit continuation of payment during the period prior to the effective date of termination not to exceed 6 months, if the applicable conditions of § 488.450 are met.

(2) The State's decision to terminate a facility's participation and the procedures for appealing such termination, as specified in § 431.153(c) of this chapter, takes precedence when—

(i) The State, but not HCFA, finds that a NF's participation should be terminated; and

(ii) The State's effective date for the termination of the NF's provider agreement is no later than 6 months after the last day of survey.

(c) *Disagreement over timing of termination of facility.* The State's timing of termination takes precedence if it does not occur later than 6 months after the last day of the survey when both HCFA and the State find that—

(1) A facility is not in substantial compliance; and

(2) The facility's participation should be terminated.

(d) *Disagreement over remedies.* (1) When HCFA or the State, but not both, establishes one or more remedies, in addition to or as an alternative to termination, the additional or alternative remedies will also apply when—

(i) Both HCFA and the State find that a facility has not achieved substantial compliance; and

(ii) Both HCFA and the State find that no immediate jeopardy exists.

(2) *Overlap of remedies.* When HCFA and the State establish one or more remedies, in addition to or as an alternative to termination, only the HCFA remedies apply when both HCFA and the State find that a facility has not achieved substantial compliance.

(e) Regardless of whether HCFA's or the State's decision controls, only one noncompliance and enforcement decision is applied to the Medicaid agreement, and for a dually participating facility, that same decision will apply to the Medicare agreement.

§ 488.454 Duration of remedies.

(a) Except as specified in paragraph (b) of this section, alternative remedies continue until—

(1) The facility has achieved substantial compliance, as determined by HCFA or the State based upon a revisit or after an examination of credible written evidence that it can verify without an on-site visit; or

(2) HCFA or the State terminates the provider agreement.

(b) In the cases of State monitoring and denial of payment imposed for repeated substandard quality of care, remedies continue until—

(1) HCFA or the State determines that the facility has achieved substantial compliance and is capable of remaining in substantial compliance; or

(2) HCFA or the State terminates the provider agreement.

(c) In the case of temporary management, the remedy continues until—

(1) HCFA or the State determines that the facility has achieved substantial compliance and is capable of remaining in substantial compliance;

(2) HCFA or the State terminates the provider agreement; or

(3) The facility which has not achieved substantial compliance reassumes management control. In this case, HCFA or the State initiates termination of the provider agreement and may impose additional remedies.

(d) If the facility can supply documentation acceptable to HCFA or the State survey agency that it was in substantial compliance, and was capable of remaining in substantial compliance, if necessary, on a date preceding that of the revisit, the remedies terminate on the date that HCFA or the State can verify as the date that substantial compliance was achieved.

§ 488.456 Termination of provider agreement.

(a) *Effect of termination.* Termination of the provider agreement ends—

(1) Payment to the facility; and

(2) Any alternative remedy.

(b) *Basis for termination.* (1) HCFA and the State may terminate a facility's provider agreement if a facility—

(i) Is not in substantial compliance with the requirements of participation, regardless of whether or not immediate jeopardy is present; or

(ii) Fails to submit an acceptable plan of correction within the timeframe specified by HCFA or the State.

(2) HCFA and the State terminate a facility's provider agreement if a facility—

(i) Fails to relinquish control to the temporary manager, if that remedy is imposed by HCFA or the State; or

(ii) Does not meet the eligibility criteria for continuation of payment as set forth in § 488.412(a)(1).

(c) *Notice of termination.* Before terminating a provider agreement, HCFA does and the State must notify the facility and the public—

(1) At least 2 calendar days before the effective date of termination for a facility with immediate jeopardy deficiencies; and

(2) At least 15 calendar days before the effective date of termination for a facility with non-immediate jeopardy deficiencies that constitute noncompliance.

(d) *Procedures for termination.* (1) HCFA terminates the provider agreement in accordance with procedures set forth in § 489.53 of this chapter; and

(2) The State must terminate the provider agreement of a NF in accordance with procedures specified in parts 431 and 442 of this chapter.

PART 489—PROVIDER AGREEMENTS AND SUPPLIER APPROVAL

I. Part 489 is amended as follows:

1. The authority citation for part 489 is revised to read as follows:

Authority: Secs. 1102, 1819, 1861, 1864(m), 1866, and 1871 of the Social Security Act (42 U.S.C. 1302, 1395i–3, 1395x, 1395aa(m), 1395cc, and 1395hh).

2. The heading for part 489 is revised as set forth above.

3. In § 489.3, the definition of "immediate jeopardy" is revised to read as follows:

§ 489.3 Definitions.

* * * * *

Immediate jeopardy means a situation in which immediate corrective action is necessary because the provider's

noncompliance with one or more requirements of participation has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident.

* * * * *

§ 489.11 [Amended]

4. Section 489.11 is amended by removing paragraph (c)(3).

5. Section 489.12 is amended by revising paragraph (a) to read as follows:

§ 489.12 Decision to deny an agreement.

(a) *Bases for denial.* HCFA may refuse to enter into an agreement for any of the following reasons:

(1) Principals of the prospective provider have been convicted of fraud (see § 420.204 of this chapter);

(2) The prospective provider has failed to disclose ownership and control interests in accordance with § 420.206 of this chapter; or

(3) The prospective provider is unable to give satisfactory assurance of compliance with the requirements of title XVIII of the Act.

* * * * *

6. Section 489.13 is revised to read as follows:

§ 489.13 Effective date of agreement.

(a) *All Federal requirements are met on the date of the survey.* The agreement is effective on the date the on-site survey is completed if, on the date of the survey, the provider meets all Federal health and safety conditions of participation or requirements (for SNFs), and any other requirements imposed by HCFA.

(b) *All Federal requirements are not met on the date of the survey.* If the provider fails to meet any of the requirements specified in paragraph (a) of this section, the agreement will be effective on the earlier of the following dates:

(1) The date on which the provider meets all requirements.

(2) Except for SNFs, the date on which the provider is found to meet all conditions of participation and submits a plan of correction acceptable to HCFA for lower-level deficiencies or an approvable waiver request, or both.

(3) The date on which a SNF—

(i) Is in substantial compliance, as defined in § 488.301; and

(ii) Submits an acceptable plan of correction, if applicable, or an approvable waiver request, or both.

§ 489.15 [Removed]

7. Section 489.15 is removed.

§ 489.16 [Removed]

8. Section 489.16 is removed.

9. Section 489.18 is amended by revising paragraph (d) to read as follows:

§ 489.18 Change of ownership or leasing: Effect on provider agreement.

* * * * *

(d) *Conditions that apply to assigned agreements.* An assigned agreement is subject to all applicable statutes and regulations and to the terms and conditions under which it was originally issued including, but not limited to, the following:

(1) Any existing plan of correction.

(2) Compliance with applicable health and safety standards.

(3) Compliance with the ownership and financial interest disclosure requirements of part 420, subpart C, of this chapter.

(4) Compliance with civil rights requirements set forth in 45 CFR Parts 80, 84, and 90.

* * * * *

10. Section 489.53 is amended by removing and reserving paragraph (b), adding a new paragraph (a)(13), and revising paragraph (c) to read as follows:

§ 489.53 Termination by HCFA.

(a) * * *

(13) It refuses to permit photocopying of any records or other information by, or on behalf of HCFA, as necessary to determine or verify compliance with participation requirements.

(b) [Reserved]

(c) *Notice of termination*—(1) *Timing: Basic rule.* Except as provided in § 488.456 of this chapter, HCFA gives the provider notice of termination at least 15 days before the effective date of termination of the provider agreement.

(2) *Immediate jeopardy deficiencies.* For a provider or supplier with deficiencies that pose immediate jeopardy to residents' or patients' health or safety, HCFA gives notice of termination at least 2 days before the effective date of termination of the provider agreement.

(3) *Content of notice.* The notice states the reasons for, and the effective date of, the termination, and explains the extent to which services may continue after that date, in accordance with § 489.55.

(4) *Notice to public.* HCFA concurrently gives notice of the termination to the public.

* * * * *

Subpart F—[Removed]

10. Subpart F, consisting of §§ 489.60, 489.62, 489.64, and 489.66 is removed.

PART 498—APPEALS PROCEDURES FOR DETERMINATIONS THAT AFFECT PARTICIPATION IN THE MEDICARE PROGRAM AND FOR DETERMINATIONS THAT AFFECT THE PARTICIPATION OF ICFS/MR AND CERTAIN NFS IN THE MEDICAID PROGRAM

K. Part 498 is amended as follows:

1. The authority citation for part 498 is revised to read as follows:

Authority: Secs. 205(a), 1102, 1819, 1861(aa), 1869(c), 1871, 1872, and 1919 of the Social Security Act (42 U.S.C. 405(a), 1302, 1395i–3, 1395x(aa), 1395ff(c), 1395hh, 1395ii and 1396r(g) and (h)), unless otherwise noted.

2. The heading of part 498 is revised as set forth above.

3. Section 498.1 is amended by adding a new paragraph (h) to read as follows:

§ 498.1 Statutory basis.

* * * * *

(h) Section 1128A of the Act provides that HCFA will not collect a civil money penalty while a SNF or NF has a final administrative decision pending on the noncompliance that led to the imposition of the civil money penalty.

4. Section 498.2 is amended by revising the definition of *Provider* to read as follows:

§ 498.2 Definitions.

* * * * *

Provider means a hospital, rural primary care hospital (RPCH), skilled nursing facility (SNF), comprehensive outpatient rehabilitation facility (CORF), home health agency (HHA), or hospice, that has in effect an agreement to participate in Medicare, a nursing facility (NF), or intermediate care facility for the mentally retarded (ICF/MR) that has in effect an agreement to participate in Medicaid, or a clinic, rehabilitation agency, or public health agency that has a similar agreement but only to furnish outpatient physical therapy or outpatient speech pathology services, and "prospective provider" means any of the listed entities that seeks to participate in Medicare as a provider.

* * * * *

5. Section 498.3 is amended by revising paragraph (b)(7), adding new paragraphs (b)(12) and (b)(13), revising paragraphs (d)(1) and (d)(10), redesignating paragraphs (d)(11) and (d)(12) as (d)(13) and (d)(14), respectively, and adding new paragraphs (d)(11) and (d)(12), to read as follows:

§ 498.3 Scope and applicability.

* * * * *

(b)* * *

(7) Except for SNFs and NFs, the termination of a provider agreement in accordance with § 489.53 of this chapter, or the termination of a rural health clinic agreement in accordance with § 405.2404 of this chapter, or the termination of a Federally qualified health center agreement in accordance with § 405.2400 of this chapter.

* * * * *

(12) Except as provided at § 498.3(d)(11). for SNFs and NFs, the finding of noncompliance leading to the imposition of enforcement actions specified in § 488.406 of this chapter, but not the determination as to which remedy to impose. The scope of review on the imposition of a civil money penalty is specified in § 488.438(e) of this chapter.

(13) The level of noncompliance found by HCFA in a SNF or NF only if a successful challenge on this issue would affect the range of civil money penalty amounts that HCFA could collect.

(d) * * *

(1) The finding that a provider or supplier determined to be in compliance with the conditions of participation or the conditions for coverage has deficiencies.

* * * * *

(10) With respect to an SNF or NF that is not in substantial compliance with the requirements, the finding that the SNF's or NF's deficiencies pose immediate jeopardy to residents' health or safety, except as provided in paragraph (b)(14) of this section.

(11) For SNFs and NFs, the imposition of State monitoring or loss of nurse aide training.

(12) Except as provided in paragraph (b)(14) of this section, a determination by HCFA concerning the level of noncompliance in an SNF or NF.

* * * * *

6. A new § 498.4 is added to read as follows:

§ 498.4 NFs subject to appeals process in part 498.

A NF is considered a provider for purposes of this part when it has in effect an agreement to participate in Medicaid, including an agreement to participate in both Medicaid and Medicare and it is a—

(a) State-operated NF; or

(b) Non State-operated NF that is subject to compliance action as a result of—

(1) A validation survey by HCFA; or

(2) HCFA's review of the State's survey findings.

7. Section 498.5 is amended by revising paragraphs (f)(1), (i)(2), and (j)(1) to read as follows:

§ 498.5 Appeal rights.

* * * * *

(f) *Appeal rights of suppliers and prospective suppliers.* (1) Any supplier or prospective supplier dissatisfied with the hearing decision may request Departmental Appeals Board review of the ALJ's decision.

* * * * *

(i) *Appeal rights for suspended or excluded practitioners, providers, or suppliers.*

* * * * *

(2) Any suspended or excluded practitioner, provider, or supplier dissatisfied with a hearing decision may request Departmental Appeals Board review and has a right to seek judicial review of the Board's decision by filing an action in Federal district court.

* * * * *

(j) *Appeal rights for Medicaid ICFs/MR terminated by HCFA.* (1) Any Medicaid ICF/MR that has had its approval cancelled by HCFA in accordance with § 498.3(b)(8) has a right to a hearing before an ALJ, to request Departmental Appeals Board review of the hearing decision, and to seek judicial review of the Board's decision.

* * * * *

8. Section 498.61 is revised to read as follows:

§ 498.61 Evidence.

(a) Evidence may be received at the hearing even though inadmissible under the rules of evidence applicable to court procedure. The ALJ rules on the admissibility of evidence.

(b) In civil money penalty cases, HCFA's conclusions as to a SNF's or NF's level of noncompliance must be upheld unless clearly erroneous.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program; No. 93.773, Medicare Hospital Insurance)

Editorial Note: This document was received by the Office of the Federal Register on November 3, 1994.

Dated: June 13, 1994.

Bruce C. Vladeck,

Administrator, Health Care Financing Administration.

Dated: July 25, 1994.

Donna E. Shalala,

Secretary.

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Thursday
November 10, 1994

Part III

Department of Agriculture

Agricultural Marketing Service

7 CFR Part 956

Sweet Onions Grown in the Walla Walla Valley of Southeast Washington and Northeast Oregon; Recommended Decision; Proposed Rule

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 956

[Docket No. 94AMA–FV–956–1; FV93–956–1PR]

Sweet Onions Grown in the Walla Walla Valley of Southeast Washington and Northeast Oregon; Recommended Decision and Opportunity To File Written Exceptions to the Proposed Marketing Agreement and Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This recommended decision proposes the issuance of a marketing agreement and order for Walla Walla Sweet Onions in southern Washington and northeast Oregon. For the purposes of this document, the term "Walla Walla Sweet Onions" refers to sweet onions grown in the proposed production area, which consists of designated parts of Walla Walla County, Washington, and designated parts of Umatilla County, Oregon. The proposed order and agreement would authorize production and marketing research and marketing development and promotion projects, including paid advertising, and would authorize container markings. The order would be administered by a ten-member committee consisting of six producer members, three handler members, and a public member. The order would be financed by assessments on handlers of Walla Walla Sweet Onions grown in the production area. A primary objective of this program would be to improve producer returns by strengthening consumer demand through various promotional activities and by reducing production and marketing costs through production and marketing research. Walla Walla Sweet Onion producers would vote in a referendum to determine if they favor issuance of the proposed marketing order.

DATES: Comments must be received by December 12, 1994.

ADDRESSES: Four copies of all comments should be sent to the Hearing Clerk, United States Department of Agriculture (USDA), Room 1079, South Building, Washington, D.C. 20250–9200. All written comments will be made available for public inspection at the Office of the Hearing Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: Gary D. Olson, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, 1220 S.W. Third Avenue, Room 369, Portland, Oregon, 97204; telephone: (503)326–2724, FAX: (503)326–7440; or Robert F. Matthews, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2523–S, Washington, D.C. 20090–6456; telephone: (202)690–0464, FAX: (202)720–5698.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Notice of Hearing, issued October 26, 1993, and published in the Federal Register on October 29, 1993 [58 FR 58105].

This administrative action is governed by the provisions of sections 556 and 557 of Title 5 of the United States Code, and is therefore excluded from the requirements of Executive Order 12866.

Preliminary Statement: Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to a proposed marketing agreement and order regulating the handling of sweet onions grown in the Walla Walla Valley of Southeast Washington and Northeast Oregon. This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601–674], hereinafter referred to as the Act, and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders [7 CFR Part 900].

The proposed Federal marketing agreement and order (order) were formulated on the record of a public hearing held at the Education Service District Building in Walla Walla, Washington, on November 15, 1993. The hearing was held pursuant to the provisions of the Act. Approximately 25 witnesses, including Walla Walla Sweet Onion producers, handlers, and a Washington State University researcher, testified in support of the order. Proponents emphasized that Walla Walla Sweet Onion producers need a Federal marketing order to effectively compete with other sweet onion producing areas. No one present at the hearing testified in opposition to the proposed order. At the close of the hearing, January 15, 1994, was established as the date by which briefs, statements, and proposed corrections to the transcript were due. None were filed.

The proponents testified that Walla Walla Sweet Onion producers, in order to remain competitive with other sweet onion producing areas, must conduct research and promotion programs to reduce production and marketing costs and increase sales. Such programs should include production and marketing research projects and promotion projects, including paid advertising.

Testimony indicated that voluntary research and development efforts by the Walla Walla Sweet Onion industry have not been successful because of the lack of a coherent research and development plan with broad-based industry support. Also, a relatively small percentage of the U.S. onion crop is produced in the proposed production area in Walla Walla County, Washington, and Umatilla County, Oregon, and individual producers and handlers cannot implement an effective research, marketing development, and promotion program. By contrast, most other onion growing areas in the United States are large enough to convince private entities, such as seed companies, to conduct production research and developmental efforts with the result being new varieties specifically suited to those areas. Proponents believe that an industry-wide program is therefore necessary to enable the pooling of resources to address common problems. A single producer or even two or three producers cannot marshal the resources necessary to conduct effective research, marketing, and promotion programs.

Small Business Consideration: In accordance with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Administrator of the Agricultural Marketing Service considered the economic impact of this action on small entities. The record indicates that there are approximately nine handlers of Walla Walla Sweet Onions in the proposed production area and 50 producers. Small agricultural service firms have been defined by the Small Business Administration (SBA) (13 CFR 121.601) as those whose annual receipts are less than $5,000,000, and small agricultural producers as those having annual receipts of less than $500,000. The majority of the handlers and producers may be classified as small entities.

During the 1992 season, commercial shipments of Walla Walla Sweet Onions totaled about 390,000 hundredweight at an average f.o.b. price of $16.60 per hundredweight for a total value of $6,474,000. An indeterminate volume, probably about 10 percent, was sold at roadside stands. While there is a great variance in the size of individual handlers' operations, the record indicates that nearly all of the handlers that would be regulated under this order would qualify as small firms under the SBA's definition. Witnesses testified that because most of the producers and handlers of Walla Walla Sweet Onions are small, they are unable to

individually finance the types of research and promotion efforts needed by the industry. A marketing order program would provide a means for these small entities to pool their resources and work together to solve their common problems. Witnesses testified that such action is necessary for this relatively small industry to remain profitable in the face of intense competition from larger industries.

Acreage and supplies of Walla Walla Sweet Onions have declined in recent years, and proponents believe that the order would provide a much needed means of halting the drop in grower returns experienced in past seasons. This would be achieved by strengthening demand and developing new markets for existing supplies and encouraging increased production. Also, costs could be reduced through production research. Thus, the order would be expected to have a positive impact on producer returns.

The order would authorize the collection of assessments from handlers of Walla Walla Sweet Onions grown in the designated parts of Walla Walla County, Washington, and Umatilla County, Oregon. Assessment funds would be used to finance production research projects that could reduce costs by reducing the occurrence of onion diseases, controlling plant pests, and developing varieties with more desirable flavor, quality, and size. Assessment funds could also be used to strengthen demand and expand markets for Walla Walla Sweet Onions through marketing research and development, and product promotion programs, including paid advertising. Projects to develop better methods of handling, shipping or storing onions, to explore additional or alternative uses of onions, to check nutritive values, and similar research are some examples of marketing research. Examples of marketing development projects include exploring marketing possibilities, contacting buyers, distributing educational material relating to the handling and marketing of onions, and the dissemination of the results of current or past marketing research projects.

The order would be administered by a committee composed of Walla Walla Sweet Onion producers, handlers, and a public member nominated by growers and handlers and selected by the Secretary of Agriculture (Secretary). Daily administration of the order would be carried out by a staff hired by the committee. The order would not regulate the production of Walla Walla Sweet Onions and would place no restriction on the quality or quantity of Walla Walla Sweet Onions that could be handled.

The principal requirements of the order that would affect handlers would be the requirements that they pay assessments on fresh market shipments of Walla Walla Sweet Onions to fund research and promotion programs and that container markings would be regulated. The amount of the assessment rate is not specified in the proposed order, but witnesses at the hearing indicated that an appropriate rate might be five cents per 50-pound bag for administrative costs; research and promotion costs could require an additional five to seven cents per bag or more. Any assessment rate to cover committee expenses that may be established would be recommended by the committee to the Secretary for approval.

The order would also impose some reporting and recordkeeping requirements on handlers. Handler testimony indicated that the expected burden that would be imposed with respect to these requirements would be negligible. Most of the information that would be reported to the committee is already compiled by handlers for other uses and is readily available. In compliance with Office of Management and Budget (OMB) regulations (5 CFR Part 1320) which implement the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35) and section 3504(h) of that Act, the information collection and recordkeeping requirements that may be imposed by this order would be submitted to OMB for approval. Those requirements would not become effective prior to OMB approval. Any requirements imposed would be evaluated against the potential benefits to be derived and it is expected that any added burden resulting from increased recordkeeping would not be significant when compared to those anticipated benefits.

Reporting and recordkeeping requirements issued under comparable marketing order programs impose an average annual burden on each regulated handler of about one hour with a two year record requirement. It is reasonable to expect that a comparable burden may be imposed under this order on the estimated nine handlers of Walla Walla Sweet Onions.

The Act requires that prior to the issuance of an order, a referendum be conducted of affected producers to determine if they favor issuance of the order. The ballot material that will be used in conducting the referendum will be submitted to and approved by OMB prior to use. It is estimated that it would take an average of 10 minutes for each of the approximately 50 Walla Walla Sweet Onion growers to participate in the voluntary referendum balloting. Additionally, it has been estimated that it would take approximately ten minutes for each of the nine handlers to complete the marketing agreement. In determining that the order would not have a significant economic impact on a substantial number of small entities, all of the issues discussed above were considered. The order provisions have been carefully reviewed and every effort has been made to eliminate any unnecessary costs or requirements. Although the order may impose some additional costs and requirements on handlers, it is anticipated that the order would help to strengthen demand for Walla Walla Sweet Onions. Therefore, any additional costs should be offset by the benefits derived from expanded markets and sales benefitting handlers and producers alike. Accordingly, it is determined that the order would not have a significant economic impact on a substantial number of small handlers or producers.

Material Issues: The material issues presented on the record of the hearing are as follows:

1. Whether the handling of Walla Walla Sweet Onions grown in the proposed production area is in the current of interstate or foreign commerce, or directly burdens, obstructs, or affects such commerce;

2. Whether the economic and marketing conditions are such that they justify a need for an order which will tend to effectuate the declared policy of the Act;

3. What the definition of the production area and the commodity to be covered by the order should be;

4. What the identity of the persons and the marketing transactions to be regulated should be; and

5. What the specific terms and provisions of the order should be, including:

(a) The definition of terms used therein which are necessary and incidental to attain the declared policy and objectives of the order and the Act;

(b) The establishment, composition, maintenance, procedures, powers and duties of a committee that would be the local administrative agency for assisting the Secretary in the administration of the order;

(c) The authority to incur expenses and the procedure to levy assessments on handlers to obtain revenue for paying such expenses;

(d) The authority to establish or provide for the establishment of production and marketing research and

marketing development projects, including paid advertising;

(e) The authority to establish regulations for container markings and safeguards for such regulations;

(f) The establishment of requirements for handler reporting and recordkeeping;

(g) The requirement of compliance with all provisions of the order and with any regulations issued under it, and

(h) Miscellaneous provisions as set forth in §§ 956.85 through 956.96 of the Notice of Hearing published in the Federal Register of October 29, 1993 [58 FR 58105] which are common to all orders, and other terms and conditions published at §§ 956.97 through 956.99 that are common to marketing agreements only.

Findings and Conclusions:

The following proposed findings and conclusions on the material issues are based on the record of the hearing.

1. The record indicates that the handling of Walla Walla Sweet Onions grown in designated parts of Walla Walla County, Washington, and designated parts of Umatilla County, Oregon, is in the current of interstate or foreign commerce or directly burdens, obstructs or affects such commerce. The proposed production area is discussed in material issue 3.

The record evidence shows that in July 1989, 49 percent of the commercial shipments of Walla Walla Sweet Onions were marketed in Seattle, Washington. That percentage increased over the following four years, and, in 1993, 71 percent of the volume moved to outlets inside the State, the remaining 29 percent going to both eastern and western destinations outside Washington and Oregon. An indeterminate volume of Walla Walla Sweet Onions is sold within the proposed production area at roadside stands, and some are marketed throughout the United States. A negligible percentage of the crop is processed. The record indicates that no Walla Walla Sweet Onions are currently exported, but that they may be in the future.

In addition to Seattle, the record indicates that other major markets for Walla Walla Sweet Onions include Chicago, Illinois, and San Francisco, California. USDA Market News reports show that these three markets accounted for about 12 percent of commercial shipments in June, July, and August of 1992. Walla Walla Sweet Onions also were marketed (in descending order of volume marketed) in Los Angeles, California; Atlanta, Georgia; Boston, Massachusetts; New York, New York; Baltimore, Maryland; Cincinnati, Ohio; St. Louis, Missouri; Dallas, Texas; Miami, Florida; Pittsburgh, Pennsylvania; and Detroit, Michigan.

Record evidence shows that any handling of Walla Walla Sweet Onions in fresh market channels, including intrastate shipments, exerts an influence on all other handling of such onions and vice versa. Therefore, because such shipments directly burden, obstruct, or affect such commerce, all handling of Walla Walla Sweet Onions grown in the proposed production area should be covered by the order, and an order for Walla Walla Sweet Onions is supported by the evidence in the record of hearing.

2. The record indicates that onions are grown in each of the 50 States, but commercial production is concentrated in a few. There are three major seasonal groups of U.S. dry onions. They include spring onions produced mainly in Georgia, Texas, and California; summer non-storage onions grown in New Mexico, Texas, and Washington; and summer storage onions produced mostly in Colorado, Idaho, Michigan, New York, Ohio, Oregon, Utah, Minnesota, Washington, and Wisconsin.

The record also indicates that during its season, the Walla Walla Sweet Onion industry faces strong competition from other summer non-storage onion suppliers. Two major competitors are New Mexico, which, in 1992 accounted for 74 percent of the summer non-storage crop, and the High Plains and Trans-Pecos areas of Texas, with 17 percent of the crop.

The shipping season for Walla Walla Sweet Onions runs from late June through early August each year. About 23 percent of the volume moves in June, about 40 percent in July, and the remaining 37 percent is shipped in August.

As is true with other commodities, sellers of onions conduct their businesses to obtain maximum returns for the product they have for sale. Handlers and other sellers therefore continually survey all accessible markets so that they may take advantage of the best possible prices available. Further, they constantly attempt to develop demand and seek new markets for their product. Likewise, onion buyers consider prices and availability of onions from all sources in making their purchasing decisions. Frequent market news reports of onion prices are available in shipping areas, and means of rapid communication are readily available. For these reasons, onion supplies and prices in any one location are promptly known elsewhere and have a direct effect on onion supplies and prices in other locations.

Summer storage onions normally account for over half the U.S. dry onion crop. About 55 percent of the 1993 dry onion crop was summer storage compared to 59 percent in 1992. The two principal types of onions grown for the summer storage crop are globe and sweet Spanish type onions. Globe onions are the dominant type grown in the midwest and east and are not generally adaptable to production in the southern States. They tend to have a strong flavor, are firm to hard to the touch, and keep well under proper storage conditions. Spanish type onions are particularly well adapted to production in the western States. They are noted for their milder, sweeter flavor, but have a more limited storage life than globes. Onions grown in the northern States are harvested primarily in July and August, and the bulk of the crop is placed in storage. Marketing of the late-summer onion crop begins shortly after harvest and continues through the fall and winter and into the spring months.

Spring non-storage onions rank second in seasonal importance. Production totaled eight million hundredweight in 1993, 14 percent of the U.S. total. Spring crop onions are grown primarily in the southern States and are principally of the Grano and Granex types. These types of onions are typically sweeter and milder than the globe type. Additionally, they are more tender and perishable than either the globe or Spanish type onion. Unlike the summer storage onion crop, the spring crop is marketed relatively soon after harvest. Major producers of the spring onion crop are California, Texas, Arizona, and Georgia.

Summer non-storage production reached only 4.8 million hundredweight in 1993, but this was a record crop for summer non-storage production; the 1992 crop was 4.3 million hundredweight.

Testimony indicated that onions were first planted commercially in Walla Walla County, Washington, located in what is now known as the Walla Walla Valley around the year 1900. According to testimony, it was discovered that the unique growing conditions in this area of southeastern Washington and northeastern Oregon, particularly the low sulfur content of the soil, yielded a sweeter, milder onion than those grown elsewhere. In 1915, 500 carlots consisting of 300 100-pound sacks each were grown and shipped from the outskirts of Walla Walla.

The record indicates that the majority of current commercial non-storage onion production in Washington is in the Walla Walla Valley. Testimony

shows that separate acreage, price, and production statistics are not available for the Walla Walla Valley alone, but also include other areas in Washington, such as the Tri-cities area, the Yakima Valley, and the Columbia River Basin. The record indicates that neither the National Agricultural Statistics Service (NASS) nor State reporting services for Washington and Oregon report separate statistics for Walla Walla Sweet Onions. Such statistics are grouped together as summer-non storage onions. Witnesses testified that Walla Walla Sweet Onion acreage is included in the total for Washington non-storage onions, so that any figure representing Walla Walla Sweet Onions is necessarily an estimate. Moreover, no statistical data are available for Umatilla County, Oregon, although one witness testified that perhaps 150 to 200 acres of Walla Walla Sweet Onions may be grown. As reported by NASS, summer non-storage onions grown in Washington in 1980 totaled 780 acres, increasing until 1988 when 1,600 acres were harvested. Since then, acreage has declined to 1,000 acres in 1992. Testimony was offered that Walla Walla Sweet Onion acreage has been declining at the rate of about 100 acres per year. Moreover, although harvested acreage in Washington for 1991 was reported as 900 acres, the record indicates that the total number of acres of sweet onions harvested in the Walla Walla Valley was as little as half that, the remaining acreage being in other areas in the State.

Washington summer non-storage acreage currently accounts for about .71 percent of the U.S. annual total, and an estimated 9 percent of the summer non-storage crop. Washington accounts for less than a tenth of summer non-storage onion production, however, because Washington's acreage is much less than that of competing growing areas in New Mexico and Texas. The record indicates that the average yield for the Washington summer non-storage onion crop in 1992 was about 390 hundredweight per acre. This compares with the average yield for all summer non-storage onions of 341 hundredweight per acre.

Walla Walla Sweet Onion plantings begin about September 10 and end as late as October. The majority of growers attempt to have most of the crop planted by mid- to late-September. Since the growing season spans the winter months, freeze damage to Walla Walla Sweet Onions is a risk growers face each year. Harvest typically begins in the following June. Walla Walla Sweet Onions are shipped from June through August, with peak volume moving in July. Statistical data indicate that production of non-storage onions in Washington has risen in recent years, totaling 29.7 million pounds in 1991, 39.0 million pounds in 1992, and 36.0 million pounds in 1993.

The record indicates that one weakness in current post harvest handling practices is storage life. Current produced varieties of Walla Walla Sweet Onions are highly perishable and cannot be stored for extended periods. Preliminary research has shown that the life of Walla Walla Sweet Onions can be extended by low temperature storage. Additionally, the identification of varieties with longer storage capability would benefit the industry.

The record indicates that further extending the storage life of Walla Walla Sweet Onions has become a critical need of the industry, particularly in view of its competitive pressures. Witnesses testified that the relatively short life of Walla Walla Sweet Onions accentuates the industry's marketing risks by adding an urgency to move the produce quickly into wholesale and retail channels without regard to existing supplies and prices in those markets. The proposed order would authorize production research projects to address these problems.

Season average prices for Washington summer non-storage onions decreased 31 percent to $16.60 per hundredweight in 1992. Prices reached a record high in 1991 at $23.90 per hundredweight. The 1992 crop was valued at $6.5 million, which was an 8 percent decrease from the previous season. Monthly prices generally decrease during the peak harvesting in the State of Washington. There are no separate price data available for Umatilla County. However, given the small production area, such prices from the Walla Walla Valley area of Umatilla County should be similar to those of the adjacent area of Washington.

Monthly prices received for Washington summer non-storage onions decreased 9 percent from June 1992, to August, 1992 ($17.50 per hundredweight to $16.00 per hundredweight). Prices for 1991 were considerably higher, beginning at $29.40 per hundredweight and ending at $20.00 per hundredweight. The five-year average non-storage onion prices in Washington (1988–1992) for the period June through August, respectively, was $20.94, $16.94, and $14.06 per hundredweight. This compared with total U.S. five-year non-storage onion average prices of $12.22, $14.20, and $12.16 per hundredweight for the same period. U.S. summer non-storage prices in June of 1992 were 37 percent lower than Washington summer non-storage prices during that period, but prices began to even out in August of 1992 at $16.00 per hundredweight for Washington summer non-storage onions and rose 23 percent to $15.80 per hundredweight for the U.S. total for non-storage onions.

According to testimony, a major share of the Walla Walla Sweet Onion market is being lost to two major competitors, South Texas onions and those from Vidalia, Georgia. Onions grown in these areas are covered by Federal marketing order programs that fund promotion and advertising activities and, therefore, help to make buyers and consumers more aware of the favorable attributes of the onions.

Marketing order programs for Idaho-Eastern Oregon onions regulate the handling of onions grown on approximately 17,600 acres; the South Texas program has about 14,200 acres; and the Vidalia program covers about 8,000 acres. The industry believes that a research and promotion program is necessary to expand Walla Walla markets.

Witnesses attributed the recent downward trend in Walla Walla Sweet Onion prices in part to increasing competitive pressures from other, larger onion growing areas. Testimony indicated that while the Walla Walla Sweet Onion is considered unique in its sweetness, other areas have or are developing sweet varieties of onions to capitalize on the strong consumer demand for sweet onions. For example, the South Texas onion industry has funded, through a Federal marketing order, varietal research to develop an onion variety with the desired characteristics of being mild tasting and sweet. This variety, called the Texas Grano 1015 Y, has been actively promoted. The record indicates that the South Texas onion industry budgeted funds for research and market development activities through its marketing order. Additionally, handlers in Idaho and Eastern Oregon, also under a Federal marketing order program, budgeted funds during the same period for promotion and research of its sweet Spanish onion. Witnesses attributed the success these other growing areas have had to their ability to pool available resources under their respective marketing orders. Proponents testified that the research and promotion activities conducted by competitors have assisted those competing industries in developing and promoting sweeter onion varieties that are challenging the Walla Walla Sweet Onion for its share of the onion market. It is believed that a similar program is

necessary for Walla Walla Sweet Onions to remain profitable in this competitive industry.

The record indicates that most Northwest residents are familiar with the taste and origin of the Walla Walla Sweet Onion. The record also indicates that they are aware of its unique flavor characteristics and are loyal customers. However, as the Walla Walla industry has grown, the development of new markets has become necessary. Testimony demonstrated the need to differentiate the Walla Walla Sweet Onion from other onions available in the marketplace to garner customer loyalty in markets located outside Washington and Oregon.

The record indicates that most Walla Walla Sweet Onion growers and handlers are not sufficiently large to finance promotion and research programs on an individual basis. In addition, public funds to finance such projects are scarce. Heretofore, the Walla Walla Sweet Onion industry has attempted to operate and fund research and development projects under voluntary programs. Eventually, these programs ceased to operate because of inadequate support and financing. Witness testimony unanimously supported a marketing order program to be financed by all handlers, to strengthen consumer demand through promotion of the commodity and reducing costs through production research.

Witnesses also testified that market research, in the form of data collection and analysis, would be an essential part of an overall marketing and promotion strategy. Currently, limited data is gathered with respect to Walla Walla Sweet Onions. To effectively promote and market Walla Walla Sweet Onions, proponents testified that additional knowledge of market conditions and access to complete data is necessary to make prudent decisions for focusing promotional efforts and promoting the efficient allocation of resources.

The record indicates that many onions sold as Walla Walla Sweet Onions do not have the same mild flavor and other characteristics of Walla Walla Sweet Onions grown in the proposed production area. Several witnesses testified that often such onions were identified as Walla Walla Sweet Onions grown in other states or areas near the Walla Walla Valley. Testimony indicates that the growers of the Walla Walla Valley have spent time and effort attempting to market the Walla Walla Sweet Onion as one they believe has unique characteristics because of the area in which the onions are grown. These growers believe that such efforts have been offset by growers and handlers selling onions produced outside the proposed production area as Walla Walla Sweet Onions. Testimony indicated that 40 percent of the onions sold and described as Walla Walla Sweet Onions were grown outside the proposed production area and, therefore, were not true Walla Walla Sweet Onions.

In summary, a number of problems were identified in the record that could be resolved through a marketing order that would enable the Walla Walla industry to work together collectively. Identifying varieties that have good seedling survival rate, a low susceptibility to cold damage, good eating quality, and increased storage capability would add stability to the supply and quality of the Walla Walla Sweet Onion crop, and could increase yields and reduce costs. The marketing order program could assist handlers in solving mutual post harvest handling problems, in the interest of increasing the quality of their offerings, reducing costs and increasing returns. Finally, authorizing industry financing of promotion and advertising programs would enable the industry to increase consumer awareness of its unique commodity, strengthen demand and increase sales.

In view of the foregoing, it is concluded that there is a need for a marketing order for Walla Walla Sweet Onions grown in designated parts of Washington and Oregon. The order would meet many of the needs of the industry and would tend to effectuate the declared policy of the Act.

3. A definition of the term "production area" should be included in the order to delineate the area in which Walla Walla Sweet Onions must be grown before the handling thereof is subject to the marketing order. Such term should include designated parts of Walla Walla County, Washington, and Umatilla County, Oregon.

The area defined in the proposed order comprises what is generally recognized as the Walla Walla Valley of Washington and Oregon. The counties included are contiguous and share essentially the same growing, harvesting and marketing conditions with respect to Walla Walla Sweet Onions. While production of Walla Walla Sweet Onions is currently concentrated in the two counties of Walla Walla and Umatilla, onions of all types are grown throughout the proposed production area, as well as adjacent areas.

At the hearing, a witness proposed revising the definition of production area appearing in the Notice of Hearing to include an area north of the Touchet River in Washington. However, testimony indicated that this area is dry land of a different soil type. Further, it does not have a history of Walla Walla Sweet Onion production, so that onions produced there may not have the same quality attributes as others from the proposed production area. The area as defined accounts for much of the current sweet onion acreage in Washington and Oregon and, according to record evidence, is generally recognized by the onion trade and consumers as comprising the Walla Walla Sweet Onion region of Washington and Oregon. This is because of the unique soil and growing conditions in the highly localized area. Furthermore, the production area as defined in the marketing order is the smallest practicable geographic area to which the order should be applied, consistent with carrying out the declared policy of the Act.

The term "Walla Walla Sweet Onion" should be defined to specify the commodity covered by the proposed order and to which the terms and provisions of the marketing order would be applicable. The record indicates that a "Walla Walla Sweet Onion" may be any of a number of onion varieties grown in the production area, rather than one specific variety of onion. However, testimony indicated that onions acquire special characteristics when grown in the proposed production area. This is due in part to the low sulfur content of the soil. Further, according to testimony, the term "Walla Walla Sweet Onion" has a specific meaning in the onion trade, and consumers perceive Walla Walla Sweet Onions as a unique commodity distinct from other onions. For these reasons, the term "Walla Walla Sweet Onion" should be defined to mean all varieties of the genus and species *Allium cepa*, except sweet Spanish types, grown in the proposed production area.

To provide for the possibility that other types of onions that have characteristics similar to what is now known as the "Walla Walla Sweet Onion" may be grown in the production area in the future, the committee should be authorized, upon approval of the Secretary, to add those types of onions to the types included under the term "Walla Walla Sweet Onion." This would be accomplished through informal rulemaking procedures.

The definition should include dry onions, onions grown for transplanting, and salad onions. The definition in the order as originally proposed also included onion seed. However, testimony indicated that regulating seed was not necessary, as the intent of the

proponents is to define Walla Walla Sweet Onions as only those sweet onions grown in the production area. Accordingly, if onions are grown outside the proposed production area from seed produced within that area, the resulting onions would not be true Walla Walla Sweet Onions. Testimony indicated that this is because of the soil and climate unique to the Walla Walla River Valley, comprising designated parts of Walla Walla County, Washington, and Umatilla County, Oregon. Accordingly, the term "seeds" should not be included in the proposed definition of Walla Walla Sweet Onions.

4. The term "handler" is synonymous with the term "shipper" and should be defined to identify the persons who would be subject to regulation under the order. Such term should apply to any person, except a common or contract carrier transporting Walla Walla Sweet Onions owned by another person, who first performs any of the activities within the scope of the term "handle" as hereinafter defined. The definition identifies persons who would be responsible for meeting the requirements of the order, including paying assessments and submitting reports.

Common or contract carriers transporting Walla Walla Sweet Onions owned by another person would not be considered as handlers, even though they transport Walla Walla Sweet Onions, because such carriers do not have control over the Walla Walla Sweet Onions being transported. Nor are they the persons who cause the introduction of such Walla Walla Sweet Onions into the stream of commerce. The only interest of a common or contract carrier in such Walla Walla Sweet Onions is to transport them for a service charge to destinations determined by others.

Growers who handle their own Walla Walla Sweet Onions or Walla Walla Sweet Onions grown by others would be considered handlers under the order. Any person who purchases Walla Walla Sweet Onions from growers and performs any other handling function such as grading and packing such Walla Walla Sweet Onions would be a handler.

The term "handle" should be defined in the order to establish the specific functions that would place Walla Walla Sweet Onions in the current of commerce within the production area or between the production area and any point outside thereof, and to provide a basis for determining which functions are subject to regulation under authority of the marketing order. "Handle" and "ship" are used synonymously and the definition should so indicate.

The record indicates that the term "handle" should include the acts of packaging, loading, transporting or selling Walla Walla Sweet Onions. However, the term "handle" should not include the transportation, sale or delivery of field-run Walla Walla Sweet Onions to a handler within the production area or to a handler outside the production area but within Walla Walla County, Washington, or Umatilla County, Oregon, to have such onions prepared for market. In this case, the onions have not yet been prepared for market nor are they in their existing condition being transported to market. Most sellers and buyers do not consider them as yet suitable or appropriate for commercial transactions and, as such, they have not yet entered the stream of commerce.

Walla Walla Sweet Onion producers sometimes market their Walla Walla Sweet Onions themselves. In such cases, those growers would be the first handlers of Walla Walla Sweet Onions and would be responsible for paying assessments and complying with other order requirements.

5.(a) Certain terms should be defined for the purpose of designating specifically their applicability and limitations whenever they are used in the order. The definition of terms discussed below is necessary and incidental to attain the declared policy and objectives of the order and Act.

"Secretary" should be defined to mean the Secretary of Agriculture of the United States, or any officer, or employee of the United States Department of Agriculture who has been or who may be delegated the authority to act for the Secretary.

"Act" should be defined to mean the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674). This is the statute under which the proposed regulatory program would be operative, and this definition avoids the need to refer to the citation throughout the order.

"Person" should be defined to mean an individual, partnership, corporation, association, or any other business unit. This definition is the same as that contained in the Act and insures that it has the same meaning in the order as it has in the Act.

The term "registered handler" should be defined to mean a person who is a handler with adequate facilities for procuring and sorting, grading, packaging, and performing any other handling function or who is a handler with access to such facilities. This provision would require all Walla Walla Sweet Onion handlers to register with the committee after meeting certain qualifications. Some handlers may have grading and storage facilities outside of the production area. Handler registration would aid the committee in determining compliance with order requirements. Registration also would enable the committee to obtain the necessary information to levy assessments.

No testimony was presented concerning the actual method of registration. However, based on similar orders using handler registration the committee should be authorized to recommend, for approval of the Secretary, procedures with respect to handler registration. This provision has been added to the definition of registered handler.

The term "container" should be defined as a box, bag, crate, hamper, basket, package, or any other receptacle used in packaging, transporting, sales, shipment, or other handling of Walla Walla Sweet Onions. It is necessary to define the term since it may be used throughout the proposed order and any rules established thereunder.

The term "producer" should be synonymous with "grower" and should be defined to identify those persons who are eligible to vote for, and serve as, producer members and alternate producer members on the committee and those who may vote in any referendum. The term should mean any person engaged in a proprietary capacity in the production of Walla Walla Sweet Onions for market within the production area. Each business unit (such as a corporation or partnership) should be considered a single producer and should have a single vote in nomination proceedings and referenda. The term "producer" should include any person who owns or shares in the ownership of Walla Walla Sweet Onions such as a landowner landlord, tenant, or sharecropper. A person who owns and farms land resulting in that person's ownership of the Walla Walla Sweet Onions produced on such land should be considered a producer. The same is true with respect to a person who rents and farms land resulting in that person's ownership of all or part of the Walla Walla Sweet Onions produced on that land.

Likewise, any person who owns land which that person does not farm, but as rental for such land obtains the ownership of a portion of the Walla Walla Sweet Onions produced thereon, should be regarded as a producer for that portion of the Walla Walla Sweet Onions received as rent. The tenant on such land should be regarded as a producer for the remaining portion produced on such land.

A joint venture is one whereby several persons contribute resources to a single endeavor to produce and market a Walla Walla Sweet Onion crop. In such venture, one party may be the farmer who contributes one or more factors such as labor, time, production facilities or cultural skills, and the other party may be a handler who contributes money and cultural, harvesting, and marketing supervision. Normally, a husband and wife operation would be considered a partnership. Any individual, partnership, family enterprise, organization, estate, or other business unit currently engaged in the production of Walla Walla Sweet Onions for market would be considered a producer under the order, and would be entitled to vote in referenda and committee nominations. Each party would have to have title to at least part of the crop produced, electing its disposition, and receiving the proceeds therefrom. This control could come from owning and farming land producing Walla Walla Sweet Onions, payment for farming services performed, or a landlord's share of the crop for the use of the producing land. A landlord who only receives cash for the land would not be eligible to vote. A business unit would be able to cast only one vote regardless of the number and locations of its farms, but each separate legal entity would be entitled to vote.

A number of producers in the production area own or operate packing sheds. A producer who owns or operates a packing shed should not be precluded from qualifying as a producer under the order.

The term "Varieties" should mean all classifications, subdivisions, or types of Walla Walla Sweet Onions that are commonly recognized by the trade and officially recognized by the U.S. Department of Agriculture or recommended by the committee and approved by the Secretary.

Testimony indicated that only Walla Walla Sweet Onions or subdivisions or varieties thereof would be subject to any regulations issued pursuant to the proposed order, and that varieties of onions grown in the production area not possessing characteristics of Walla Walla Sweet Onions would not be included. Varieties not included would include hybrid varieties of the sweet Spanish storage type onion.

The term "Committee" should be defined to mean the administrative agency known as the Walla Walla Sweet Onion Committee established under the provisions of the order. Such a committee is authorized by the Act, and this definition is merely to avoid the necessity of repeating the full name each time it is used.

The term "fiscal period" should be defined to mean the annual period for which the committee would plan the use of its funds. This period should be established to allow sufficient time prior to the time Walla Walla Sweet Onions are first shipped for the committee to organize and develop its budget for the ensuing season. However, it should also be set to minimize the incurring of expenses during a fiscal period prior to the time assessment income is available to defray such expenses.

The Notice of Hearing proposed that "fiscal period" mean the 12-month period beginning June 1 and ending the following May 31. Record evidence indicates that the harvesting and marketing cycle for Walla Walla Sweet Onions grown in the production area begins in June and ends in August. The fiscal period should coincide with the Walla Walla Sweet Onion crop year, because the industry typically plans its operation on this basis. Hearing testimony supported the fiscal period being established for a 12-month period beginning June 1 and ending May 31 of the next year.

However, based on future experience, it may be desirable to establish a fiscal period other than one ending on May 31. Thus, authority should be included in the order to provide for the establishment of a different fiscal period if recommended by the committee and approved by the Secretary through informal rulemaking procedures. In any event, the beginning date of any new fiscal period should be sufficiently in advance of the harvesting season to permit the committee to formulate its marketing policy and perform other administrative functions. Also, it should be recognized that if at some future date there is a change in the fiscal period, such change would result in a transition period.

(b) Pursuant to the Act, it is desirable to establish an agency to administer the order locally as an aid to the Secretary in carrying out the declared policy of the Act and to provide for effective and efficient operation of the order. As proposed in § 956.20, the Walla Walla Sweet Onion Committee should therefore be established and consist of ten members, including one public member. The record indicates that a committee composed of ten members, with a like number of alternates, would provide adequate representation and would provide for reasonable judgment and deliberation with respect to recommendations made to the Secretary, and in the discharge of other committee duties.

Since the order is intended to primarily benefit Walla Walla Sweet Onion producers, it is appropriate that the committee be comprised primarily of growers. Six of the ten committee members should therefore be Walla Walla Sweet Onion growers. Since the program would be financed by handlers, and handlers would be responsible for complying with the terms of the marketing order, however, it would be reasonable to provide for handler representation on the committee as well. For this reason, proponents proposed that, of the ten members on the committee, three of those members should be handlers.

The record indicates that producer members and their alternates should be selected from the production area at large. Since the production area is relatively small, this method should be adequate to ensure equitable representation on the committee. The record indicates that Walla Walla Sweet Onion production is currently located in Walla Walla County in Washington, and Umatilla County in Oregon, which together account for all of the production.

Hearing testimony indicated that the six persons selected to serve as grower members or alternates should be individuals who are producers, or officers or employees of producers. Persons selected to serve as handlers should be engaged in handling Walla Walla Sweet Onions. Such persons could be expected to have strong interests in the effects of committee decisions of Walla Walla Sweet Onion producers and handlers.

To help ensure that the committee will not have a membership with partiality toward a single handling entity, the proposal also contains a provision that, at the time of selection, no more than two producer members may be affiliated with the same handler.

Testimony indicates that a producer member should have at least three years experience in the production of Walla Walla Sweet Onions. The proponents believe that because committee membership is a heavy responsibility requiring a high degree of individual initiative for what is done and how it is done, and cultural practices for Walla Walla Sweet Onions are diverse, it would take three years of experience producing Walla Walla Sweet Onions in order to become knowledgeable about the industry.

At the hearing, witnesses supported adding a public member to the committee. While the influence of consumers would be implicitly present in the deliberations of the producer and handler committee members, and all

meetings would be public, the appointment of a public member would offer many advantages. One would be direct communication between industry members and the public member, who would have no connection with the industry and whose opinions would afford the industry an opportunity to discuss its problems and concerns with someone who would view these problems and concerns from outside the Walla Walla Sweet Onion industry.

The public representative and that person's alternate should not be permitted to have a direct financial interest in the production, processing, financing, buying, packing, or marketing of Walla Walla Sweet Onions except as a consumer, nor be a director, officer, or employee of any firm so engaged. Such public representatives should be able to devote sufficient time and express a willingness to attend committee activities regularly and to familiarize themselves with the background and economics of the industry.

Proposed § 956.25 states that each member of the committee, including the public member, should have an alternate. This would ensure that all portions of the production area are adequately represented in the conduct of the committee's business and that the continuity of operation is not interrupted. The order should provide that alternate members should meet the same qualifications as their respective members, except for tenure and growing experience. They would act in the place and stead of their respective members during temporary absences. In the case of the death, removal, resignation, or disqualification of a member, the alternate should serve as member until a new member is selected and has qualified.

Proposed § 956.21 states that, with the exception of initial members, the term of office of committee members and their respective alternates should be for three years and should begin on June 1 and end on May 31, or for such other three year period as the committee may recommend and the Secretary approve. The record indicates that the term of office should begin on June 1 because that is considered the beginning of the Walla Walla Sweet Onion crop year. The Walla Walla Sweet Onion shipping season generally ends in August and work begins again in September when growers begin seeding for the next year's crop. At that point in time, it can be determined which growers have remained in business and qualify to serve on the committee.

A three-year term would be appropriate because it would give members sufficient time to become familiar with committee operations and enable them to make meaningful contributions at committee meetings. Furthermore, a three-year term would enable establishment of a rotation so that approximately one-third of the committee membership would terminate each year. Staggered terms would lend continuity to the committee by insuring that some experienced members would be on the committee at all times. Therefore, the order should provide that the terms shall be determined so that approximately one-third of the total committee membership terminates each year.

The Notice of Hearing proposed that the term of office for initial members and alternates should be established so that one-third of the initial producer and handler members and alternates would serve for a one-year term, one-third would serve for a two-year term, and one-third would serve for a three-year term. Since there would be only one public member, there is no need to provide for staggering that membership; the initial public member should serve a three-year term of office.

The effective date of the order, if issued, may not coincide with the specified beginning date of the terms of office of committee members and alternates. Therefore, a provision is necessary to adjust the initial terms of office. To accomplish this, the order should provide that the terms of office of the initial members and alternates shall begin as soon as possible after the effective date of the order.

In the event that the initial members are selected prior to June 1, 1995, an example of how the initial terms of office could be adjusted is as follows: the initial one-year term would not end on May 31, 1995, but would continue until May 31, 1996. Similarly, the two-year and three-year terms would end on May 31, 1997, and 1998, respectively. For the purposes of applying the tenure requirements of the proposed order, each of these initial terms would be considered as a one-year, a two-year, or a three-year term even though the actual period of the appointment may be several months longer.

To prevent unnecessary vacancies from occurring on the committee, the order should provide that members and alternates shall serve in such capacity for the term of office, or portion thereof, for which they are selected and have qualified, and until their respective successors are selected. However, so that there is a continual turnover in membership and infusion of new ideas, the order should provide that no member, including the public member, may serve more than two consecutive terms on the committee unless specifically exempted by the Secretary. After serving two consecutive terms, a committee member should be eligible to serve as an alternate, but should be ineligible to serve as a member for a period of one year. These tenure requirements should not apply to alternate members.

Testimony indicates that there should be no tenure restriction on alternate members. The proponents believe that establishing a maximum of two three-year terms for alternate members would serve no useful purpose, but potentially could limit the pool of candidates for full committee membership. Testimony also indicates that producers with less than three years experience growing Walla Walla Sweet Onions should be eligible for appointment to the committee as alternate members.

To guard against the possibility of a position remaining vacant because of a lack of eligible nominees or persons eligible to serve, the Secretary should have the authority to except an individual from tenure limitation. Such an exception would be made in special and unusual circumstances. Limiting the tenure of committee membership as proposed would be in accordance with the Secretary's "Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders."

The order should provide that the Secretary shall have the authority to select members and alternates of the committee, but the Walla Walla Sweet Onion growers and handlers should have the responsibility for recommending nominees to the Secretary for selection under proposed § 956.22. The nomination procedure outlined in the order would provide a means of making available to the Secretary the names of prospective members and alternates desired by the industry to serve on the committee.

The record does not indicate how the initial committee should be nominated, but an often used method in such instances is for the Secretary to conduct a meeting to nominate initial industry committee members. All producers of record in the production area should receive notice of the meeting in sufficient time to enable them to attend. Nominations should be received and voted upon at these meetings. Those persons receiving the highest number of votes for each of the positions to be filled should be considered the nominee for that position. Handler nominations should be accomplished in the same way.

The committee should be responsible for conducting subsequent nomination meetings, and providing notice to Walla

Walla Sweet Onion producers and handlers of those meetings. The proposal in the Notice also provided that at least one nominee be submitted for each position for the Secretary's consideration. Proposed § 956.22 provides that one nominee be designated for each member and alternate member position that is vacant or is about to become vacant. However, the Secretary would reserve the right to select any qualified candidate willing to serve.

Testimony indicates that it would be desirable to hold nomination meetings in conjunction with other industry meetings, such as a shipper's association, grower's association, or Extension Service meetings. Such a procedure would encourage higher attendance at the meetings.

Meetings held for nominating members and alternates of subsequent committees should be held no later than April 1 of each year or such other date as the committee may recommend and the Secretary may approve. Inasmuch as the term of office would begin June 1 of each year, nomination meetings should be held in sufficient time to assure that appointments may be made prior to the beginning of each new term of office.

Nominations should be submitted in such manner and form as the Secretary may prescribe. One nominee should be designated for each position that is to be filled the following June 1. Sufficient information about each nominee should be provided so the Secretary can determine if such person is qualified for the position for which nominated.

Only Walla Walla Sweet Onion producers should participate in designating nominees for producer members and alternates. Only Walla Walla Sweet Onion handlers would be entitled to vote for handler members. If a person both produces and handles Walla Walla Sweet Onions, such person may vote either as a producer or a handler, but not both. Each eligible person should be allowed to cast only one vote in the nomination process for each member and alternate member position that is to be filled.

Provisions also should be made for the nomination and selection of a public member and alternate. The record indicates that nominees for the public member and alternate should be selected by the industry members of the committee every three years at the first meeting following the selection of the current committee. The names of the nominees would then be forwarded to the Secretary for selection.

The order should provide that the members of the committee should be selected by the Secretary from persons nominated or from among other qualified persons, in accordance with proposed § 956.23. In the event nominations are not made within the time and in the manner specified in the order, the Secretary may select members and alternates without regard to nominations, in accordance with proposed § 956.27. Such selection should be from qualified persons as provided in the order. Each person to be selected by the Secretary as a member or as an alternate member of the committee should, prior to selection, qualify by advising the Secretary that such person agrees to serve in the position for which nominated.

Proposed § 956.26 states that the order should provide a method for promptly filling any vacancies on the committee for unexpired terms of office. There may be vacancies caused by the death, removal, resignation, or disqualification of a member or alternate. The order should provide that the Secretary should name a successor to fill an unexpired term from nominations made in the same manner as provided for nominating all other members and alternates. Any nomination meetings for filling vacancies should be held within a reasonable amount of time after a vacancy occurs.

In order to avoid holding meetings and electing nominees when other nominees acceptable to the Walla Walla Sweet Onion industry are before the Secretary, the selection of members from nominees previously submitted but not selected should be permitted. This would allow, for example, the Secretary to appoint a person who received the second highest number of votes at the last nomination meeting for the position that has become vacant.

As set forth in proposed § 956.28, the order should specify a procedure for the committee to conduct its meetings. It should provide that a majority of all members of the committee is necessary to constitute a quorum and to pass any motion or approve any committee action. However, any action made pursuant to proposed § 956.61 pertaining to recommendations for regulations, would require seven concurring votes. Accordingly, six members of the ten-member committee must be present in order to constitute a quorum and enable the committee to conduct a meeting. At least six affirmative votes should be required to pass any motion or approve any committee action, except when dealing with recommendations for regulations, which would require at least seven. The evidence of record is that at least seven committee members should be required to concur on any recommendations pertaining to the imposition of container marking requirements because more is needed to protect minority interests while at the same time allowing majority rule. A simple majority would be sufficient for recommendations on other activities authorized under the marketing order, i.e., recommendations on production and marketing research and marketing development and promotion projects, including paid advertising, and the financing of these activities through handler assessments and voluntary contributions.

There may be times when it will be impossible to assemble the committee promptly to meet an emergency situation. Therefore, the order also should enable committee members, and alternates when acting as members, to vote by mail, telegraph, telephone, facsimile, or other means of communication, provided that any vote cast orally be confirmed promptly in writing. If an assembled meeting is held, all votes should be cast in person, to ensure that the person voting on a motion or committee action hears both sides of the question before taking such action. The majority, quorum, and voting requirements should still apply when voting by mail, telegraph, telephone, facsimile, or other means of communication.

Committee members and alternates will necessarily incur some expense while on committee business. Reasonable expenses, which may include travel, meals and lodging, should be reimbursed to members while attending committee meetings or performing other duties under the order, in accordance with proposed § 956.29. Therefore, the order should provide that members, and alternates when serving as members of the committee, should serve without compensation but shall be reimbursed for such expenses authorized by the committee and necessarily incurred by them in attending committee meetings and in the performance of their duties under the order. Testimony indicates that it should be at the discretion of the committee to pay expenses of alternate members who are requested to attend meetings regardless of whether their respective members are present.

The committee, under proposed § 956.30, should be given those specific powers that are set forth in section 608c(7)(C) of the Act. Such powers are granted by the enabling statutory authority and are necessary for an administrative agency, such as the Walla Walla Sweet Onion Committee, to carry out its proper functions. It would be necessary for the committee to adopt rules and regulations, prescribe the

terms on which applications or information is to be filed, and to set up procedural rules to administer this part. The committee also should have the power to investigate complaints of violations to the order and forward such information to the Secretary, and to recommend to the Secretary appropriate amendments to this part.

The committee's duties as set forth in § 956.31 of the proposed order are necessary for the discharge of its responsibilities. These duties are similar to those typically specified for administrative agencies under other programs of this nature. They pertain to specific activities authorized under the order, such as investigating and compiling information regarding Walla Walla Sweet Onion marketing conditions, and to the general operation of the order including hiring employees, appointing officers, and keeping records of all committee transactions. It is proposed that the marketing order delineate committee duties as follows:

(1) At the beginning of each fiscal period, or as soon thereafter as practicable, the committee should hold an organizational meeting at which a chairman and such other officers as may be necessary would be selected, any necessary subcommittees should be appointed, and such rules and regulations for the conduct of business should be adopted as may be advisable.

(2) The committee should act as intermediary between the Secretary and producers and handlers of Walla Walla Sweet Onions.

(3) Any available information requested by the Secretary should be furnished by the committee.

(4) The committee should appoint such employees, agents, and representatives as it may deem necessary, and determine salaries, benefits, and duties for each such persons.

(5) At such times as may be necessary, the committee should investigate and assemble data on the growing, harvesting, shipping, and marketing conditions of Walla Walla Sweet Onions. Furthermore, upon approval of the Secretary, the committee should engage in research and service activities that relate to the production, handling, or marketing of Walla Walla Sweet Onions.

(6) The committee should keep minutes, books, and records which clearly reflect all of its acts and transactions. These minutes, books, and records would be subject to examination at any time by the Secretary or an authorized agent or representative of the Secretary.

(7) The committee should ensure that its voting record on recommended regulations and other matters are available to producers and handlers.

(8) Prior to the beginning of each fiscal period, the committee should submit to the Secretary a budget of its proposed expenses for such fiscal period along with a recommendation for the assessment rate for such period.

(9) The committee should have its books audited by a competent independent accountant at least once each fiscal period, and at such other times as the committee may find necessary or as the Secretary may request. The audit report should show the receipt and expenditures of funds collected pursuant to this part. A copy of this report should be made available to the Secretary, as well as at the principal office of the committee for inspection by handlers and producers. Confidential or proprietary information should be removed from the audit report before making it available to handlers and producers.

(10) The committee should have the duty of consulting, cooperating, and exchanging information with other onion marketing committees, as well as with other individuals or agencies in connection with all proper committee activities and objectives under this subpart.

The duties listed in proposed § 956.31 are reasonable and necessary if the committee is to function in the manner prescribed under the Act and the order. It should be recognized that the duties specified are not necessarily all inclusive, and it may develop that there are other duties that the committee may need to perform which are incidental to, and not inconsistent with, these specified duties.

(c) The committee should be authorized under § 956.40 of the proposed order to incur such expenses as the Secretary finds are reasonable and likely to be incurred during each fiscal year. Such a provision is necessary to assure the maintenance and functioning of the committee, as well as to finance production research and market promotion programs. Necessary expenses would include, but would not be limited to, such items as employee salaries and benefits; establishment of an office and equipping such office; telephone and mail services; and business-related transportation for the committee staff. Expenses incurred by committee members in attending committee meetings should also be a reimbursable expense. All such expenses may be incurred on an ongoing basis.

The committee, under proposed § 956.41, should be required to prepare a budget showing estimates of income and expenditures necessary for the administration of the marketing order during each fiscal year. The budget, including an analysis of its component parts, should be submitted to the Secretary sufficiently in advance of each fiscal period to provide for the Secretary's review and approval. The submitted budget should include a recommendation to the Secretary of a rate of assessment designed to secure all or part of the income required for such fiscal year. The committee should be permitted to use reserve and other committee funds carried over from previous years, and voluntary contributions, to meet budget requirements as authorized under the order.

The Act authorizes the Secretary to approve the incurring of expenses by the administrative agency established under an order and states that the order must contain provisions requiring handlers to pay their pro rata share of such expenses.

The rate of assessment should be established by the Secretary on the basis of the committee's recommendation and other available information in accordance with proposed § 956.42. In the event that an assessment rate is established which does not generate sufficient income to pay for the approved expenses, the committee should be authorized to recommend to the Secretary an increase in the rate of assessment in order to secure sufficient funds. The Secretary may approve an assessment rate increase, and such increase should be applicable to all Walla Walla Sweet Onions handled during the fiscal year to which that assessment rate applies.

The order should provide for the payment of assessments by first handlers of Walla Walla Sweet Onions for the maintenance and functioning of the committee throughout the time the order is in effect, irrespective of whether particular provisions of the order are suspended or are inoperative. For example, adverse weather during a growing season could result in reduced supplies, and therefore, planned market support activities for the season could be canceled. The committee should be able to continue levying assessments to pay other approved expenses incurred for other purposes.

If a handler does not pay any assessment by the date it is due, the order should provide that the late assessment may be subject to a late payment charge or an interest charge, or both, at rates set by the committee with

the Secretary's approval. Such charges should be set at rates established to cover additional costs that may be incurred by the committee in attempting to collect overdue assessments, and should encourage timely payments. The period in which payments would be considered late, and late payment charges or interest charges incurred should be recommended by the committee and approved by the Secretary.

The committee should be authorized to accept advance payment of assessments so that it may pay expenses which become due before assessment income is normally received. This would give the committee more flexibility in paying obligated expenses, particularly in the first part of a fiscal year before assessment funds are received.

The committee should also be able to borrow money to meet administrative expenses that would be incurred before assessment income is sufficient to defray such expenses. However, the committee should not borrow money to pay obligations if sufficient funds already exist in the committee's reserve fund or in other committee accounts.

All funds collected by the committee through assessments or any other provision of the order should be used only for the purposes set forth in the order, as set forth in proposed § 956.43. The Secretary should at all times have authority to require the committee, its members and alternates, and its employees and agents to account for all receipts, disbursements, property or records of the committee for which such person has been responsible. Likewise, when any such person ceases to act in the aforesaid positions, that person should account for all receipts, disbursements, property or records of the committee for which such person has been responsible. In the event the order is terminated or becomes inoperative, the committee should appoint, with the approval of the Secretary, one or more trustees for holding records, funds or other property of the committee.

If, at the end of a fiscal period, the assessments collected are in excess of expenses incurred, such excess should be established as a reserve or refunded pro rata to the handlers, under proposed § 956.44. The committee should be authorized to carry over excess assessment income into the following fiscal period as a reserve. If such excess income is not carried over as a reserve, handlers should be entitled to a refund proportionate to the assessments each handler paid. The reserve should not be allowed to exceed approximately two years' of committee expenses.

One purpose of the reserve fund would be to provide stability in the administration of the order in the case of a short crop. Also, establishing a reserve should minimize the necessity of the committee borrowing money at the beginning of a fiscal year or raising an assessment rate during a season of less than anticipated production.

Finally, reserve funds could be used to cover necessary liquidation expenses in the event the order is terminated. Upon such termination, any funds not needed to defray liquidation expenses should be disposed of as determined by the Secretary. To the extent possible, however, these funds should be returned pro rata to the handlers from whom they were collected.

Under proposed § 956.45, for the payment of production research or promotional activities as authorized by the order, the committee should also be authorized to receive voluntary contributions. Testimony also indicated that contributions should be authorized for first-year administrative start-up costs. Such contributions should be received by the committee without any obligations to the donor, and the expenditure of such funds should be under the complete control of the committee and subject to the provisions of the order. The committee should not receive a voluntary contribution from any person if that contribution could represent a conflict of interest. Testimony indicates that donations should be considered as miscellaneous receipts, the same as interest or dividend income, and be subject to all of the accounting provisions of the order.

(d) Under proposed § 956.50, the order should authorize the committee to establish and provide for the establishment of production research, marketing research and development, and marketing promotion projects, including paid advertising, designed to assist, improve, or promote the marketing, distribution, consumption, or efficient production of Walla Walla Sweet Onions. Funding for these programs should come from any authorized receipts of the committee including assessment income, voluntary contributions and miscellaneous income such as interest.

The committee should have the authority to initiate new production and marketing research projects, as well as to contribute to research which may currently be taking place.

Testimony indicated that public funds for research are becoming scarcer and more difficult to obtain. Marketing order proponents believe that their industry needs to finance research on improved onion storage and cultural practices.

The record also supports the need for marketing research and promotion projects. Research would enable the Walla Walla Sweet Onion industry to identify and analyze its current markets and find ways of expanding current markets and developing new ones.

Expanding markets for Walla Walla Sweet Onions could be accomplished by promotional activities, including paid advertising, to acquaint wholesalers, retailers, and consumers with the product available from the Walla Walla area.

Market development projects would enable the committee to compile meaningful market data and to explore marketing possibilities, such as how to gain entry to or recapture a specific market. That authority also would enable the committee to contact buyers and food editors to distribute educational material relating to the handling and marketing of Walla Walla Sweet Onions, and disseminate to the industry the results of current or past marketing research projects. It would also allow the committee to give out promotional literature, recipes, and information relative to consumption or use.

Record testimony indicated that the committee should be authorized to develop and register a common identifying mark, or logo, that could be used by all Walla Walla Sweet Onion producers and handlers to distinguish the Walla Walla Sweet Onion in the marketplace. Proponents supported utilizing such a mark in conjunction with any paid advertising, to make the consumer aware that they are purchasing Walla Walla Sweet Onions. Witnesses supported advertising as a means of increasing demand for Walla Walla Sweet Onions.

Walla Walla Sweet Onions have a very limited marketing season (June to early August) and prices customarily begin to decline rapidly over the season. Proponents believe an education and advertising campaign would help increase the public's awareness of this specialty onion with the objective of expanding the market and increasing consumption of Walla Walla Sweet Onions. Paid advertising with an identifying mark would assist in clarifying and maintaining the Walla Walla Sweet Onion's image in the marketplace in a way not available through other forms of promotion or publicity. Also, Walla Walla Sweet Onion producers face larger and better funded competition. Testimony indicates that paid advertising is

necessary for the industry to be competitive and maintain or increase its market share. Testimony also indicates that advertising could have a positive influence on the demand for Walla Walla Sweet Onions, particularly in times of heavy supply, thereby tending to increase grower returns.

Market promotion programs, including paid advertising, for Walla Walla Sweet Onions carried out with funds collected under the proposed program, would be generic in nature and would not use particular name brands, handler or producer names, or favor any particular portion of the production area. In addition, any promotional material or advertising would not be authorized to make false or unwarranted claims on behalf of Walla Walla Sweet Onions.

Nor would such material be authorized to include statements that disparage other agricultural commodities.

The record does not indicate the amount of assessment funds that may be allotted for research and promotion programs. The committee should have the responsibility to determine the amount of funds spent on each program each year. Such determination should be based on the needs of the industry each year. The amount of funds to be spent on research and promotion programs would be included in the annual budget required to be submitted to the Secretary for review and approval.

All research and promotion projects to be conducted under the order in a given fiscal period should be submitted by the committee to the Secretary for approval prior to being undertaken. This will ensure that all projects are appropriate given the order's authority, and that sufficient funds will be available for their funding. Further, the committee should be required to report at least annually on the progress of each project and at the conclusion of each project. Such reports should be made to the Secretary.

(e) In accordance with proposed § 956.61, the committee should have the authority to recommend regulations to the Secretary, whenever it believes that regulations issued pursuant to proposed § 956.62 regarding container markings would be appropriate. Also, the committee should be authorized to recommend to the Secretary the amendment, modification, termination, or suspension of any regulation issued under this part, when deemed necessary. The committee should also be permitted to recommend modification, termination, or suspension of any regulation or amendment thereto to facilitate the handling of Walla Walla Sweet Onions for special purpose handling pursuant to proposed § 956.63, regarding handling for specified purposes.

The committee should have the authority to recommend to the Secretary rules and regulations for fixing the markings of the containers used in the packaging and handling of Walla Walla Sweet Onions. This could include a logo or other markings that would identify the contents of such containers. Such a logo or other marking would be small enough to be used in conjunction with the handler's own label, so that handlers would not have to incur the cost of having existing labels remade.

As set forth in proposed § 956.63, there should be provision for handling Walla Walla Sweet Onions in other than fresh market channels differently than those for the fresh market. It would authorize the Secretary, whenever it is found that it would tend to effectuate the declared policy of the Act, to issue regulations, suspend or terminate assessment requirements, container marking regulations, or any combination thereof, to facilitate the handling of Walla Walla Sweet Onions for other than fresh market uses. Such uses would be for relief or charity, livestock feed, planting and/or plants, salad onions, and all processing uses including canning, freezing, pickling, peeling, dehydration, juicing, or other processing. In addition, shipments for disposal, for packing and storing within the production area or to specified areas outside the production area in Washington and Oregon, or for other purposes which may be specified are included.

Requirements for special purpose shipments would be intended to ensure that shipments of Walla Walla Sweet Onions for these uses would not be diverted to the fresh market. Shipments for relief, charity, or livestock feed would not compete with fresh market shipments in the market place. Onion plants are too small to be used as a food product. Salad onions, i.e., immature Walla Walla Sweet Onions of smaller sizes, usually 1½ to 2 inches in diameter, would not normally be regulated in the same way as fully mature, dry bulbs. Onions for canning and freezing are exempt from regulation under the authority for this part, and onions of such poor quality that they must be destroyed would not be marketable in any case. Shipments for storage both within and in specified locations outside of the production area would be handled as special purpose shipments with suitable safeguards. Such safeguards might be in the form of handler reports and would include such information that the committee would deem adequate to ensure compliance with program provisions. Other safeguards, unforeseen at this time, might be needed to assure program compliance and prevent abuses. Hence, the committee should be provided the flexibility to recommend, with approval of the Secretary, other safeguards as needed.

There should be authority under proposed § 956.64 to establish minimum quantities of Walla Walla Sweet Onions that would not be subject to regulation under this part. Testimony indicates that this quantity should be recommended by the committee and approved by the Secretary. Such quantities would not be subject to the requirements set forth in §§ 956.42, 956.62, and/or 956.63. Such quantities usually are too small to affect the overall marketing of Walla Walla Sweet Onions.

In accordance with proposed § 956.65, the Secretary should notify the committee of each regulation issued, and of each amendment, modification, suspension, or termination thereof, and the committee would give reasonable notice of such action to handlers subject to this part. Such notification would be necessary for the efficient operation of the marketing order.

The committee should be able to issue appropriate rules, regulations, and safeguards in connection with shipments for specified purposes and minimum quantity shipments. Such rules and regulations should authorize the use of appropriate safeguards under proposed § 956.66.

The term "certificate of privilege" is intended to mean the approval or permit necessary to make special purpose shipments. Authority should be included for the committee to specify the requirements contained in the certificate of privilege. Such requirements, established through rulemaking, would be intended to ensure that shipments would not be diverted to the fresh market.

Safeguards should be adequate so that the committee can track such shipments from the time they leave the local shipping point to ultimate destination. This would be necessary to determine that such shipments did not enter fresh market channels of trade.

The committee should have the authority to rescind or deny certificates of privilege or any other permit to any handler if proof is obtained that such handler shipped Walla Walla Sweet Onions for any other purpose than stated on the certificate of privilege. The committee would rescind or deny certificates only after an appropriate

investigation concerning the alleged shipments and upon adequate and substantial proof that the handler did in fact violate the regulation. The Secretary would have the right to modify, change, or rescind any safeguards prescribed and any certificates issued by the committee pursuant to the provisions of this section.

The committee would report to the Secretary such information concerning certificates of privilege as may be requested.

(f) The committee should have the authority, under proposed § 956.80, with the approval of the Secretary, to require that first handlers submit to the committee such reports and information as the committee may need to perform its functions and fulfill its responsibilities under the order. In the normal course of business, Walla Walla Sweet Onion handlers collect and record information that may be needed by the committee. Witnesses expressed the belief that the reporting requirements that may be imposed under the proposed order would not constitute an undue burden on handler businesses since the information is typically collected for other purposes.

Reports could be needed by the committee for such purposes as collecting assessments; compiling statistical data for use in evaluating marketing research and development projects; promotional activities; making recommendations for production research; and determining whether handlers are complying with order requirements. The record evidence indicates that to the extent necessary for the committee to perform its functions, handlers will likely need to provide information on the quantity of Walla Walla Sweet Onions handled each season. This required information may include, but would not necessarily be limited to, the quantities of Walla Walla Sweet Onions received by the handler and the quantities disposed of by such handler, the date of each such receipt and disposition, and the identity of the carrier transporting such onions. This should not be construed as a complete list of information the committee might require, nor should it be assumed that all of the above would necessarily be required of handlers. There may be other reports or kinds of information that the committee may find necessary for the proper conduct of its operations under the order. Therefore, the committee should have the authority, with the Secretary's approval, to require each handler to furnish such information as it finds necessary to perform its duties under the order.

Each handler should be required to maintain such records of Walla Walla Sweet Onions received and disposed of as may be necessary to verify the reports that the handlers submit to the committee. All such records should be maintained for at least two fiscal periods after the fiscal period in which the transactions occurred. The order should provide that the Secretary and authorized employees of the committee should have access to handlers' premises to examine those records pertaining to matters within the purview of the order. This provision would enable verification of compliance with requirements of the order.

All reports and records submitted for committee use by handlers would be required to remain confidential and be disclosed to none other than persons authorized by the Secretary, as required by the Act. Such reports should become part of the committee and Secretary's records. However, the committee should be authorized to release composite information from any or all reports that do not reveal confidential information. Such composite information could be helpful to the committee and to the industry in planning operations under the order and in promoting the order. Any release of composite information should not disclose the identity of the persons furnishing the information or any person's individual operation.

(g) No handler should be permitted to handle Walla Walla Sweet Onions except in conformity with the provisions of this part, as set forth in proposed § 956.89. If the program is to be effective, compliance with its requirements is essential, and no handler should be permitted to evade any of its provisions. Any such evasion, on the part of even one handler, could be demoralizing to those handlers who are in compliance and would tend to impair the effective operation of the program.

Witnesses testified that consumers are being deceived when they purchase onions they believe to be Walla Walla Sweet Onions, but which are actually onions produced outside the production area. Proponents testified that the application of the Walla Walla name to onions not grown in the production area is an unfair trade practice that destroys the reputation of the Walla Walla Sweet Onion and causes harm to the industry.

The Act provides that a marketing order can only apply to a defined commodity grown in a specified production area. No authority exists for regulating the handling of that commodity grown outside that production area.

In accordance with proposed § 956.85, the order should provide that the Secretary conduct a periodic referendum every six years with the initial referendum conducted within six years of the effective date of the marketing order.

The Secretary of Agriculture has determined that continuance referenda are an effective means for ascertaining whether producers favor continuance of marketing order programs. The Act provides that the Secretary shall terminate a marketing order whenever, through the conduct of a referendum, it is indicated that a majority of all producers favor termination and such majority produced more than 50 percent of the commodity for market during a representative period.

Since less than 50 percent of all producers usually participate in a referendum, it is difficult to determine overall producer support or opposition to termination of an order. Thus, to provide a basis for determining whether producers favor continuance of the order, a provision for continuance referenda should be included. Continuance should be based upon the affirmative vote of either two-thirds of the producers voting or an affirmative vote of the producers of two-thirds of the volume of Walla Walla Sweet Onions represented in the referendum.

The Act requires that in the promulgation or amendment of a marketing order, at least two-thirds of the producers voting, by number or volume represented in the referendum, must favor the issuance or amendment of a marketing order. Continuance referenda should be based on the same standard of industry support. This requirement is considered adequate to measure producers' support to continue the marketing order. The Secretary would consider termination of the order if less than two-thirds of the producers voting in the referendum and producers of less than two-thirds of the volume of Walla Walla Sweet Onions represented in the referendum favor continuance. In evaluating the merits of continuance versus termination, the Secretary should not only consider the results of the referendum but also should consider all other relevant information concerning the operation of the order and the relative benefits and disadvantages to producers, handlers and consumers in order to determine whether continued operation of the order would tend to effectuate the declared policy of the Act.

In any event, section 608(C)(16)(B) of the Act requires the Secretary to terminate the order whenever the Secretary finds that the majority of all producers favor termination, and that

such majority produced more than 50 percent of the commodity for market.

The Secretary's "Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders" provide for periodic referenda to allow producers the opportunity to indicate their support for or rejection of a marketing order. It is the position of the Department that periodic referenda ensure that marketing order programs continue to be accountable to producers, obligate producers to evaluate their programs periodically, and involve them more closely in their operation. The record evidence supports these goals.

The provisions of proposed §§ 956.87 through 956.99 of the order as contained in the Notice of Hearing and hereinafter set forth, are common to marketing agreements and orders now operating. All such provisions are incidental to and not inconsistent with the Act and are necessary to effectuate the other provisions of the marketing order and marketing agreement and to effectuate the declared policy of the Act. The record evidence supports inclusion of each such provision as proposed in the Notice of Hearing. These provisions, which are applicable to both the marketing agreement and the marketing order, are identified by section number and heading as follows: § 956.87 Proceedings after termination; § 956.88 Effect of termination or amendment; § 956.90 Right of the Secretary; § 956.91 Duration of immunities; § 956.92 Agents; § 956.93 Derogation; § 956.94 Personal liability; § 956.95 Separability; and § 956.96 Amendments. Those provisions applicable to the marketing agreement only are: § 956.97 Counterparts; § 956.98 Additional parties; and § 956.99 Order with marketing agreement.

Miscellaneous changes have been made from the provisions as proposed in the notice of hearing for the purpose of clarity.

List of Subjects in 7 CFR Part 956

Marketing agreements, Onions, Reporting and recordkeeping requirements.

Title 7, Chapter IX is proposed to be amended by adding Part 956 to read as follows:

PART 956—SWEET ONIONS GROWN IN THE WALLA WALLA VALLEY OF SOUTHEAST WASHINGTON AND NORTHEAST OREGON

Subpart—Order Regulating Handling

Definitions

Sec.

956.1 Secretary.
956.2 Act.
956.3 Person.
956.4 Production area.
956.5 Walla Walla Sweet Onions.
956.6 Handler.
956.7 Registered handler.
956.8 Handle.
956.9 Container.
956.10 Producer.
956.11 Varieties.
956.12 Committee.
956.13 Fiscal period.

Administrative Committee

956.20 Establishment and membership.
956.21 Term of office.
956.22 Nominations.
956.23 Selection.
956.24 Qualifications and acceptance.
956.25 Alternates.
956.26 Vacancies.
956.27 Failure to nominate.
956.28 Procedure.
956.29 Expenses.
956.30 Powers.
956.31 Duties.

Expenses and Assessments

956.40 Expenses.
956.41 Budget.
956.42 Assessments.
956.43 Accounting.
956.44 Excess funds.
956.45 Contributions.

Research and Development

956.50 Research and development.

Regulation

956.61 Recommendation for regulations
956.62 Container markings.
956.63 Handling for specified purposes.
956.64 Minimum quantities.
956.65 Notification of regulations.
956.66 Safeguards.

Reports

956.80 Reports and recordkeeping.

Miscellaneous Provisions

956.85 Termination or suspension.
956.87 Proceedings after termination.
956.88 Effect of termination or amendment.
956.89 Compliance.
956.90 Right of the Secretary.
956.91 Duration of immunities.
956.92 Agents.
956.93 Derogation.
956.94 Personal liability.
956.95 Separability.
956.96 Amendments.
956.97 Counterparts.
956.98 Additional parties.
956.99 Order with marketing agreement.

Authority: 7 U.S.C. 601–674.

Definitions

§ 956.1 Secretary.

Secretary means the Secretary of Agriculture of the United States or any officer or employee of the Department of Agriculture who has been delegated, or to whom authority may hereafter be delegated, the authority to act for the Secretary.

§ 956.2 Act.

Act means Public Act No. 10, 73d Congress (May 12, 1933), as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended (Sec. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601 et seq.).

§ 956.3 Person.

Person means an individual, partnership, corporation, association, or any other business unit.

§ 956.4 Production area.

Production area means a tract of land in Umatilla County, Oregon, and Walla Walla County, Washington, based on surveyors' maps, enclosed by the following boundaries: Commencing at the Southeast corner of Section 13, Township (Twp.) 5 North, Range (Rge.) 36 East, W.M.; thence Westerly along the South line of Sections 13, 14, 15, 16, 17, and 18 in Twp. 5 North, Rge. 36 East, Sections 13, 14, 15, 16, 17, and 18 in Twp. 5 North, Rge. 35 East, Sections 13, 14, 15, 16, 17, and 18 in Twp. 5 North, Rge. 34 East, Sections 13, 14, and 15 in Twp. 5 North, Rge. 33 East, W.M. to the East right of way line of the Northern Pacific Railway, as it runs Northwesterly through Vansyckle Canyon; thence Northwesterly along said Easterly right of way line to a point in the Northwest ¼ of Section 20, Twp. 7 North, Rge. 32 East, W.M. where said line intersects the South right of way of the Union Pacific Railway, said intersection being commonly known as Zangar Junction; thence Easterly along said South right of way line of the Union Pacific Railway to a point in the Southwest ¼ of Section 23, Twp. 7 North, Rge. 32 East where said line intersects the South right of way line of Washington State Highway No. 12; thence Easterly along said South right of way line to the intersection with the West line of Section 34, Twp. 7 North, Rge. 33 East, W.M.; thence North, along the West line of Sections 34, 27, 22, 15, 10, and 3 in Twp. 7 North, Rge. 33 East, W.M., and the West line of Sections 34, 27, and 22 in Twp. 8 North, Rge. 33 East, W.M. to the Northwest corner of said Section 22; thence East along the North line of said Section 22 to the Northeast corner thereof; thence North

along the West line of Sections 14, 11, and 2 in Twp. 8 North, Rge. 33 East, W.M. to the Northwest corner of said Section 2; thence East along North lines of Sections 2 and 1 in Twp. 8 North, Rge. 33 East, W.M. and the North line of Section 6, Twp. 8 North, Rge. 34 East, W.M. to the centerline of the Touchet River; thence northerly and Easterly along said centerline of the Touchet River as it runs through Twp. 9 North, Rge. 34 East, Twp. 9 North, Rge. 35 East, Twp. 10 North, Rge. 35 East, Twp. 10 North, Rge. 36 East, Twp. 9 North, Rge. 36 East, and Twp. 9 North, Rge. 37 East to a point on the East line of Section 11 in Twp. 9 North, Rge. 37 East, W.M., thence South along the East line of Sections 11, 14, 23, 26, and 35 in Twp. 9 North, Rge. 37 East, W.M., the East lines of Sections 2, 11, 14, 23, 26, and 35 in Twp. 8 North, Rge. 37 East, W.M., the East lines of Sections 2, 11, 14, 23, 26, and 35 in Twp. 7 North, Rge. 37 East, W.M., and the East lines of Sections 2, 11, and fractional Section 14 in Twp. 6 North, Rge. 37 East, W.M., to a point on the Washington-Oregon State line; thence West along said State Line to the closing corner on the West side of Section 18 in Twp. 6 North, Rge. 37 East, W.M.; thence South along the West line of Sections 18, 19, 30, and 31 in Twp. 6 North, Rge. 37 East, W.M. and the West line of Sections 6, 7, and 18 in Twp. 5 North, Rge. 37 East to the corner common to Sections 18 and 19 in Twp. 5 North, Rge. 37 East, W.M. and 13 and 24 in Twp. 5 North, Rge. 36 East, W.M., Being the True Point of Beginning of this Legal Description.

§ 956.5 Walla Walla Sweet Onions.

Walla Walla Sweet Onions means all varieties of *Allium cepa* grown within the production area, except Spanish hybrid varieties. The committee may, with the approval of the Secretary, exempt individual varieties from any or all regulations issued under this part.

§ 956.6 Handler.

Handler is synonymous with "shipper" and means any person (except a common or contract carrier of Walla Walla Sweet Onions owned by another person) who handles Walla Walla Sweet Onions or causes Walla Walla Sweet Onions to be handled.

§ 956.7 Registered handler.

Registered handler means any person with adequate facilities for preparing Walla Walla Sweet Onions for commercial market, who has requested such registration and is so recorded by the committee, or any person who has access to such facilities and has recorded with the committee the ability and willingness to assume customary obligations of preparing Walla Walla Sweet Onions for commercial market. The committee may recommend, for approval of the Secretary, procedures with respect to handler registration.

§ 956.8 Handle.

Handle is synonymous with "ship" and means to package, load, sell, transport, or in any way place Walla Walla Sweet Onions or cause Walla Walla Sweet Onions to be placed in the current of commerce within the production area or between the production area and any point outside thereof. Such term shall not include the transportation, sale, or delivery of harvested Walla Walla Sweet Onions to a handler within the production area for the purpose of having such Walla Walla Sweet Onions prepared for market.

§ 956.9 Container.

Container means a box, bag, crate, hamper, basket, package, or any other receptacle used in the packaging, transporting, sale, shipment, or other handling of Walla Walla Sweet Onions.

§ 956.10 Producer.

Producer is synonymous with "grower" and means any person engaged in a proprietary capacity in the production of Walla Walla Sweet Onions for market.

§ 956.11 Varieties.

Varieties means and includes all classifications, subdivisions, or types of Walla Walla Sweet Onions according to those definitive characteristics now or hereafter recognized by the United States Department of Agriculture or recommended by the committee and approved by the Secretary.

§ 956.12 Committee.

Committee means the Walla Walla Sweet Onion Committee established pursuant to § 956.20.

§ 956.13 Fiscal period.

Fiscal period means the period beginning on June 1 and ending on May 31 of each year, or other such period as may be recommended by the committee and approved by the Secretary.

Administrative Committee

§ 956.20 Establishment and membership.

(a) The Walla Walla Sweet Onion Committee, consisting of ten members, is hereby established. The committee shall consist of six producer members, three handler members, and one public member. Each member shall have an alternate who shall have the same qualifications as the member.

(b) A producer shall have three years of experience in producing onions in order to qualify for committee membership. At the time of selection, no more than two producer members may be affiliated with the same handler.

§ 956.21 Term of office.

(a) Except as otherwise provided in paragraph (b) of this section, the term of office of committee members and their respective alternates shall be for three fiscal periods beginning on June 1 or such other date as recommended by the committee and approved by the Secretary. The terms shall be determined so that one-third of the grower membership and one-third of the handler membership shall terminate each year. Members and alternates shall serve during the term of office for which they are selected and have been qualified, or during that portion thereof beginning on the date on which they qualify during such term of office and continuing until the end thereof, or until their successors are selected and have qualified.

(b) The term of office of the initial members and alternates shall begin as soon as possible after the effective date of this subpart. One-third of the initial industry members and alternates shall serve for a one-year term, one-third shall serve for a two-year term, and one-third shall serve for a three-year term. The initial, as well as all successive terms of office of the public member and alternate member shall be for three years.

(c) The consecutive terms of office for all members shall be limited to two three-year terms. There shall be no such limitation for alternate members.

§ 956.22 Nominations.

Nominations from which the Secretary may select the members of the committee and their respective alternates may be made in the following manner:

(a) The committee shall hold or cause to be held, within the production area and prior to April 1 of each year or by such other date as may be specified by the Secretary, one or more meetings of producers and handlers for the purpose of designating one nominee for each of the member and alternate member positions which are vacant or will be vacant at the end of the fiscal period;

(b) In arranging for such meetings the committee may, if it deems such desirable, cooperate with existing organizations and agencies;

(c) Nominations for committee members and alternate members shall be provided to the Secretary, in such manner and form as the Secretary may

prescribe, not later than 30 days prior to the end of the fiscal period within which the current term of office expires;

(d) Only producers may participate in designating nominees for producer committee members and their alternates and only handlers may participate in designating nominees for handler committee members and their alternates;

(e) Each person who is both a handler and a producer may vote either as a handler or as a producer, but not both;

(f) Each person is entitled to cast only one vote on behalf of him or herself, his or her partners, agents, subsidiaries, affiliates and representatives, in designating nominees for committee members and alternates. An eligible producer's or handler's privilege of casting only one vote, as aforesaid, shall be construed to permit such voter to cast one vote for each producer member and alternate member position to be filled or each handler member and alternate member position to be filled, but not both.

(g) Every three years, at the first meeting following selection, the committee shall nominate the public member and alternate for a three-year term of office.

(h) The committee shall prescribe such additional qualifications, administrative rules and procedures for selection and voting for each candidate as it deems necessary and as the Secretary approves.

§ 956.23 Selection.

The Secretary shall select members and alternate members of the committee from the nominations made pursuant to § 956.22 or from other qualified persons.

§ 956.24 Qualification and acceptance.

Any person nominated to serve as a member or alternate member of the committee shall, prior to selection by the Secretary, qualify by filing a written background and acceptance statement indicating such person's willingness to serve in the position for which nominated.

§ 956.25 Alternates.

An alternate member of the committee shall act in the place and stead of the member for whom such person is an alternate, during such member's absence. In the event of the death, removal, resignation, or disqualification of a member, that member's alternate shall serve until a successor to such member has qualified and is selected.

§ 956.26 Vacancies.

To fill any vacancy occasioned by the failure of any person nominated as a member or as an alternate to qualify, or in the event of the death, removal, resignation, or disqualification of a member or alternate, a successor for the unexpired term may be selected by the Secretary from nominations made pursuant to § 956.22 from previously unselected nominees on the current nominee list, or from other eligible persons.

§ 956.27 Failure to nominate.

If nominations are not made within the time and manner prescribed in § 956.22 the Secretary may, without regard to nominations, select the members and alternates on the basis of the representation provided for in § 956.20.

§ 956.28 Procedure.

(a) Six members of the committee shall constitute a quorum, and six concurring votes shall be required to pass any motion or approve any committee action, except that recommendations made pursuant to § 956.61 shall require seven concurring votes.

(b) The committee may provide for meetings by telephone, telegraph, facsimile, or other means of communication, and any vote cast orally at such meetings shall be confirmed promptly in writing: *Provided*, That if an assembled meeting is held, all votes shall be cast in person.

§ 956.29 Expenses.

Members and alternates shall serve without compensation but shall be reimbursed for such expenses authorized by the committee and necessarily incurred by them in attending committee meetings and in the performance of their duties under this part.

§ 956.30 Powers.

The committee shall have the following powers:

(a) To administer the provisions of this part in accordance with its terms;

(b) To make rules and regulations to effectuate the terms and provisions of this part;

(c) To receive, investigate, and report to the Secretary complaints of violations of the provisions of this part; and

(d) To recommend to the Secretary amendments to this part.

§ 956.31 Duties.

It shall be among the duties of the committee:

(a) At the beginning of each fiscal period, or as soon thereafter as practicable, to meet and organize, to select a chairman and such other officers as may be necessary, to select subcommittees, and to adopt such rules and regulations for the conduct of its business as it may deem advisable;

(b) To act as intermediary between the Secretary and any producer or handler;

(c) To furnish to the Secretary such available information as the Secretary may request;

(d) To appoint such employees, agents, and representatives as it may deem necessary and to determine the salaries and define the duties of each such person;

(e) To investigate from time to time and to assemble data on the growing, harvesting, shipping, and marketing conditions with respect to Walla Walla Sweet Onions and to engage in such research and service activities which relate to the production, handling, or marketing of Walla Walla Sweet Onions as may be approved by the Secretary;

(f) To keep minutes, books, and records which clearly reflect all of the acts and transactions of the committee. Such minutes, books, and records shall be subject to examination at any time by the Secretary or the Secretary's authorized agent or representative;

(g) To make available to producers and handlers the committee voting record on recommended regulations and on other matters of policy;

(h) Prior to each fiscal period, to submit to the Secretary a budget of its proposed expenses for such fiscal period, together with a report thereon, and a recommendation as to the rate of assessment for such period;

(i) To cause its books to be audited by a competent accountant at least once each fiscal period, and at such other time as the committee may deem necessary or as the Secretary may require; the report of such audit shall show the receipt and expenditure of funds collected pursuant to this part; a copy of each such report shall be furnished to the Secretary, and a copy of each such report shall be made available at the principal office of the committee for inspection by producers and handlers: *Provided*, that confidential information shall be removed from all copies made available to the public; and

(j) To consult, cooperate, and exchange information with other onion marketing committees and other individuals or agencies in connection with all proper committee activities and objectives under this subpart.

Expenses and Assessments

§ 956.40 Expenses.

The committee is authorized to incur such expenses as the Secretary may find are reasonable and likely to be incurred

by the committee for its maintenance and functioning, and to enable it to exercise its powers and perform its duties in accordance with the provisions of this part. The funds to cover such expenses shall be acquired in the manner prescribed in §§ 956.42 and 956.45.

§ 956.41 Budget.

Prior to each fiscal period and as may be necessary thereafter, the committee shall prepare an estimated budget of income and expenditures necessary for the administration of this part. The committee shall recommend a rate of assessment calculated to provide adequate funds to defray its proposed expenditures. The committee shall present such budget to the Secretary with an accompanying report showing the basis for its calculations.

§ 956.42 Assessments.

(a) The funds to cover the committee's expenses shall be acquired by the levying of assessments upon handlers as provided in this subpart. Each person who first handles Walla Walla Sweet Onions shall pay assessments to the committee upon demand, which assessments shall be in payment of such handler's pro rata share of the committee's expenses.

(b) Assessments shall be levied upon handlers, at rates established by the Secretary. Such rates may be established upon the basis of the committee's recommendations or other available information.

(c) At any time during, or subsequent to, a given fiscal period, the committee may recommend the approval of an amended budget and an increase in the rate of assessment. Upon the basis of such recommendations, or other available information, the Secretary may approve an amended budget and increase the assessment rate. Such increase in the assessment rate shall be applicable to all Walla Walla Sweet Onions which were handled by each handler thereof during such fiscal period.

(d) The payment of assessments for the maintenance and functioning of the committee may be required under this part throughout the period it is in effect, irrespective of whether particular provisions of this part are suspended or become inoperative.

(e) To provide funds for the administration of the provisions of this part during the initial fiscal period or the first part of a fiscal period when neither sufficient operating reserve funds nor sufficient revenue from assessments on the current season's shipments are available, the committee may accept payment of assessments in advance or may borrow money for such purposes.

(f) The committee may impose a late payment charge or an interest charge, or both, on any handler who fails to pay any assessment in a timely manner. Such time and the rates shall be recommended by the committee and approved by the Secretary.

§ 956.43 Accounting.

(a) All funds received by the committee pursuant to the provisions of this part shall be used solely for the purposes specified in this part.

(b) The Secretary may at any time require the committee, its members and alternate members, employees, agents, and all other such persons associated with the committee to account for all receipts, disbursements, funds, property, or records for which they are responsible. Whenever any person ceases to be a member, alternate member, employee, or agent of the committee, such person shall account for all receipts, disbursements, funds, property, and records pertaining to the committee's activities for which such person was responsible, deliver all property and funds in such person's possession to the committee, and execute such assignments and other instruments as may be necessary or appropriate to vest in the committee full title to all of the property, funds, and claims vested in such person pursuant to this part.

(c) The committee may make recommendations to the Secretary for one or more of the members thereof, or any other person, to act as a trustee for holding records, funds, or any other committee property during periods of suspension of this part, or during any period or periods when regulations are not in effect and, upon determining such action is appropriate, the Secretary may direct that such person or persons shall act as trustee or trustees for the committee.

§ 956.44 Excess funds.

If, at the end of a fiscal period, the assessments collected are in excess of expenses incurred, such excess shall be accounted for as follows:

(a) The committee, with approval of the Secretary, may establish an operating reserve and may carry over to subsequent fiscal periods excess funds in a reserve so established, except funds in the reserve shall not exceed the equivalent of approximately two fiscal periods' budgeted expenses. Such reserve funds may be used:

(1) To defray any expenses authorized under this part;

(2) To defray expenses during any fiscal period prior to the time assessment income is sufficient to cover such expenses;

(3) To cover deficits incurred during any fiscal period when assessment income is less than expenses;

(4) To defray expenses incurred during any period when any or all provisions of this part are suspended or are inoperative; and

(5) To cover necessary expenses of liquidation in the event of termination of this part.

(b) Upon termination of this part, any funds not required to defray the necessary expenses of liquidation shall be disposed of in such manner as the Secretary may determine to be appropriate except that to the extent practicable, such funds shall be returned pro rata to the persons from whom such funds were collected.

(c) If such excess is not retained in a reserve as provided in paragraph (a) of this section, each handler entitled to a proportionate refund of the excess assessments collected shall be credited at the end of a fiscal period with such refund against the operations of the following fiscal period unless such handler demands payment thereof, in which event such proportionate refund shall be paid as soon as practicable.

§ 956.45 Contributions.

The committee may accept voluntary contributions but these shall be used only to pay expenses incurred pursuant to § 956.50. Such contributions shall be free from any encumbrances by the donor, and the committee shall retain complete control of their use.

Research and Development

§ 956.50 Research and development.

(a) The committee, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research and development, and marketing promotion projects, including paid advertising, designed to assist, improve, or promote the marketing, distribution, consumption, or efficient production of Walla Walla Sweet Onions. Any such project for the promotion and advertising of Walla Walla Sweet Onions may utilize an identifying mark, including but not limited to registered trademarks and logos, which shall be made available for use by all handlers in accordance with such terms and conditions as the committee, with the approval of the Secretary, may prescribe. The committee may register such logos with the Commissioner of Patents and Trademarks, U.S. Patent and Trademark Office. The expense of

such projects shall be paid from funds collected pursuant to §§ 956.42 and 956.45.

(b) In recommending projects pursuant to this section, the committee shall give consideration to the following:

(1) The expected supply of Walla Walla Sweet Onions in relation to market requirements;

(2) The supply situation among competing onion areas and communities;

(3) The anticipated benefits from such projects in relation to their costs;

(4) The need for marketing research with respect to any market development activity; and

(5) Other relevant factors.

(c) If the committee concludes that a program of research and development should be undertaken, or continued, in any fiscal period, it shall submit the following for the approval of the Secretary:

(1) Its recommendations as to the funds to be obtained pursuant to §§ 956.42 and 956.45;

(2) Its recommendations as to any research projects; and

(3) Its recommendations as to promotion activity and paid advertising.

(d) Upon conclusion of each activity, but at least annually, the committee shall summarize and report the results of such activity to the Secretary.

(e) All marketing promotion activity engaged in by the committee, including paid advertising, shall be subject to the following terms and conditions:

(1) No marketing promotion, including paid advertising, shall refer to any private brand, private trademark, or private trade name;

(2) No promotion or advertising shall disparage the quality, use, value, or sale of like or any other agricultural commodity or product, and no false or unwarranted claims shall be made in connection with the product; and

(3) No promotion or advertising shall be undertaken without reason to believe that returns to producers will be improved by such activity.

Regulation

§ 956.61 Recommendation for regulations.

The committee shall recommend regulations to the Secretary whenever it deems it advisable, as provided in § 956.62. The committee also may recommend modification, suspension, or termination of any regulation, or amendments thereto, in order to facilitate the handling of Walla Walla Sweet Onions for the purposes authorized in § 956.63. The committee may also recommend amendment, modification, termination, or suspension of any regulation issued under this part.

§ 956.62 Container markings.

The committee may, with the approval of the Secretary, provide a method, through rules and regulations issued pursuant to this part, for fixing the marking of containers which may be used in the packaging or handling of Walla Walla Sweet Onions, including appropriate logo or other container markings to identify the contents thereof. Further, the committee may, with the approval of the Secretary, establish through rules and regulations such safeguards as may be necessary to ensure that such container marking requirements are complied with.

§ 956.63 Handling for specified purposes.

Upon the basis of recommendations and information submitted by the committee, or other available information, the Secretary may issue special regulations, or modify, suspend, or terminate requirements in effect pursuant to §§ 956.42 and 956.62 or any combination thereof, in order to facilitate the handling of onions for the following purposes:

(a) Shipments of Walla Walla Sweet Onions for relief or to charitable institutions;

(b) Shipments of Walla Walla Sweet Onions for livestock feed;

(c) Shipments of Walla Walla Sweet Onions for planting and for plants;

(d) Shipments of Walla Walla Sweet Onions as salad onions;

(e) Shipments of Walla Walla Sweet Onions for all processing uses including, pickling, peeling, dehydration, juicing, or other processing;

(f) Shipments of Walla Walla Sweet Onions for disposal;

(g) Shipments of Walla Walla Sweet Onions for seed;

(h) Shipments of Walla Walla Sweet Onions for packing or storing within the production area or outside the production area, but within specified locations in the States of Oregon and Washington; and

(i) Shipments of Walla Walla Sweet Onions for other purposes which may be specified.

§ 956.64 Minimum quantities.

The committee, with the approval of the Secretary, may establish minimum quantities below which Walla Walla Sweet Onion shipments will be free from the requirements in, or pursuant to, §§ 956.42, 956.62, and 956.63, or any combination thereof.

§ 956.65 Notification of regulations.

The Secretary shall notify the committee of each regulation issued and of each amendment, modification, suspension, or termination thereof. The committee shall give reasonable notice thereof to handlers.

§ 956.66 Safeguards.

(a) The committee, with the approval of the Secretary, may prescribe adequate safeguards to prevent Walla Walla Sweet Onions shipped, pursuant to §§ 956.63 and 956.64, from entering channels of trade for other than the purpose authorized therefor.

(b) The committee, with the approval of the Secretary, may also prescribe rules and regulations governing the issuance, and the contents, of Certificates of Privilege, if such certificates are prescribed as safeguards by the committee. Such safeguards may include requirements that:

(1) Handlers shall first file applications with the committee to ship such Walla Walla Sweet Onions.

(2) Handlers shall pay the pro rata share of expenses provided by § 956.42 in connection with such Walla Walla Sweet Onions.

(3) Handlers shall obtain Certificates of Privilege from the committee prior to effecting the particular onion shipment.

(c) The committee may rescind any Certificate of Privilege, or refuse to issue any Certificate of Privilege, to any handler if proof is obtained that Walla Walla Sweet Onions shipped by the handler for the purposes stated in the Certificate of Privilege were handled contrary to the provisions of this part.

(d) The Secretary shall have the right to modify, change, alter, or rescind any safeguards prescribed and any certificates issued by the committee pursuant to the provisions of this section.

(e) The committee shall make reports to the Secretary as requested, showing the number of applications for such certificates, the quantity of Walla Walla Sweet Onions covered by such applications, the number of such applications denied and certificates granted, the quantity of Walla Walla Sweet Onions handled under duly issued certificates, and such other information as may be requested.

Reports

§ 956.80 Reports and recordkeeping.

Upon request of the committee, made with the approval of the Secretary, each handler shall furnish to the committee, in such manner and at such time as it may prescribe, such reports and other information as may be necessary for the

committee to perform its duties under this part.

(a) Such reports may include, but are not necessarily limited to, the following:

(1) The acreage of Walla Walla Sweet Onions grown;

(2) The quantities of Walla Walla Sweet Onions received by such handler;

(3) The quantities of Walla Walla Sweet Onions disposed of by such handler;

(4) The disposition date of such Walla Walla Sweet Onions;

(5) The manner of disposition of such Walla Walla Sweet Onions; and

(6) The identification of the carrier transporting such Walla Walla Sweet Onions.

(b) All such reports shall be held under appropriate protective classification and custody by the committee, or duly appointed employees thereof, so that any information contained therein which may adversely affect the competitive position of any handler in relation to other handlers will not be disclosed. Compilations of general reports from data submitted by handlers is authorized, subject to the prohibition of disclosure of individual handler's identity or operations.

(c) Each handler shall maintain for at least two succeeding years such records of the Walla Walla Sweet Onions received and disposed of by such handler as may be necessary to verify reports submitted to the committee pursuant to this section.

Miscellaneous Provisions

§ 956.85 Termination or suspension.

(a) The Secretary may at any time terminate the provisions of this subpart by giving at least one day's notice by means of a press release or in any other manner which the Secretary may determine.

(b) The Secretary shall terminate or suspend the operations of any or all of the provisions of this subpart whenever it is found that such provisions do not tend to effectuate the declared policy of the act.

(c) The Secretary shall terminate the provisions of this subpart at the end of any fiscal period whenever it is found that such termination is favored by a majority of producers who, during a representative period, have been engaged in the production of Walla Walla Sweet Onions: *Provided*, That such majority has, during such representative period, produced for market more than fifty percent of the volume of such Walla Walla Sweet Onions produced for market, but such termination shall be announced at least 90 days before the end of the current fiscal period.

(d) Within six years of the effective date of this subpart the Secretary shall conduct a continuance referendum to ascertain whether continuance of this subpart is favored by producers. Subsequent referenda to ascertain continuance shall be conducted every six years thereafter. The Secretary may terminate the provisions of this part at the end of any fiscal period in which the Secretary has found that continuance of this subpart is not favored by a majority of producers who, during a representative period determined by the Secretary, have been engaged in the production for market of Walla Walla Sweet Onions in the production area. Such termination shall be announced on or before the end of the fiscal period.

(e) The provisions of this subpart shall, in any event, terminate whenever the provisions of the Act authorizing them cease to be in effect.

§ 956.87 Proceedings after termination.

(a) Upon the termination of the provisions of this subpart, the then functioning members of the committee shall continue as joint trustees, for the purpose of liquidating the affairs of the committee, of all funds and property then in the possession, or under control, of the committee, including claims for any funds unpaid or property not delivered at the time of such termination. Action by said trusteeship shall require the concurrence of a majority of the said trustees.

(b) The said trustees shall continue in such capacity until discharged by the Secretary; shall, from time to time, account for all receipts and disbursements and deliver all property on hand, together with all books and records of said committee and of the trustees, to such person as the Secretary may direct; and shall upon the request of the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such person full title and right to all of the funds, property, and claims vested in said committee or the trustees pursuant to this subpart.

(c) Any person to whom funds, property, or claims have been transferred or delivered by the committee or its members pursuant to this section shall be subject to the same obligations imposed upon the members of the committee and upon the said trustees.

§ 956.88 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, the termination of this subpart or of any regulation issued pursuant to this subpart, or the issuance of any amendments to either thereof, shall not:

(a) Affect or waive any right, duty, obligation, or liability which shall have arisen or which may thereafter arise in connection with any provision of this subpart;

(b) Release or extinguish any violation of this subpart or of any regulations issued under this subpart; and

(c) Affect or impair any rights or remedies of the Secretary or of any other person with respect to any such violations.

§ 956.89 Compliance.

No handler shall handle Walla Walla Sweet Onions except in conformity to the provisions of this part.

§ 956.90 Right of the Secretary.

The members of the committee, including successors and alternates, and any agent or employee appointed or employed by the committee shall be subject to removal or suspension by the Secretary at any time. Each and every order, regulation, decision, determination, or other act of the committee shall be subject to the continuing right of the Secretary to disapprove of the same at any time. Upon such disapproval, the disapproved action of the committee shall be deemed null and void except as to acts done in reliance thereon or in compliance therewith prior to such disapproval by the Secretary.

§ 956.91 Duration of immunities.

The benefits, privileges, and immunities conferred upon any person by virtue of this subpart shall cease upon the termination of this subpart, except with respect to acts done under and during the existence of this subpart.

§ 956.92 Agents.

The Secretary may, by designation in writing, name any person, including any officer or employee of the Government, or name any agency in the United States Department of Agriculture, to act as the Secretary's agent or representative in connection with any of the provisions of this part.

§ 956.93 Derogation.

Nothing contained in this part is, or shall be construed to be, in derogation or in modification of the rights of the Secretary or of the United States to exercise any powers granted by the Act or otherwise, or, in accordance with such powers, to act in the premises whenever such action is deemed advisable.

§ 956.94 Personal liability.

No member or alternate of the committee or any employee or agent thereof, shall be held personally responsible, either individually or jointly with others, in any way whatsoever, to any handler or to any person for errors in judgment, mistakes, or other acts, either of commission or omission, as such member, alternate, employee, or agent, except for acts of dishonesty, willful misconduct, or gross negligence.

§ 956.95 Separability.

If any provision of this subpart is declared invalid, or the applicability thereof to any person, circumstance, or thing is held invalid, the validity of the remainder of this subpart, or the applicability thereof to any other person, circumstance, or thing shall not be affected thereby.

§ 956.96 Amendments.

Amendments to this subpart may be proposed, from time to time, by the committee or by the Secretary.

§ 956.97 Counterparts.

This agreement may be executed in multiple counterparts, and when one counterpart is signed by the Secretary, all such counterparts shall constitute, when taken together, one and the same instrument as if all signatures were contained in one original.

§ 956.98 Additional parties.

After the effective date hereof, any handler may become a party to this agreement if a counterpart is executed by him and delivered to the Secretary. This agreement shall take effect as to such new contracting party at the time such counterpart is delivered to the Secretary, and the benefits, privileges, and immunities conferred by this agreement shall then be effective as to such new contracting party.

§ 956.99 Order with marketing agreement.

Each signatory handler hereby requests the Secretary to issue, pursuant to the Act, an order providing for regulating the handling of Walla Walla Sweet Onions in the same manner as is provided for in this agreement.

Dated: November 3, 1994.

Kenneth C. Clayton,

Acting Administrator.

[FR Doc. 94–27759 Filed 11–4–94; 3:53 pm]

BILLING CODE 3410–02–P

federal register

Thursday
November 10, 1994

Part IV

Environmental Protection Agency

40 CFR Part 82
Protection of Stratospheric Ozone;
Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 82

[FRL–5100–4]

RIN 2060–AE70

Protection of Stratospheric Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed rulemaking.

SUMMARY: With this action, EPA is proposing amendments to anticipate the phaseout of production and consumption of various ozone-depleting substances and to clarify minor aspects of the current regulation as provided for under section 604 and 606 of the Clean Air Act Amendments of 1990 (CAA). To ensure an orderly phaseout of the production and consumption of halons in 1994, and of chlorofluorocarbons (CFCs), carbon tetrachloride, methyl chloroform and hydrobromofluorocarbons in 1996, this action proposes to alter the administrative requirements of the regulations so companies may continue to produce for special exempted uses. Today's action also proposes clarifications to improve the efficiency of the current requirements and to reduce the burden on the affected companies while ensuring continued compliance with Title VI of the CAA and in a manner consistent with the United States' obligations under the Montreal Protocol on Substances that Deplete the Ozone Layer as amended.

Specifically, EPA proposes to (1) change the requirements for the post-phaseout period for transformation and destruction of ozone-depleting substances; (2) establish the framework for the post-phaseout exempted production for essential uses; (3) revise the controls for imports of controlled substances that are used or recycled; (4) ease the requirements for exporting substances to Article 5 countries; (5) change the allowance requirements for exports of ozone-depleting substances; (6) clarify the definitions for transhipments and heels; (7) provide a period of reconciliation in which allowance balances may be adjusted; and (8) adjust the recordkeeping and reporting requirements.

DATES: Written comments on this proposed rule must be received on or before December 12, 1994, unless a public hearing is requested. Comments must then be received on or before 30 days following the public hearing. Any party requesting a public hearing must notify the contact person listed below by 5 p.m. Eastern Standard Time on November 21, 1994. If a hearing is held EPA will publish a document in the **Federal Register** announcing the hearing information.

ADDRESSES: Comments on this proposed rulemaking should be submitted in duplicate (two copies) to: Air Docket No. A–92–13, U.S. Environmental Protection Agency, 401 M Street SW., Room M–1500, Washington, DC 20460. Inquiries regarding a public hearing should be directed to the Stratospheric Ozone Information Hotline at 1–800–296–1996.

Materials relevant to this proposed rulemaking are contained in Docket No. A–92–13. The Docket is located in room M–1500, First Floor, Waterside Mall at the address above. The materials may be inspected from 8 a.m. until 4 p.m. Monday through Friday. A reasonable fee may be charged by EPA for copying docket materials.

FOR FURTHER INFORMATION CONTACT: Tom Land, U.S. Environmental Protection Agency, Stratospheric Protection Division, Office of Atmospheric Programs, 6205J, 401 M Street SW., Washington, DC, 20460, (202)-233–9185.

SUPPLEMENTARY INFORMATION:

I. Background
II. Administrative Changes in the Stratospheric Protection Program
A. Program Requirements for Continued Post-Phaseout Production and Imports
1. Post-Phaseout Requirements for Transformation and Destruction of Controlled Substances
2. Post-Phaseout Requirements for Essential-Use Production
B. Imports of Used Controlled Substances
1. Information Requirements
2. Certification by the Country of Export
C. Program Adjustments and Clarifications to Become Effective January 1, 1995
1. Changes in Requirements for Export to Article 5 Countries
2. Administrative Changes to the Consumption Allowance Requirements for Exports
3. Administrative Changes to Production Allowance Requirements for Exports that are Transformed or Destroyed
4. Treatment of Controlled Substances Remaining in Emptied Containers, i.e. "Heels"
5. Clarification of the Definition of Transhipment
6. Provision of Account Reconciliation Period
7. Additional Clarifications
8. Clarification of Reporting and Recordkeeping Requirements
III. Summary of Supporting Analysis
A. Executive Order 12866
B. Regulatory Flexibility Act
C. Paperwork Reduction Act

I. Background

The current regulatory requirements of the Stratospheric Ozone Protection Program that limit production and consumption of ozone-depleting substances were promulgated by the Environmental Protection Agency (EPA) in the **Federal Register** on December 10, 1993 (58 FR 65018), and on December 30, 1993 (58 FR 69235). These rules set out the requirements of an Allowance Program (the Program).

The Allowance Program was originally developed in 1988 (published on August 12, 1988, 58 FR 30568) in response to the 1987 "Montreal Protocol on Substances that Deplete the Ozone Layer," an international agreement that requires nations that are Parties to the Protocol to reduce and eventually eliminate their production and consumption of ozone-depleting chemicals.[1]

In 1990, the Parties to the Protocol amended the Montreal Protocol during their meeting in London and added other ozone-depleting chemicals and designated phaseout dates for production and consumption of these chemicals. Shortly after the 1990 meeting of the Protocol Parties, the United States Congress passed the Clean Air Act Amendments (CAA). The CAA requires the phaseout of ozone-depleting chemicals on a schedule parallel to, or in some cases more stringent than, that of the Protocol.

The Allowance Program promulgated in the **Federal Register**, first on March 6, 1991 (56 FR 9518), and then as a final rule on July 30, 1992 (57 FR 33754), was designed to ensure that the United States meet its obligations to control and phase out these substances under the Protocol and consistent with Title VI of the CAA. Since that time, the Parties to the Protocol agreed to accelerate the phaseout of all class I substances (except Group VI), to control class II substances and to add methyl bromide and hydrobromofluorocarbons (HBFCs) to the list of class I substances. EPA modified its control requirements in a final rule promulgated December 10, 1993, in the **Federal Register**, to be consistent with Title VI and the Protocol adjustments and amendments.

The substances that are listed in the Protocol, and controlled in the accelerated phaseout, are:

CLASS I

- Chlorofluorocarbons (CFCs);

[1] Several minor revisions to the original 1988 rule were issued on the following dates: February 9, 1989 (54 FR 6376), April 3, 1989 (54 FR 13502), July 5, 1989 (54 FR 28062), July 12, 1989 (54 FR 29337), February 13, 1990 (55 FR 5005), June 15, 1990 (55 FR 24490) and June 22, 1990 (55 FR 25812).

- Halons;
- Carbon Tetrachloride;
- Methyl Chloroform;
- Methyl Bromide;
- Hydrobromofluorocarbons (HBFCs);

CLASS II

- Hydrochlorofluorocarbons (HCFCs).

(These substances are described in greater detail in 58 FR 65018).

EPA promulgated regulations on December 10, 1993, accelerating the phaseout of halons to January 1, 1994, the phaseout of chlorofluorocarbons (CFCs), carbon tetrachloride, methyl chloroform, and HBFCs to January 1, 1996, and the phaseout of methyl bromide to January 1, 2001. The rule also accelerates the phaseout of class II substances, HCFC–22, HCFC–141b and HCFC–142b.

Both the Protocol and the Clean Air Act require the phaseout of production and consumption of ozone-depleting substances. In the context of the Program, the use of the term consumption may be misleading. It is not the "use" of these substances that is controlled through the regulations but rather the amount of the substance available for U.S. domestic consumption, defined as production plus imports minus exports of bulk virgin chemicals.

In developing the regulatory program, EPA collected information on the amounts of ozone-depleting substances produced, imported, exported, transformed and destroyed domestically. This information was used to establish the U.S. production and consumption ceilings for these chemicals. The data was also used to assign company-specific production and import rights in most cases for companies either importing or producing during the base years of the data collection. These rights are called allowances.

Companies expend allowances when they produce or import ozone-depleting substances. With certain restrictions, the allowances can be traded among companies both domestically and internationally (between Party countries). To control production, the Agency allocated baseline production allowances to producers of specific ozone-depleting chemicals. To control consumption, the Agency allocated baseline consumption allowances to producers and importers of specific ozone-depleting chemicals. Allowances for class I substances are currently provided to companies on an annual basis except for the production of halons, which was phased out on January 1, 1994.

In summary, the Program currently operates as follows:

- In order to produce controlled ozone-depleting substances, companies must use both production and consumption allowances;
- In order to import controlled substances, companies must use consumption allowances;
- No allowances are required in order to export, once allowances are expended in the production or importation of the substance. Rather, companies that export can apply for and be granted additional consumption allowances;
- If a company exports certain controlled substances to an Article 5 country (developing nations as defined by the Protocol that consume less than .3 kilograms of CFCs per capita), the company producing these chemicals can request additional production allowances as well as the consumption allowances normally granted for export. Production by Parties to the Protocol for these developing countries will continue for 10 years after the phaseout in the United States. The number of additional production allowances that can be provided to a company for this purpose is currently limited to 10 percent of their baseline allowance but will increase to 15 percent upon phaseout of these controlled substances.
- No allowances are required to produce ozone-depleting substances that are transformed or destroyed domestically;
- Used or recycled ozone-depleting chemicals can be imported without allowances. No consumption allowances are granted if used or recycled ozone-depleting chemicals are exported;
- Companies are required to maintain records and to provide the data to ensure compliance with the regulation and to meet the reporting requirements of the Protocol.

The Program currently controls and monitors the production and consumption of ozone-depleting substances in the United States. The production and import of halons has already been phased out, and the phaseout for the remaining class I substances, except for methyl bromide, is scheduled for January 1, 1996. In order to ensure an orderly phaseout in 1996, the EPA must alter the administrative requirements of the regulations so companies may continue to produce for exempted uses permitted under the Montreal Protocol and Clean Air Act Amendments.

In addition, the Agency is seeking to improve the efficiency of the requirements and to reduce the burden on the affected companies while ensuring continued compliance with Title VI of the CAA and the Montreal Protocol. In light of these objectives, the Agency is proposing the following administrative changes to improve the Program.

II. Administrative Changes in the Stratospheric Protection Program

A. Program Requirements for Continued Post-Phaseout Production and Imports

The paragraphs under Section A., Program Requirements for Continued Post-Phaseout Production and Imports, describe the administrative changes being proposed by EPA to facilitate the phaseout of all class I ozone-depleting substances effective January 1, 1996 (except for methyl bromide), and the special production and importation scenarios allowed for essential uses.[2]

The Program currently requires the use of allowances by companies that produce or import class I chemicals, except halons (Group II), which were phased out January 1, 1994. Under the current regulation, the phaseout of the production and consumption of the following Groups of class I controlled substances will be complete by January 1, 1996:

Group I, CFCs
Group II, Halons
Group III, Other CFCs
Group IV, Carbon Tetrachloride
Group V, Methyl Chloroform, and
Group VII, HBFCs.

A list of the specific class I ozone-depleting chemicals in each Group is in Appendix A and F in Subpart A.

Due to the phaseout, the Agency is proposing to no longer use production and consumption allowances for all class I controlled substances, except Group VI, methyl bromide, beginning January 1, 1996. Today's proposal anticipates the 1996 production phaseout agreed to by the Parties to the Protocol for CFCs, carbon tetrachloride, methyl chloroform and HBFCs, but allows production for essential uses to become effective January 1, 1996, contingent upon approval for such essential uses by the Parties to the Protocol at the October 1994 meeting.

Although EPA proposes to no longer use production and consumption allowances for class I controlled substances (except methyl bromide) beginning January 1, 1996, the Agency envisions that the manufacture of class I controlled substances will continue after January 1, 1996, provided the substances are:

[2] In contrast, the changes in Section C., Program Adjustments and Clarifications, are proposed to modify the current regulation in order to increase the effectiveness of the program and ease administrative burdens and will go into effect January 1, 1995.

- either transformed or destroyed,
- exported to Article 5 countries,
- produced for essential uses as authorized by the Protocol and CAA and consistent with essential-use allowances, or
- produced with destruction or transformation credits.

In addition, EPA envisions class I controlled substances (except methyl bromide) being imported without the need for consumption allowances after January 1, 1996, if:

- the substance is either transformed or destroyed,
- the substance was previously used, recycled or reclaimed,
- the substance was imported using destruction or transformation credits, or
- the substance was imported using essential-use allowances.

Although the proposal is to no longer use production or consumption allowances for the phased out class I substances (except methyl bromide), the Agency wishes:

(1) to maintain a category of Article 5 allowances (previously called potential production allowances),

(2) to create a new category of essential-use allowances, and

(3) to create destruction and transformation credits (similar to the previous process for granting additional production allowances when substances produced or imported with expended allowances are transformed or destroyed).

The following paragraphs describe the allowance requirements for a variety of production and importation scenarios under the current Allowance Program. In addition, the paragraphs describe the administrative changes being proposed by EPA to facilitate the phaseout of all class I ozone-depleting substances effective January 1, 1996, (except for methyl bromide) and the special production and importation scenarios proposed for the post-phaseout period.

1. Post-Phaseout Requirements for Transformation and Destruction of Controlled Substances

The current regulation distinguishes between two categories of controlled substances that are transformed or destroyed. The two categories are: (1) controlled substances that were produced or imported explicitly for uses that result in transformation or destruction, and (2) controlled substances that were produced or imported with the intention of putting the substance to an "emissive use." EPA proposes adding the definition of emissive use to the current regulation, such that emissive use would be those uses of controlled substances that do not result in the transformation or destruction of the substance. Examples of emissive uses would be the incorporation of controlled substances into a refrigerator or an air conditioner (for a car, household or building), or the use of a controlled substance as a solvent to clean machine parts or circuit boards.

The current program assumes that when a controlled substance is produced or imported for other than transformation or destruction it is intended for an emissive use. When the controlled substance is produced or imported for an intended emissive use, the producer or importer must expend allowances under the current program. Whether or not the controlled substance is actually incorporated into an emissive use is not as important as the fact that it was intended for an emissive use. If the controlled substance is *intended* for an emissive use at the time of production or importation, the person producing or importing the substance is required to expend allowances. However, the expenditure of allowances is not sufficient to define emissive use. For example, a controlled substance recovered from an air conditioner, refrigerator or dehumidifier manufactured before the current program became effective (July 1989) would not have been produced with expended allowances.

In the following discussion, EPA proposes changes to the requirements for controlled substances that are produced explicitly for transformation and destruction, and to the requirements for controlled substances that are produced for intended emissive uses and then subsequently transformed or destroyed. The requirements differ according to the intended purpose of the controlled substance during production.

a. *Production or importation of controlled substances explicitly for uses that result in domestic transformation or destruction.* The current regulation does not require a person to expend allowances if they are explicitly producing or importing a controlled substance for a use that will result in the transformation or destruction of that substance in the United States. In other words, allowances do not need to be expended at the time of production or importation as long as the producer or importer has certification that the controlled substance will be transformed or destroyed by themselves, by a second-party, or by a third-party. As long as the producer or importer has such certification that the substance will be transformed or destroyed domestically, there is no need to expend allowances for the production or importation of the substance. To confirm the future transformation or destruction of the controlled substance, the current regulation requires the second- or third-party person, who will transform or destroy the substance, to submit a transformation certification or destruction verification to the producer or exporter.

EPA proposes that the current system continue after January 1, 1996, and that companies be permitted to produce or import controlled substances explicitly for uses that result in transformation or destruction with the same requirements as under the current regulation.[3] Therefore, such producers and importers will continue to receive an IRS certification of intent to transform or a destruction verification from the second- or third-party transformers or destroyers. The producers and importers will also continue to submit these certificates or verifications to EPA along with their quarterly reports (see Section C.7. Recordkeeping and Reporting).

b. *Production or importation of controlled substances intended for emissive use but subsequently transformed or destroyed.* Under the current regulation a person who transforms or destroys a controlled substance that was produced or imported with expended allowances may petition the Agency for "additional" consumption and production allowances. The person who transforms or destroys a controlled substance that was produced or imported with expended allowances is essentially requesting a "refund" of the allowances originally used in the production or importation of the substance.

EPA proposes that, after the phaseout begins on January 1, 1996, companies will no longer be able to request additional production allowances or consumption allowances for the transformation or destruction of controlled substances which were produced or imported for emissive uses (other than for methyl bromide). The Agency proposes the elimination of the specific provisions that grant additional production and consumption allowances, beginning January 1, 1996, for all class I controlled substances, except methyl bromide, in anticipation of the post-phaseout elimination of production and consumption allowances for those substances. Thus, a person who expends allowances to produce or import a class I substance,

[3] Controlled substances produced for export to be transformed or destroyed are discussed in section C.3. "Administrative Changes to Production Allowance Requirements for Exports that are Transformed or Destroyed."

other than methyl bromide, and then transforms or destroys that substance after January 1, 1996, will not be granted additional production or consumption allowances. However, a person who expends allowances and then transforms or destroys methyl bromide after January 1, 1996, would still be able to petition the Agency for additional production and consumption allowances until January 1, 2001, as under the current regulation. In this respect, a person who transforms or destroys methyl bromide that was produced or imported for an intended emissive use may continue to follow the existing regulation as described under § 82.9 and § 82.10.

c. *The post-phaseout procedures for granting destruction and transformation credits.* At the Fourth Meeting of the Protocol Parties in Copenhagen in 1992, in Decision IV/24, the Parties agreed to urge "all practicable measures to prevent releases of controlled substances into the atmosphere." In accordance with this Decision, EPA wishes to continue encouraging destruction and transformation of controlled substances after the phaseout begins January 1, 1996, especially for those controlled substances that were produced or imported for intended emissive uses. EPA believes a system of incentives can be devised to foster destruction or transformation of ozone-depleting substances in order to prevent their emission to the atmosphere.

In this action, EPA proposes a system of incentives to encourage destruction or transformation after the accelerated phaseout dates by offering credits for the destruction or transformation of controlled substances. These credits would be used to produce or import an amount of controlled substance. The Agency believes a system of incentives to encourage destruction or transformation of controlled substances after the phaseout is an important mechanism to deter individuals from releasing the unneeded controlled substance to the atmosphere.

As discussed below, EPA believes that Decision IV/24 of the Parties to the Protocol urging measures to prevent the release of unneeded controlled substances to the atmosphere and the Protocol definition of production provide the basis to devise incentives for destruction or transformation after the accelerated phaseout and until the interim and final phaseout dates set forth in the CAA.

The Protocol defines production as the "amount of controlled substances produced, minus the amount destroyed by technologies to be approved by the Parties and minus the amount entirely used as feedstock in the manufacture of other chemicals." Under the Protocol, Parties may continue to produce controlled substances after they are phased out as long as the amount of the controlled substance produced is offset in each control period by the same amount that is transformed [4] or destroyed by an approved technology.[5] The Protocol definition of production indicates that an amount of controlled substance produced and the same amount destroyed or transformed would balance in a calculation of atmospheric loading and result in a net environmental impact of zero.

Although the definition of production in the Protocol would permit continued production beyond the phaseout as long as such production was offset by transformation or destruction, the definition of production under the Clean Air Act Amendments is distinct and does not permit such offsetting. The CAA defines "produce," "produced" and "production" as the "manufacture of a controlled substance from any raw material or feedstock chemical, but such terms do not include (A) the manufacture of a substance that is used and entirely consumed (except for trace quantities) in the manufacture of other chemicals, or (B) the reuse or recycling of a substance." Under the CAA definition, once production of a controlled substance is phased-out, it may no longer be produced for emissive purposes because there are no provisions, as in the Protocol's definition, to permit that continued production be offset by destruction or transformation.

Pursuant to CAA section 614, in the case of conflict between any provision of the CAA and the Montreal Protocol, the more stringent provision shall govern. Because the CAA definition of production is more stringent than that of the Protocol, the definition of production under the CAA shall apply when the phaseout dates under the CAA take effect. Section 604 of the CAA sets interim reductions and final phaseout dates for listed class I substances. The class I substances listed in the CAA must be phased out by the year 2000, except for methyl chloroform which must be phased out by the year 2002. In addition, under the terms of the CAA, methyl bromide must be phased out by 2001. Section 604 also includes interim reductions for the listed class I substances as outlined in Table I below.

In today's rule, EPA proposes to authorize the use of destruction/transformation credits until the respective dates when the terms of the CAA become more stringent than those of the Protocol (2000 for most class I controlled substances, 2001 for methyl bromide, and 2002 for methyl chloroform). For example, under the terms of the Protocol, CFC–12 must be phased out by 1996, but production may be continued as long as it is offset by either transformation or destruction. However, the CAA requires that in 1996, the maximum allowable production of CFC–12 be no more than 40 percent of the quantity produced in the baseline year. From 1995 until 1999, the CAA requires that the maximum allowable production of CFC–12 be no more than 15 percent of the quantity produced in the baseline year, and in the year 2000, no CFC–12 may be produced.

Today's proposal permits the use of destruction and/or transformation credits, but does not permit continued production beyond the maximum allowable limits set forth in the CAA. Thus in the example above, for 1996, individuals may use destruction and/or transformation credits, but in no case may CFC–12 be produced for emissive purposes beyond 40 percent of the quantity produced in the baseline year. To comply with the 1996 phaseout date and definition of production under the Protocol, production of this amount of CFC–12 must be offset by the amount transformed or destroyed.[6]

Below is a chart indicating the dates and the maximum permissible production levels set forth in the Clean Air Act Amendment of 1990.

TABLE I.—TITLE VI OF THE CLEAN AIR ACT AMENDMENTS OF 1990 PRODUCTION PHASEOUT SCHEDULE FOR OZONE-DEPLETING SUBSTANCE

Date	Carbon tetrachloride (percent)	Methyl chloroform (percent)	Other class I substances (percent)
1994	70	85	65
1995	15	70	50
1996	15	50	40
1997	15	50	15
1998	15	50	15

[4] Under the current regulation, transformation is defined as the amount entirely used as feedstock (except for trace quantities) in the manufacture of other chemicals.

[5] To date, Parties have approved five technologies for destruction (Decision IV/11) which are listed in the definition or "destruction" under § 82.3.

[6] Limits are being proposed in today's action for production after 1996 regarding destruction and transformation credits, essential-use allowances (to be discussed in the next section of the preamble) and Article 5 allowances (discussed in section C.1 "Changes in Requirements for Export to Article 5 Countries" of the preamble.)

TABLE I.—TITLE VI OF THE CLEAN AIR ACT AMENDMENTS OF 1990 PRODUCTION PHASEOUT SCHEDULE FOR OZONE-DEPLETING SUBSTANCE—Continued

Date	Carbon tetrachloride (percent)	Methyl chloroform (percent)	Other class I substances (percent)
1999	15	50	15
2000		20	
2001		20	

Proposed System for Credits—EPA is seeking comments on a system that would grant destruction credits and/or transformation credits as an incentive to destroy and/or transform controlled substances produced or imported for intended emissive uses. EPA is seeking comments on this system in which a person may submit, after January 1, 1996, a request to the Agency for credits based on the destruction or transformation of a quantity of controlled substances in the United States that were initially produced for an emissive use. The person requesting credits would need to identify the amount of controlled substance that was destroyed or transformed and the previous use of the controlled substance. In addition, the person would need to submit to EPA a copy of the destruction efficiency certification as under § 82.13(k). Upon approval, EPA would grant the person credits equal to the amount of the controlled substance they destroyed or transformed minus an offset. EPA proposes that credits could be used for: (i) the importation of a calculated level of the controlled substance, or (ii) the production of a calculated level of the controlled substance. Consistent with the parameters set for control periods by the Montreal Protocol, EPA proposes that credits not be carried over from one control period to the next, due to the limits on net production. The recordkeeping and reporting requirements associated with the credits described in these paragraphs are outlined in paragraph C.7.a.iv and C.7.a.v below.

Under the proposed system, the Agency will create a balance of credits for the person upon approval of a request. Deductions will be made from this balance of credits based upon quarterly reports to EPA showing production and importation. EPA is proposing that inter-pollutant transfers of credits as currently defined in § 82.12 be permitted within the Groups of class I substances listed in Appendix A and F to Subpart A, subtracting a one percent offset. The Agency is also proposing that inter-company transfers of credits be permitted as currently defined in § 82.12, subtracting the one percent offset. Inter-Party trades of credits would also be permitted under today's proposal as currently described in § 82.9 with the actual controlled substance returning to the United States.

Discussion of Options—The following discussion outlines options considered by EPA in proposing today's system to grant credits for the destruction or transformation of controlled substances. The initial discussion focuses on options for destruction credits. This is followed by a summary of how the same arguments pertain to a parallel system for granting transformation credits.

Options for Destruction Credits—The Agency considered many factors in analyzing how to provide incentives to destroy controlled substances in the post-phaseout period.

EPA envisions granting destruction credits to people who destroy controlled substances that were recovered from use systems, as well as controlled substances that were produced or imported for intended emissive uses. The Agency believes that as the phaseout goes into effect on January 1, 1996, an increasing number of people will retrofit or switch from use systems that use class I controlled substances to use systems that occupy other chemicals or processes less damaging to stratospheric ozone. However, in the near term the Agency anticipates a period of transition in which some people continue to use equipment that occupies class I substances. To meet the needs of people with equipment designed for class I controlled substances after the phaseout, EPA presumes market demand will engender a service industry to recover the phased out substances from existing equipment, such as building chillers, commercial refrigeration units, and automobile air conditioners as this equipment is retrofitted with alternative chemicals or is taken out of commission. EPA anticipates that much of the recovered controlled substances will be recycled or reclaimed and stored (banked) to meet the near term needs of people still using equipment that requires phased out substances. At this point in time, it is difficult to project what the future supply and demand for controlled substances will be once the post-phaseout period begins (January 1, 1996) and how long the transition period will last.

EPA is proposing destruction credits to encourage the destruction of controlled substances when the supply of these substances exceeds the demand. In time, the demand for class I controlled substances should fall as the majority of equipment is converted to alternative chemicals or new systems replace old systems. The Agency presumes this will occur as alternative substances, retrofits and new equipment are brought into wider use throughout all sectors, obviating the need for banked class I controlled substances. Under this scenario, when the supply of a class I substance being banked for the period of transition exceeds the demand, the price will drop and the existing stocks will become "unneeded," as mentioned in Decision IV/24 of the Parties to the Protocol cited above. When the substances are unneeded, the demand for phased out controlled substances may no longer even warrant storage. A person with a stored quantity of class I controlled substance that no longer has a market due to the conversion and replacement of equipment should be encouraged through a meaningful incentive system to destroy the substance. Without such an incentive, individuals may continue storing these controlled substances, increasing the risk of leaks, accidental releases or intentional releases to the atmosphere. EPA believes destruction should be encouraged to prevent such releases into the atmosphere.

The proposed system encourages the destruction of controlled substances that are unneeded as demand shifts from one specific substance to alternatives or other types of equipment. The system of granting destruction credits allows market flexibility in meeting demand by allowing inter-pollutant transfers of destruction credits at the same time that it provides an incentive to destroy the excess supply of a given substance that might potentially be released into the atmosphere. As a hypothetical example, CFC–11 might be recovered from several use systems and banked during the first years after the phaseout (January 1, 1996) to meet demand during the period of transition. But as alternative substances and/or equipment are brought to market to replace the need for CFC–11, the supply of CFC–11 that was banked would become unnecessary. Today's proposed destruction credits would encourage the destruction of this excess supply of CFC–11 and the credits could be used, through an inter-pollutant transfer, to produce or import a different controlled substance in the same Group of controlled substances, such as CFC–12, to satisfy a still unmet demand for CFC–12.

As under the current regulation, the Agency will grant credits equal to 100 percent of the volume destroyed (minus

the offset) for controlled substances that are completely destroyed (using the current definition of completely destroy). For controlled substances destroyed at less than a 98 percent destruction efficiency, EPA will grant allowances commensurate with that percent of destruction efficiency that is actually achieved (minus the offset).

Another factor considered in proposing an incentive system was the general technical destruction characteristic of the chlorinated and brominated compounds regulated under the current rule. Due to the chemical composition of these ozone-depleting substances, the by-products of destruction are often corrosive acids. The corrosivity of these destruction by-products may influence the maintenance costs for approved destruction technologies. Increased rates of destruction of controlled substances could increase the frequency with which operators of approved incineration technologies would need to replace the liners of their incineration units. Therefore, operators will probably continue to charge high prices for the destruction of controlled substances.

EPA received anecdotal information that very few incineration facilities in the United States are now accepting bulk quantities of CFCs for destruction and as a result the price being charged is extremely high. The Agency does not want the maintenance costs at incineration facilities to impede the overall availability of destruction for controlled substances, especially as controlled substances are taken from existing use systems. If destruction is limited and expensive, the release of controlled substances to the atmosphere may be an unfortunately attractive option. Offering credits for destruction provides an economic incentive to persons who have controlled substances but would like to dispose of them. The credits have economic value which could offset the high costs of destruction. If persons gain a benefit from destroying a controlled substance, they will be more likely to destroy the controlled substance than release it to the atmosphere. The overall goal of providing the incentives for destruction is to prevent the release of ozone-depleting substances to the atmosphere.

EPA believes that the proposed system for granting destruction credits will have an overall environmental benefit. Without an incentive to increase the current rate of destruction the Agency presumes there will be greater release of controlled substances to the atmosphere as equipment that contains the phased out substances is taken out of commission. Today's proposal is to grant destruction credits equal to the quantity of controlled substance destroyed minus an offset of 15 percent. Although the credits can be used to produce or import controlled substances, the amount produced or imported will be less than the amount destroyed due to the offset. The credits also provide an incentive to destroy ozone-depleting substances that otherwise might be emitted.

In making today's proposal the Agency considered other ways of encouraging destruction. EPA considered a voluntary system for encouraging destruction of controlled substances. The voluntary system would not grant credits but simply try to persuade companies to destroy ozone-depleting substances with publicity and public relations assistance. For instance, the Agency could develop a list of companies actively destroying controlled substances as "friends of the ozone" in a national publicity campaign. EPA believes, however, that a system of credits would provide greater incentive to increase current rates of destruction and there would be less chance of controlled substances being released to the atmosphere.

Another option considered by EPA was to grant destruction credits equal to the amount of controlled substance destroyed. Under an option of giving 1:1 credits for kilograms, a person who destroys 100 kilograms of CFC–12 would be given a calculated level of 100 kilograms of destruction credits which could be used to produce or import 100 kilograms of new CFC–12. Although the incentive would be great to destroy unneeded stocks of controlled substances without an offset, EPA believes the environmental benefits of the actual destruction would be balanced by the subsequent production or importation of an equal amount of additional controlled substance.

In developing today's proposal, EPA considered offsetting the number of credits to be granted by one percent from the actual quantity destroyed. A one percent offset is used throughout the current regulation in calculating allowances authorized in various transfers; both between Groups of controlled substances (inter-pollutant trades) and between companies (inter-company trades). The offset was developed to address Section 607 of the CAA which requires that trades result in less overall production or consumption than would have occurred absent the trade. The one percent offset was proposed in the September 30, 1991 rule, as an amount large enough to provide a net environmental benefit but without discouraging the trading that might be necessary to meet market demand.

In today's proposal, EPA recommends a 15 percent offset. The 15 percent offset is proposed to ensure that environmental benefits result from the proposed incentive system granting additional production or importation to encourage destruction and prevent the release of controlled substances. The 15 percent offset proposed today is based on an estimate of the amount of controlled substances that could possibly be destroyed given the capacity of U.S. approved technologies. Estimates of destruction capacity for controlled substances in the United States for 1992 are 15 percent of annual production.[7] Therefore, the greatest environmental benefit that can be obtained in the U.S. from destruction is 15 percent of annual U.S. production. The 15 percent offset means a person who destroys a quantity of controlled substance after the phaseout (January 1, 1996) may request credits equal to 85 percent of the quantity destroyed. The 85 percent is the portion of annual United States production of controlled substances for intended emissive uses that cannot be destroyed due to the limits of estimated domestic destruction capacity. To control and reduce the damage caused by corrosive by-products from the destruction of controlled substances, operators of incineration units usually incorporate a small percentage of halogenated substances in each batch. The offset would encourage owners of approved destruction technologies to maximize their capacity for incorporating controlled substances.

Options for Transformation Credits—The discussion of destruction credits above also pertains to a system for granting transformation credits. Transformation credits would be granted to a person who transforms controlled substances originally produced or imported for intended emissive uses. EPA is seeking comment on a system that would grant transformation credits as a parallel system to the system for destruction credits described above. In other words, transformation credits would be granted for a quantity of controlled substance transformed originally produced or imported for intended emissive uses, minus the 15 percent offset.

EPA is aware that most controlled substances currently produced or

[7] United States capacity for destruction of halogenated compounds at commercial and public hazardous waste incineration facilities is 63,600 metric tons per year. United Nations Environmental Programme's Report from the Ad-Hoc Technical Advisory Committee on ODS Destruction Technology, May 1992.

imported for intended emissive uses do not subsequently become a feedstock for a transformation process. However, EPA believes that new technologies may appear that can transform controlled substances that were produced or imported for intended emissive uses. As defined in the current regulation, transformation is the process of entirely consuming a controlled substance (except for trace quantities) in the manufacture of other chemicals for commercial purposes. The Agency has learned of independent efforts to develop transformation technologies that would transform controlled substances into commercially useful chemicals. The information EPA has on these technologies suggests that they may be able to transform even controlled substances that are taken from use systems and that are contaminated. Today's proposal anticipates the development of these new technologies and would offer an incentive for the transformation of controlled substances that might otherwise be released into the atmosphere.

EPA is proposing to implement the Decision of the Parties to the Protocol to encourage practicable measures to prevent the release of controlled substances to the atmosphere, recognizing that there are many options for creating incentives that also achieve varying degrees of environmental benefits. EPA is therefore seeking comments on today's proposed system for granting credits as an incentive for the destruction or transformation of controlled substances after the phaseout and the options discussed above.

2. Post-Phaseout Requirements for Essential-Use Production

EPA discussed the issue of essential uses in its **Federal Register** notice containing the final accelerated allowance regulations (December 10, 1993, 58 FR 65018). While recognizing the need to include provisions to implement the essential use provisions of the Montreal Protocol, the final rule did not address how this would be incorporated into EPA's allowance program.

a. *Protocol Decisions Regarding Essential-Use Production.* The Montreal Protocol established an essential use provision at the Fourth Meeting of the Parties (Decision IV/25). Production and consumption are only to be permitted past the phaseout date for those applications approved under this Decision. The Decision established both criteria for determining whether a specific use should be approved as essential and a process for the Parties to use in making such a determination.

The criteria for an essential use adopted by the Parties is the following:

"(1) that a use of a controlled substance should qualify as 'essential' only if:

(i) it is necessary for the health, safety or is critical for the functioning of society (encompassing cultural and intellectual aspects); and

(ii) there are no available technically and economically feasible alternatives or substitutes that are acceptable from the standpoint of environment and health;

(2) that production and consumption, if any, of a controlled substance for an essential use should be permitted only if:

(i) all economically feasible steps have been taken to minimize the essential use and any associated emission of the controlled substance; and

(ii) the controlled substance is not available in sufficient quantity and quality from existing stocks of banked or recycled controlled substances, also bearing in mind the developing country need for controlled substance."

Thus, any proposed application for an essential use would be evaluated based on the social utility of that application, the availability of substitutes, and the potential for meeting that need through banked or recycled controlled substances.

Decision IV/25 also set out the procedural steps for implementing this process. It first calls for individual Parties to nominate essential uses. These nominations are then to be evaluated by the Protocol's Technology and Economic Assessment Panel (TEAP or the Panel) which makes recommendations to representatives of all Protocol Parties. The final decision on which nominations are to be approved is to be taken by a meeting of the Parties.

The initial cycle of implementing this Decision has been completed in the context of halons which were phased out of production at the end of 1993. EPA issued a **Federal Register** notice requesting nominations for essential uses of halons (February 2, 1993; 58 FR 6786). In response, the Agency received over ten nominations, but was able to work with applicants to resolve their near-term requirements. As a result, the U.S. did not nominate any uses for continued halon production in 1994. About a dozen other nations put forth nominations which were reviewed by the Technical and Economics Assessment Panel. Because the Panel determined that in each case alternatives existed or that the existing supply of banked halons was adequate to meet near-term needs, it did not recommend approval of any of the nominations. In November of 1993, at the Fifth Meeting, the Parties unanimously adopted the recommendation of the Panel not to approve any essential uses for the production or consumption of halons in 1994.

EPA issued a second notice for essential use nominations for halons on October 18, 1993 (58 FR 53722). These nominations covered possible production of halons in 1995 for essential uses. In response to this inquiry, EPA received no nominations.

Only one nomination (from France) was received by the TEAP for production and consumption of halons for an essential use in 1995. The TEAP did not recommend approval of this nomination.

EPA also issued a **Federal Register** notice requesting nominations for essential use applications which would need to continue beyond the 1996 phaseout of consumption and production allowances for CFCs, methyl chloroform, carbon tetrachloride, and hydrobromofluorocarbons (May 20, 1993, 58 FR 29410). EPA received 20 applications in response to this notice. For several of these applications, EPA determined that the criteria contained in the Decision had not been satisfied. For example, two applications sought CFCs for servicing existing air-conditioning equipment. EPA rejected these applications on the basis that if all economically feasible steps were taken prior to the 1996 phaseout, then adequate supplies of banked and recycled CFCs should be available. However, in rejecting these nominations, the United States noted that servicing existing air-conditioning and refrigeration remains a major challenge to the successful transition from the use of CFCs and that a future nomination in this area might be necessary if a combination of retrofits, replacements, recycling, recovery at disposal, and banking do not adequately address these needs.

Of the responses to the **Federal Register** request for essential use applications, the United States submitted essential use nominations to the Protocol for the following uses of CFCs: metered dose inhalers and other selected medical applications; a bonding agent for the Space Shuttle; aerosol wasp killers; limited use in a specified bonding agent and polymer application; and a generic application for laboratory uses under specified

limitations. (Letter from Pomerance to UNEP, September 27, 1993).

Nominations from the U.S. and other countries for over 200 specific uses were submitted to the Montreal Protocol Secretariat and provided to the Technical and Economics Assessment Panel for review. In March 1994, the Panel issued the "1994 Report of the Technology and Economic Assessment Panel." The Report includes the Panel's recommendations for essential-use production and consumption exemptions. The Panel recommended that essential use exemptions be granted for nominations of: methyl chloroform in solvent bonding of the Space Shuttle; CFCs used in metered dose inhalers; and specific controlled substances needed for laboratory and analytical applications.

For each of the other nominations submitted, the Panel determined that one or more of the criteria for evaluating an essential use had not been satisfied. For example, in the case of several of the U.S. nominations, the report states that alternatives are available and therefore the essential use exemption is not warranted.

The next meeting of the Parties is scheduled for October 1994. At that session the Parties will review the recommendations by the Technology and Economic Assessment Panel and make final decisions on this round of essential use nominations.

In 1993, the Parties to the Protocol modified the timetable for submission of essential use nominations to combine both halons and all the other class I controlled substances (except methyl bromide) and to reduce the overall length of time between nomination and decision. According to Decision V/18, essential use nominations for halon consumption and production for 1995 and beyond, and essential use nominations for all the other class I controlled substances (except methyl bromide) for 1997 and beyond, must be submitted to the Secretariat prior to January 1st of the year prior to the year for which production and consumption is being sought.[8] Parties must submit essential use nominations for CFCs for 1997 (nominations for 1996 have already been considered) to the Montreal Protocol Secretariat by January 1, 1996. EPA will revise its domestic schedule to require that nominations be submitted at least three months prior to the Protocol Secretariat deadline for submission, and will issue a **Federal Register** notice in August 1994, calling for essential use nominations for halons for 1996 and beyond. The next call by EPA for other class I controlled substances will be in August of 1995 for 1997 essential-use exemption nominations.

b. *Domestic Implementation of Essential-Use Program.* Any essential use exemptions would also have to comply with the provisions of the CAA. Section 604 of the CAA authorizes the granting of specific exemptions from the phaseout schedules contained in the Clean Air Act for essential uses for methyl chloroform for which no safe and effective substitute is available (section 604(d)(1)), for limited quantities of class I substances solely for use in medical devices if such authorization is determined to be necessary (section 604(d)(2)) and for limited quantities of halon–1211, halon–1301 and halon–2402 solely for use in aviation safety if no safe and effective substitute is available and if such authorization is necessary. The CAA also authorizes specific exemptions from the phaseout schedule of CFC–114, halon–1211, halon–1301 and halon–2402 for national security (section 604(f)).

In today's action, EPA does not propose essential uses under the provisions of the CAA. However, EPA does propose to permit continued production for the essential uses authorized under the Protocol, so long as these essential use exemptions do not exceed amounts allowed in the schedule contained in section 604(a) of the CAA.

As indicated on the table below, EPA is proposing essential uses for specified controlled substances for the years 1996 and 1997. As discussed in section A.1.c., "The Post-Phaseout Procedures for Granting Destruction and Transformation Credits," EPA proposes to authorize continued production for essential uses permitted under the Montreal Protocol, but not to exceed the maximum allowable limits set forth in section 604(a) of the CAA. As used in a previous example in section A.1.c., the CAA requires that in 1996, the maximum allowable production of CFC–12 may be no more than 40 percent of the quantity produced in the baseline year. Thus, in 1996, if total production of CFC–12 were to be used for essential uses, the amount produced for those essential uses may not exceed 40 percent of the quantity produced in the baseline year. Although production may be used for some combination of essential uses, destruction credits, or transformation credits, the total amount produced could not exceed the maximum allowable limits set forth in the CAA as reproduced in Table 1 below.

To incorporate the essential-use provisions under the Montreal Protocol into our domestic allowance program, EPA is proposing the creation of a new class of allowances to be referred to as "essential-use allowances."

The essential-use allowances will be allocated to United States entities based on the nominations made to the Protocol which will be decided upon by the Parties at the October 1994 meeting and at meetings thereafter. In the nominations to the Protocol, U.S. entities apply for an essential-use exemption from the production and consumption phaseout for a specific quantity of controlled substance for a specific use. EPA proposes using the applications that are agreed to by the Parties to the Protocol to make specific allocations of essential-use allowances. Although the TEAP has received applications for essential-use exemptions beyond 1997, today's proposal only includes those recommendations by the Panel for 1996 and 1997. In today's rulemaking, EPA proposes an allocation of essential-use allowances up to the amount being recommended by the Technology and Economic Assessment Panel to the Parties for their meeting in October 1994. It should be noted that the final essential-use allowances promulgated by EPA may not exceed the exemptions adopted by the Parties.

[8] Decision V/18 also directed the Technology and Economic Assessment Panel to develop a "Handbook of Essential Use Nominations." The Handbook is being prepared and will contain forms and instructions for how to apply for an essential-use exemption. When available, the Handbook may be obtained from the Stratospheric Protection Division, U.S. Environmental Protection Agency or the Ozone Secretariat of the Montreal Protocol in Nairobi.

ESSENTIAL USES RECOMMENDATION BY THE UNEP TECHNOLOGY AND ECONOMIC ASSESSMENT PANEL

Company	Year	Chemical	Quantity (metric tons)
Metered Dose Inhalers:			
International Pharmaceutical & Aerosol Consortium	1996	CFC–11	749.8
	.....	CFC–12	2353.2
	.....	CFC–114	314.1
	1997	CFC–11	658.3
	.....	CFC–12	2166.5
	.....	CFC–114	311.4
Sterling Winthrop	1996	CFC–12	10.2
	.....	CFC–114	29.6
	1997	CFC–12	10.5
	.....	CFC–114	31.7
Space Shuttle Solvent			
NASA/Thiokol	1996	Methyl Chloroform	56.8
	1997	Methyl Chloroform	56.8
Laboratory and Analytical Applications			
Global Exemption	1996	CFCs, Methyl Chloroform, Carbon Tetrachloride.	(1)
	1997	(2)	(2)

[1] No quantity specified.
[2] Same.

The nomination for essential uses in 1996, 1997 and 1998 of CFCs, methyl chloroform and carbon tetrachloride in analytical and laboratory applications is being recommended by the Technology and Economic Assessment Panel for a global exemption which will not specify the quantity granted to each Party. The TEAP describes the many analytical and laboratory procedures for which small quantities of controlled substances are now used and for which applications were received, such as: equipment calibration; extraction solvents, diluents, or carriers for specific chemical analyses; inducing chemical-specific health effects for biochemical research; and other critical purposes in research and development where substitutes are not readily available or where standards set by national and international agencies require specific use of a controlled substance. The TEAP recommendation for a global exemption pertains only to 1996, 1997 and 1998 and refers to the manufacture of CFCs, methyl chloroform and carbon tetrachloride of very high purities to be packaged in small containers. Additional detailed information regarding the purity of the substances and the size of the containers being recommended by the TEAP is contained in Appendix G to subpart A. In anticipation of the Parties adopting this recommendation of the Technology and Economic Assessment Panel, EPA is proposing that a specific quantity of essential-use allowances for laboratory and analytical use not be designated.

In anticipation of a Decision by the Parties at the October 1994 meeting that does not specify the quantity of essential use allowances permitted for analytical and laboratory application, but a global essential-use exemption, EPA is proposing that producers or importers of the controlled substance require that laboratories certify they are purchasing the designated essential-use controlled substances only for laboratory or analytical uses, and that the substance will not be resold (see Recordkeeping and Reporting in Section C.7.b.). Unlike the system for the allocation of essential-use allowances for metered dose inhalers and space shuttle solvents, there will not be specific recipients of analytical/laboratory essential-use allowances. A person who claims the essential need for an analytical or laboratory application of a substance that has been phased out will be permitted to purchase the requested quantity as long as a certificate is provided to the importer or producer of the substance. The certificates will allow EPA to monitor the quantities of phased-out controlled substances that are used in analytical or laboratory applications domestically. EPA reserves the right to amend these procedures in the future based on information collected through the certificates and changes made by the Protocol.

In the case of the allowances for specific essential uses, EPA proposes that the recipient of essential-use allowances confer to a producer or importer the right to produce or import a specific quantity of the specific controlled substance. The company conferring the essential-use allowances must, as in the case of laboratories, certify to the producer or importer that the controlled substance will only be used for the specified essential use. The producer or importer will report to EPA quarterly the quantity produced for essential uses, submitting the certification from the holder of the essential-use allowance.

Due to the specific nominations of specific substances for specific uses, EPA is proposing that inter-pollutant transfers of essential-use allowances not be permitted. The application process described above in which U.S. companies petitioned the Parties to the Protocol through EPA for an essential-use exemption for a specific quantity of a specific substance for a given year indicated that the substance is essential for the specific application because no practicable alternative chemical exists. EPA reviewed these applications and made recommendations to the TEAP, which in turn reviewed the claims that the specific substance is essential for the application and recommended an exemption be given in those cases where experts felt no substitute exists. For the same reason, EPA proposes that inter-company transfers of essential-use

allowances not be permitted because allowances will be allocated based on a company's application to the Parties through EPA for a specific quantity of a controlled substance for a specific use. As a result, EPA is also proposing that inter-Party trades not be permitted since these would be trades between companies internationally and the allocations being recommended by the TEAP to the Parties for the October 1994 meeting are country-specific.

B. Imports of Used Controlled Substances

In recognition of the critical role that previously used materials would play in ensuring a smooth transition to ozone-friendly substances, the Parties to the Montreal Protocol decided to encourage their expanded use. Specifically, in Decision IV/24 (Copenhagen, 1992), the Parties decided "not to take into account, for calculating consumption, the import and export of recycled and used controlled substances." EPA implemented this decision domestically in the December 10, 1993 phaseout rule (December 10, 1993; 58 FR 65018). Accordingly, EPA rules now allow importation of previously used or recycled controlled substances without allowances (§ 82.4(a) and (b)).

Although the December rule allows importation of used or recycled controlled substances, EPA is now investigating several cases of potential fraud in which the importer claimed that the substance was used or recycled when in fact, the Agency believes the substance was virgin or "off-spec" virgin (a newly manufactured substance that does not meet industry specifications for quality). Several other countries are investigating importation of controlled substances that were believed to be fraudulently labelled as used or recycled. Due to the difficulty of determining whether a substance is used or recycled, the Parties to the Montreal Protocol are very likely to consider a clarification of Decision IV/24 during the 1994 meeting. In an effort to facilitate final adoption of a rule that is consistent with the Protocol Parties' action, EPA is today proposing alternative methods for ensuring that materials brought into the country under the used and recycled allowance exemption are in fact used or recycled.

Additionally, EPA is today proposing that the current definition of used and recycled controlled substances be changed to include only the term "used" since EPA believes recycled and reclaimed substances fall under the current definition. In this manner, a controlled substance is defined as used if it was recovered from a use system, regardless of whether it was subsequently recycled or reclaimed. The proposed change simplifies the references to used substances without confusion regarding their subsequent treatment.

1. Information Requirements

One method for ensuring that a substance claimed to be used is in fact used is to require that the importer have proof of the origin of the substance prior to import. Naming the previous use of the substance offers opportunities for verification, whether through chemical analysis or through knowledge of a country's infrastructure. Therefore, EPA is considering incorporating some or all of the following information requirements:

—the name and address of the firm that recovered the chemical,
—the type of equipment from which the substance was recovered,
—the type of machine used to recover and/or recycle the material,
—the name of the facility and/or the name of the equipment employed to reclaim a previously used substance, or
—a chain of ownership of the substance from recovery to final import,
—a certification from the foreign seller that the substance is previously used,
—a chemical test of used imports where the quantity of the import exceeds some specified weight (e.g., 10,000 pounds).

EPA is aware that the importer may not always know if the imported substance was in fact previously used. In the absence of information requirements such as those noted above, the importer might be forced to rely solely on the statements of exporters from other countries—individuals about whom the importer may know little or nothing. The types of information noted above are designed to provide an opportunity for independent verification of the nature of the substance being imported (both from the U.S., and by the exporting country government).

As an alternative, or in addition to requiring import information such as that noted above, EPA proposes that it be able to request post-import information designed to ensure that the product is treated in a manner consistent with the claimed import status. Importers of used material that was not reclaimed may be asked to provide information on the facilities that they will use for reclaiming the used substances once imported. Information that EPA may require could include, where applicable:

—the name of the reclamation facility that will clean a used or a recycled substance to the specified ARI–700 Standard,
—information demonstrating that such cleaning will take place, or
—the bills of sale from the exporter to the actual purchaser of the substance (not necessarily the importer).

EPA requests comment on the above-noted list of potential information requirements, and requests comment on alternative information requirements that can reasonably be expected to result in an accurate determination of whether the substance being imported is in fact used.

2. Certification by the Country of Export

In future meetings, the Parties to the Protocol may decide to require the government of the country of origin of a material to certify its status as used prior to export. While this might obviate the need for some of the information listed in paragraph B.1. above, it would also require EPA to establish a program to certify any U.S. exports of used controlled substances. EPA already has a limited certification program for certain reclamation facilities. Under this program, reclamation facilities must be able to ensure that previously used substances will be reclaimed to a level of purity called for by the ARI–700 Standard. With regard to exports of used substances, with such Protocol changes, U.S. exporters could be required to certify to EPA that the "used" substance that it wishes to export was indeed taken from a use system. The exporter could also be required to keep records on selected items under paragraph B.1. above, to facilitate future verification. EPA requests comments on this approach to certify that the used and recycled class I substances being exported are being recovered from use systems.

3. Creation of a Permit Program for the Importation of Used Materials

EPA is considering the use of a permit system for the importation of used controlled substances. In addition to the measures discussed in paragraphs B.1. and B.2. above, EPA believes a permit system may deter fraudulent import of mislabelled controlled substances, and may provide greater control over the entry of used controlled substances into United States jurisdiction. The European Union requires importers to have permits to control the import of mislabelled ozone-depleting substances that are used. EPA believes that adoption of a similar system of permits for the importation of used controlled substances may increase the

effectiveness of enforcement actions against the illegal importation of used substances into the U.S. EPA seeks comments on the potential effectiveness of a permit system in controlling the import of mislabelled used controlled substances, in general, and the specific permit systems described below. Under all options being considered, an importer would not be able to import until a permit was granted.

Currently, EPA receives a monthly list of importers of controlled substances from U.S. Customs. With a permit system, EPA would collect information from importers of used controlled substances and could match persons on the monthly U.S. Customs list with the list of persons who have permits to import used controlled substances. A person appearing on the U.S. Customs list who does not have a permit would be in potential violation of the regulation. A permit system would also enable compliance and enforcement staff to link suspicious imports by permitted importer to a specific person, i.e., the name and address of the company. Importers would also be aware that EPA held information on each import, providing a disincentive for fraudulent activity.

One option EPA is considering would require individuals to obtain a permit from EPA prior to each proposed import of a used controlled substance. EPA would require the person to submit an application for a permit 15 days before the import is due to enter U.S. jurisdiction. EPA would then have 5 days in which to grant the permit. If EPA does not act within 5 days, the permit would be granted automatically. EPA would review the information to determine if the information is sufficient and verify the accuracy of the claims. If the application is denied, the person may appeal within 5 days. EPA would then have 5 days in which to review the appeal and deny or grant the permit. If EPA does not make a determination on the appeal within 5 days, the permit would be granted automatically.

The application for an import permit for a particular shipment of used controlled substances would need to include the name and address of the importer, their importer identification number, and the quantity of controlled substance that the person intends to import. In addition, the individual would be required to furnish information such as that outlined under paragraph B.1., "Information Requirements," that ensures the substance being imported is in fact "used." EPA is requesting comment on a list of information requirements in paragraph B.1. to identify those which might best verify that a controlled substance is in fact "used." In addition, importers of used controlled substances may be asked to provide information on the reclamation facility they will use once the substance is imported, in order to bring the contaminated material to chemical and physical specifications for sale in the United States. EPA is considering this option because it would provide detailed, timely information on each shipment and allow more accurate compliance determinations. However, EPA is seeking comments on the potential constraints on trade that a shipment by shipment permitting system might impose.

Another option EPA is considering would require all importers of used controlled substances to apply each year for a permit. Such a permit application would need to be submitted to EPA between November 1 and November 15 in the year prior to the control period for which it would be applicable. The permit application would include the person's name and address, their importer identification number, and the intended quantity of used controlled substance that the person estimates will be imported during the control period. The estimates would not be binding, but would provide EPA with information on the total potential import of used controlled substances for the U.S. for that year. EPA would need to make a determination within 30 days of the receipt of an application. If the application is denied due to insufficient information, the person would have 5 days in which to appeal the decision. EPA would then have an additional 5 days in which to deny or grant the permit. If EPA did not act in the 5 days, the permit would be granted automatically. A person wishing to import used controlled substances who did not apply for a permit during the designated time before the control period, may submit an application at any time during the year. However, EPA would maintain the right to review the application within 60 days of its receipt. A 60-day review of the application is justified by the fact that the person is applying outside of the designated time for processing permits. Any person receiving a permit outside of the designated time period for application would be required to apply again for the following control period, during the designated period.

The importers granted permits for a year would be asked to furnish information upon the import of each shipment of used controlled substance. EPA is requesting comment on a list of information requirements in paragraph B.1. to determine those that best verify that an imported controlled substance is used. Such information would become the reporting requirements for each particular shipment for individuals holding a permit to import used controlled substances.

The yearly permit system described may be easier to implement and comply with than a permit system for each imported shipment of used controlled substance. A permit system for each shipment, however, could provide more detailed information and potential control over each particular import of used substances. The Agency seeks comments on the options discussed above and also solicits suggestions on other approaches for permit requirements that are not burdensome but adequately ensure that imported used controlled substances are in fact "used."

C. Adjustments and Clarifications of the Allowance Program to Become Effective January 1, 1995

This section describes proposed changes to the current regulation in an effort to address issues that have arisen since the December 10, 1993 rule. The proposed clarifications in this section are made to increase the efficiency of the requirements and reduce the administrative burden for affected individuals and the Agency. The following paragraphs propose changes to the current rule that would go into effect January 1, 1995, for the last control period before the phaseout begins on January 1, 1996.

1. Changes in Requirements for Export to Article 5 Countries

In accordance with the Montreal Protocol, limited production of controlled substances for export to Article 5 countries may continue after the phaseout. Specifically, Article 2 of the Protocol allows Parties to produce beyond the January 1, 1996 phaseout to meet the basic domestic needs of Article 5 countries. Article 5 countries are defined by the Parties as developing countries "whose annual calculated level of consumption of class I, Group I controlled substances is less than 0.3 kilograms per capita." Article 5 countries are listed in Appendix E to Subpart A.

Under the current Allowance Program, a company must have production and consumption allowances before producing a controlled substance for export to an Article 5 country. Companies with a baseline allocation of consumption and production allowances for specific

controlled substances currently are given an allocation of potential production allowances amounting to ten percent of their baseline production allowances until January 1, 2000, and fifteen percent of baseline production allowances from January 1, 2000, until January 1, 2011 based on phaseout dates required by the Clean Air Act (see discussion below regarding proposed changes in percentage allocations, based on accelerated phaseout dates). These companies may request the conversion of these potential production allowances to production allowances after exporting a controlled substance to an Article 5 country.

Effective January 1, 1995, EPA proposes changing the name of potential production allowances to Article 5 allowances. In today's rule, EPA also proposes to eliminate the process for converting potential production allowances to production allowances beginning January 1, 1995. This proposed change would eliminate the current process where companies expend production and consumption allowances up-front to produce a controlled substance for export to an Article 5 country and, after the export, request the conversion of potential production allowances to production allowances. The changes are proposed to anticipate the elimination of production allowances for class I controlled substances (except methyl bromide) after January 1, 1996, and to ease the administrative burdens created by the current process.

EPA proposes that beginning January 1, 1995, the Agency assign Article 5 allowances to companies that have an allocated baseline of production allowances.[9] Under the proposed system, a company would notify the Agency at the end of the quarter in which they exported to Article 5 countries. EPA would then deduct the amount of controlled substance exported to Article 5 countries from the balance of Article 5 allowances held by the company, rather than require an application to convert potential production allowances to production allowances.

The Agency is also proposing to correct the date from which, and until which, companies may produce 15 percent of baseline allowances for export to Article 5 countries. CAA section 604(e)(2)(C) permits production for developing countries to exceed baseline allowances by up to 15 percent beginning January 1, 2000, and to continue until January 1, 2010 (2012 in the case of methyl chloroform). However, the Protocol permits production for export to Article 5 countries at 15 percent of baseline allowances beginning with the phaseout date (January 1, 1994, for halons, and January 1, 1996, for CFCs, methyl chloroform and carbon tetrachloride) and continuing for ten years after the Protocol phaseout (until 2003 for halons and until 2006 for CFCs, methyl chloroform and carbon tetrachloride). Since the terms of the Protocol are more stringent than those of the CAA, EPA proposes to permit production of class I substances for export to Article 5 countries to continue until 2006 (2003 for halons).

At the 1992 London meetings, the Parties agreed that Parties may produce fifteen percent of baseline production allowances of all class I controlled substances (except methyl bromide and HBFCs) to meet the basic domestic needs of Article 5 countries starting from the phaseout date (January 1, 1994, for halons, and January 1, 1996, for CFCs, methyl chloroform and carbon tetrachloride). CAA section 604(e)(2) authorizes production of a class I substance at the production percentage specified for a given year (see phaseout schedule in Table I of section A.2. Post-Phaseout Requirements for Essential-Use Production), plus an amount equal to 10 percent of the baseline production allowances for export to developing countries. In the year in which the CAA phases out production of class I controlled substances, section 604(e)(2)(B) authorizes production of a class I controlled substance for export to developing countries up to 15 percent of baseline allowances. Under the CAA, production of listed class I controlled substances terminates on January 1, 2000, except for methyl bromide on January 1, 2001, and methyl chloroform on January 1, 2002.

CAA section 604(e)(2) permits production based on limits imposed under section 604(a) plus 10 percent of the baseline allowance. Thus, in the example cited above for 1996, the CAA authorizes 40 percent of baseline production for CFC–12 as listed in Table I in this preamble, plus an additional 10 percent for export to Article 5 countries, for a total production of 50 percent of total baseline production for that year. Under today's proposal, because the Protocol phases out production of CFCs in 1996, up to 50 percent of baseline could be produced through a combination of destruction credits, transformation credits, essential use allowances and Article 5 allowances. A person's total production in 1996 could not exceed 50 percent of baseline allowances. Of this total production, production for export to Article 5 countries could not exceed 15 percent of baseline allowances as authorized under the Protocol. In addition, any amount of production in excess of 40 percent of baseline allowances would have to be for export to Article 5 countries. This same scenario would pertain to the production of halons for export to Article 5 countries from 1994. EPA invites comment on this interpretation.

In proposing today's changes to the procedures for Article 5 allowances, EPA considered the following changes to the provisions for transfers and conversions in § 82.12. Inter-pollutant transfers of Article 5 allowances, as currently defined in § 82.12, will continue to be permitted within the Groups of class I substances listed in Appendix A and F of Subpart A. Inter-pollutant transfers of Article 5 allowances will continue to require a one percent offset, as required by section 607 of the CAA and stipulated in the current regulation.

The Agency is also proposing that inter-company transfers of Article 5 allowances be permitted as currently defined in § 82.12 and inter-Party trades of Article 5 allowances be permitted as currently described in § 82.9. However, the requirement that the controlled substance in an inter-Party trade return to the country from whom the allowances were traded will not apply in the case of Article 5 allowances as stipulated in § 82.9(a)(b)(1)(vi). As an example, if one Party to the Protocol wants to trade Article 5 allowances to another Party to achieve improved economies of scale, the controlled substance produced with the allowances would not need to be returned to the Party from whom the allowances were traded; instead, the substance could be sold directly to an Article 5 country. The Agency proposes maintaining the requirement that the contract contain the statement that the controlled substance exported to an Article 5 country will only be used to meet basic domestic needs, as defined by the Montreal Protocol, and will not be reshipped. In addition, EPA understands that the Parties to the Protocol are considering, for future discussion, that reports be sent from the exporter to Article 5 countries indicating that they should expect to receive a shipment of a specific quantity of controlled substance. The Parties may discuss requirements that the exporting company send a copy of the sales contract for an export to the head of the Montreal Protocol delegation of the

[9] Under a separate **Federal Register** notice, EPA is allocating Article 5 allowances for production of methyl bromide (class I, Group VI) to persons with baseline production allowances.

Article 5 country or to the stratospheric ozone unit in the Article 5 country.

EPA seeks comments on the proposed changes to the system for controlling and monitoring exports of controlled substances to Article 5 countries.

2. Administrative Changes to the Consumption Allowance Requirements for Exports

The current regulation requires that production of controlled substances for export to Parties meet the requirements for both consumption and production allowances. The current rule requires producers to expend both production and consumption allowances to produce class I controlled substances. If the controlled substance is then exported to a Party, the producer (or exporter) may request that EPA "refund" consumption allowances equal to the amount exported.

EPA considered not proposing any changes to the administrative procedures because only one year remains before the phaseout of class I controlled substances begins on January 1, 1996. However, EPA recognizes that the administrative process of expending consumption allowances to produce class I controlled substances for export, with the subsequent request to have the consumption allowances refunded for these exported substances, is cumbersome for the producer, especially at this point in the schedule of the phaseout. In the last control period before the phaseout (from January 1, 1995 to January 1, 1996), producers are reducing their production to a fraction of the quantity they produced in previous years (see schedule for phaseout in § 82.8).

EPA believes United States companies should be able to respond in a timely manner to requests for controlled substances. If United States companies are not able to respond to requests for controlled substances in a timely manner due to the administrative procedures created by the current rule, these business opportunities will be lost to foreign competitors.

According to reports from producers, the time lag between the expenditure of consumption allowances during production and the receipt of the refunded consumption allowances for an export can often mean missing the opportunity to fulfill a request for a controlled substance. As a result, the Agency is proposing to reduce the time taken to refund consumption allowances for an exported controlled substance.

By changing the reporting requirements so companies report earlier to the Agency, EPA proposes to reduce the time taken to refund the consumption allowances expended in the production of controlled substances that are exported. This proposal would permit a U.S. company to report the export of a controlled substance to a Party at the time the export is initiated, rather than requiring the producer to submit the completed bill of lading and the invoice with the request for additional refunded consumption allowances. This change in the reporting procedures would allow the company to submit a preliminary report of export earlier. Therefore, EPA would be able to authorize the refund of consumption allowances earlier, contingent upon verification of the export when the company submitted the bill of lading and invoice. Today's proposal would permit companies to expend the contingent consumption allowances to meet their production or importation needs in a more timely manner. The contingent authorization of consumption allowances will accelerate the time in which companies receive the allowances, allowing them to meet requests for controlled substances in a timely manner. Thus, companies will be less constrained by the time lag caused by current administrative requirements. However, in the event that documentation submitted by the company does not support the export, EPA will consider that the granting of the consumption allowances never occurred, potentially putting the company in violation of the requirements.

EPA also considered another option in making today's proposal. The option considered would exempt the production of class I controlled substances from the consumption allowance requirements, if the substance is exported to Parties during the one remaining control period before the phaseout (from January 1, 1995 to January 1, 1996). This option would include an exemption for methyl bromide from the consumption allowance requirements for exports beginning January 1, 1995, and extending until January 1, 2001. Producers would be allowed to produce class I controlled substances for export to a Party with only the expenditure of production allowances.

Under the second option described above, exports would be exempt from the requirements to expend consumption allowances. If the producer is certain that a person purchasing the controlled substance in the United States would export to a Party, there would be no requirement to expend consumption allowances in the production of that substance under this option. The exporter would certify to the producer, either in the sales agreement or in a letter, that the controlled substance would be exported. When the producer has no guarantee that the substance would, or would not, be exported to a Party, they would expend both production and consumption allowances in producing the controlled substance.

Under the current regulation, a person in the United States may receive both production and consumption allowances from a Party to the Protocol in an inter-Party trade (under the Protocol this is called industrial rationalization). The U.S. company that receives the allowances from the other Party expends the production and consumption allowances to produce a controlled substance. The controlled substance produced with the traded allowances is then exported to the Party from whom the allowances were traded. The U.S. company expends consumption allowances in the production of the controlled substance for an inter-Party trade and then asks EPA for a "refund" of these consumption allowances because the controlled substance was exported.

Due to the redundant cycling of consumption allowances in inter-Party trades to the United States described above, EPA is also considering the option that a person *not* receive additional consumption allowances through inter-Party trades for the remaining control period from January 1, 1995, to January 1, 1996. Under this option, consumption allowances would not be expended in the production of controlled substances as part of an inter-Party trade. The option of eliminating consumption allowances for inter-Party trades to the United States for methyl bromide would begin January 1, 1995, and extend until January 1, 2001. EPA seeks comments on this considered option to alleviate administrative requirements for consumption allowances for the export of controlled substances to Parties to the Protocol.

Today's proposal is to receive a preliminary export report from U.S. companies at the time they initiate an export and authorize a contingent refund of consumption allowances with verification conducted later when the company submits the bill of lading and invoice for the export. However, the Agency considered two other options for today's proposed rulemaking: (1) to maintain the status quo requirements and reporting procedures in the current regulation for the remaining control period from January 1, 1995 to January 1, 1996, (2) to eliminate the requirement that consumption allowances be

expended if the controlled substance is produced for export to a Party to the Protocol. EPA seeks comments on today's proposal and the other options considered for controlled substances exported to Parties of the Protocol.

3. Administrative Changes to Production Allowance Requirements for Exports that are Transformed or Destroyed

EPA is proposing that a person who produces a controlled substance for exportation to a Party to the Protocol for transformation or destruction may request from the Agency the refund of the production allowances expended in the production of the substance. The proposal pertains to the production of class I controlled substances for the control period beginning January 1, 1995 and ending January 1, 1996, except for methyl bromide. For methyl bromide, the proposed refund of expended production allowances for quantities exported to Parties which are certified to be for transformation or destruction would begin January 1, 1995 and extend until January 1, 2001. As with the procedures for refunding consumption allowances, a person in the U.S. producing or purchasing a class I controlled substance may, upon export to a Party for subsequent transformation or destruction, request from EPA a "refund" of production allowances with a certification that the production allowances were expended in the production of the substance. To ensure that the controlled substance is in fact transformed or destroyed by the recipient in a Party country, the Agency is proposing exporters be required to include in the sales contract a certification of the future transformation or destruction.

In parallel with the administrative changes proposed in the previous section for consumption allowances, the Agency proposes accelerating the procedures for requesting production allowances for the export of substances that will be transformed or destroyed. This proposal would permit a U.S. company to report the export of a controlled substance for transformation or destruction at the time the export is initiated, rather than requiring a completed bill of lading and invoice with a certification in order to grant additional production allowances. EPA would authorize the refund of production allowances contingent upon verification of the export for transformation or destruction by the bill of lading and invoice and the certification of transformation or destruction. The company could expend the contingent production allowances to meet their production or importation needs in a timely manner. However, in the event that documentation submitted by the company does not support the export for transformation or destruction, EPA will consider that the granting of the production allowances never occurred, which may mean the company is in violation if they do not have sufficient production allowances for the quantity of controlled substances produced.

In making today's proposal, EPA also considered eliminating the expenditure of production allowances for class I controlled substances to be exported to Parties of the Protocol for transformation or destruction. Under this option, the production of all class I controlled substances explicitly for transformation or destruction in the U.S. or in a Party after January 1, 1995, would not require the producer to expend production allowances. The producer would need a certification of intent to transform or verification of destruction. To ensure that the controlled substance is transformed or destroyed by the recipient in a Party country, the Agency would require the exporter to include a certification of future transformation or destruction in the sales contract.

EPA seeks comments on today's proposal to allow a person to request production allowances for the export of class I controlled substances to Parties for transformation or destruction.

4. Treatment of Controlled Substances Remaining in Emptied Containers, i.e. "Heels"

Heels are the amount of a substance remaining in a vessel or container after the majority is off-loaded or discharged. For example, when a ship returns from transporting a controlled substance, the container that held the controlled substance often retains a residue of the substance. This is known as the heel. Heels can be as much as ten percent of the volume of a given container. A ship returning with a heel represents a significant volume of controlled substance returning to the United States.

Heels are included in the current definition of bulk controlled substance in the current regulation. Therefore, the current interpretation of a bulk controlled substance requires ships returning with a heel to the United States to expend consumption allowances to import that substance.

EPA proposes amending the current consumption allowance requirements to exempt heels, effective January 1, 1995. The amended definition will allow vessels with heels to return to the United States if the company certifies that certain conditions are met. EPA proposes that heels be exempted from the consumption allowance requirements if the company bringing the heel into the United States certifies that the residual amount will remain in the container and be included in a future shipment, or recovered and banked for future recycling, reclamation, transformation, destruction or non-emissive use. The industry rule-of-thumb is that a heel is up to ten percent of the volume of the container. Therefore, EPA proposes that containers returning to the United States with more than ten percent of their volume filled with controlled substance, and labelled as a heel, be required to expend consumption allowances to import the substance until January 1, 1996. After January 1, 1996, a heel that is greater than ten percent of the volume of the container would require the use of destruction or transformation credits for the importation for the amount in excess of ten percent.

The Agency is proposing that persons who bring heels back to the United States report annually their returns of heels. The Agency will review this information to determine if the returns of heels is cause for concern due to volume and frequency of occurrence. Comments are requested on this issue of exempting heels from the requirements to expend consumption allowances to import.

5. Clarification of the Definition of Transhipment

Under the current regulation a person who transships a controlled substance from one foreign country through the United States to another foreign destination does not need allowances.

In the current regulation, transhipments of controlled substances are excluded from the limits and requirements for allowances. The current regulation excludes transhipments from the allowance requirements consistent with the Decision of the Parties to the Protocol. However, EPA wishes to further elaborate on the definition of transhipment.

The request to clarify the definition of transhipment was made by a company who ships controlled substances through United States ports. The company brings controlled substances from other countries to United States ports where the contents of a larger vessel are subdivided into smaller vessels for shipment to other countries. The question arose whether this constituted repackaging and therefore was considered an import and thus subject to the requirements of the

regulation. Although the language of the regulation does not preclude repackaging, the preamble states that transhipments are shipments of bulk chemicals that are "not repackaged within the United States." Therefore, the transfer of a controlled substance from one ship to another while in a U.S. port could possibly be interpreted to constitute repackaging.

In today's proposal, EPA further clarifies the definition of transhipment to allow for the transfer of controlled substances between ships in United States ports as long as the substance does not enter into United States jurisdiction. In other words, repackaging of controlled substances that are being transhipped through the United States, and that do not enter into United States jurisdiction, do not require the expenditure of allowances. Today's proposal is intended to clarify that transhipments do not require consumption allowances to be expended, whether or not the controlled substance is repackaged. Today's clarification does not change the current rule; and transhipments are still excluded from the requirements for production and consumption allowances.

EPA wishes to further clarify the definition of transhipment to allow for shipments into and out of United States foreign trade zones and subzones without requiring the expenditure of production or consumption allowances. Controlled substances that enter United States foreign trade zones and subzones are not considered to be entering into United States jurisdiction. EPA seeks comments on the proposed clarification of the definition of transhipment.

6. Provision of an Account Reconciliation Period

EPA recognizes that as the phaseout enters the final year (1995) for production and consumption of class I controlled substances (except methyl bromide), the administrative task increases for a company to ensure that it has a balance of allowances at the end of the year. This is particularly difficult given the need to meet requirements for each controlled substance and to reconcile transformations, destructions, exports, imports and production. Several companies that produce, import, export, transform or destroy controlled substances have requested a period in which to reconcile all previous transactions in a year.

EPA is proposing an administrative change to ease the end-of-year burden of reconciling the balance of allowances without changing the level of environmental protection provided by the regulation. To ease this burden, EPA is proposing a 45-day period of reconciliation beyond the end of the control period in which persons may make inter-pollutant transfers of class I controlled substances as defined in the current regulation. Inter-pollutant transfers of controlled substances can only be made between controlled substances in the same Group as listed in Appendix A and F of Subpart A. In addition, the inter-pollutant transfer must be authorized by EPA and will include a one percent offset. The Agency is proposing that inter-company trades not be allowed past the end of the control period (December 31st of 1995), and every subsequent control period for methyl bromide. The proposal allows for a potential net environmental benefit and greater flexibility for end-of-control-period compliance.

The proposed reconciliation period is being limited only to inter-pollutant transfers, in part, to provide a margin of latitude for companies in the final year of the phaseout when balancing production and consumption allowances at the end of year is important before closing the books. For many companies, the final year will be particularly difficult because there is less margin of error afforded in the amount of allowances provided for imports and production. Inter-pollutant transfers at the end of the control period are intra-company adjustments to the balance of allowances through paper accounting rather than an extension of the control period for trades, exports or transfers between companies. EPA seeks comments on the proposed period for the reconciliation of these specific allowances at the end of the control period.

7. Additional Clarifications

a. *Unintended by-products of research and development.* EPA proposes adding the production of unintended by-products of research and development applications to the list of inadvertent or coincidental creation of insignificant quantities of listed substances in Appendix A or Appendix B in the definition of "controlled substance." The Agency is proposing that these inadvertent or coincidental creations of insignificant quantities of unintended by-products during research and development applications not be considered controlled substances. The Agency believes that an unintended by-product a substance generated during research and development can be considered an inadvertent creation of a controlled substance. In addition, EPA received information from various companies that the amounts generated during research and development applications are generally insignificant quantities. The Agency reserves the right to require a person to destroy the unintended by-products of research and development applications if they are determined to be no longer insignificant.

b. *Export of increased production that is received through a trade from a party.* EPA proposes removing the requirements under § 82.9(b)(vi) and § 82.10(c)(3) that compel increased production to return to the Party from whom a U.S. producer receives additional production or consumption allowances through an international trade. As a result of this proposal, U.S. companies could receive allowances through an international trade to produce for either the demand within the country from whom the allowances were traded or for the demand in the U.S. domestic market. The proposal would permit greater international market flexibility without increasing global production of ozone-depleting substances. EPA believes that U.S. producers will need greater flexibility to meet domestic demand as they enter the final year before the production of class I controlled substances is phased out (January 1, 1996). Sections 82.9 and 82.10 of the current regulation permit international trades in accordance with the Protocol's definition of "international rationalization" as discussed in the **Federal Register** proposed rule published on December 14, 1987. Today's proposal would further support international rationalization by increasing opportunities for achieving "economic efficiencies" globally. Achieving these economic efficiencies is particularly important as all Parties continue to reduce production prior to the phaseout in 1996. EPA seeks comments on the proposed amendment that would allow international trades from Parties to meet market demand for class I controlled substances within the United States.

8. Clarification of Reporting and Recordkeeping Requirements

EPA is proposing amendments to the current recordkeeping and reporting requirements to more effectively address issues that have arisen and are likely to arise as the phaseout date is near and for the period following the end of production of class I controlled substances in the United States. In addition, EPA proposes to amend reporting and recordkeeping requirements to reflect the proposed changes discussed earlier.

a. *Reporting and recordkeeping for transformation and destruction.* As with

the earlier section describing transformation and destruction (Section A.1.), this section distinguishes between the different categories of recordkeeping and reporting requirements for producers, importers, transformers and destroyers.

EPA is proposing that the administrative changes to the recordkeeping and reporting requirements for transformation and destruction be effective January 1, 1995. The changes are made to reduce redundancy and clarify the responsibilities of companies that produce or import substances that are transformed or destroyed, as well as the responsibilities of transformers or destroyers controlled substances (see paragraph A.1. of this proposed rule). EPA is proposing changes to the recordkeeping and reporting requirements for importers to address issues of importation of used, recycled or reclaimed controlled substances. These proposed recordkeeping and reporting requirements for importers are described in greater detail in Section C.7.c., Recordkeeping and Reporting for Imports.

(i) Reporting and recordkeeping requirements for producers and importers of controlled substances that were produced or imported explicitly for transformation or destruction in the United States. Today's proposal does not change the recordkeeping and reporting requirements for persons who produce controlled substances that are explicitly for transformation or destruction within the United States. Although EPA is proposing changes to the recordkeeping and reporting requirements for importers to address issues of importation of used, recycled or reclaimed controlled substances (described in greater detail in Section C.7.c., Recordkeeping and Reporting for Imports), there are no changes to the requirements for importing controlled substances that are explicitly for transformation or destruction.

Under the current regulation, companies that produce or import controlled substances explicitly for destruction or transformation in the United States are required to maintain records and to report to EPA quarterly. The producers and importers must report quarterly the "amount of controlled substances sold or transferred during the quarter to a person for use in processes resulting in their transformation or destruction," and submit the IRS transformation certification or destruction verification. Producers and importers must also report quarterly on the quantity that they themselves transform or destroy in the quarter.

(ii) Reporting and recordkeeping requirements for producers and importers of controlled substances that were produced or imported for intended emissive uses but subsequently transformed or destroyed. Today's proposal does not change these requirements regarding controlled substances sold for intended emissive uses that are subsequently transformed or destroyed.

The current regulation requires producers and importers to report on controlled substances sold for emissive uses. However, the current rule does not require producers or importers to maintain records or report to the Agency on the subsequent transformation or destruction of controlled substances initially produced for emissive uses. Once the controlled substance is sold for an emissive use the producer or importer is no longer responsible for informing the Agency of its subsequent disposition, whether it be for emissive use, for transformation, or, for destruction.

(iii) Reporting and recordkeeping requirements for transformers and destroyers of controlled substances that were produced or imported explicitly for transformation or destruction. The Agency is not proposing changes to the recordkeeping and reporting requirements for those persons who transform or destroy controlled substances that were produced or imported explicitly for transformation or destruction. The transformers will continue to submit an IRS certification of intent to transform to the producer or importer and the destroyers will continue to submit a destruction verification to the producer or importer. Those transformers and destroyers who submit a certification or verification must continue to report annually to EPA as in the current regulation under § 82.13(m). The Agency verifies the transformation or destruction of controlled substances that were explicitly produced or imported for transformation or destruction through this annual reporting.

The current regulation requires all companies that destroy or transform controlled substances, regardless of whether or not they were produced or imported explicitly for transformation or destruction, to maintain records and to report to EPA the amounts of substances destroyed or transformed within 45-days of the end of the control period (annually). Facilities that transform or destroy controlled substances that were explicitly produced or imported for transformation or destruction must submit an IRS certificate of intent to transform or a destruction verification to the producer when the substance is sold or transferred. The producer reports to EPA quarterly the quantities sold or transferred for transformation or destruction with a copy of the IRS transformation certification or the destruction verification. EPA requires the information from both the producer/importer and the transformer/destroyer to crosscheck and verify the quantity of controlled substances claimed to be produced or imported without expended allowances explicitly because it was for transformation or destruction.

(iv) Reporting and recordkeeping requirements for transformers of controlled substances produced or imported for intended emissive uses. Under the current regulation, a person who transforms a controlled substance that was produced for intended emissive uses may request additional production allowances or consumption allowances from the Agency. The current regulation lists the information the Agency must receive to consider a request for additional production allowances in § 82.9(c) and for additional consumption allowances in § 82.10(b). A person may only request additional production allowances and consumption allowances for the transformation of class I controlled substances (except methyl bromide) that were produced for intended emissive uses during the remaining control period from January 1, 1995, to January 1, 1996. A person transforming methyl bromide that was produced for intended emissive uses may request additional production and/or consumption allowances until January 1, 2001.

EPA proposes waiving the annual reporting requirement for transformation facilities that receive controlled substances that were produced or imported for intended emissive uses, as long as the facility does not request from EPA additional production or consumption allowances before January 1, 1996, and does not request transformation credits after January 1, 1996. If a person transforms a controlled substance produced or imported for intended emissive use for which additional production or consumption allowances are requested from EPA during the control period from January 1, 1995, until January 1, 1996, or for which transformation credits are requested from the Agency after January 1, 1996, the transformer must report to the Agency the name and quantity of substance transformed at the end of the control period.

The proposed recordkeeping and reporting requirements for a transformer who requests transformation credits (beginning after January 1, 1996) are similar to the current requirements for obtaining additional production allowances as listed under § 82.9(c). Effective January 1, 1996, a person who transforms a class I controlled substance (except methyl bromide) that was produced or imported for intended emissive use may submit specific information to EPA requesting transformation credits (see Section A.1.c., "The Post-Phaseout Procedures for Granting Destruction or Transformation Credits). The following information must be submitted to request transformation credits:

—The identity and address of the person requesting the credits;
—The name, quantity, and volume of controlled substance transformed;
—A copy of the invoice or receipt documenting the sale of the controlled substance to the person;
—The name of the use system from which the controlled substance was recovered;

(v) Reporting and recordkeeping requirements for destroyers of controlled substances produced or imported for intended emissive uses. Under the current regulation, all facilities that destroy controlled substances that were produced or imported for intended emissive uses are required to report the names and quantities of class I substances destroyed within 45-days of the end of the control period. In addition, these destroyers may request additional production allowances and/or consumption allowances from EPA under the current regulation in § 82.9(c) and § 82.10(b).

EPA proposes waiving the annual reporting requirement for destruction facilities that receive controlled substances that were produced or imported for intended emissive uses, as long as the facility does not request from EPA additional production or consumption allowances before January 1, 1996, and does not request destruction credits after January 1, 1996. However, if a person destroys a controlled substance produced or imported for intended emissive use for which additional production or consumption allowances are requested from EPA during the control period from January 1, 1995, until January 1, 1996, or for which destruction credits are requested from the Agency after January 1, 1996, the destroyer must report to the Agency the name and quantity of substances destroyed at the end of the control period.

The recordkeeping and reporting requirements for a destroyer who requests destruction credits (beginning after January 1, 1996) are similar to the information now required for additional production allowances as listed under § 82.9(c). Effective January 1, 1996, a person who destroys a class I controlled substance (except methyl bromide) that was produced or imported for intended emissive use may submit specific information to EPA requesting destruction credits (see Section A.1.c. for a description of the "The Post-Phaseout Procedures for Granting Destruction and Transformation Credits"). The information someone must submit to request destruction credits is:

—The identity and address of the person requesting the credits;
—The name, quantity, and volume of controlled substance destroyed;
—A copy of the invoice or receipt documenting the sale of the controlled substance to the person;
—The name of the use system from which the controlled substance was recovered;
—The efficiency of the destruction process.

(vi) Recordkeeping and reporting for exporters of controlled substances that are transformed or destroyed. The current regulation has no specific recordkeeping or reporting requirements for exporters of controlled substances that are transformed or destroyed. All exporters of controlled substances, regardless of whether the substance is exported for an intended emissive use, for transformation or for destruction, must submit the information listed under § 82.13(h) to the Agency annually.

Today's proposal includes procedures for refunding expended production allowances for controlled substances exported for transformation or destruction in the final control period. A person who requests additional production allowances for controlled substances exported for transformation or destruction must submit the same information required under the current rule for persons requesting additional consumption allowances in § 82.10(a):

—The identities and addresses of the exporter and the recipient of the exports;
—The exporter's Employer Identification Number;
—The names and telephone numbers of contact person for the exporter and recipient;
—The quantity and type of controlled substance exported;
—The source of the controlled substance and the date purchased;
—The date on which and port from which the controlled substances are exported from the United States or its territories;
—The country to which the controlled substances were exported;
—The bill of lading and the invoice indicating the net quantity of controlled substances shipped and documenting the sale of the controlled substances to the purchaser for either transformation or destruction;
—The commodity code of the controlled substance exported.

In today's proposal, EPA wishes to accelerate the time when exporters of controlled substances to Parties can submit forms for the "refund" of consumption allowances, whether or not the substance is for transformation or destruction or for an emissive use. EPA is proposing that exporters submit the current "Request for Additional Consumption Allowances" form at the initiation of the export of a specific quantity of controlled substance to a Party rather than wait until a completed bill of lading and invoice are prepared. The proposed change accelerates the time taken to grant consumption allowances for exports. EPA proposes that the consumption allowances be granted for the quantity of controlled substance exported, with confirmation contingent upon receipt of the bill of lading and invoice. Granting of the consumption allowances will be confirmed upon review of the bill of lading and invoice. Such allowances may be used at the time granted, prior to confirmation. In the event, however, that EPA determines that the controlled substances are not exported for whatever reason, then EPA will consider that allowances were expended by the producer for the production of the controlled substance and the consumption allowances were never granted. Without the consumption allowances, the producer may have a negative balance, at which time the producer will be out of compliance.

b. *Reporting and recordkeeping for essential uses.* Today's proposal creates a new category of allowances called essential-use allowances in anticipation of the special exemptions that Parties to the Protocol will most likely approve for essential-use production after January 1, 1996.

In today's rule, EPA is proposing that the final allocation of essential-use allowances be published in the final rule based on the Decisions of the Parties at their meeting in October of

1994. Once the Parties have reached a final Decision in this first round of essential-uses designations, EPA will propose allocations of essential-use allowances that parallel the specific quantities of a controlled substance for the specific uses as nominated by specific U.S. entities to the Protocol.

EPA is proposing a system whereby deductions will be made from the control period allocations of essential-use allowances based on quarterly reports submitted by producers and the recipient of the essential-use allowances.

The producer or importer of controlled substances for essential uses must maintain, under today's proposal, the following records: (i) The letter conferring the essential-use allowances from the recipient of the allowances certifying that the controlled substance will be used only for the specified essential-use, and (ii) in the case of essential-use production for laboratory or analytical use, a certification from the laboratories that the quantity of the specific substance purchased will be used only for laboratory/analytical applications and will not be resold.

EPA is also proposing that the producers and importers of controlled substances for essential uses submit the following information to the Agency quarterly: (i) A list of the labs and essential-use allowance holders for whom specific controlled substances were produced or imported during the quarter, (ii) the name and quantity of the controlled substance produced or imported for each lab and essential-use allowance recipient.

To verify and crosscheck that essential-use allowances were conferred and that the controlled substance was delivered, EPA is proposing that the original recipients of essential-use allowances submit quarterly a list of the producers or importers to whom they transferred allowances and the quantity of the specific controlled substance that will be, or was, delivered. Those persons purchasing controlled substances under the global exemption for labs must provide the producer or importer with a detailed description of the analytical procedures requiring the substance with references to published instructions, standards, or specifications.

c. *Reporting and recordkeeping for importers.* EPA is proposing a clarification of the reporting and recordkeeping for importers to include the entry of virgin and "off-spec" virgin controlled substances under current requirements in order to forestall those mislabelled as used, recycled or reclaimed controlled substance (the issue raised in Section B. "Imports of Used or Recycled Controlled Substances," of this preamble). EPA is proposing that importers in general, including importers of used, recycled or reclaimed controlled substances, be required to maintain records on the items included in Section B. of this preamble that are included in the final rule. In addition, EPA is proposing that the current quarterly reports from importers differentiate between quantities of imported virgin substances and imported substances that are used, recycled or reclaimed.

EPA is also proposing that, at the point of entry into U.S. jurisdiction, importers of used refrigerant provide documentation (or verification) of the reclamation facility where the controlled substance will be sent before it is sold within the United States. In accordance with the regulation published in the **Federal Register** on May 14, 1993, (40 CFR Part 82) no class I or class II controlled substance may be sold or offered for sale for use as a refrigerant unless it has been reclaimed to the ARI–700 Standard (§ 82.154). Therefore, EPA is proposing that importers of used or recycled controlled substances (including halons) provide information regarding the facility at which the substance will be reclaimed. The proposal asks for information that should be readily available to the importer because it is required by 40 CFR Part 82. By asking the importer to name the point of reclamation, EPA hopes to deter the immediate sale of virgin or off-spec virgin controlled substances that are mislabelled as imported used or recycled substances.

To deter the import of virgin or off-spec virgin controlled substances that are mislabelled as reclaimed, EPA is proposing that importers identify, at the point of entry into U.S. jurisdiction, the name and address of the overseas reclamation facility to verify that the substance was indeed previously used and reclaimed. There are a limited number of reclamation facilities for controlled substances worldwide, and as a Party to the Protocol, the United States can identify those Parties capable of reclamation. Through the continued cooperation with U.S. Customs, EPA plans to develop coordinated procedures for reviewing import documents at the point of entry into U.S. Customs territory that will identify controlled substances suspected of being mislabelled virgin or off-spec virgin entering the U.S. as used, recycled or reclaimed.

The specific reporting requirements (in addition to any recordkeeping requirements that may be established under Section B. of this preamble) that EPA is proposing, which would accompany the bill of lading and the bill of sale for the import of used, recycled or reclaimed controlled substances, are:

(i) For imports of used or recycled controlled substance, the previous use of each substance, and the intended reclamation destination of the controlled substances in the United States, or

(ii) For imports of reclaimed controlled substances, the country of origin of the used controlled substance, and the foreign reclamation facility (reclamation equipment used) where the substance was reclaimed.

d. *Reporting and recordkeeping for article 5 exports.* The current regulation asks producers to report quarterly on the amount of potential production allowances that are converted to production allowances and the amount of unexpended potential production allowances. Today's proposal changes the name of potential production allowances to Article 5 allowances but does not change the reporting requirements. Instead of requiring the quarterly reporting of converted and unexpended potential production allowances, today's proposal requires the producer to indicate the amount of Article 5 allowances expended quarterly in production for export to Article 5 countries.

Today's proposed amendments to the recordkeeping and reporting requirements are made to anticipate the phaseout of class I controlled substances (except methyl bromide) in January 1, 1996. EPA proposes simplifying the quarterly reporting beginning January 1, 1996, so that producers indicate which of the production exceptions applies (i.e., essential-use allowances, Article 5 allowances, destruction credits, transformation credits, transformation or destruction) for a given quantity of controlled substance. EPA is proposing many of the changes to the requirements to address issues and concerns raised by industry regarding the maintenance of a transparent and openly competitive market in controlled substances during the transition to the phaseout. EPA requests comments on today's proposed amendments to the recordkeeping and reporting requirements.

III. Summary of Supporting Analysis

A. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether this regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order.

The Order defines "significant" regulatory action as one that is likely to lead to a rule that may:

(1) have an annual effect on the economy of $100 million or more, or adversely and materially affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) materially alter the budgetary impact of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined by OMB and EPA that this proposed amendment to the final rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review under the Executive Order.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–602, requires that Federal agencies examine the impacts of their regulations on small entities. Under 5 U.S.C. 604(a), whenever an agency is required to publish a general notice of proposed rulemaking, it must prepare and make available for public comment an initial regulatory flexibility analysis (RFA). Such an analysis is not required if the head of an agency certifies that a rule will not have a significant economic impact on a substantial number of small entities, pursuant to 5 U.S.C. 605(b).

The Agency originally published an RFA to accompany the August 12, 1988 final rule (53 FR 30566) that placed the initial limits on the production and consumption of CFCs and halons. That RFA was also updated as Appendix G of the Regulatory Impact Analysis for the regulations implementing the phaseout schedule of section 604 of the Clean Air Act Amendments of 1990. The Addendum to the Regulatory Impact Analysis was further updated in 1993 to examine the impact of the acceleration of the phaseout and the phaseout of HCFCs on small businesses. The analysis in the Addendum indicated that the actions were not expected to have a substantial impact on small entities. Today's proposed amendments to the current regulation do not significantly change the current requirements, and in many cases reduce reporting or recordkeeping burdens that might possibly impact small businesses. However, almost all businesses participating in the phaseout program for ozone-depleting substances are large companies. Therefore, today's proposed amendments are expected to have minimal if any impact on small entities.

Under section 605 of the Regulatory Flexibility Act, 5 U.S.C. 605, I certify that the regulation promulgated in this notice will not have any additional negative economic impacts on any small entities.

C. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et. seq.* An Information Collection Request document has been prepared by EPA (ICR No. 1432.15) and a copy may be obtained from Sandy Farmer, Information Policy Branch, U.S. EPA, 401 M St., SW., (2136), Washington, DC 20460 or by calling (202)–260–2740.

The information collection requirements for this proposed action has an estimated reporting burden averaging 23.3 hours per response. This estimate includes time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed and completing the collection of information.

Send comments regarding the burden estimate of any other aspect of this collection of information, including suggestions for reducing this burden to Chief, Information Policy Branch, U.S. EPA, 401 M St., SW., (2316), Washington, DC 20503, marked "Attention: Desk Officer for EPA." The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

List of Subjects in 40 CFR Part 82

Administrative practice and procedure, Air pollution control, Chemicals, Chlorofluorocarbons, Exports, Hydrochlorofluorocarbons, Imports, Ozone layer, Reporting and recordkeeping requirements, Stratospheric ozone layer.

Dated: October 25, 1994.

Carol M. Browner,

Administrator.

40 CFR Part 82 is proposed to be amended as follows:

PART 82—PROTECTION OF STRATOSPHERIC OZONE

1. The authority citation for part 82 continues to read as follows:

Authority: 42 U.S.C. 7414, 7671–7671q.

2. Subpart A is revised to read as follows:

Subpart A—Production and Consumption Controls

Sec.
82.1 Purpose and scope.
82.2 Effective date.
82.3 Definitions.
82.4 Prohibitions.
82.5 Apportionment of baseline production allowances.
82.6 Apportionment of baseline consumption allowances.
82.7 Grant and phased reduction of baseline production and consumption allowances for class I controlled substances.
82.8 Grant and freeze of baseline production and consumption allowances for class II controlled substances. [Reserved]
82.9 Availability of production allowances in addition to baseline production allowances.
82.10 Availability of consumption allowances in addition to baseline consumption allowances.
82.11 Exports to Article 5 Parties.
82.12 Transfers.
82.13 Recordkeeping and reporting requirements.
Appendix A to Subpart A—Class I Controlled Substances
Appendix B to Subpart A—Class II Controlled Substances
Appendix C to Subpart A—Parties to the Montreal Protocol and Nations Complying with, but Not Parties to, the Protocol
Appendix D to Subpart A—Harmonized Tariff Schedule
Description of Products That May Contain Controlled Substances in Appendix A to Subpart A, Class I, Groups I and II
Appendix E to Subpart A—Article 5 Parties
Appendix F to Subpart A—Listing of Ozone Depleting Chemicals
Appendix G to Subpart A—UNEP Recommendations for Conditions Applied to Exemption for Laboratory and Analytical Uses
Appendix H to Subpart A—Clean Air Act Amendments of 1990
Phaseout Schedule for Production of Ozone-Depleting Substances

Subpart A—Production and Consumption Controls

§ 82.1 Purpose and scope.

(a) The purpose of the regulations in this subpart is to implement the Montreal Protocol on Substances that Deplete the Ozone Layer and sections 603, 604, 605, 606, 607 and 616 of the Clean Air Act Amendments of 1990, Public Law 101–549. The Protocol and section 604 impose limits on the production and consumption (defined as production plus imports minus exports, excluding transhipments and used controlled substances) of certain ozone-depleting substances, according to specified schedules. The Protocol also requires each nation that becomes

a Party to the agreement to impose certain restrictions on trade in ozone-depleting substances with non-Parties.

(b) This subpart applies to any person that produces, transforms, destroys, imports or exports a controlled substance or imports a controlled product.

§ 82.2 Effective date.

(a) The regulations under this subpart take effect January 1, 1995, unless otherwise noted herein.

(b) The regulations under this subpart that were effective prior to [date of publication of the final rule] continue to apply for purposes of enforcing the provisions that were applicable prior to January 1, 1995.

§ 82.3 Definitions.

As used in this subpart, the term:

Administrator means the Administrator of the Environmental Protection Agency or his authorized representative.

Article 5 allowances means the allowances apportioned under § 82.9(a) of this subpart.

Baseline consumption allowances means the consumption allowances apportioned under § 82.6 of this subpart.

Baseline production allowances means the production allowances apportioned under § 82.5 of this subpart.

Calculated level means the weighted amount of a controlled substance determined by multiplying the amount (in kilograms) of the controlled substance by that substance's ozone depletion weight listed in Appendix A or Appendix B to this subpart.

Class I refers to the controlled substances listed in Appendix A to this subpart.

Class II refers to the controlled substances listed in Appendix B to this subpart.

Completely destroy means to cause the expiration of a controlled substance at a destruction efficiency of 98 percent or greater, using one of the destruction technologies approved by the Parties.

Complying with the Protocol, when referring to a foreign state not Party to the 1987 Montreal Protocol, the London Amendments, or the Copenhagen Amendments, means that the non-Party has been determined as complying with the Protocol, as indicated in Appendix C to this subpart, by a meeting of the Parties as noted in the records of the directorate of the United Nations Secretariat.

Consumption means the production plus imports minus exports of a controlled substance (other than transhipments, or used controlled substances).

Consumption allowances means the privileges granted by this subpart to produce and import class I controlled substances; however, consumption allowances may be used to produce class I controlled substances only in conjunction with production allowances. A person's consumption allowances are the total of the allowances obtained under §§ 82.7 and 82.6 of this subpart and § 82.10 of this subpart, as may be modified under § 82.12 of this subpart (transfer of allowances).

Control period means the period from January 1, 1992 through December 31, 1992, and each twelve-month period from January 1 through December 31, thereafter.

Controlled product means a product that contains a controlled substance listed as a Class I, Group I or II substance in appendix A to this subpart. Controlled products include, but are not limited to, those products listed in appendix D to this subpart. Controlled products belong to one or more of the following six categories of products:

(1) Automobile and truck air conditioning units (whether incorporated in vehicles or not);

(2) Domestic and commercial refrigeration and air-conditioning/heat pump equipment (whether containing controlled substances as a refrigerant and/or in insulating material of the product), e.g. Refrigerators, Freezers, Dehumidifiers, Water coolers, Ice machines, Air-conditioning and heat pump units;

(3) Aerosol products, except medical aerosols;

(4) Portable fire extinguishers;

(5) Insulation boards, panels and pipe covers;

(6) Pre-polymers.

Controlled substance means any substance listed in appendix A or appendix B to this subpart, whether existing alone or in a mixture, but excluding any such substance or mixture that is in a manufactured product other than a container used for the transportation or storage of the substance or mixture. Thus, any amount of a listed substance in appendix A or appendix B to this subpart that is not part of a use system containing the substance is a controlled substance. If a listed substance or mixture must first be transferred from a bulk container to another container, vessel, or piece of equipment in order to realize its intended use, the listed substance or mixture is a "controlled substance." The inadvertent or coincidental creation of insignificant quantities of a listed substance in appendix A or appendix B to this subpart; during a chemical manufacturing process; resulting from unreacted feedstock; from the listed substance's use as a process agent present as a trace quantity in the chemical substance being manufactured; or as an unintended byproduct of research and development applications, is not deemed a controlled substance. Controlled substances are divided into two classes, Class I in appendix A to this subpart, and Class II listed in appendix B to this subpart. Class I substances are further divided into seven groups, Group I, Group II, Group III, Group IV, Group V, Group VI, and Group VII, as set forth in appendix A to this subpart.

Copenhagen Amendments means the Montreal Protocol on Substances That Deplete the Ozone Layer, as amended at the Fourth Meeting of the Parties to the Montreal Protocol in Copenhagen in 1992.

Destruction means the expiration of a controlled substance to the destruction efficiency actually achieved, unless considered completely destroyed as defined in this section. Such destruction does not result in a commercially useful end product and uses one of the following controlled processes approved by the Parties to the Protocol:

(1) Liquid injection incineration;

(2) Reactor cracking;

(3) Gaseous/fume oxidation;

(4) Rotary kiln incineration; or

(5) Cement kiln.

Destruction Credits means those privileges that may be obtained under § 82.9 of this subpart to produce or import controlled substances.

Emissive Use means that use of a controlled substance that does not result in the transformation or destruction of the controlled substance as defined in this subpart.

Essential-Uses means those uses of controlled substances designated by the Parties to the Protocol to be necessary for the health and safety of, or critical for the functioning of, society; and for which there are no available technically and economically feasible alternatives or substitutes that are acceptable from the standpoint of environment and health. Beginning January 1, 2000 (January 1, 2002 for methyl chloroform) the essential use designations for class I substances must be made in accordance with the provisions of the Clean Air Act Amendments of 1990.

Essential-Use Allowances means the privileges granted by § 82.4(o) of this subpart to produce class I substances, effective January 1, 1996 until January 1, 2000, as determined by allocation decisions made by the Parties to the

Montreal Protocol and in accordance with the restrictions delineated in the Clean Air Act Amendments of 1990.

Export means the transport of virgin or used controlled substances from inside the United States or its territories to persons outside the United States or its territories, excluding United States military bases and ships for on-board use.

Exporter means the person who contracts to sell controlled substances for export or transfers controlled substances to his affiliate in another country.

Facility means any process equipment (e.g., reactor, distillation column) used to convert raw materials or feedstock chemicals into controlled substances or consume controlled substances in the production of other chemicals.

Foreign state means an entity which is recognized as a sovereign nation or country other than the United States of America (Taiwan is not considered a foreign state).

Foreign state not Party to or *Non-Party* means a foreign state that has not deposited instruments of ratification, acceptance, or other form of approval with the Directorate of the United Nations Secretariat, evidencing the foreign state's ratification of the provisions of the 1987 Montreal Protocol, the London Amendments, or of the Copenhagen Amendments, as specified.

Heel means the amount of a controlled substance that remains in a container after it is discharged or off-loaded (that is no more than ten percent of the volume of the container) and that the person owning or operating the container certifies will remain in the container and be included in a future shipment or recovered and banked for future recycling, reclamation, transformation, destruction or for non-emissive purposes.

Import means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into any place subject to the jurisdiction of the United States whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States, with the following exemptions:

(1) Off-loading used or excess controlled substances or controlled products from a ship during servicing,

(2) Bringing controlled substances into the U.S. from Mexico where the controlled substance had been admitted into Mexico in bond and was of U.S. origin; and

(3) Bringing a controlled product into the U.S. when transported in a consignment of personal or household effects or in a similar non-commercial situation normally exempted from U.S. Customs attention.

Importer means any person who imports a controlled substance or a controlled product into the United States. "Importer" includes the person primarily liable for the payment of any duties on the merchandise or an authorized agent acting on his or her behalf. The term also includes, as appropriate:

(1) The consignee;

(2) The importer of record;

(3) The actual owner; or

(4) The transferee, if the right to draw merchandise in a bonded warehouse has been transferred.

London Amendments means the Montreal Protocol, as amended at the Second Meeting of the Parties to the Montreal Protocol in London in 1990.

Montreal Protocol means the Montreal Protocol on Substances that Deplete the Ozone Layer, a protocol to the Vienna Convention for the Protection of the Ozone Layer, including adjustments adopted by the Parties thereto and amendments that have entered into force.

1987 Montreal Protocol means the Montreal Protocol, as originally adopted by the Parties in 1987.

Nations complying with, but not joining, the Protocol means any nation listed in appendix C, Annex 2, to this subpart.

Party means any foreign state that is listed in appendix C to this subpart (pursuant to instruments of ratification, acceptance, or approval deposited with the Depositary of the United Nations Secretariat), as having ratified the specified control measure in effect under the Montreal Protocol. Thus, for purposes of the trade bans specified in § 82.4(h)(2) pursuant to the London Amendments, only those foreign states that are listed in appendix C to this subpart as having ratified both the 1987 Montreal Protocol and the London Amendments shall be deemed to be Parties.

Person means any individual or legal entity, including an individual, corporation, partnership, association, state, municipality, political subdivision of a state, Indian tribe; any agency, department, or instrumentality of the United States; and any officer, agent, or employee thereof.

Plant means one or more facilities at the same location owned by or under common control of the same person.

Production means the manufacture of a controlled substance from any raw material or feedstock chemical, but does not include:

(1) The manufacture of a controlled substance that is subsequently transformed;

(2) The reuse or recycling of a controlled substance;

(3) Amounts that are destroyed by the approved technologies; or

(4) Amounts that are spilled or vented unintentionally.

Production allowances means the privileges granted by this subpart to produce controlled substances; however, production allowances may be used to produce controlled substances only in conjunction with consumption allowances. A person's production allowances are the total of the allowances he obtains under § 82.7 and § 82.5 of this subpart and § 82.9 of this subpart, and as may be modified under § 82.12 of this subpart (transfer of allowances).

Transform means to use and entirely consume (except for trace quantities) a controlled substance in the manufacture of other chemicals for commercial purposes.

Transformation Credits means those privileges that may be obtained under § 82.9 of this subpart to produce or import controlled substances.

Transhipment means the continuous shipment of a controlled substance from a foreign state of origin through the United States, its territories, or foreign trade zones, including possible repackaging, to a second foreign state of final destination, as long as the shipment does not enter into United States jurisdiction.

Unexpended consumption allowances means consumption allowances that have not been used. At any time in any control period a person's unexpended consumption allowances are the total of the level of consumption allowances the person has authorization under this subpart to hold at that time for that control period, minus the level of controlled substances that the person has produced or imported (not including transhipments and used controlled substances) in that control period until that time.

Unexpended production allowances means production allowances that have not been used. At any time in any control period a person's unexpended production allowances are the total of the level of production allowances he has authorization under this subpart to hold at that time for that control period, minus the level of controlled substances that the person has produced in that control period until that time.

Used controlled substances means controlled substances that have been recovered from their intended use systems.

§ 82.4 Prohibitions.

(a) Prior to January 1, 1996, for all Groups of class I controlled substances, except Group VI, and prior to January 1, 2001 for Group VI, no person may produce, at any time in any control period, any controlled substance (except that are transformed or destroyed) in excess of the amount of unexpended production allowances or unexpended Article 5 allowances for that substance held by that person under the authority of this subpart at that time for that control period. Every kilogram of excess production constitutes a separate violation of this subpart.

(b) Effective January 1, 1996, no person may produce, at any time in any control period, any class I, Group I, Group II, Group III, Group IV, Group V, or Group VII controlled substance (except for controlled substances that are transformed or destroyed) in excess of the amount of unexpended essential-use allowances under § 82.4, amount of unexpended Article 5 allowances as allocated under § 82.9 or the amount of unexpended destruction or transformation credits as obtained under § 82.9 for that substance held by that person under the authority of this subpart at that time for that control period. Every kilogram of excess production constitutes a separate violation of this subpart.

(c) Effective January 1, 1996, no person's total production of a class I controlled substance (except Group VI) as allocated under § 82.4 for essential-use allowances, and as obtained under § 82.9 for destruction or transformation credits, may, at any time, in any control period until January 1, 2000, exceed the percent limitation of baseline production in appendix H of this subpart, as set forth in the Clean Air Act Amendments of 1990.

(d) In addition to total production permitted under § 82.4(c), effective January 1, 1996, for class I, Group I, Group III, Group IV and Group V controlled substances, and effective January 1, 1995, for class I, Group II, a person may, at any time, in any control period until January 1, 2000, produce 10 percent of baseline production as apportioned under § 82.5 for export to Article 5 countries. No person may, at any time, in any control period until January 1, 2000, produce class I, Group I, Group II, Group III, Group IV, and Group V controlled substances for export to Article 5 countries in excess of the Article 5 allowances allocated under § 82.9(a).

(e) Prior to January 1, 1996, for all Groups of class I controlled substances, except Group VI, and prior to January 1, 2001, for Group VI, no person may produce or (except for transhipments, heels, or for used controlled substances) import, at any time in any control period, any class I controlled substance (except for controlled substances that are transformed, or destroyed) in excess of the amount of unexpended consumption allowances held by that person under the authority of this subpart at that time for that control period. Every kilogram of excess production or importation (other than transhipments or used and recycled controlled substances) constitutes a separate violation of this subpart.

(f) Effective January 1, 1995, no person may import, at any time in any control period, a heel of any class I controlled substance that is greater than 10 percent of the volume of the container in excess of the amount of unexpended consumption allowances, unexpended destruction credits or unexpended transformation credits held by that person under the authority of this subpart at that time for that control period. Every kilogram of excess importation constitutes a separate violation of this subpart.

(g) Prior to January 1, 1996, for all Groups of class I controlled substances, except Group VI, and prior to January 1, 2001, for Group VI, a person may not use production allowances to produce a quantity of a class I controlled substance unless that person holds under the authority of this subpart at the same time consumption allowances sufficient to cover that quantity of class I controlled substances nor may a person use consumption allowances to produce a quantity of class I controlled substances unless the person holds under authority of this subpart at the same time production allowances sufficient to cover that quantity of class I controlled substances. However, only consumption allowances are required to import class I controlled substances with the exception of transhipments, heels and used controlled substances.

(h) Every kilogram of a controlled substance, and every controlled product, imported or exported in contravention of this subpart constitutes a separate violation of this subpart, thus no person may:

(1) Import or export any quantity of a controlled substance listed in Class I, Group I or Group II, in appendix A to this subpart from or to any foreign state not listed as a Party to the 1987 Montreal Protocol unless that foreign state is complying with the 1987 Montreal Protocol (See appendix C, Annex 2 of this subpart);

(2) Import or export any quantity of a controlled substance listed in Class I, Group III, Group IV or Group V, in appendix A to this subpart, from or to any foreign state not Party to the London Amendments (as noted in appendix C, Annex 1, to this subpart), unless that foreign state is complying with the London Amendments (as noted in appendix C, Annex 2, to this subpart); or

(3) Import a controlled product from any foreign state not Party to the 1987 Montreal Protocol (as noted in appendix C, Annex 1, to this subpart), unless that foreign state is complying with the Protocol (as noted in appendix C, Annex 2, to this subpart).

(i) Effective January 1, 2003, no person may produce HCFC–141b except in a process resulting in its transformation, use in a process resulting in destruction, or for exceptions stated in paragraph (p) of this section.

(j) Effective January 1, 2003, no person may import HCFC–141b except for use in a process resulting in its transformation, use in a process resulting in destruction, or for exceptions stated in paragraph (p) of this section.

(k) Effective January 1, 2010, no person may produce or consume (as defined under § 82.3 of this subpart) HCFC–22 or HCFC–142b for any purpose other than for use in a process resulting in their transformation, use in a process resulting in their destruction, for use in equipment manufactured prior to January 1, 2010, or for exceptions stated in paragraph (p) of this section in excess of baseline allowances allocated § 82.5(h) and § 82.6(h).

(l) Effective January 1, 2020, no person may produce or consume (as defined under § 82.3 of this subpart) HCFC–22 or HCFC–142b for any purpose other than for use in a process resulting in their transformation, use in a process resulting in their destruction or for exceptions stated in paragraph (p) of this section.

(m) Effective January 1, 2015, no person may produce or consume (as under defined under § 82.3 of this subpart) class II substances not previously controlled, for any purpose other than for use in a process resulting in its transformation, use in a process resulting in their destruction, as a refrigerant in equipment manufactured before January 1, 2020, or for exceptions stated in paragraph (p) of this section, in excess of baseline production and consumption levels defined in § 82.5(h) and § 82.6(h).

(n) Effective January 1, 2030, no person may produce or consume class II substances, for any purpose other than for use in a process resulting in their

transformation, use in a process resulting in their destruction, or for exceptions stated in paragraph (p) of this section.

(o) Effective January 1, 1996, essential-use allowances are apportioned to a person for the exempted production of specified class I (except class I, Group VI) controlled substances.

(1) Essential-uses for the production of controlled substances as agreed to by the Parties to the Protocol and subject to the periodic revision of the Parties are:

(i) Medical Dose Inhalers—aerosols.

(ii) Space Shuttle—solvents.

(iii) Laboratory and Analytical Applications (see Appendix G of this subpart).

(2) Persons in the following list are allocated essential-use allowances for a specific quantity of a specific class I controlled substances for a specific essential-use exemption:

(i) Metered Dose Inhalers—Aerosols.

ESSENTIAL USES RECOMMENDATION BY THE UNEP TECHNOLOGY AND ECONOMIC ASSESSMENT PANEL

Company	Year	Chemical	Quantity (metric tons)
Metered Dose Inhalers			
International Pharmaceutical & Aerosol Consortium	1996	CFC–11	749.8
		CFC–12	2353.2
		CFC–114	314.1
	1997	CFC–11	858.3
		CFC–12	2166.5
		CFC–114	311.4
Sterling Winthrop	1996	CFC–12	10.2
		CFC–114	29.6
	1997	CFC–12	10.5
		CFC–114	31.7
Space Shuttle Solvent			
NASA/Thiokol	1996	Methyl Chloroform	56.8
	1997	Methyl Chloroform	56.8
Laboratory and Analytical Applications			
Global Exemption	1996	CFCs, Methyl Chloroform, Carbon Tetrachloride.	No quantity specified.
	1997	Same	Same.

(p) The following exemptions apply to the production and consumption restrictions under paragraphs (i), (j), (k), (l), (m) and (n) of this section:

(1) Medical Devices [Reserved].

(2) Exports to developing countries [Reserved].

§ 82.5 Apportionment of baseline production allowances.

Persons who produced controlled substances in Group I or Group II in 1986 are apportioned baseline production allowances as set forth in paragraphs (a) and (b) of this section. Persons who produced controlled substances in Group III, IV, or V in 1989 are apportioned baseline production allowances as set forth in paragraphs (c), (d), and (e) of this section. Persons who produced controlled substances in Group VI and VII in 1991 are apportioned baseline allowances as set forth in paragraphs (f) and (g) of this section.

Controlled substance	Person	Allowances (kg)
(a) For Group I Controlled Substances		
CFC–11	Allied-Signal, Inc	23,082,358
	E.I. DuPont de Nemours & Co	33,830,000
	Elf Atochem, N.A	21,821,500
CFC–12	Laroche Chemicals	12,856,364
	Allied-Signal, Inc	35,699,776
	E.I. DuPont de Nemours & Co	64,849,000
	Elf Atochem, N.A	31,089,807
CFC–113	Laroche Chemicals	15,330,909
	Allied-Signal, Inc	21,788,896
CFC–114	E.I. DuPont de Nemours & Co	58,553,000
	Allied-Signal, Inc	1,488,569
CFC–115	E.I. DuPont de Nemours & Co	4,194,000
	E.I. DuPont de Nemours & Co	4,176,000
(b) For Group II Controlled Substances		
Halon–1211	Great Lakes Chemical Corp	826,487
	ICI Americas, Inc	2,135,484
Halon–1301	E.I. DuPont de Nemours & Co	3,220,000
	Great Lakes Chemical Corp	1,766,850
Halon–2402		

Controlled substance	Person	Allowances (kg)
	(c) For Group III Controlled Substances	
CFC–13	Allied-Signal, Inc	127,125
	E.I. DuPont de Nemours & Co	187,831
	Elf Atochem, N.A	3,992
	Great Lakes Chemical Corp	56,381
	Laroche Chemicals	29,025
CFC–111	* * * * *	* * * * *
CFC–112	* * * * *	* * * * *
CFC–211	E.I. DuPont de Nemours & Co	11
CFC–212	E.I. DuPont de Nemours & Co	11
CFC–213	E.I. DuPont de Nemours & Co	11
CFC–214	E.I. DuPont de Nemours & Co	11
CFC–215	E.I. DuPont de Nemours & Co	511
	Halocarbon Products Corp	1,270
CFC–216	E.I. DuPont de Nemours & Co	170,574
CFC–217	E.I. DuPont de Nemours & Co	511
	(d) For Group IV Controlled Substances	
CCl_4	Akzo Chemicals, Inc	7,873,615
	Degussa Corporation	26,546
	Dow Chemical Company, USA	18,987,747
	E.I. DuPont de Nemours & Co	9,099
	Hanlin Chemicals—WV, Inc	219,616
	ICI Americas, Inc	853,714
	Occidental Chemical Corp	1,059,358
	Vulcan Chemicals	21,931,987
	(e) For Group V Controlled Substances	
Methyl Chloroform	Dow Chemical Company, USA	168,030,117
	E.I. DuPont de Nemours & Co	2
	PPG Industries, Inc	57,450,719
	Vulcan Chemicals	89,689,064
	(f) For Group VI Controlled Substances	
Methyl Bromide	Great Lakes Chemical Corporation	19,945,788
	Ethyl Corporation	8,233,894
	(g) For Group VII Controlled Substances	
HBFC 22B1–1	Great Lakes Chemical Corporation	46,211
	(h) For Class II Controlled Substances (Reserved)	

§ 82.6 Apportionment of baseline consumption allowances.

Persons who produced, imported, or produced and imported controlled substances in Group I or Group II in 1986 are apportioned chemical-specific baseline consumption allowances as set forth in paragraphs (a) and (b) of this section. Persons who produced, imported, or produced and imported controlled substances in Group III, Group IV, or Group V in 1989 are apportioned chemical-specific baseline consumption allowances as set forth in paragraphs (c), (d) and (e) of this section. Persons who produced, imported, or produced and imported controlled substances in Group VI or VII in 1991 are apportioned chemical specific baseline consumption allowances as set forth in paragraphs (f) and (g) of this section.

Controlled substance	Person	Allowances (kg)
	(a) For Group I Controlled Substances	
CFC–11	Allied-Signal, Inc	22,683,833
	E.I. DuPont de Nemours & Co	32,054,283
	Elf Atochem, N.A	21,740,194
	Hoechst Celanese Corporation	185,396
	ICI Americas, Inc	1,673,436
	Kali-Chemie Corporation	82,500
	Laroche Chemicals	12,695,726
	National Refrigerants, Inc	693,707
	Refricentro, Inc	160,697
	Sumitomo Corporation of America	5,800
CFC–12	Allied-Signal, Inc	35,236,397
	E.I. DuPont de Nemours & Co	61,098,726
	Elf Atochem, N.A	32,403,869
	Hoechst Celanese Corporation	138,865
	ICI Americas, Inc	1,264,980
	Kali-Chemie Corporation	355,440
	Laroche Chemicals	15,281,553

Controlled substance	Person	Allowances (kg)
	National Refrigerants, Inc	2,375,384
	Refricentro, Inc	242,526
CFC–113	Allied-Signal, Inc	18,241,928
	E.I. DuPont de Nemours & Co	49,602,858
	Elf Atochem, N.A	244,908
	Holchem	265,199
	ICI Americas, Inc	2,399,700
	Refricentro, Inc	37,385
CFC–114	Sumitomo Corp. of America	280,163
	Allied-Signal, Inc	1,429,582
	E.I. DuPont de Nemours & Co	3,686,103
	Elf Atochem, N.A	22,880
CFC–115	ICI Americas, Inc	32,930
	E.I. DuPont de Nemours & Co	2,764,109
	Elf Atochem, N.A	633,007
	Hoechst Celanese Corporation	8,893
	ICI Americas, Inc	2,366,351
	Laroche Chemicals	135,520
	Refricentro, Inc	27,337
	(b) For Controlled Substances	
Halon-1211	Elf Atochem, N.A	411,292
	Great Lakes Chemical Corp	772,775
	ICI Americas, Inc	2,116,641
	Kali-Chemie Corporation	330,000
Halon-1301	E.I. DuPont de Nemours & Co	2,772,917
	Elf Atochem, N.A	89,255
	Great Lakes Chemical Corp	1,744,132
	Kali-Chemie Corporation	54,380
Halon-2402	Ausimont	34,400
	Great Lakes Chemical Corp	15,900
	(c) For Group III Controlled Substances	
CFC–13	Allied-Signal, Inc	127,124
	E.I. DuPont de Nemours & Co	158,508
	Elf Atochem, N.A	3,992
	Great Lakes Chemical Corp	56,239
	ICI Americas, Inc	5,855
	Laroche Chemicals	29,025
	National Refrigerants, Inc	16,665
CFC–111	Sumitomo Corporation of America	5,912
CFC–112	TG (USA) Corporation	9,253
	E.I. DuPont de Nemours & Co	11
CFC–211	E.I. DuPont de Nemours & Co	11
CFC–212	E.I. DuPont de Nemours & Co	11
CFC–213	E.I. DuPont de Nemours & Co	11
CFC–214	E.I. DuPont de Nemours & Co	511
CFC–215	Halocarbon Products Corp	1,270
	E.I. DuPont de Nemours & Co	170,574
CFC–216	E.I. DuPont de Nemours & Co	511
CFC–217.		
	(d) For Group IV Controlled Substances	
CCl_4	Crescent Chemical Co	41
	Degussa Corporation	56
	Dow Chemical Company, USA	12,466
	E.I. DuPont de Nemours & Co	8,170,561
	Elf Atochem, N.A	26,537
	Hanlin Chemicals-WV, Inc	103,133
	Hoechst Celanese Corporation	3
	ICC Chemical Corp	1,173,723
	ICI Americas, Inc	855,466
	Occidental Chemical Corp	497,478
	Sumitomo Corporation of America	9
	(e) For Group V Controlled Substances	
Methyl Chloroform	3V Chemical Corp	3,528
	Actex, Inc	50,171
	Atochem North America	74,355
	Dow Chemical Company, USA	125,200,200
	E.I. DuPont de Nemours & Co	2
	IBM	2,026
	ICI Americas, Inc	14,179,850
	Laidlaw	420,207

Controlled substance	Person	Allowances (kg)
	PPG Industries	45,254,115
	Sumitomo	1,954
	TG (USA) Corporation	7,073
	Unitor Ships Service, Inc	14,746
	Vulcan Chemicals	70,765,072
	(f) For Group VI Controlled Substances	
Methyl Bromide	Great Lakes Chemical Corporation	15,514,746
	Ethyl Corporation	6,379,906
	AmeriBrom, Inc	3,524,393
	TriCal, Inc	109,225
	(g) For Group VII Controlled Substances	
HBFC 22B1–1	Great Lakes Chemical Corporation	40,110
	(h) For Class II Controlled Substances (Reserved)	

§ 82.7 Grant and phase reduction of baseline production and consumption allowances for class I controlled substances.

For each control period specified in the following table, each person is granted the specified percentage of the baseline production and consumption allowances apportioned to him under §§ 82.5 and 82.6 of this subpart.

Control period	Class I substances in groups I and III (percent)	Class I substances in group II (percent)	Class I substances in group IV (percent)	Class I substances in group V (percent)	Class I substances in group VI (percent)	Class I substances in Group VII (percent)
1994	25	0	50	50	100	100
1995	25	0	15	30	100	100
1996	0	0	0	0	100	0
1997	0	0	0	0	100	0
1998	0	0	0	0	100	0
1999	0	0	0	0	100	0
2000	0	0	0	0	100	0
2001	0	0	0	0	0	0

§ 82.8 Grant and phased reduction of baseline production and consumption allowances for class II controlled substances. [Reserved]

§ 82.9 Availability of allowances in addition to baseline production allowances.

(a) Every person apportioned baseline production allowances for class I controlled substances under § 82.5 (a) through (e) of this subpart is also granted Article 5 allowances equal to:

(1) 15 percent of his baseline production allowances for class I, Group II controlled substances listed under § 82.5 of this subpart for each control period beginning January 1, 1994 until January 1, 2003;

(2) 10 percent of his baseline production allowance listed for class I, Group I, Group III, Group IV, and Group V controlled substances listed under § 82.5 of this subpart for each control period ending before January 1, 1996;

(3) 15 percent of his baseline production allowances for class I, Group I, Group III, Group IV, and Group V controlled substances listed under § 82.5 of this subpart for each control period beginning January 1, 1996 until January 1, 2006.

(b) Effective January 1, 1995, a person allocated Article 5 allowances may produce class I controlled substances for export to Article 5 countries as under § 82.11 and transfer Article 5 allowances as under § 82.12. In addition, a company may also increase or decrease its Article 5 allowances by trading with another Party to the Protocol according to the provisions under this paragraph of this section. A nation listed in Appendix C to this subpart (Parties to the Montreal Protocol) must agree either to transfer to the person for the current control period some amount of Article 5 production that the nation is permitted under the Montreal Protocol or to receive from the person for the current control period some amount of Article 5 production that the person is permitted under this subpart.

(c) Until January 1, 1996, a company may also increase or decrease its production allowances by trading with another Party to the Protocol according to the provision under this paragraph of this section. A nation listed in Appendix C to this subpart (Parties to the Montreal Protocol) must agree either to transfer to the person for the current control period some amount of production that the nation is permitted under the Montreal Protocol or to receive from the person for the current control period some amount of production that the person is permitted under this subpart.

(1) For trades from a Party, the person must obtain from the principal diplomatic representative in that nation's embassy in the United States a signed document stating that the appropriate authority within that nation has established or revised production limits for the nation to equal the lesser of the maximum production that the nation is allowed under the Protocol minus the amount transferred, the maximum production that is allowed under the nation's applicable domestic law minus the amount transferred, or the average of the nation's actual national production level for the three years prior to the transfer minus the production allowances transferred. The person must submit to the Administrator a transfer request that includes a true copy of this document and that sets forth the following:

(i) The identity and address of the person;

(ii) The identity of the Party;

(iii) The names and telephone numbers of contact persons for the person and for the Party;

(iv) The chemical type and level of production being transferred; and

(v) The control period(s) to which the transfer applies.

(2) For trades to a Party, a person must submit a transfer request that sets forth the following:

(i) The identity and address of the person;

(ii) The identity of the Party;

(iii) The names and telephone numbers of contact persons for the person and for the Party;

(iv) The chemical type and level of allowable production to be transferred; and

(v) The control period(s) to which the transfer applies.

(3) After receiving a transfer request that meets the requirements of paragraph (b)(2) of this section, the Administrator may, at his discretion, consider the following factors in deciding whether to approve such a transfer:

(i) Possible creation of economic hardship;

(ii) Possible effects on trade;

(iii) Potential environmental implications; and

(iv) The total amount of unexpended production allowances held by United States entities.

(4) The Administrator will issue the person a notice either granting or deducting production allowances and specifying the control period to which the transfer applies, provided that the request meets the requirement of paragraph (c)(1) of this section for trades from Parties and paragraphs (c)(2) of this section for trades to Parties, unless the Administrator has decided to disapprove the trade under paragraph (c)(3) of this section for trades to Parties. For a trade from a Party, the Administrator will issue a notice that revises the allowances held by the person to equal the unexpended production allowances held by the person under this subpart plus the level of allowable production transferred from the Party. For a trade to a Party, the Administrator will issue a notice that revises the production limit for the person to equal the lesser of:

(i) The unexpended production allowances held by the person under this subpart minus the amount transferred; or

(ii) The unexpended production allowances held by the person under this subpart minus the amount by which the United States average annual production of the controlled substance being traded for the three years prior to the transfer is less than the total allowable production allowable for that substance under this subpart minus the amount transferred. The change in allowances will be effective on the date that the notice is issued.

(5) If after one person obtains approval for a trade of allowable production of a controlled substance to a Party, one or more other persons obtain approval for trades involving the same controlled substance and the same control period, the Administrator will issue notices revising the production limits for each of the other persons trading that controlled substance in that control period to equal the lesser of:

(i) The unexpended production allowances held by the person under this subpart minus the amount transferred; or

(ii) The unexpended production allowances held by the person under this subpart minus the amount by which the United States average annual production of the controlled substance being traded for the three years prior to the transfer is less than the total allowable production for that substance under this subpart multiplied by the amount transferred divided by the total amount transferred by all the other person trading the same controlled substance in the same control period minus the amount transferred by that person.

(iii) The Administrator will also issue a notice revising the production limit for each person who previously obtained approval of a trade of that substance in that control period to equal the unexpended production allowances held by the person under this subpart plus the amount by which the United States average annual production of the controlled substance being traded for the three years prior to the transfer is less than the total allowable production under this subpart multiplied by the amount transferred by that person divided by the amount transferred by all of the persons that have traded that controlled substance in that control period. The change in production allowances will be effective on the date that the notice is issued.

(d) Effective January 1, 1996, there will be no trade in production or consumption allowances with Parties to the Protocol for class I controlled substances, except for class I, Group VI, methyl bromide.

(e) Until January 1, 1996, for all class I controlled substances, except Group VI, and until January 1, 2001, for class I, Group VI, a person may obtain production allowances for that controlled substance equal to the amount of that controlled substance produced in the United States that was transformed or destroyed within the United States in the cases where production allowances were expended to produce such substance in accordance with the provisions of this paragraph. A request for production allowances under this section will be considered a request for consumption allowances under § 82.10(b) of this subpart.

(1) Until January 1, 1996, for all class I controlled substances, except Group VI, and until January 1, 2001, for class I, Group VI, a person must submit a request for production allowances that includes the following:

(i) The identity and address of the person;

(ii) The name, quantity, and level of controlled substance transformed or the name, quantity and volume destroyed;

(iii) A copy of the invoice or receipt documenting the sale of the controlled substance to the person;

(iv) A certification that production allowances were expended for the production of the controlled substance;

(v) If the controlled substance is transformed, the name, quantity, and verification of the commercial use of the resulting chemical transformed; and

(vi) If the controlled substance is destroyed, the efficiency of the destruction process.

(2) Until January 1, 1996, for all class I controlled substances, except Group VI, and until January 1, 2001, for class I, Group VI, the Administrator will review the information and documentation submitted under paragraph (e)(1) of this section and will assess the quantity of class I controlled substance that the documentation and information verifies was transformed or destroyed. The Administrator will issue the person production allowances equivalent to the controlled substances that the Administrator determines were transformed or destroyed. For controlled substances completely destroyed under this rule, the Agency will grant allowances equal to 100 percent of volume intended for destruction. For those controlled substances destroyed at less than a 98 percent destruction efficiency, the Agency will grant allowances commensurate with that percentage of destruction efficiency that is actually achieved. The grant of allowances will be effective on the date that the notice is issued.

(3) Until January 1, 1996, for all class I controlled substances, except Group VI, and until January 1, 2001, for class I, Group VI, if the Administrator determines that the request for production allowances does not satisfactorily substantiate that the person transformed or destroyed controlled substances as claimed, or that modified allowances were not expended, the Administrator will issue

a notice disallowing the request for additional production allowances. Within ten working days after receipt of notification, the person may file a notice of appeal, with supporting reasons, with the Administrator. The Administrator may affirm the disallowance or grant an allowance, as she/he finds appropriate in light of the available evidence. If no appeal is taken by the tenth day after notification, the disallowance will be final on that day.

(f) Until January 1, 1996, for all class I controlled substances, except Group VI, and until January 1, 2001, for class I, Group VI, a person may obtain production allowances for that controlled substance equal to the amount of that controlled substance produced in the United States that was exported to be transformed or destroyed within a Party in the cases where production allowances were expended to produce such substance in accordance with the provisions of this paragraph.

(1) Until January 1, 1996, for all class I controlled substances, except Group VI, and until January 1, 2001, for class I, Group VI, a person must submit a request for production allowances that includes the following:

(i) The identities and addresses of the exporter and the recipient of the exports;

(ii) The exporter's Employer Identification Number;

(iii) The names and telephone numbers of contact persons for the exporter and the recipient;

(iv) The quantity and type of controlled substances exported;

(v) The source of the controlled substance and the date purchased;

(vi) The date on which, and the port from which, the controlled substances were exported from the United States or its territories;

(vii) The country to which the controlled substances were exported;

(viii) The bill of lading and the invoice indicating the net quantity of controlled substances shipped and documenting the sale of the controlled substances to the purchaser for either transformation or destruction;

(ix) The commodity code of the controlled substance exported.

(x) Written statement from the producer that the controlled substance was produced with expended allowances.

(2) Until January 1, 1996, for all class I controlled substances, except Group VI, and until January 1, 2001, for class I, Group VI, the Administrator will review the information and documentation submitted under paragraph (f)(1) of this section and will assess the quantity of class I controlled substance that the documentation and information verifies was exported to be transformed or destroyed. The Administrator will issue the person production allowances equivalent to the controlled substances that the Administrator determines were exported to be transformed or destroyed. The Agency will grant allowances equal to 100 percent of volume intended for destruction or transformation. The grant of allowances will be effective on the date that the notice is issued.

(3) Until January 1, 1996, for all class I controlled substances, except Group VI, and until January 1, 2001, for class I, Group VI, if the Administrator determines that the documentation for production allowances does not satisfactorily substantiate that the person exported for transformation or destruction as claimed, the Administrator will issue a notice disallowing the request for additional production allowances. Within ten working days after receipt of notification, the person may file a notice of appeal, with supporting reasons, with the Administrator. The Administrator may affirm the disallowance or grant an allowance, as she/he finds appropriate in light of the available evidence. If no appeal is taken by the tenth day after notification, the disallowance will be final on that day.

(g) Effective January 1, 1996, and until January 1, 2000, a person may obtain destruction or transformation credits for a class I controlled substance (except class I, Group VI) equal to the amount of that controlled substance produced in the United States that was destroyed or transformed within the United States in cases where the controlled substance was produced for an emissive use in accordance with the provisions of this subpart, subtracting an offset of 15 percent.

(1) Effective January 1, 1996, and until January 1, 2000, a person must submit a request for destruction or transformation credits that includes the following:

(i) The identity and address of the person;

(ii) The name, quantity and volume of controlled substance destroyed or transformed;

(iii) A copy of the invoice or receipt documenting the sale or transfer of the controlled substance to the person;

(iv) A certification of the previous use of the controlled substance;

(v) For destruction credits, a certification that the controlled substance was destroyed and a certification of the efficiency of the destruction process; and

(vi) For transformation credits, an IRS certificate of feedstock use or transformation of the controlled substance.

(2) Effective January 1, 1996, and until January 1, 2000, the Administrator will issue the person destruction or transformation credits equivalent to the class I controlled substance (except class I, Group VI) produced for emissive uses that the Administrator determines were destroyed or transformed, subtracting the offset of 15 percent. For controlled substances completely destroyed under this rule, the Agency will grant destruction credits equal to 100 percent of volume destroyed minus the offset. For those controlled substances destroyed at less than a 98 percent destruction efficiency, the Agency will grant destruction credits commensurate with that percentage of destruction efficiency that is actually achieved minus the offset. The grant of credits will be effective on the date that the notice is issued.

(3) Effective January 1, 1996, and until January 1, 2000, if the Administrator determines that the request for destruction or transformation credits does not satisfactorily substantiate that the person destroyed or transformed a class I controlled substance (except class I, Group VI) as claimed, or that the controlled substance was not previously used for an emissive purpose, the Administrator will issue a notice disallowing the request for additional destruction or transformation credits. Within ten working days after receipt of notification, the person may file a notice of appeal, with supporting reasons, with the Administrator. The Administrator may affirm the disallowance or grant an allowance, as she/he finds appropriate in light of the available evidence. If no appeal is taken by the tenth day after notification, the disallowance will be final on that day.

§ 82.10 Availability of consumption allowances in addition to baseline consumption allowances.

(a) Until January 1, 1996, for all class I controlled substances, except Group VI, and until January 1, 2001 for class I, Group VI, any person may obtain, in accordance with the provisions of this subsection, consumption allowances equivalent to the level of class I controlled substances (other than used controlled substances or transhipments) that the person has exported from the United States and its territories to a Party (as listed in Appendix C to this subpart).

(1) Until January 1, 1996, for all class I controlled substances, except Group VI, and until January 1, 2001 for class

I, Group VI, to receive consumption allowances in addition to baseline consumption allowances, the exporter of the class I controlled substances must submit to the Administrator a request for consumption allowances setting forth the following:

(i) The identities and addresses of the exporter and the recipient of the exports;

(ii) The exporter's Employer Identification Number;

(iii) The names and telephone numbers of contact persons for the exporter and the recipient;

(iv) The quantity and type of controlled substances exported;

(v) The source of the controlled substance and the date purchased;

(vi) The date on which, and the port from which, the controlled substances were exported from the United States or its territories;

(vii) The country to which the controlled substances were exported;

(viii) The commodity code of the controlled substance exported; and

(ix) Written statement from the producer that the controlled substance was produced with expended allowances.

(2) The Administrator will review the information and documentation submitted under paragraph (a)(1) of this section. The Administrator will issue the exporter contingent consumption allowances equivalent to the level of controlled substances that the Administrator determined will be exported contingent upon receipt of confirming documentation.

(3) To receive the consumption allowances, the exporter of the class I controlled substances must submit to the Administrator a request for consumption allowances including the following:

(i) The bill of lading and the invoice indicating the net quantity of controlled substances shipped and documenting the sale of the controlled substances to the purchaser.

(ii) [Reserved]

(4) The Administrator will assess the quantity of controlled substances that the documentation under paragraph (a)(3) verifies was exported. The Administrator will issue the exporter consumption allowances equivalent to the level of controlled substances that the Administrator determined were exported. The grant of the consumption allowances will be effective on the date the notice is issued. If the Administrator determines that the confirming documentation does not satisfactorily substantiate that the person exported controlled substances as claimed the Administrator will issue a notice that the consumption allowances are not granted.

(b) A person may obtain consumption allowances for that controlled substance equal to the amount of a controlled substance either produced in, or imported into, the United States that was transformed or destroyed in the case where consumption allowances were expended to produce or import such substance in accordance with the provisions of this paragraph. Effective January 1, 1996, consumption allowances will not be granted for a class I controlled substance (except class I, Group VI) produced in, or imported into, the United States that was transformed or destroyed. However, a person producing or importing a controlled substance (except class I, Group VI) that was transformed or destroyed must submit to the Administrator the information described under § 82.13 (f)(3) (i) and (ii).

(c) A company may also increase its consumption allowances by receiving production from another Party to the Protocol for class I, Group I through Group V and Group VII controlled substances until January 1, 1996, and for class I, Group VI controlled substances until January 1, 2001. A nation listed in Appendix C to this subpart (Parties to the Montreal Protocol) must agree to transfer to the person for the current control period some amount of production that the nation is permitted under the Montreal Protocol. For trades from a Party, the person must obtain from the principal diplomatic representative in that nation's embassy in the United States a signed document stating that the appropriate authority within that nation has established or revised production limits for the nation to equal the lesser of the maximum production that the nation is allowed under the Protocol minus the amount transferred, the maximum production that is allowed under the nation's applicable domestic law minus the amount transferred, or the average of the nation's actual national production level for the three years prior to the transfer minus the production allowances transferred. The person must submit to the Administrator a transfer request that includes a true copy of this document and that sets forth the following:

(1) The identity and address of the person;

(2) The identity of the Party;

(3) The names and telephone numbers of contact persons for the person and for the Party;

(4) The chemical type and level of production being transferred; and

(5) The control period(s) to which the transfer applies.

(d) On the first day of each control period the Agency will grant consumption allowances to any person that produced and exported a Group IV controlled substance in the baseline year and that was not granted baseline consumption allowances under § 82.5 of this subpart.

(1) The number of consumption allowances any such person will be granted for each control period will be equal to the number of production allowances granted to that person under § 82.7 for that control period.

(2) Any person granted allowances under this paragraph must hold the same number of unexpended consumption allowances for the control period for which the allowances were granted by February 15 of the following control period. Every kilogram by which the person's unexpended consumption allowances fall short of the amount the person was granted under this paragraph constitutes a separate violation.

§ 82.11 Exports to Article 5 Parties.

(a) A person may produce class I controlled substances for export (not including exports resulting in transformation or destruction, or used controlled substances) to foreign states listed in appendix E to this subpart (Article 5 countries) if apportioned Article 5 allowances under § 82.9(a). Upon notification, the Administrator will deduct from the person's balance of Article 5 allowances the amount equal to the class I controlled substance exported.

(b) A person must submit a notice to the Administrator of exports to Article 5 countries (except transhipments, exports resulting in transformation or destruction, or used controlled substances) at the end of the quarter that includes the following:

(1) The identities and addresses of the exporter and the recipient of the exports;

(2) The exporter's Employee Identification Number;

(3) The names and telephone numbers of contact persons for the exporter and for the recipient;

(4) The quantity and the type of controlled substances exported, its source and date purchased;

(5) The date on which, and the port from which, the controlled substances were exported from the United States or its territories;

(6) The country to which the controlled substances were exported;

(7) A copy of the bill of lading and invoice indicating the net quantity shipped and documenting the sale of

the controlled substances to the purchaser;

(8) The commodity code of the controlled substance exported; and

(9) A copy of the contract covering the sale of the controlled substances to the recipient that contains provisions forbidding the reexport of the controlled substance in bulk form and subjecting the recipient or any transferee of the recipient to liquidated damages equal to the resale price of the controlled substances if they are reexported in bulk form.

§ 82.12 Transfers.

(a) Inter-company transfers.

(1) Until January 1, 1996, for all class I controlled substances, except for Group VI, and until January 1, 2001, for Group VI, any person ("transferor") may transfer to any other person ("transferee") any amount of the transferor's consumption allowances or production allowances or Article 5 allowances, as follows:

(i) The transferor must submit to the Administrator a transfer claim setting forth the following:

(A) The identities and addresses of the transferor and the transferee;

(B) The name and telephone numbers of contact persons for the transferor and the transferee;

(C) The type of allowances or authorizations being transferred, including the names of the controlled substances for which allowances are to be transferred;

(D) The group of controlled substances to which the allowances or authorizations being transferred pertains;

(E) The amount of allowances or authorizations being transferred;

(F) The control period(s) for which the allowances or authorizations are being transferred;

(G) The amount of unexpended allowances of the type and for the control period being transferred that the transferor holds under authority of this subpart as of the date the claim is submitted to EPA; and

(H) The amount of the one percent offset applied to the unweighted amount traded that will be deducted from the transferor's allowance balance (except for trades from transformers and destroyers to producers or importers for the purpose of allowance reimbursement).

(ii) The Administrator will determine whether the records maintained by EPA, taking into account any previous transfers and any production, allowable imports and exports of controlled substances reported by the transferor, indicate that the transferor possesses, as of the date the transfer claim is processed, unexpended allowances sufficient to cover the transfer claim (i.e., the amount to be transferred plus, in the case of transferors of production or consumption allowances, one percent of that amount). Within three working days of receiving a complete transfer claim, the Administrator will take action to notify the transferor and transferee as follows:

(A) If EPA's records show that the transferor has sufficient unexpended allowances to cover the transfer claim, the Administrator will issue a notice indicating that EPA does not object to the transfer and will reduce the transferor's balance of unexpended allowances by the amount to be transferred plus, in the case of transfers of production or consumption allowances, one percent of that amount. When EPA issues a no objection notice, the transferor and the transferee may proceed with the transfer. However, if EPA ultimately finds that the transferor did not have sufficient unexpended allowances to cover the claim, the transferor and transferee will be held liable for any violations of the regulations of this subpart that occur as a result of, or in conjunction with, the improper transfer.

(B) If EPA's records show that the transferor has insufficient unexpended allowances to cover the transfer claim, or that the transferor has failed to respond to one or more Agency requests to supply information needed to make a determination, the Administrator will issue a notice disallowing the transfer. Within 10 working days after receipt of notification, either party may file a notice of appeal, with supporting reasons, with the Administrator. The Administrator may affirm or vacate the disallowance. If no appeal is taken by the tenth working day after notification, the disallowance shall be final on that day.

(iii) In the event that the Administrator does not respond to a transfer claim within the three working days specified in paragraph (a)(1)(ii) of this section, the transferor and transferee may proceed with the transfer. EPA will reduce the transferor's balance of unexpended allowances by the amount to be transferred plus, in the case of transfers of production or consumption allowances, one percent of that amount. However, if EPA ultimately finds that the transferor did not have sufficient unexpended allowances to cover the claim, the transferor and transferee will be held liable for any violations of the regulations of this subpart that occur as a result of, or in conjunction with, the improper transfer.

(2) Effective January 1, 1995, any person ("transferor") may transfer to any other person ("transferee") any amount of the transferor's Article 5 allowances. The transfer proceeds as follows:

(i) The transferor must submit to the Administrator a transfer claim setting forth the following:

(A) The identities and addresses of the transferor and the transferee;

(B) The name and telephone numbers of contact persons for the transferor and the transferee;

(C) The type of allowances being transferred, including the controlled substances for which allowances are to be transferred;

(D) The group of controlled substances to which the allowances being transferred pertains;

(E) The amount of Article 5 allowances being transferred;

(F) The control period(s) for which the Article 5 allowances are being transferred; and

(G) The amount of unexpended Article 5 allowances for the control period being transferred that the transferor holds under authority of this subpart as of the date the claim is submitted to EPA.

(H) The amount of the one-percent offset applied to the unweighted amount traded that will be deducted from the transferor's balance.

(ii) The Administrator will determine whether the records maintained by EPA, taking into account any previous transfers and any production of controlled substances reported by the transferor, indicate that the transferor possesses, as of the date the transfer claim is processed, unexpended Article 5 allowances sufficient to cover the transfer claim. Within three working days of receiving a complete transfer claim, the Administrator will take action to notify the transferor and transferee as follows:

(A) If EPA's records show that the transferor has sufficient unexpended Article 5 allowances to cover the transfer claim the Administrator will issue a notice indicating that EPA does not object to the transfer and will reduce the transferor's balance of unexpended Article 5 allowances by the amount to be transferred. When EPA issues a no objection notice, the transferor and the transferee may proceed with the transfer. However, if EPA ultimately finds that the transferor did not have sufficient unexpended Article 5 allowances to cover the claim, the transferor and transferee will be held liable for any violations of the

regulations of this subpart that occur as a result of, or in conjunction with, the improper transfer.

(B) If EPA's records show that the transferor has insufficient unexpended Article 5 allowances to cover the transfer claim, or that the transferor has failed to respond to one or more Agency requests to supply information needed to make a determination, the Administrator will issue a notice disallowing the transfer. Within 10 working days after receipt of notification, either party may file a notice of appeal, with supporting reasons, with the Administrator. The Administrator may affirm or vacate the disallowance. If no appeal is taken by the tenth working day after notification, the disallowance shall be final on that day.

(iii) In the event that the Administrator does not respond to a transfer claim within the three working days specified in paragraph (a)(2)(ii) of this section, the transferor and transferee may proceed with the transfer. EPA will reduce the transferor's balance of unexpended Article 5 allowances by the amount to be transferred. However, if EPA ultimately finds that the transferor did not have sufficient unexpended allowances to cover the claim, the transferor and transferee will be held liable for any violations of the regulations of this subpart that occur as a result of, or in conjunction with, the improper transfer.

(3) Effective January 1, 1996, any person ("transferor") may transfer to any other person ("transferee") any amount of the transferor's destruction credits or transformation credits. The type of credit received by the transferee in a transfer are the same type of credits transferred by the transferor. The transfer proceeds as follows:

(i) The transferor must submit to the Administrator a transfer claim setting forth the following:

(A) The identities and addresses of the transferor and the transferee;

(B) The name and telephone numbers of contact persons for the transferor and the transferee;

(C) The type of credits being transferred, including the names of the controlled substances for which credits are to be transferred;

(D) The group of controlled substances to which the credits being transferred pertains;

(E) The amount of destruction credits or transformation credits being transferred;

(F) The control period(s) for which the destruction credits or transformation credits are being transferred;

(G) The amount of unexpended destruction credits or transformation credits for the control period being transferred that the transferor holds under authority of this subpart as of the date the claim is submitted to EPA; and

(H) The amount of the one-percent offset applied to the unweighted amount traded that will be deducted from the transferor's balance.

(ii) The Administrator will determine whether the records maintained by EPA, taking into account any previous transfers and any production of controlled substances reported by the transferor, indicate that the transferor possesses, as of the date the transfer claim is processed, unexpended destruction credits or transformation credits sufficient to cover the transfer claim (i.e., the amount to be transferred plus one percent of that amount). Within three working days of receiving a complete transfer claim, the Administrator will take action to notify the transferor and transferee as follows:

(A) If EPA's records show that the transferor has sufficient unexpended destruction credits or transformation credits to cover the transfer claim the Administrator will issue a notice indicating that EPA does not object to the transfer and will reduce the transferor's balance of unexpended or credits by the amount to be transferred plus one percent of that amount. When EPA issues a no objection notice, the transferor and the transferee may proceed with the transfer. However, if EPA ultimately finds that the transferor did not have sufficient unexpended credits to cover the claim, the transferor and transferee will be held liable for any violations of the regulations of this subpart that occur as a result of, or in conjunction with, the improper transfer.

(B) If EPA's records show that the transferor has insufficient unexpended destruction credits or transformation credits to cover the transfer claim, or that the transferor has failed to respond to one or more Agency requests to supply information needed to make a determination, the Administrator will issue a notice disallowing the transfer. Within 10 working days after receipt of notification, either party may file a notice of appeal, with supporting reasons, with the Administrator. The Administrator may affirm or vacate the disallowance. If no appeal is taken by the tenth working day after notification, the disallowance shall be final on that day.

(iii) In the event that the Administrator does not respond to a transfer claim within the three working days specified in paragraph (a)(2)(ii) of this section, the transferor and transferee may proceed with the transfer. EPA will reduce the transferor's balance of unexpended destruction credits or transformation credits by the amount to be transferred plus one percent of that amount. However, if EPA ultimately finds that the transferor did not have sufficient unexpended credits to cover the claim, the transferor and transferee will be held liable for any violations of the regulations of this subpart that occur as a result of, or in conjunction with, the improper transfer.

(b) Inter-pollutant conversions.

(1) Until January 1, 1996, for all class I controlled substances, except Group VI, and until January 1, 2001 for Group VI, any person ("convertor") may convert consumption allowances or production allowances for one class I controlled substance to the same type of allowance for another class I controlled substance within the group of controlled substances as the first as follows:

(i) The convertor must submit to the Administrator a conversion claim setting forth the following:

(A) The identity and address of the convertor;

(B) The name and telephone number of a contact person for the convertor;

(C) The type of allowances being converted, including the names of the controlled substances for which allowances are to be converted;

(D) The group of controlled substances to which the allowances being converted pertains;

(E) The amount and type of allowances to be converted;

(F) The amount of allowances to be subtracted from the convertor's unexpended allowances for the first controlled substance, to be equal to 101 percent of the amount of allowances converted;

(G) The amount of allowances or to be added to the convertor's unexpended allowances for the second controlled substance, to be equal to the amount of allowances for the first controlled substance being converted multiplied by the quotient of the ozone depletion factor of the first controlled substance divided by the ozone depletion factor of the second controlled substance, as listed in Appendix A to this subpart;

(H) The control period(s) for which the allowances are being converted; and

(I) The amount of unexpended allowances or authorizations of the type and for the control period being converted that the convertor holds under authority of this subpart as of the date the claim is submitted to EPA.

(ii) The Administrator will determine whether the records maintained by EPA, taking into account any previous

conversions, any transfers, and any production, imports (not including transshipments, or used controlled substances), or exports (not including transshipments, or used controlled substances) of controlled substances reported by the convertor, indicate that the convertor possesses, as of the date the conversion claim is processed, unexpended allowances sufficient to cover the conversion claim (i.e., the amount to be converted plus, in the case of conversions of production or consumption allowances, one percent of that amount). Within three working days of receiving a complete conversion claim, the Administrator will take action to notify the convertor as follows:

(A) If EPA's records show that the convertor has sufficient unexpended allowances to cover the conversion claim the Administrator will issue a notice indicating that EPA does not object to the conversion and will reduce the convertor's balance of unexpended allowances by the amount to be converted plus, in the case of conversions of production or consumption allowances, one percent of that amount. When EPA issues a no objection notice, the convertor may proceed with the conversion. However, if EPA ultimately finds that the convertor did not have sufficient unexpended allowances to cover the claim, the convertor will be held liable for any violations of the regulations of this subpart that occur as a result of, or in conjunction with, the improper conversion.

(B) If EPA's records show that the convertor has insufficient unexpended allowances to cover the conversion claim, or that the convertor has failed to respond to one or more Agency requests to supply information needed to make a determination, the Administrator will issue a notice disallowing the conversion. Within 10 working days after receipt of notification, the convertor may file a notice of appeal, with supporting reasons, with the Administrator. The Administrator may affirm or vacate the disallowance. If no appeal is taken by the tenth working day after notification, the disallowance shall be final on that day.

(iii) In the event that the Administrator does not respond to a conversion claim within the three working days specified in paragraph (b)(2) of this section, the convertor may proceed with the conversion. EPA will reduce the convertor's balance of unexpended allowances by the amount to be converted plus, in the case of conversions of production or consumption allowances, one percent of that amount. However, if EPA ultimately finds that the convertor did not have sufficient unexpended allowances to cover the claims, the convertor will be held liable for any violations of the regulations of this subpart that occur as a result of, or in conjunction with, the improper conversion.

(2) Effective January 1, 1995, any person ("convertor") may convert Article 5 allowances for one class I controlled substance to the same type of allowance for another class I controlled substance within the same Group of controlled substances as the first, as follows:

(i) The convertor must submit to the Administrator a conversion claim setting forth the following:

(A) The identity and address of the convertor;

(B) The name and telephone number of a contact person for the convertor;

(C) The type of Article 5 allowances being converted, including the names of the controlled substances for which allowances are to be converted;

(D) The group of controlled substances to which the Article 5 allowances being converted pertains;

(E) The amount and type of allowances to be converted;

(F) The amount of allowances to be subtracted from the convertor's unexpended allowances for the first controlled substance, to be equal to 101 percent of the amount of allowances converted.

(G) The amount of Article 5 allowances to be added to the convertor's unexpended allowances for the second controlled substance, to be equal to the amount of allowances for the first controlled substance being converted multiplied by the quotient of the ozone depletion factor of the first controlled substance divided by the ozone depletion factor of the second controlled substance, as listed in Appendix A to this subpart.

(H) The control period(s) for which the Article 5 allowances are being converted; and

(I) The amount of unexpended Article 5 allowances for the control period being converted that the convertor holds under authority of this subpart as of the date the claim is submitted to EPA.

(ii) The Administrator will determine whether the records maintained by EPA, taking into account any previous conversions, any transfers, and any production, or exports of controlled substances reported by the convertor, indicate that the convertor possesses, as of the date the conversion claim is processed, unexpended Article 5 allowances sufficient to cover the conversion claim. Within three working days of receiving a complete conversion claim, the Administrator will take action to notify the convertor as follows:

(A) If EPA's records show that the convertor has sufficient unexpended Article 5 allowances to cover the conversion claim the Administrator will issue a notice indicating that EPA does not object to the conversion and will reduce the convertor's balance of unexpended allowances by the amount to be converted. When EPA issues a no objection notice, the convertor may proceed with the conversion. However, if EPA ultimately finds that the convertor did not have sufficient unexpended Article 5 allowances to cover the claim, the convertor will be held liable for any violations of the regulations of this subpart that occur as a result of, or in conjunction with, the improper conversion.

(B) If EPA's records show that the convertor has insufficient unexpended Article 5 allowances to cover the conversion claim, or that the convertor has failed to respond to one or more Agency requests to supply information needed to make a determination, the Administrator will issue a notice disallowing the conversion. Within 10 working days after receipt of notification, the convertor may file a notice of appeal, with supporting reasons, with the Administrator. The Administrator may affirm or vacate the disallowance. If no appeal is taken by the tenth working day after notification, the disallowance shall be final on that day.

(iii) In the event that the Administrator does not respond to a conversion claim within the three working days specified in paragraph (b)(2)(ii) of this section, the convertor may proceed with the conversion. EPA will reduce the convertor's balance of unexpended allowances by the amount to be converted. However, if EPA ultimately finds that the convertor did not have sufficient unexpended allowances to cover the claims, the convertor will be held liable for any violations of the regulations of this subpart that occur as a result of, or in conjunction with, the improper conversion.

(3) Effective January 1, 1996, any person ("convertor") may convert destruction and/or transformation credits for one class I controlled substance to the same type of credits for another class I controlled substance within the same group of controlled substances as the first as follows:

(i) The convertor must submit to the Administrator a conversion claim setting forth the following:

(A) The identity and address of the convertor;

(B) The name and telephone number of a contact person for the convertor;

(C) The type of destruction and/or transformation credits being converted, including the names of the controlled substances for which credits are to be converted;

(D) The group of controlled substances to which the destruction and/or transformation credits being converted pertains;

(E) The amount and type of credits to be converted;

(F) The amount of credits to be subtracted from the convertor's unexpended credits for the first controlled substance, to be equal to 101 percent of the amount of credits converted;

(G) The amount of destruction and/or transformation credits to be added to the convertor's unexpended credits for the second controlled substance, to be equal to the amount of credits for the first controlled substance being converted multiplied by the quotient of the ozone depletion factor of the first controlled substance divided by the ozone depletion factor of the second controlled substance, as listed in Appendix A to this subpart.

(H) The control period(s) for which the destruction and/or transformation credits are being converted; and

(I) The amount of unexpended destruction and/or transformation credits for the control period being converted that the convertor holds under authority of this subpart as of the date the claim is submitted to EPA.

(ii) The Administrator will determine whether the records maintained by EPA, taking into account any previous conversions, any transfers, and any production, imports (not including transhipments, or used controlled substances), or exports (not including transhipments, exports for destruction or transformation, or used controlled substances) of controlled substances reported by the convertor, indicate that the convertor possesses, as of the date the conversion claim is processed, unexpended destruction and/or transformation credits sufficient to cover the conversion claim (i.e., the amount to be converted plus one percent of that amount). Within three working days of receiving a complete conversion claim, the Administrator will take action to notify the convertor as follows:

(A) If EPA's records show that the convertor has sufficient unexpended destruction and/or transformation credits to cover the conversion claim the Administrator will issue a notice indicating that EPA does not object to the conversion and will reduce the convertor's balance of unexpended credits by the amount to be converted plus one percent of that amount. When EPA issues a no objection notice, the convertor may proceed with the conversion. However, if EPA ultimately finds that the convertor did not have sufficient unexpended destruction and/or transformation credits to cover the claim, the convertor will be held liable for any violations of the regulations of this subpart that occur as a result of, or in conjunction with, the improper conversion.

(B) If EPA's records show that the convertor has insufficient unexpended destruction and/or transformation credits to cover the conversion claim, or that the convertor has failed to respond to one or more Agency requests to supply information needed to make a determination, the Administrator will issue a notice disallowing the conversion. Within 10 working days after receipt of notification, the convertor may file a notice of appeal, with supporting reasons, with the Administrator. The Administrator may affirm or vacate the disallowance. If no appeal is taken by the tenth working day after notification, the disallowance shall be final on that day.

(iii) In the event that the Administrator does not respond to a conversion claim within the three working days specified in paragraph (b)(2) of this section, the convertor may proceed with the conversion. EPA will reduce the convertor's balance of unexpended destruction and/or transformation credits by the amount to be converted plus one percent of that amount. However, if EPA ultimately finds that the convertor did not have sufficient unexpended destruction and/or transformation credits to cover the claims, the convertor will be held liable for any violations of the regulations of this subpart that occur as a result of, or in conjunction with, the improper conversion.

(3) Effective January 1, 1995, and for every control period thereafter, inter-pollutant trades will be permitted during the 45 days after the end of a control period.

(c) Inter-company transfers and Inter-pollutant conversions.

(1) Until January 1, 1996, if a person requests an inter-company transfer and an inter-pollutant conversion simultaneously, the amount subtracted from the convertor-transferor's unexpended allowances for the first controlled substance will be equal to 101 percent of the amount of allowances converted and transferred in the case of transfer-conversions of production or consumption allowances.

(2) Effective January 1, 1995, if a person requests an inter-company transfer and an inter-pollutant conversion simultaneously, the amount subtracted from the convertor-transferor's unexpended Article 5 allowances for the first controlled substance will be equal to 101 percent of the amount of Article 5 allowances converted and transferred in the case of transfer-conversions of Article 5 allowances.

(3) Effective January 1, 1996, if a person requests an inter-company transfer and an inter-pollutant conversion simultaneously, the amount subtracted from the convertor-transferor's unexpended destruction and/or transformation credits for the first controlled substance will be equal to 101 percent of the amount of destruction and/or transformation credits converted and transferred in the case of transfer-conversions of destruction and/or transformation credits allowances.

§ 82.13 Record-keeping and reporting requirements.

(a) Unless otherwise specified, the recordkeeping and reporting requirements set forth in this section take effect on January 1, 1995.

(b) Reports and records required by this section may be used for purposes of compliance determinations. These requirements are not intended as a limitation on the use of other evidence admissible under the Federal Rules of Evidence.

(c) Unless otherwise specified, reports required by this section must be mailed to the Administrator within 45 days of the end of the applicable reporting period.

(d) Records and copies of reports required by this section must be retained for three years.

(e) In reports required by this section, quantities of controlled substances must be stated in terms of kilograms.

(f) Every person ("producer") who produces class I controlled substances during a control period must comply with the following recordkeeping and reporting requirements:

(1) Within 120 days of November 10, 1994, or within 120 days of the date that a producer first produces a class I controlled substance, whichever is later, every producer who has not already done so must submit to the Administrator a report describing:

(i) The method by which the producer in practice measures daily quantities of controlled substances produced;

(ii) Conversion factors by which the daily records as currently maintained can be converted into kilograms of controlled substances produced, including any constants or assumptions used in making those calculations (e.g., tank specifications, ambient temperature or pressure, density of the controlled substance);

(iii) Internal accounting procedures for determining plant-wide production;

(iv) The quantity of any fugitive losses accounted for in the production figures; and

(v) The estimated percent efficiency of the production process for the controlled substance.

Within 60 days of any change in the measurement procedures or the information specified in the above report, the producer must submit a report specifying the revised data or procedures to the Administrator.

(2) Every producer of a class I controlled substance during a control period must maintain the following records:

(i) Dated records of the quantity of each controlled substance produced at each facility;

(ii) Dated records of the quantity of controlled substances produced for use in processes that result in their transformation or for use in processes that result in their destruction and quantity sold for use in processes that result in their transformation or for use in processes that result in their destruction;

(iii) Dated records of the quantity of controlled substances produced for an essential-use;

(iv) Dated records of the quantity of controlled substances produced with expended destruction and/or transformation credits;

(v) Copies of invoices or receipts documenting sale of controlled substance for use in processes resulting in their transformation or for use in processes resulting in destruction;

(vi) Dated records of the quantity of each controlled substance used at each facility as feedstocks or destroyed in the manufacture of a controlled substance or in the manufacture of any other substance, and any controlled substance introduced into the production process of the same controlled substance at each facility;

(vii) Dated records identifying the quantity of each chemical not a controlled substance produced within each facility also producing one or more controlled substances;

(viii) Dated records of the quantity of raw materials and feedstock chemicals used at each facility for the production of controlled substances;

(ix) Dated records of the shipments of each controlled substance produced at each plant;

(x) The quantity of controlled substances, the date received, and names and addresses of the source of recyclable or recoverable materials containing controlled substances which are recovered at each plant;

(xi) Records of the date, the controlled substance, and the estimated quantity of any spill or release of a controlled substance that equals or exceeds 100 pounds;

(xii) For transformation or destruction in the United States, copies of IRS certification that the controlled substance will be transformed or of the verification that it will be destroyed; for transformation or destruction outside the United States, a copy of all sales contracts certifying that the controlled substance that was exported, by the producer or another U.S. company, to a Party to the Protocol, will be transformed or destroyed in cases when production and consumption allowances were not expended;

(xiii) Written verifications that essential-use allowances were conveyed to the producer for the production of specified quantities of a specific controlled substance that will only be used for the named essential-use; and

(xiv) Written verifications from a U.S. purchaser that the controlled substance was exported to an Article 5 country in cases when Article 5 allowances were expended during production.

(3) For each quarter, each producer of a class I controlled substance must provide the Administrator with a report containing the following information:

(i) The production by company in that quarter of each controlled substance, specifying the quantity of any controlled substance used in processing, resulting in its transformation by the producer;

(ii) The amount of production for use in processes resulting in destruction of controlled substances by the producer;

(iii) The levels of production (expended allowances) for each controlled substance;

(iv) The producer's total of expended and unexpended production allowances, consumption allowances, Article 5 allowances, essential-use allowances and destruction and/or transformation credits at of the end of that quarter;

(v) The quantity of recyclable and recoverable materials received containing the controlled substances which are recovered;

(vi) The amount of controlled substance sold or transferred during the quarter to a person other than the producer for use in processes resulting in its transformation or eventual destruction;

(vii) Internal Revenue Service Certificates in the case of transformation, or the purchaser's destruction verification in the case of destruction, showing that the purchaser or recipient of a controlled substance intends to either transform or destroy the controlled substance;

(viii) A list of the essential-use allowance holder and/or laboratory from whom orders were placed and the quantity of specific essential-use controlled substances requested and produced;

(ix) A list of U.S. purchasers of controlled substances that exported to an Article 5 country in cases when Article 5 allowances were expended during production; and

(x) A list of the quantities and names of controlled substances exported, by the producer and or by other U.S. companies, to a Party to the Protocol that will be transformed or destroyed and therefore were not produced expending production or consumption allowances.

(4) For any person who fails to maintain the records required by this paragraph, or to submit the report required by this paragraph, the Administrator may assume that the person has produced at full capacity during the period for which records were not kept, for purposes of determining whether the person has violated the prohibitions at § 82.4 of this subpart.

(g) Importers of class I controlled substances during a control period must comply with record-keeping and reporting requirements specified in this subsection.

(1) Recordkeeping—Importers. Any importer of a class I controlled substance (including used, recycled and reclaimed controlled substances) must maintain the following records:

(i) The quantity of each controlled substance imported, either alone or in mixtures, including the percentage of each mixture which consists of a controlled substance;

(ii) The quantity of those controlled substances imported that are used, recycled or reclaimed;

(iii) The quantity of controlled substances other than transhipments or used, recycled or reclaimed substances imported for use in processes resulting in their transformation or destruction and quantity sold for use in processes that result in their destruction or transformation;

(iv) The date on which the controlled substances were imported;

(v) The port of entry through which the controlled substances passed;
(vi) The country from which the imported controlled substances were imported;
(vii) The commodity code for the controlled substances shipped;
(viii) The importer number for the shipment;
(ix) A copy of the bill of lading for the import;
(x) The invoice for the import;
(xi) The quantity of imports of used class I controlled substances and class II controlled substances;
(xii) The U.S. Customs entry form;
(xiii) Dated records documenting the sale or transfer of controlled substances for use in process resulting in transformation or destruction;
(xiv) Copies of IRS certifications that the controlled substance will be transformed or destruction verifications that it will be destroyed;
(xv) Dated records of the quantity of controlled substances produced for an essential-use; and
(xvi) Copies of documents conveying the right to import controlled substances for essential uses.

(2) Reporting Requirements-Importers. For each quarter, every importer of a class I controlled substance (including importers of used controlled substances) must submit to the Administrator a report containing the following information:
(i) Summaries of the records required in paragraph (g)(1)(i) through (xvi) of this section for the previous quarter;
(ii) The total quantity imported in kilograms of each controlled substance for that quarter;
(iii) The quantity of those controlled substances imported that are used, recycled or reclaimed;
(iv) The levels of import (expended consumption allowances) of controlled substances for that quarter and totaled by chemical for the control-period-to-date;
(vii) The importer's total sum of expended and unexpended consumption allowances by chemical as of the end of that quarter;
(viii) The amount of controlled substances imported for use in processes resulting in their transformation or destruction; .
(ix) The amount of controlled substances sold or transferred during the quarter to each person for use in processes resulting in their transformation or eventual destruction;
(x) The amount of controlled substances sold or transferred during the quarter to each person for an essential use;
(xi) Internal Revenue Service Certificates showing that the purchaser or recipient of imported controlled substances intends to transform those substances or destruction verifications showing that purchaser or recipient intends to destroy the controlled substances; and
(xii) A list of the essential-use allowance holder and/or laboratory from whom orders were placed and the quantity of specific essential-use controlled substances requested and imported.

(h) Reporting Requirements-Exporters. For any exports of class I controlled substances not reported under § 82.10 of this subpart (additional consumption allowances), or under § 82.13(f)(3) (reporting for producers of controlled substances), the exporter who exported a class I controlled substances must submit to the Administrator the following information within 45 days after the end of the control period in which the unreported exports left the United States:
(1) The names and addresses of the exporter and the recipient of the exports;
(2) The exporter's Employee Identification Number;
(3) The type and quantity of each controlled substance exported and what percentage, if any, of the controlled substance are recycled or used;
(4) The date on which and the port from which the controlled substances were exported from the United States or its territories;
(5) The country to which the controlled substances were exported; and
(6) The commodity code of the controlled substance shipped.
(7) The sales contract certifying that the controlled substance that was exported to a Party to the Protocol will be transformed or destroyed.

(i) Every person who has requested additional production allowances or destruction and/or transformation credits under § 82.9 (e), (f) and (g) of this subpart or consumption allowances under § 82.10(b) of this subpart or who transforms or destroys class I controlled substances not produced by that person must maintain the following:
(1) Dated records of the quantity and level of each controlled substance transformed or destroyed;
(2) Copies of the invoices or receipts documenting the sale or transfer of the controlled substance to the person;
(3) In the case where those controlled substances are transformed, dated records of the names, commercial use, and quantities of the resulting chemical(s);
(4) In the case where those controlled substances are transformed, dated records of shipments to purchasers of the resulting chemical(s);
(5) Dated records of all shipments of controlled substances received by the person, and the identity of the producer or importer of the controlled substances;
(6) Dated records of inventories of controlled substances at each plant on the first day of each quarter; and
(7) A copy of the person's IRS certification of intent to transform or the purchaser's or recipient's destruction verification of intent to destroy, in the case where substances were purchased or transferred for transformation or destruction purposes.

(j) Persons who destroy class I controlled substances shall, following promulgation of this rule, provide EPA with a one-time report stating the destruction unit's destruction efficiency and the methods used to record the volume destroyed and those used to determine destruction efficiency and the name of other relevant federal or state regulations that may apply to the destruction process. Any changes to the unit's destruction efficiency or methods used to record volume destroyed and to determine destruction efficiency must be reflected in a revision to this report to be submitted to EPA within 60 days of the change.

(k) Persons who purchase or receive and subsequently destroy controlled class I substances that were originally produced without expending allowances shall provide the producer or importer from whom they purchase or receive controlled substances to be destroyed with a verification that controlled substances will be used in processes that result in their destruction.
(1) The verification shall include the following:
(i) Identity and address of the person intending to destroy controlled substances;
(ii) Indication of whether those controlled substances will be completely destroyed, as defined in § 82.3 of this rule, or less than completely destroyed, in which case the destruction efficiency at which such substances will be destroyed must be included;
(iii) Period of time over which the person intends to destroy controlled substances; and
(iv) Signature of the verifying person.
(2) If, at any time, any aspects of this verification change, the person must submit a revised verification reflecting such changes to the producer from whom that person purchases controlled substances intended for destruction.

(l) Persons who purchase class I controlled substances and who

subsequently transform such controlled substances shall provide the producer or importer with the IRS certification that the controlled substances are to be used in processes resulting in their transformation.

(m) Any person who transforms or destroys class I controlled substances who has submitted an IRS certificate of intent to transform or a destruction verification to the producer of the controlled substance, or who has requested destruction and/or transformation credits from the Administrator must report the names and quantities of class I controlled substances transformed and destroyed for each control period within 45 days of the end of such control period.

(n) Every person who produces, imports, or exports class II chemicals must report its quarterly level of production, imports, and exports of these chemicals within 45 days of the end of each quarter (except those substances transformed or destroyed).

(o) Persons who import used, recycled or reclaimed controlled substances must label their bill of lading or invoice indicating that the controlled substance is used, recycled or reclaimed.

(1) Every person who imports used or recycled controlled substances must present a letter to United States Customs for entry clearance, that contains the following:

(i) the previous use of each controlled substance in each shipment, and

(ii) the intended reclamation destination of each controlled substance in a shipment.

(2) Every person who imports reclaimed controlled substances must present a letter to United States Customs for entry clearance, that contains the following:

(i) the previous use(s) of each controlled substance in a shipment, and

(ii) the reclamation facility (or name of equipment used) in the foreign country where the controlled substance was reclaimed.

(p) Persons who export used, recycled or reclaimed controlled substances must label their bill of lading or invoice indicating that the controlled substance is used, recycled or reclaimed.

(q) Persons who import heels of controlled substances must label their bill of lading or invoice indicating that the controlled substance in the container is a heel.

(r) Every person who brings back a container with a heel to the United States must report the annual quantity brought back into the United States within 45 days of the end of the control period.

(s) Every person who imports or exports used, recycled or reclaimed group II, class I controlled substances, or class II controlled substances must report its annual level within 45 days of the end of the control period.

(t) Every person who transships a controlled substance must maintain records that indicate that the controlled substance shipment originated in one country destined for another country, and does not enter interstate commerce with the United States.

(u) Any person who submits an order to a producer or importer for a controlled substance for an essential use must report the annual quantity received from each producer or importer within 45 days of the end of the control period. Those persons receiving controlled substances under the exemption for laboratories must provide a detailed description of the analytical procedures for which the specific controlled substance is essential and reference the published instructions, standards or specifications. The person reporting should submit the following:

(1) The identity and address of the person;

(2) The name, quantity, and level of controlled substance transformed or the name, quantity and volume destroyed;

(3) A copy of the invoice or receipt documenting the sale of the controlled substance to the person;

(4) A certification that production allowances were expended for the production of the controlled substance;

(5) If the controlled substance is transformed, the name, quantity, and verification of the commercial use of the resulting chemical transformed; and

(6) If the controlled substance is destroyed, the efficiency of the destruction process.

Appendix A to Subpart A—Class I Controlled Substances

Class I controlled substances	Ozone depletion potential (ODP)
A. Group I:	
$CFCl_3$-Trichlorofluoromethane (CFC–11)	1.0
CF_2Cl_2-Dichlorofifluoromethane (CFC–12)	1.0
$C_2F_3Cl_3$-Trichlorotrifluoroethane (CFC–113)	0.8
$C_2F_4Cl_2$-Dichlorotetrafluoroethane (CFC–114)	1.0
C_2F_5Cl-Monochloropentafluoroethane (CFC–115)	0.6
All isomers of the above chemicals.	
B. Group II:	
CF_2ClBr-Bromochlorodifluoromethane (Halon-1211)	3.0
CF_3Br-Bromotrifluoromethane (Halon-1301)	10.0
$C_2F_4Br_2$-Dibromotetrafluoroethane (Halon-2402)	6.0
All isomers of the above chemicals.	
C. Group III:	
CF_3Cl-Chlorotrifluoromethane (CFC–13)	1.0
C_2FCl_5-(CFC–111)	1.0
$C_2F_2Cl_4$-(CFC–112)	1.0
C_3FCl_7-(CFC–211)	1.0
$C_3F_2Cl_6$-(CFC–212)	1.0
$C_3F_3Cl_5$-(CFC–213)	1.0
$C_3F_4Cl_4$-(CFC–214)	1.0
$C_3F_5Cl_3$-(CFC–215)	1.0
$C_3F_6Cl_2$-(CFC–216)	1.0
C_3F_7Cl-(CFC–217)	1.0
All isomers of the above chemicals.	
D Group IV:	
CCl_4-Carbon Tetrachloride	1.1
E. Group V:	

Class 1 controlled substances	Ozone depletion potential (ODP)
$C_2H_3Cl_3$-1,1,1 Trichloroethane (Methyl chloroform)	0.1
All isomers of the above chemical except 1,1,2-trichloroethane.	
F. Group VI:	
CH3Br—Bromomethane (Methyl Bromide)	0.7
G. Group VII:	
$CHFBR_2$	1.00
CHF_2Br (HBFC–2201)	0.74
CH_2FBr	0.73
C_2HFBr_4	0.3–0.8
$C_2HF_2Br_3$	0.5–1.8
$C_2HF_3Br_2$	0.4–1.6
C_2HF_4Br	0.7–1.2
$C_2H_2FBr_3$	0.1–1.1
$C_2H_2F_2Br_2$	0.2–1.5
$C_2H_2F_3Br$	0.7–1.6
$C_2H_2FBr_2$	0.1–1.7
$C_2H_3F_2Br$	0.2–1.1
C_2H_4FBr	0.07–0.1
C_3HFBr_6	0.3–1.5
$C_3HF_2Br_5$	0.2–1.9
$C_3HF_3Br_4$	0.3–1.8
$C_3HF_4Br_3$	0.5–2.2
$C_3HF_5Br_2$	0.9–2.0
C_3HF_6Br	0.7–3.3
$C_3H_2FBr_5$	0.1–1.9
$C_3H_2F_2Br_4$	0.2–2.1
$C_3H_2F_3Br_3$	0.2–5.6
$C_3H_2F_4Br_2$	0.3–7.5
$C_3H_2F_5Br$	0.9–14
$C_3H_3FBr_4$	0.08–1.9
$C_3H_3F_2Br_3$	0.1–3.1
$C_3H_3F_3Br_2$	0.1–2.5
$C_3H_3F_4Br$	0.3–4.4
$C_3H_4FBr_3$	0.03–0.3
$C_3H_4F_2Br_2$	0.1–1.0
$C_3H_4F_3Br$	0.07–0.8
$C_3H_5FBr_2$	0.04–0.4
$C_3H_5F_2Br$	0.07–0.8
C_3H_6FB	0.02–0.7

Appendix B to Subpart A.—Class II Controlled Substances

Controlled substance	ODP
$CHFC1_2$-Dichlorofluoromethane (HCFC-21)	[reserved]
CHF_2C1-Chlorodifluoromethane (HCFC-22)	0.05
CH_2FC1-Chlorofluoromethane (HCFC-31)	[reserved]
C_2HFC1_4-(HCFC-121)	[reserved]
$C_2HF_2C1_3$-(HCFC-122)	[reserved]
$C_2HF_3C1_2$-(HCFC-123)	0.02
C_2HF_4C1-(HCFC-124)	0.02
$C_2H_2FC1_3$-(HCFC-131)	[reserved]
$C_2H_2F_2C1_2$-(HCFC-132b)	[reserved]
$C_2H_2F_3C1$-(HCFC-133a)	[reserved]
$C_2H_3FC1_2$-(HCFC-141b)	0.12
$C_2H_3F_2C1$-(HCFC-142b)	0.06
C_3HCFC1_6-(HCFC-221)	[reserved]
$C_3HF_2C1_5$-(HCFC-222)	[reserved]
$C_3HF_3c1_4$-(HCFC-223)	[reserved]
$C_3HF_4C1_3$-(HCFC-224)	[reserved]
$C_3HF_5C1_2$-(HCFC-225ca)	[reserved]
C_3HF_5C1-(HCFC-225cb)	[reserved]
C_3HF_6C1-(HCFC-226)	[reserved]
$C_3H_2FC1_5$-(HCFC-231)	[reserved]
$C_3H_2F_2C1_4$-(HCFC-232)	[reserved]
$C_3H_2F_3C1_3$-(HCFC-233)	[reserved]
$C_3H_2F_4C1_2$-(HCFC-234)	[reserved]
$C_3H_2F_5C1$-(HCFC-235)	[reserved]
$C_3H_3FC1_4$-(HCFC-241)	[reserved]
$C_3H_3F_2C1_3$-(HCFC-242)	[reserved]
$C_3H_3F_3C1_2$-(HCFC-243)	[reserved]

Appendix B to Subpart A.—Class II Controlled Substances—Continued

Controlled substance	ODP
$C_3H_3F_4C1$-(HCFC-244)	[reserved]
$C_3H_4FC1_3$-(HCFC-251)	[reserved]
$C_3H_4F_2C1_2$-(HCFC-252)	[reserved]
$C_3H_4F_3C1$-(HCFC-253)	[reserved]
$C_3H_5FC1_2$-(HCFC-261)	[reserved]
$C_3H_5F_2C1$-(HCFC-262)	[reserved]
C_3H_6FC1-(HCFC-271)	[reserved]
All isomers of the above chemicals.	

Appendix C to Subpart A.—Parties to the Montreal Protocol and Nations Complying With, But Not Parties to, the Protocol

[Annex 1—Parties to the Montreal Protocol]

Foreign State	Montreal Protocol	London Amendments	Copenhagen Amendments
Algeria	√	√	
Antigua and Barbuda	√	√	√
Argentina	√	√	
Australia	√	√	
Austria	√	√	
Bahamas	√	√	√
Bahrain	√	√	
Bangladesh	√		
Barbados	√		
Belarus	√		
Belgium	√	√	
Benin	√		
Bosnia and Herzegovina	√		
Botswana	√		
Brazil	√	√	
Burnei	√		
Bulgaria	√		
Burkina Faso	√		
Cameroon	√	√	
Canada	√	√	
Central African Republic	√		
Chile	√	√	
China	√	√	
Colombia	√		
Congo	√		
Costa Rica	√		
Cote Ivoire	√		
Croatia	√	√	
Cuba	√		
Cyprus	√		
Czech Republic	√		
Denmark	√	√	√
Dominica	√	√	
Ecuador	√	√	√
Egypt	√	√	
El Salvador	√		
European E.C.	√	√	
Fiji	√		
Finland	√	√	√
France	√	√	
Gabon	√		
Gambia	√		
Germany	√	√	√
Ghana	√	√	
Greece	√	√	
Grenada	√	√	
Guatemala	√		
Guinea	√	√	
Guyana	√	√	
Honduras	√		
Hungary	√	√	
Iceland	√	√	
India	√	√	
Indonesia	√	√	

Appendix C to Subpart A.—Parties to the Montreal Protocol and Nations Complying With, But Not Parties to, the Protocol—Continued

[Annex 1—Parties to the Montreal Protocol]

Foreign State	Montreal Protocol	London Amendments	Copenhagen Amendments
Iran	√		
Ireland	√	√	
Israel	√	√	
Italy	√	√	
Jamaica	√	√	
Japan	√	√	
Jordan	√	√	
Kenya	√		
Kiribati	√		
Korea, Republic of	√	√	
Kuwait	√		
Lebanon	√	√	
Libya	√		
Liechtenstein	√		
Luxembourg	√	√	
Malawi	√	√	√
Malaysia	√	√	√
Maldives	√	√	
Malta	√	√	
Marshall Islands	√	√	√
Mauritius	√	√	√
Mexico	√	√	
Monaco	√	√	
Morocco	√		
Myranmar	√	√	
Namibia	√		
Netherlands	√	√	
New Zealand	√	√	√
Nicaragua	√		
Niger	√		
Nigeria	√		
Norway	√	√	√
Pakistan	√	√	
Panama	√	√	
Papua New Guinea	√	√	
Paraguay	√	√	
Peru	√	√	
Philippines	√	√	
Poland	√		
Portugal	√	√	
Romania	√	√	
Russian Federation	√	√	
Saint Kitts and Nevis	√		
Saint Lucia	√		
Samoa	√		
Saudi Arabia	√	√	√
Senegal	√	√	
Seychelles	√	√	√
Singapore	√	√	
Slovenia	√	√	
Solomon Islands	√	√	
South Africa	√	√	
Spain	√	√	
Sri Lanka	√	√	
Sudan	√		
Swaziland	√		
Sweden	√	√	√
Switzerland	√	√	
Syrian Arab Republic	√		
Tanzania, United Republic of	√	√	
Thailand	√	√	
Togo	√		
Trinidad and Tobago	√		
Tunisia	√	√	
Turkey	√		
Turkministan	√		
Tuvalu	√		
Uganda	√	√	

Appendix C to Subpart A.—Parties to the Montreal Protocol and Nations Complying With, But Not Parties to, the Protocol—Continued

[Annex 1—Parties to the Montreal Protocol]

Foreign State	Montreal Protocol	London Amendments	Copenhagen Amendments
Ukranian SSR	√		
United Arab Emirates	√		
United Kingdom	√	√	
United States	√	√	√
Uruguay	√	√	
Uzbekistan	√		
Venezuela	√	√	
Viet Nam	√	√	√
Yugoslavia	√		
Zambia	√		
Zimbabwe	√		

Annex 2—Nations Complying With, but not Parties to, the Protocol [Reserved]

Appendix D to Subpart A—Harmonized Tariff Schedule Description of Products That May Contain Controlled Substances in Appendix A to Subpart A, Class I Groups I and II

This Appendix is based on information provided by the Ozone Secretariat of the United Nations Ozone Environment Programme.[1] The Appendix lists available U.S. harmonized tariff schedule codes identifying headings and subheadings for Annex D products that may contain controlled substances. The Harmonized Tariff Schedule of the United States uses an enumeration system to identify products imported and exported to and from the U.S. This system relies on a four digit heading, a four digit subheading and additional two digit statistical suffix to characterize products. The United States uses the suffix for its own statistical records and analyses. This Appendix lists only headings and subheadings.

While some can be readily associated with harmonized system codes, many products cannot be tied to HS classifications unless their exact composition and the presentation are known. It should be noted that the specified HS classifications represent the most likely headings and subheadings which may contain substances controlled by the Montreal Protocol. The codes given should only be used as a starting point; further verification is needed to ascertain whether or not the products actually contain controlled substances.

Category 1. Automobile and Truck Air Conditioning Units (Whether Incorporated in Vehicles or Not)

There are no separate code numbers for air conditioning units specially used in automobiles and trucks. Although a code has been proposed for car air conditioners, it is not yet officially listed in the Harmonized Tariff Schedule (see category 2). The following codes apply to the vehicles potentially containing air conditioning units.

Heading/subheading	Article description
[2]8701.(10, 20, 30, 90)	Tractors.
8702	Public-transport type passenger motor vehicles.
8702.10	With compression-ignition internal-combustion piston engine (diesel or semi-diesel).
8702.90	Other.
8703	Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 8702), including station wagons and racing cars.
8703.10	Vehicles specially designed for traveling on snow; golf carts and similar vehicles; includes subheading 10.10 and 10.50.
8703.(21, 22, 23, 24)	Other vehicles, with spark-ignition internal combustion reciprocating engines.
8703.(31, 32, 33, 90)	Other vehicles, with compression-ignition internal combustion piston engine (diesel or semi-diesel).
8704	Motor vehicles for the transport of goods.
8704.10.(10, 50)	Dumpers designed for off-highway use.
8704.(21, 22, 23)	Other, with compression-ignition internal combustion piston engine (diesel or semi-diesel).
8704.(31, 32, 90)	Other, with compression-ignition internal combustion piston engine.
8705	Special purpose motor vehicles, other than those principally designed for the transport of persons or goods (for example, wreckers, mobile cranes, fire fighting vehicles, concrete mixers, road sweepers, spraying vehicles, mobile workshops, mobile radiological units).
8705.10	Crane lorries.
8705.20	Mobile drilling derricks.
8705.30	Fire fighting vehicles.
8705.90	Other.

[2]At this time vehicle air conditioning units are considered components of vehicles or are classified under the general category for air conditioning and refrigeration equipment. Vehicles containing air conditioners are therefore considered products containing controlled substances.

[1]"A Note Regarding the Harmonized System Code Numbers for the Products Listed in Annex D:" Adopted by Decision IV/15 paragraph 3, of the Fourth Meeting of the Parties in Copenhagen, 23–25 November, 1992.

Category 2. Domestic and Commercial Refrigeration and Air Conditioning/Heat Pump Equipment

Domestic and commercial air conditioning and refrigeration equipment fall primarily under headings 8415 and 8418

Heading/subheading	Article description
8415	Air conditioning machines, comprising a motor-driven fan and elements for changing the temperature and humidity, including those machines in which the humidity cannot be separately regulated.
8415.20	Proposed code for air conditioning of a kind used for persons, in motor vehicles.
8415.10.00	A/C window or wall types, self-contained.
8415.81.00	Other, except parts, incorporating a refrigerating unit and a valve for reversal of the cooling/heat cycle.
8415.82.00	Other, incorporating a refrigerating unit.
	Self-contained machines and remote condenser type air conditioners (not for year-round use).
	Year-round units (for heating and cooling).
	Air conditioning evaporator coils.
	Dehumidifiers.
	Other air conditioning machines incorporating a refrigerating unit.
8415.83	Automotive air conditioners.
8418	Refrigerators, freezers and other refrigerating or freezing equipment, electric or other; heat pumps, other than air conditioning machines of heading 8415; parts thereof.
8418.10.00	Combined refrigerator-freezers, fitted with separate external doors.
8418.21.00	Refrigerators, household type, Compression type.
8418.22.00	Absorption type, electrical.
8418.29.00	Other.
8418.30.00	Freezers of the chest type.
8418.40	Freezers of the upright type.
8418.50.0040	Other refrigerating or freezing chests, cabinets, display counters, showcases and similar refrigerating or freezing furniture.
8418.61.00	Other refrigerating or freezing equipment; heat pumps.
8418.69	Other.
	Icemaking machines.
	Drinking water coolers, self-contained.
	Soda fountain and beer dispensing equipment.
	Centrifugal liquid chilling refrigerating units.
	Absorption liquid chilling units.
	Reciprocating liquid chilling units.
	Other refrigerating or freezing equipment (household or other).
8479.89.10	Dehumidifiers (other than those under 8415 or 8424 classified as "machines and mechanical appliances having individual functions, not specified or included elsewhere").

Category 3.—Aerosol Products

An array of different products use controlled substances as aerosols and in aerosol applications. Not all aerosol applications use controlled substances, however. The codes given below represent the most likely classifications for products containing controlled substances. The product codes listed include:[3]

- varnishes
- perfumes
- preparations for use on hair
- preparations for oral and dental hygiene
- shaving preparations
- personal deodorants, bath preparations
- prepared room deodorizers
- soaps
- lubricants
- polishes and creams
- explosives
- insecticides, fungicides, herbicides, disinfectants
- arms and ammunition
- household products such as footwear or leather polishes
- other miscellaneous products

Heading/subheading	Article description
3208	Paints and varnishes[4] (including enamels and lacquers) based on synthetic polymers of chemically modified natural polymers, dispersed or dissolved in a non-aqueous medium;
3208.10	Based on polyesters.
3208.20	Based on acrylic or vinyl polymers.
3208.90	Other.
3209	Paints and varnishes (including enamels and lacquers) based on synthetic polymers or chemically modified natural polymers, dispersed or dissolved in an aqueous medium.
3209.10	Based on acrylic or vinyl polymers.
3209.90	Other.
3210.00	Other paints and varnishes (including enamels, lacquers and distempers) and prepared water pigments of a kind used for finishing leather.
3212.90	Dyes and other coloring matter put up in forms or packings for retail sale.
3303.00	Perfumes and toilet waters.

[3] Other categories of products that may contain controlled substances are listed below. EPA is currently working to match them with appropriate codes. They include: coatings and electronic equipment (e.g., electrical motors), coatings or cleaning fluids for aircraft maintenance, mold release agents (e.g. for production of plastic or elastomeric materials), water and oil repellant (potentially under HS 3402), spray undercoats (potentially under "paints and varnishes"), spot removers, brake cleaners, safety sprays (e.g., mace cans), animal repellant, noise horns (e.g., for use on boats), weld inspection developers, freezants, gum removers, intruder alarms, tire inflators, dusters (for electronic and non-electronic applications), spray shoe polish, and suede protectors.

Heading/subheading	Article description
3304.30	Manicure or pedicure preparations.
3305.10	Shampoos.
3305.20	Preparations for permanent waving or straightening.
3305.30	Hair lacquers.
3305.90	Other hair preparations.
3306.10	Dentrifices.
3306.90	Other dental (this may include breath sprays).
3307.10	Pre-shave, shaving or after-shave preparations.
3307.20	Personal deodorants and antiperspirants.
3307.30	Perfumed bath salts and other bath preparations.
3307.49	Other (this may include preparations for perfuming or deodorizing rooms, including odoriferous preparations used during religious rites, whether or not perfumed or having disinfectant properties).
3307.90	Other (this may include depilatory products and other perfumery, cosmetic or toilet preparations, not elsewhere specified or included).
3403	Lubricating preparations (including cutting-oil preparations, bolt or nut release preparations, anti-rust or anti-corrosion preparations and mould release preparations, based on lubricants), and preparations of a kind used for the oil or grease treatment of textile materials, leather, fur skins or other materials, but excluding preparations containing, as basic constituents, 70 percent or more by weight of petroleum oils or of oils obtained from bituminous minerals.
3402	Organic surface-active agents (other than soap); surface-active preparations, washing preparations and cleaning operations, whether or not containing soap, other than those of 3401.
3402.20	Preparations put up for retail sale.
3402.19	Other preparations containing petroleum oils or oils obtained from bituminous minerals.
3403	Lubricating preparations consisting of mixtures containing silicone greases or oils, as the case may be.
2710.00	Preparations not elsewhere specified or included, containing by weight 70 percent or more of petroleum oils or of oils obtained from bituminous minerals, these oils being the basic constituents of the preparations.
3403.11	Lubricants containing petroleum oils or oils obtained from bituminous minerals used for preparations from the treatment of textile materials, leather, fur skins or other materials.
3403.19	Other preparations containing petroleum oils or oils obtained from bituminous minerals.
3405	Polishes and creams, for footwear, furniture, floors, coachwork, glass or metal, scouring pastes and powders and similar preparations excluding waxes of heading 3404.
3405.10	Polishes and creams for footwear or leather.
3405.20	Polishes for wooden furniture, floors or other woodwork.
36	Explosives.
3808	Insecticides, rodenticides, fungicides, herbicides, anti-sprouting products and plant-growth regulators, disinfectants and similar products, put up in forms or packings for retail sale or as preparations or articles (for example, sulphur-treated bands, wicks and candles, and fly papers).
3808.10	Insecticides.
3808.20	Fungicides.
3808.30	Herbicides, anti-sprouting products and plant growth regulators.
3808.40	Disinfectants.
3808.90	Other insecticides, fungicides.
3809.10	Finishing agents, dye carriers to accelerate the dyeing or fixing of dye-stuffs and other products and preparations (for example, dressings and mordants) of a kind used in the textile, paper, leather or like industries, not elsewhere specified or included, with a basis of amylaceous substances.
3814	Organic composite solvents and thinners (not elsewhere specified or included) and the prepared paint or varnish removers.
3910	Silicones in primary forms.
9304	Other arms (for example, spring, air or gas guns and pistols, truncheons), excluding those of heading No. 93.07. Thus, aerosol spray cans containing tear gas may be classified under this subheading.
0404.90	Products consisting of natural milk constituents, whether or not containing added sugar or other sweetening matter, not elsewhere specified or included.
1517.90	Edible mixtures or preparations of animal or vegetable fats or oils or of fractions of different fats or oils of this chapter, other than edible fats or oils or their fractions of heading No. 15.16.
2106.90	Food preparations not elsewhere specified or included.

[4] Although paints do not generally use contain controlled substances, some varnishes use CFC 113 and 1,1,1, trichlorethane as solvents.

Category 4.—Portable Fire Extinguishers

Heading/subheading	Article description
8424	Mechanical appliances (whether or not hand operated) for projecting, dispersing, or spraying liquids or powders; fire extinguishers whether or not charged, spray guns and similar appliances; steam or sand blasting machines and similar jet projecting machines.
8424.10	Fire extinguishers, whether or not charged.

Category 5.—Insulation Boards, Panels and Pipe Covers

These goods have to be classified according to their composition and presentation. For example, if the insulation materials are made of polyurethane, polystyrene, polyolefin and phenolic plastics, then they may be classified Chapter 39, for "Plastics and articles thereof". The exact description of the products at issue is necessary before a classification can be given.[6]

[6] This category may include insulating board for building panels and windows and doors. It also

Continued

Heading/subheading	Article description
3917.21 to 3917.39	Tubes, pipes and hoses of plastics.
3920.10 to 3920.99	Plates, sheets, film, foil and strip made of plastics, non-cellular and not reinforced, laminated, supported or similarly combine with other materials.
3921.11 to 3921.90	Other plates, sheets, film, foil and strip, made of plastics.
3925.90	Builders' ware made of plastics, not elsewhere specified or included.
3926.90	Articles made of plastics, not elsewhere specified or included.

Category 6.—Pre-Polymers

According to the Explanatory Notes to the Harmonized Commodity Description and Coding System, "prepolymers are products which are characterized by some repetition of monomer units although they may contain unreacted monomers. Prepolymers are not normally used as such but are intended to be transformed into higher molecular weight polymers by further polymerization. Therefore the term does not cover finished products, such as diisobutylenes or mixed polyethylene glycols with very low molecular weight. Examples are epoxides based with epichlorohydrin, and polymeric isocyanates."

Heading/subheading	Article description
3901	Pre-polymers based on ethylene (in primary forms).
3902	Pre-polymers based on propylene or other olefins (in primary forms).
3903, 3907, 3909	Pre-polymers based on styrene (in primary forms), epoxide and phenols.

Appendix E to Subpart A—Article 5 Parties

Algeria, Antigua and Barbuda, Argentina, Bahamas, Bahrain, Bangladesh, Barbados, Benin, Bosnia and Hertsegovina, Botswana, Brazil, Burkina Faso, Cameroon, Central African Republic, Chile, China, Colombia, Costa Rica, Cote Ivoire, Croatia, Cuba, Dominica, Ecuador, Egypt, El Salvador, Fiji, Gambia, Ghana, Grenada, Guatemala, Guinea, Guyana, Honduras, India, Indonesia, Iran, Jamaica, Jordan, Kenya, Kiribati, Lebanon, Libya, Malawi, Malaysia, Maldives, Malta, Mauritius, Mexico, Myranmar, Namibia, Nicaragua, Niger, Nigeria, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Romania, Saint Kitts and Nevis, Saint Lucia, Samoa, Senegal, Seychelles, Slovenia, Solomon Islands, Sri Lanka, Sudan, Swaziland, Syrian Arab Republic, Tanzania, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkey, Tuvalu, Uganda, Uruguay, Venezuela, Viet Nam, Yugoslavia, Zambia, Zimbabwe.

Appendix F to Subpart A—Listing of Ozone Depleting Chemicals

Controlled substance	ODP[1]	AT L[2]	CLP[3]	BLP[4]
A. Class I:				
1. Group I:				
$CFCl_3$-Trichlorofluoromethane (CFC–11	1.0	60.0	1.0	0.00
CF_2Cl_2-Dichlorodifluoromethane (CFC–12)	1.0	120.0	1.5	0.00
$C_2F_3Cl_3$-Trichlorotrifluoroethane (CFC–113)	0.8	90.0	1.11	0.00
$C_2F_4Cl_2$-Dichlorotetrafluoroethane (CFC–114)	1.0	200.00	1.8	0.00
C_2F_5Cl-Monochloropentafluorethane (CFC–115)	0.6	400.0	2.0	0.00
All isomers of the above chemicals. [Reserved]				
2. Group II:				
CF_2ClBr-Bromochlorodifluoromethane (Halon-1211)	3.0–18	12.0–.08	0.06–0.03	0.13
CF_3Br-Bromotrifluoromethane (Halon-1301)	10.0–107	72.0	0.00	1.00
$C_2F_4Br_2$-Dibromotetrafluoroethane (Halon-2402)	6.0–28	23.0	0.00–0.37	0.30
All isomers of the above chemicals. [Reserved]				
3. Group III:				
CF_3Cl-Chlorotrifluoromethane (CFC–13)	1.0–250	120.0–1.83	0.88	0.00
C_2FCl_5-(CFC–111)	1.0–90	60.0–1.56	1.04	0.00
$C_2F_2Cl_4$-(CFC–112)	1.0–90	60.0–1.35	0.90	0.00
C_3FCl_7-(CFC–211)	1.0–500	100.0–8.81	1.76	0.00
$C_3F_2Cl_6$-(CFC–212)	1.0–500	100.0–7.98	1.60	0.00
$C_3F_3Cl_5$-(CFC–213)	1.0–500	100.0–7.06	1.41	0.00
$C_3F_4Cl_4$-(CFC–214)	1.0–500	100.0–6.01	1.20	0.00
$C_3F_5Cl_3$-(CFC–215)	1.0–500	100.0–4.82	0.96	0.00
$C_3F_6Cl_2$-(CFC–216)	1.0–500	100.0–3.45	0.69	0.00
C_3F_7Cl-(CFC–217)	1.0–500	100.0–1.87	0.37	0.00
All isomers of the above chemicals. [Reserved]				
4. Group IV:				
CCl_4-Carbon Tetrachloride	1.1	50.0	1.0	0.00
5. Group V:				
$C_2H_3Cl_3$ 1,1,1 Trichloroethane (Methyl chloroform)	0.1	6.3	0.11	0.00

includes rigid appliance insulation for pipes, tanks, trucks, trailers, containers, train cars & ships, refrigerators, freezers, beverage vending machines, bulk beverage dispensers, water coolers and heaters and ice machines.

Controlled substance	ODP[1]	AT L[2]	CLP[3]	BLP[4]
All isomers of the above chemical except 1,1,2-trichloroethane. [Reserved]				
6. Group VI:				
$CH3Br$-Bromomethane (Methyl Bromide)	0.7		[Reserved]	
7. Group VII:				
$CHFBr_2$-	1.00		[Reserved]	
CHF_2Br-(HBFC–22B1)	0.74		[Reserved]	
$CH_{22}FBr$	0.73		[Reserved]	
C_2HFBr_4	0.3–0.8		Reserved]	
$C_2HF_2Br_3$	0.5–1.8		[Reserved]	
$C_2HF_3Br_2$	0.4–16		[Reserved]	
C_2HF_4Br	0.7–1.2		[Reserved]	
$C_2H_2FBr_3$	0.1–1.1		[Reserved]	
$C_2H_2F_2Br_2$	0.2–1.50		[Reserved]	
$C_2H_2F_3Br$	0.7–1.6		[Reserved]	
$C_2H_3FBr_2$	0.1–1.7		[Reserved]	
$C_2H_3F_2Br$	0.2–1.1		[Reserved]	
C_2H_4FBr	0.07–0.1		[Reserved]	
C_3HFBr_6	0.3–1.5		[Reserved]	
$C_3HF_2Br_5$	0.2–1.9		[Reserved]	
$C_3HF_3Br_4$	0.3–1.8		[Reserved]	
$C_3HF_4Br_3$	0.5–2.2		[Reserved]	
$C_3HF_5Br_2$	0.9–2.0		[Reserved]	
C_3HF_6Br	0.7–3.3		[Reserved]	
$C_3H_2FBr_5$	0.1–1.9		[Reserved]	
$C_3H_2F_2Br_4$	0.2–2.1		[Reserved]	
$C_3H_2F_3Br_3$	0.2–5.6		[Reserved]	
$C_3H_2F_4Br_2$	0.3–7.5		[Reserved]	
$C_3H_2F_5Br$	0.9–1.4		[Reserved]	
$C_3H_3FBR_4$	0.08–1.9		[Reserved]	
$C_3H_3F_2Br_3$	0.1–3.1		[Reserved]	
$C_3H_3F_3Br_2$	0.1–2.5		[Reserved]	
$C_3H_3F_4Br$	0.3–4.4		[Reserved]	
$C_3H_4FBr_3$	0.03–0.3		[Reserved]	
$C_3H_4F_2Br_2$	0.1–1.0		[Reserved]	
$C_3H_4F_3Br$	0.07–0.8		[Reserved]	
$C_3H_5FBr_2$	0.04–0.4		[Reserved]	
$C_3H_5F_2Br$	0.07–0.8		[Reserved]	
C_3H_6FB	0.02–0.7		[Reserved]	
B. Class II:				
$CHFCl_2$-Dichlorofluoromethane (HCFC–21)	[Reserved]	2.1	0.03	0.00
CHF_2Cl-Chlorodifluoromethane (HCFC–22)	0.05	15.3	0.14	0.00
CH_2FCl-Chlorofluoromethane (HCFC–31)	[Reserved]	1.44	0.02	0.00
C_2HFCl_4(HCFC–121)	[Reserved	0.6	0.01	0.00
$C_2HF_2Cl_3$-(HCFC–122)	[Reserved]	1.4	0.02	0.00
$C_2HF_3Cl_2$-(HCFC–123)	0.02	1.6	0.016	0.00
C_2HF_4Cl-(HCFC–124)	0.02	6.6	0.04	0.00
$C_2HF_2Cl_3$-(HCFC–131)	[Reserved]	4.0	0.06	0.00
$C_2H_2F_2Cl_2$-(HCFC–132b)	[Reserved]	4.2	0.05	0.00
$C_2H_2F_3Cl$-(HCFC–133a)	[Reserved]	4.8	0.03	0.00
$C_2H_3FCl_2$-(HCFC–141b)	0.12	7.8	0.10	0.00
$C_2H_3F_2Cl$-(HCFC–142b)	0.06	19.1	0.14	0.00
C_3HFCl_6-(HCFC–221)	[Reserved]			0.00
$C_3HF_2Cl_5$-(HCFC–222)	[Reserved]			0.00
$C_3HF_3Cl_4$-(HCFC–223)	[Reserved]			0.00
$C_3HF_4Cl_3$-(HCFC–224)	[Reserved]			0.00
$C_3HF_5Cl_2$-(HCFC–225ca)	[Res.]-1.7	1.5	0.01	0.00
(HCFC–225cb)	[Reserved]	5.1	0.04	0.00
C_3HF_6Cl-(HCFC–226)	[Reserved]			0.00
$C_3H_2FCl_5$-(HCFC–231)	[Reserved]			0.00
$C_3H_2F_2Cl_4$-(HCFC–232)	[Reserved]			0.00
$C_3H_2F_3Cl_3$-(HCFC–233)	[Reserved]			0.00
$C_3H_2F_4Cl_2$-(HCFC–234)	[Reserved]			0.00
$C_3H_2F_5Cl$-(HCFC–235)	[Reserved]			0.00
$C_3H_3FCl_4$-(HCFC–241)	[Reserved]			0.00
$C_3H_3F_2Cl_3$-(HCFC–242)	[Reserved]			0.00
$C_3H_3F_3Cl_2$-(HCFC–243)	[Reserved]			0.00
$C_3H_3F_4Cl$-(HCFC–244)	[Reserved]			0.00
$C_3H_4FCl_3$-(HCFC–251)	[Reserved]			0.00
$C_3H_4F_2Cl_2$-(HCFC–252)	[Reserved]			0.00
$C_3H_4F_3Cl$-(HCFC–253)	[Reserved]			0.00
$C_3H_5FCl_2$-(HCFC–261)	[Reserved]			0.00
$C_2H_5F_2Cl$-(HCFC–262)	[Reserved]			0.00
C_3H_6FCl-(HCFC–271)	[Reserved]			0.00

Controlled substance	ODP[1]	AT L[2]	CLP[3]	BLP[4]
All isomers of the above chemicals. [Reserved]				

[1] Ozone Depletion Potential.
[2] Atmospheric Lifetime.
[3] Chlorine Loading Potential.
[4] Bromine Loading Potential.

Appendix G to Subpart A—UNEP Recommendations for Conditions Applied to Exemption for Laboratory and Analytical Uses

1. Laboratory purposes are identified at this time to include equipment calibration; use as extraction solvents, diluents, or carriers for chemcial analysis; biochemical research; inert solvents for chemical reactions, as a carrier or laboratory chemical and other critical analytical and laboratory purposes. Production for laboratory and analytical purposes is authorized provided that these laboratory and analytical chemicals shall contain only controlled substances manufactured to the following purities:

CTC (reagent grade)	99.5
1,1,1=trichloroethane	99.0
CFC–11	99.5
CFC–13	99.5
CFC–12	99.5
CFC–113	99.5
CFC–114	99.5
Other w/ Boiling P>20° C	99.5
Other w/ Boiling P<20° C	99.0

2. These pure, controlled substances can be subsequently mixed by manufacturers, agents or distributors with other chemicals controlled or not controlled by the Montreal Protocol as is customary for laboratory and analytical uses.

3. These high purity substances and mixtures containing controlled substances shall be supplied only in reclosable containers or high pressure cylinders smaller than three litres or in 10 millilitre or smaller glass ampoules, marked clearly as substances that deplete the ozone layer, restricted to laboratory use and analytical purposes and specifying that used or surplus substances should be collected and recycled, if practical. The material should be destroyed if recycling is not practical.

4. Parties shall annually report for each controlled substance produced: the purity; the quantity; the application, specific test standard, or procedure requiring its uses; and the status of efforts to eliminate its use in each application. Parties shall also submit copies of published instructions, standards, specifications, and regulations requiring the use of the controlled substance.

Appendix H to Subpart A—Clean Air Act Amendments of 1990 Phaseout Schedule for Production of Ozone-Depleting Substances

Class I and date	Carbon tetrachloride (percent)	Methyl chloroform (percent)	Other substances (percent)
1994	70	85	65
1995	15	70	50
1996	15	50	40
1997	15	50	15
1998	15	50	15
1999	15	50	15
2000	.....	20	.....
2001	.....	20	.....

[FR Doc. 94–27019 Filed 11–9–94; 8:45 am]
BILLING CODE 6560–50–P

federal register

Thursday
November 10, 1994

Part V

Department of Education

Independent Living Services for Older Individuals Who Are Blind; Notice

DEPARTMENT OF EDUCATION

Independent Living Services for Older Individuals Who Are Blind

AGENCY: Department of Education.

ACTION: Notice of proposed priority.

SUMMARY: The Secretary proposes a priority under the Independent Living Services for Older Individuals Who Are Blind program. The Secretary may use this priority for fiscal year (FY) 1995 and subsequent years. The Secretary takes this action to focus Federal financial assistance on States that do not currently have projects funded under this program. The priority is intended to increase the number of States participating in this program.

DATES: Comments must be received on or before December 12, 1994.

ADDRESSES: All comments concerning this proposed priority should be addressed to John Nelson, U.S. Department of Education, 600 Independence Avenue, S.W., Room 3326, Switzer Building, Washington, D.C. 20202–2741. Comments may also be sent through the internet to "older_blind@ed.gov."

FOR FURTHER INFORMATION CONTACT: Raymond Melhoff, U.S. Department of Education, 600 Independence Avenue, S.W., Room 3416, Switzer Building, Washington, D.C. 20202–2741. Telephone: (202).205–9320. Individuals who use a telecommunications device for the deaf (TTD) may call (202) 205–9362.

SUPPLEMENTARY INFORMATION: This notice contains one proposed priority under the Independent Living Services for Older Individuals Who Are Blind program. Grants under this program are authorized by section 752(a) of the Rehabilitation Act of 1973 (Act), as amended. The expenditure of grant funds under this program is governed by the regulations in 34 CFR Part 367, which were published in the **Federal Register** on August 15, 1994 (59 FR 41910).

The purpose of this program is to support projects that provide to older individuals who are blind any of the independent living services that are described in 34 CFR 367.3(b); conduct activities that will improve or expand services for these individuals; and conduct activities to help improve public understanding of the problems of these individuals.

This program is an important part of the National Education Goals. This programs supports the National Education Goal that, by the year 2000, every adult American will be literate and will possess the knowledge and skills necessary to compete in a global economy and exercise the rights and responsibilities of citizenship.

Any designated State agency (DSA) that meets the requirements in 34 CFR 367.2 is eligible to receive an award under this program. A DSA's application for funds under this program must contain the assurances required by 34 CFR 367.11 and any other agreements, assurances, and information that the Secretary determines to be necessary to carry out this program. In addition, section 21 of the Act requires that projects funded under this program must demonstrate how they will address, in whole or in part, the needs of older individuals who are blind and are from minority backgrounds.

The Secretary will announce the final priority in a notice in the **Federal Register**. The final priority will be determined by responses to this notice, available funds, and other considerations of the Department. Funding of particular projects depends on the availability of funds, the nature of the final priority, and the quality of the applications received. The publication of this proposed priority does not preclude the Secretary from proposing additional priorities, nor does it limit the Secretary to funding only this priority, subject to meeting applicable rulemaking requirements.

Note: This notice of proposed priority does not solicit applications. A notice inviting applications under this competition will be published in the **Federal Register** concurrent with or following publication of the notice of final priority.

Priority

Under 34 CFR 75.105(c)(3), the Secretary proposes to give an absolute preference to applications that meet the following priority. The Secretary proposes to fund under this competition only applications that meet this absolute priority:

Background

The Department funded projects in 45 States in fiscal year 1994 to provide independent living services for older individuals who are blind. The Secretary is interested in supporting projects in States that do not currently have projects funded under this program. This priority would increase the number of States providing services to older individuals who are blind under this program.

Priority

Projects must provide services to older individuals who are blind in States that do not currently have projects funded under this program.

Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR Part 79. The objective of the Executive order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for 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 actions for this program.

Invitation To Comment

Interested persons are invited to submit comments and recommendations regarding this proposed priority.

All comments submitted in response to this notice will be available for public inspection, during and after the comment period, in Room 3326, Mary Switzer Building, 330 C Street, S.W., Washington, D.C., between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday of each week except Federal holidays.

Applicable Program Regulations: 34 CFR Part 367.

Program Authority: 29 U.S.C. 796f.

(Catalog of Federal Domestic Assistance Number 84.177A, Independent Living Services for Older Individuals Who Are Blind)

Dated: November 2, 1994.

Howard R. Moses,

Acting Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 94–27778 Filed 11–9–94; 8:45 am]

BILLING CODE 4000–01–P

federal register

Thursday
November 10, 1994

Part VI

Department of Energy

Office of Nuclear Energy

Management of Depleted Uranium Hexafluoride; Request for Recommendations; Alternative Strategies for the Long-Term Management of Depleted Uranium Hexafluoride Resources at Several Geographic Locations; Notices

DEPARTMENT OF ENERGY

Office of Nuclear Energy

Management of Depleted Uranium Hexafluoride (UF_6); Request for Recommendations

AGENCY: Department of Energy.

ACTION: Notice of request for recommendations.

SUMMARY: DOE is preparing to assess several alternative strategies for the long-term management or use of depleted UF_6. As part of that assessment, DOE is requesting recommendations from interested persons, industry, and other Government agencies for potential uses for the depleted UF_6 stored at the gaseous diffusion plants in Paducah, Kentucky, and Portsmouth, Ohio, and at the Oak Ridge Reservation in Tennessee, as well as for technologies that could facilitate the long-term management of this material.

DATES: Individuals or organizations wishing to make recommendations should do so in writing by December 12, 1994, to ensure their consideration.

ADDRESSES: Please submit recommendations to Mr. Charles E. Bradley Jr., Office of Uranium Programs, Office of Nuclear Energy, U.S. Department of Energy, 19901 Germantown Road, Germantown, MD 20874.

SUPPLEMENTARY INFORMATION:

1. Background

Uranium is a naturally-occurring radioactive element containing different isotopes, notably Uranium-238 (U-238) and Uranium-235 (U-235). The usability of uranium for controlled fission in nuclear chain reactions in most nuclear reactors depends on increasing the proportion of the U-235 isotope in the material through an isotopic separation process called enrichment. This process divides a stream of UF_6 into separate streams—one enriched in U-235 and the other depleted in U-235. The first large scale enrichment process was developed by the United States through the Manhattan Project in the 1940s. The process of enrichment used in the United States is called "gaseous diffusion," and has continued under the auspices of the Atomic Energy Commission and its successor agencies, including DOE. On July 1, 1993, general responsibility for uranium enrichment was transferred from DOE to the United States Enrichment Corporation (USEC).

Gaseous diffusion was developed, on a large scale, first at the Oak Ridge Reservation in Tennessee and, later, at plants located near Paducah, Kentucky, and Portsmouth, Ohio. Using UF_6 as feed material for the enrichment process, these plants produced highly enriched uranium for defense needs of the United States, as well as low enriched uranium for use as fuel in commercial nuclear reactors. The production of highly enriched uranium was discontinued in 1992 due to the reduced requirements of the U.S. defense programs. All diffusion operations at the Oak Ridge facility ceased in 1985.

A major consequence of the gaseous diffusion process is the accumulation of a significant amount of depleted UF_6. This material is so named because it is depleted in the percentage of the U-235 isotope, as compared to the original feed material. Most of this material is stored at the Paducah and Portsmouth Gaseous Diffusion Plants and at the Oak Ridge Reservation. The total amount in storage at these three sites is approximately 560,000 metric tons. Depleted UF_6 is a solid at ambient temperatures, and is stored in large cylinders holding approximately 14 tons each, stacked two layers high, which are subject to regular inspection and maintenance. About 29,000 cylinders are stored at Paducah, 13,000 at Portsmouth, and 5,000 at Oak Ridge.

2. DOE is publishing, elsewhere in today's **Federal Register**, an Advance Notice of Intent (ANOI) to prepare an EIS on alternative strategies for the long-term management of depleted UF_6. The first step in the process to consider alternative approaches is this Request to the public, industry, and other Government agencies for information and suggestions for potential uses for depleted UF_6 and/or technologies that could facilitate the long-term management of the material. This Request will help to ensure that the resulting long-range management strategy will consider all reasonable alternatives. For purposes of responding to this Request, current regulatory requirements should not be considered a barrier to recommended uses or technologies. DOE will evaluate each submission to determine if it should be included as a reasonable alternative in the EIS, which will assess the environmental impacts of the various alternative management strategies.

3. DOE requests from the public, industry, and other Government agencies, their suggestions and recommendations on the following:

A. *Uses or applications of products or materials that use any form of depleted uranium.* Such uses or applications could be for the depleted uranium in its current chemical form, for any of its individual components, for either the uranium or fluorine in some other chemical or physical form, or products made from any form or compound of depleted UF_6 including alloys, cements, or other materials. Suggested uses and applications should not be limited to those that only DOE or another Government agency might pursue. The Department is interested in all possible uses or applications for the depleted UF_6, whether by the public or the private sector. With the suggestions, the Department requires as much of the following information as possible:

1. A description of the use or application, including a design description and/or flow sheet; material, fabrication, product, and other specifications; and resulting wastes or effluents;

2. The potential annual and total usage;

3. The technical status of the use or application (that is, whether it is standard industrial practice; demonstrated on a bench or small scale, but not on an industrial scale; engineering, materials, or design development needed; etc.);

4. Facilities, equipment, other materials, and labor required;

5. Environmental and health and safety approvals required;

6. Any Government participation or funding required;

7. Estimated cost, including research, development and demonstration; construction; operations; decontamination; decommissioning; basis for estimates; and assumptions; product value, if any; and

8. Proposed schedule including, research, development and demonstration; and operations.

B. *Technologies that could facilitate the long-term management of the depleted uranium.* The Department requires as much of the following information as possible concerning the recommended technology:

1. The environmental, health and safety, and economic characteristics;

2. A description of the technology and any processes or treatment, including a design description and/or flow sheet; material, fabrication, product, and other specifications; and resulting wastes or effluents;

3. The status of the technology and any required research, development or demonstration;

4. Materials balance information and chemical composition of any wastes produced;

5. Labor requirements for both construction and operation;

6. Timing of research, development and demonstration; construction; and operation;

7. Factors that might limit siting choices;

8. Facilities, equipment, or materials required; and

9. Estimated cost, including research, development and demonstration; construction; operations; product value, if any; decontamination; decommissioning; basis for estimates; and assumptions.

4. If any of the information supplied to the Department is proprietary, privileged and confidential commercial or financial information, a trade secret, or otherwise exempt from public disclosure, it should be so designated and the Department will protect this information in accordance with its standard procedures as prescribed in 10 CFR 1004.11 or other applicable law. The title page of the information should be marked with the restriction cited in the regulation. Each page to be so restricted should be marked with the following legend:

Use or disclosure of data contained on this sheet is subject to the restriction on the title page.

5. A DOE Laboratory will prepare a report, based on evaluations by independent experts, on the responses to the request for recommendations. After review of the laboratory report, responses DOE considers reasonable will be included as alternatives for which environmental impacts will be assessed in the EIS. DOE will also initiate a study of the life cycle costs of each EIS alternative. That study will also be considered, along with the final EIS, when DOE selects a strategy from among these alternatives.

6. This Request is solely for the information described above and is not for the purpose of obtaining recommendations and/or proposals for research, development, and demonstration to be funded by the Government.

7. Except as provided in paragraph 4, the written submissions from the public, industry, and other Government agencies will be made available for public review at DOE Public Reading Room located in Room 1E–190 at 1000 Independence Avenue SW, Washington, DC 20585.

8. Throughout this process, opportunities for public participation will be provided to discuss technologies submitted. Comments will be requested on the criteria that the technical experts will use to evaluate responses to this Request for Recommendations.

9. In addition to the ANOI, DOE intends in the future to publish in the **Federal Register**, a notice of intent to begin the scoping process for the preparation of the EIS on the selection of a strategy for the long-term management of the depleted uranium hexafluoride.

Issued in Washington, D.C. on this 26th day of October, 1994.

Terry R. Lash,

Director, Office of Nuclear Energy.

[FR Doc. 94–27781; Filed 11–9–94; 8:45 am]

BILLING CODE 6450–01–P

Alternative Strategies for the Long-Term Management of Depleted Uranium Hexafluoride Resources at Several Geographic Locations

AGENCY: Department of Energy.

ACTION: Advance notice of intent to prepare an environmental impact statement.

SUMMARY: The Department of Energy is providing advance notice of its intent to prepare an environmental impact statement pursuant to the National Environmental Policy Act of 1969 (NEPA). The environmental impact statement will assess the potential environmental impacts of alternative strategies for the long-term management or uses of depleted uranium hexafluoride (UF_6) resources currently stored at Paducah, Kentucky; Portsmouth, Ohio; and Oak Ridge, Tennessee.

This environmental impact statement will consider general strategy options, including the general impacts of siting potential facilities or transporting materials to or from such facilities. In addition, such analyses would focus on those issues that would affect strategy selection, such as consolidation at one site. The specific environmental impacts of the transportation of materials or impacts from the actual siting of any projects that would result from strategy selection would be further assessed by any necessary project NEPA documents to follow.

DATES AND ADDRESSES: The Department of Energy requests comments by January 9, 1994, but comments sent after that time will be considered to the extent possible. The anticipated date for the formal notice of intent is June 1995. The dates and locations of all scoping meetings will be announced in that notice of intent or subsequent **Federal Register** notices as well as in local media, prior to the planned meetings.

Written comments on the scope of the environmental impact statement, questions concerning the proposed action, and requests for copies of referenced material should be directed to: Mr. Charles E. Bradley Jr., Office of Uranium Programs, Office of Nuclear Energy, United States Department of Energy, 19901 Germantown Road, Germantown, Maryland 20874, (301) 903–4781.

FOR FURTHER INFORMATION CONTACT: For general information on the Department of Energy NEPA review process, please contact Ms. Carol M. Borgstrom, Director, Office of NEPA Oversight, United States Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C. 20585, (202) 586–4600 or 1–800–472–2756.

SUPPLEMENTARY INFORMATION: Depleted UF_6 is stored as a solid compound of uranium and fluorine in large cylinders. It is produced by an enrichment process that divides a single stream of UF_6 into two separate streams—one enriched in uranium-235 and one depleted in uranium-235. The enriched UF_6 is withdrawn from the process and used to produce fuel for commercial nuclear power plants. The depleted UF_6 is withdrawn from the process and stored in large cylinders.

The purpose of the environmental impact statement is to assess the potential impacts of a range of technological or market options related to the management of depleted UF_6 (currently stored at Paducah, Kentucky; Portsmouth, Ohio; and Oak Ridge, Tennessee), including use, reuse, conversion, or disposal, and to select a strategy for the long-term management of such depleted UF_6 in light of the changed missions and functions. Should the Department of Energy develop any proposal in the future to use any fraction of the depleted UF_6 inventory for its own research or other activity, that proposal would be the subject of a separate NEPA document, and would not affect this notice.

The environmental impact statement will focus on the Department of Energy's depleted UF_6 stored at the Paducah, Portsmouth, and Oak Ridge sites. Other forms of depleted uranium (e.g., uranium oxides and uranium metal) and depleted UF_6 used or stored at other sites would not be analyzed in the environmental impact statement since they exist only in small quantities (taken all together they total about 7 percent of the quantity of the subject depleted UF_6), would not affect strategy selection, and would involve different management and potentially different uses. Should the Department propose an action that involves these other forms of depleted uranium, such a proposal would receive appropriate NEPA review.

The Department of Energy is publishing elsewhere in today's **Federal Register** a Request for Recommendations for potential uses for the depleted UF_6, which includes a request for suggestions of technologies that could facilitate the long-term management of the material. The request will also be published in industry and trade publications.

The Department of Energy intends to use technical experts to evaluate the responses that are received from the requests. Following the Department's receipt of the technical evaluations, the Department will determine which responses evaluated are reasonable and include them as alternatives to be assessed in the environmental impact statement. The Department will provide opportunities for the public to participate in the technology evaluation process. The Department will also initiate a separate study on the costs of the depleted UF_6 uses and management options assessed in the environmental impact statement. This request to the public, industry, and other Government agencies is the first step in the process to consider alternative approaches. The request and the evaluations that follow will help to ensure that the resulting long-range management strategy will consider all reasonable alternatives.

The Department of Energy will also initiate a study of the life cycle costs of each environmental impact statement alternative. That study will also be considered, along with the final environmental impact statement, when the Department selects a strategy from among the reasonable alternatives.

Invitation To Comment

The Department of Energy intends to conduct a full and open process to define the scope of the environmental impact statement and is issuing this Advance Notice of Intent as a preliminary step in seeking public comment on the proposed action, the range of alternatives, and the scope of impact analysis. Written comments from all interested parties are invited in order to assist the Department in defining the scope of the environmental impact statement, including the identification of the likely alternatives and significant environmental issues. Written comments should be sent to the address shown at the beginning of this notice.

Following the completion of this preliminary public comment period, the Department of Energy will publish a notice of intent to initiate the scoping process, including the schedule of public meetings to receive oral or written comments on the scope of this environmental impact statement. At this time, the Department is not scheduling any public meetings in advance of the notice of intent. If there is significant interest in holding earlier public meetings, however, the Department will consider any requests and would publish notices for such meetings prior to holding them.

Background

Uranium is a naturally-occurring radioactive element containing different isotopes, notably Uranium-238 and Uranium-235. The ability to use uranium for controlled fission in nuclear chain reactions in most nuclear reactors depends on increasing the proportion of the Uranium-235 isotope in the material through an isotopic separation process called enrichment. This process divides a single stream of UF_6 into two separate streams—one enriched in Uranium-235 and the other depleted in Uranium-235. The first large-scale enrichment process was developed by the United States through the Manhattan Project in the 1940s. The enrichment technology employed in the United States is called "gaseous diffusion," which has continued under the auspices of the Atomic Energy Commission and its successor agencies including the Department of Energy. On July 1, 1993, general responsibility for uranium enrichment in the United States was transferred from the Department to the United States Enrichment Corporation.

Gaseous diffusion was developed, on a large scale, first at the Oak Ridge Reservation in Tennessee and later at plants located near Paducah, Kentucky, and Portsmouth, Ohio. Using UF_6 as feed material for the enrichment process, these plants produced highly enriched uranium for the defense needs of the United States, as well as low enriched uranium for use in making fuel for commercial nuclear power reactors. All diffusion operations at the Oak Ridge facility ceased in 1985, and that facility is awaiting decontamination and decommissioning.

The Energy Policy Act of 1992 established the United States Enrichment Corporation as a new Government corporation which generally has responsibility for enriched uranium production at the Portsmouth and Paducah plants, as well as United States marketing rights for enriched uranium produced or blended at those plants. The United States Enrichment Corporation is leasing the plants from the Department of Energy, has signed an agreement for division of responsibilities between the Department and the Corporation at the two plants, and assumed responsibility for enriched uranium production on July 1, 1993. All depleted UF_6 created beginning July 1, 1993, is the responsibility of the Corporation. Consequently, the proposed Department strategy for depleted UF_6 management does not include material created after July 1, 1993; however, the Department's decisions on depleted UF_6 disposition could affect the Corporation's operating plans and policies. The environmental impact statement will include a discussion of the likely impacts of any of the Department's decisions on the Corporation, but cannot commit to a course of action for material controlled by the Corporation without prior agreement. Public comment on the scope of possible actions and agreements is welcome.

A major consequence of the gaseous diffusion process is the accumulation of a significant amount of depleted UF_6. Most of this material is stored at the Paducah and Portsmouth Gaseous Diffusion Plants and at the Oak Ridge Reservation. The total amount of depleted UF_6 stored at these three sites is approximately 560,000 metric tons. Depleted UF_6 is stored in large steel cylinders holding approximately 14 tons each, stacked two layers high, in large "yards" at the sites. The cylinders are inspected regularly to detect and repair any leaks should they occur. About 29,000 cylinders are stored at Paducah, 13,000 at Portsmouth, and 5,000 at Oak Ridge.

Potential uses of depleted UF_6 and its chemical constituents include: (1) use of uranium metal in armament manufacture or as metal or oxide-based shielding in the management of radioactive materials, including wastes or spent nuclear fuel; and (2) use of hydrogen fluoride, hydrofluoric acid, and fluorine for commercial industrial processes.

Purpose of the Environmental Impact Statement

The purpose of the environmental impact statement is to evaluate the impacts of alternative strategies for the long-term management and use of depleted UF_6 stored at the Paducah, Portsmouth, and Oak Ridge sites. Such alternatives would be analyzed for their impacts on the human environment, including risks to public health and safety, occupational health and safety, and effects upon the natural environment. The need for the proposed action arises from changes in various domestic and international factors. These factors include: the changed mission and functions of the Department of Energy programs for nuclear materials production and

research; changes brought about by the end of the Cold War; the shift in emphasis mandated by the President's budget requests; and by directives of the Secretary of Energy to reconsider future Department missions, functions, and responsibilities. The unique properties and value of depleted UF_6, as well as the large volumes in storage, suggest that the evaluation, analysis, and decisions on the fate of this material be made separate from those of other materials in storage or awaiting disposition. The Department has determined that such an action is a major Federal action with potentially significant environmental impacts and requires the preparation of an environmental impact statement in accordance with NEPA. This environmental impact statement will aid in making management decisions on depleted UF_6 by evaluating the environmental impacts of a range of reasonable alternatives, as well as providing a means for a public voice in the decision-making process. The Department is committed to ensuring that the public has a full and complete opportunity to be heard on this matter and is providing this advance notice of intent to that end.

Preliminary Description of Alternatives for Environmental Impact Statement

The Department of Energy requests public input on all relevant aspects of the long-term management and use of depleted UF_6 and potential alternatives. At this time, the Department has no preferred alternative and will consider for inclusion in the environmental impact statement all reasonable alternatives. The following is a discussion about the preliminary list of alternatives for the environmental impact statement that may be modified by additions or deletions; public comment on the range of alternatives is hereby requested.

Continue Current Storage and Management Practices (NO ACTION)

This alternative would continue present storage and management practices for depleted UF_6 at the Paducah, Portsmouth, and Oak Ridge locations for at least twenty to thirty years, until shutdown and decommissioning of the facilities. At this time, the depleted UF_6 at the Department of Energy's Paducah, Portsmouth, and Oak Ridge facilities is stored in steel cylinders the specifications for which are typically: a capacity of 14 tons, a diameter of 48 inches, a length of 12 feet, and wall thickness of 5/16 inch. There are approximately 47,000 such cylinders in storage at the three sites (29,000 at Paducah, 13,000 at Portsmouth, and 5,000 at Oak Ridge).

Current management practices consist of: (1) use of special equipment to transport cylinders within the storage yards; (2) regular visual inspection of all cylinders to verify cylinder integrity; (3) replacement/refurbishment of deteriorating cylinders, as necessary; (4) construction/reconstruction of cylinder storage yards, as necessary; (5) operating procedures for control of radioactive and hazardous material exposure to workers and for response to any unanticipated releases of depleted UF_6; (6) restacking of cylinders when needed to facilitate inspections, and replacing wood "saddles" (storage chocks) with concrete saddles; (7) technical assessments of cylinder performance and development of improved inspection methods; and (8) research on coatings to apply to cylinder surfaces to control corrosion.

Modifications to Depleted UF_6 Storage Facilities and Procedures

This alternative would include significant changes in the Department of Energy's facilities and management procedures for depleted UF_6 in storage. Such changes could consist of one or more of the following:

(1) redesign of the storage yards to add diking and runoff collection;

(2) construction of storage buildings in lieu of outdoor storage;

(3) provision of double-walled containers for the cylinders; and

(4) increased inspection frequency.

Use of Depleted UF_6

This alternative would consist of a number of sub-alternatives for depleted UF_6 use by means of conversion through chemical processes that separate the uranium from the fluorine. Likely end products could be uranium oxide, calcium fluoride, depleted uranium metal, depleted uranium concrete, hydrogen fluoride or hydrofluoric acid, the latter having commercial value in industrial processing. Locations for such conversions could include one or more of the following: (1) Department of Energy facilities where depleted UF_6 is stored; (2) One or more commercial nuclear fuel fabrication plants or industrial facilities in the United States; or (3) Commercial nuclear facilities outside of the United States. The analysis of this alternative would include the results of feasibility studies of each subalternative, as well as a discussion of the relative impacts of each subalternative.

Use of the converted depleted UF_6 would be evaluated as subalternatives including: (1) use as radiation shielding in the management of nuclear materials including waste and spent nuclear fuel, and (2) use in armament manufacture.

Disposal of Depleted UF_6

This alternative would consist of the analysis of potential impacts from the disposal of depleted UF_6 either in its present form, or in other forms, at appropriate waste disposal facilities.

Identification of Environmental Issues. The impact analysis would consider, for each alternative, the health and safety risks to workers and to the public of material transportation, storage, and use, as well as any potential impacts to environmental resources. As to the site-specific impacts of technologies, the analyses would be generic rather than site-specific for any technology alternative; selection of a site is not part of the proposed Department of Energy action and will be preceded by appropriate NEPA documentation. The environmental impact statement would provide estimates of the maximum impacts expected.

Related and Other Department of Energy NEPA Documentation. Should the depleted UF_6 strategy selection result in site-specific actions, additional NEPA documents would be prepared to consider the specific impacts on the site and vicinity from any proposed action. Such analyses would address site-specific issues such as historic resources, threatened and endangered species, critical environmental resources, floodplain, and land use.

The Draft and Final Environmental Impact Statements on the Alternative Strategies for the Long-Term Management of Depleted Uranium Hexafluoride Resources at Several Geographic Locations, and related documents, will be available for inspection, when completed, at the Department of Energy's Freedom of Information Reading Rooms. The location of these Reading Rooms will be announced in the Notice of Intent to prepare an environmental impact statement.

Issued in Washington, D.C., this 21st day of October, 1994.

Peter N. Brush,

Principal Deputy Assistant Secretary, Environment, Safety and Health.

[FR Doc. 94-27780; Filed 11-9-94; 8:45 am]

BILLING CODE 6450-01-P

federal register

Thursday
November 10, 1994

Part VII

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Endangered Status for the Plant Mann's Bluegrass; Final Rules

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AB97

Endangered and Threatened Wildlife and Plants; Endangered Status for the Plant Poa Mannii (Mann's Bluegrass)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service (Service) designates endangered status pursuant to the Endangered Species Act of 1973, as amended (Act), for the plant *Poa mannii* (Mann's bluegrass). Four extant populations containing a total of approximately 125 individuals of the species are known to occur in the northwestern and north-central region of the island of Kauai. The species and its habitat are threatened by goats, competition by naturalized, introduced vegetation, fire, landslides, and erosion. The existence of few populations and individuals increases the likelihood of extinction from stochastic events and/or reduced reproductive vigor.

This final rule implements the Federal protection provisions provided by the Act.

EFFECTIVE DATE: December 12, 1994.

ADDRESSES: The complete file for this final rule is available for public inspection, by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Pacific Islands Office, 300 Ala Moana Boulevard, Room 6307, P.O. Box 50167, Honolulu, Hawaii 96850.

FOR FURTHER INFORMATION CONTACT: Robert P. Smith, Field Supervisor, at the above address (808/541–2749).

SUPPLEMENTARY INFORMATION:

Background

Poa mannii was first collected by Horace Mann, Jr., and William Tufts Brigham in 1864 or 1865 in Waimea Canyon on the island of Kauai. The name *Poa mannii* was published without a description (attributed to William Munro) in Seemann's *Journal of Botany* in 1869. The specific epithet was selected to honor one of the original collectors. Subsequently, the species was validly published by Hillebrand (1888) in his flora.

Poa mannii of the grass family (Poaceae) is a perennial with short rhizomes (underground stems) and erect, tufted culms (bunched stems) 50 to 75 centimeters (cm) (20 to 30 inches (in)) tall. The leaf sheath completely surrounds the leaf, and the ligule (appendage at the junction of the leaf blade and sheath) completely encircles the stem, is about 0.5 millimeters (mm) (0.02 in) long, and has a tooth about 2 to 4 mm (0.08 to 0.2 in) long and a fringed margin. The leaf blade is up to 15 cm (6 in) long and 2 to 4 mm (0.08 to 0.2 in) wide, and has a rough upper surface and a hairless lower surface. The panicles (branched flower clusters) are usually less than 5 cm (2 in) long and have primary branches 5 to 20 mm (0.2 to 0.8 in) long. The 4 to 7 mm (0.2 to 0.3 in) long, flattened spikelets (ultimate flower clusters) are pale greenish or yellowish brown and usually are comprised of 4 or 5 flowers. The glumes (small pair of bracts at the base of each spikelet) are about 3 mm (0.1 in) long. The lemma (outer bract at the base of a floret) is 3 to 4 mm (0.1 to 0.2 in) long and has cobwebby hairs at its base. The palea (inner bract at the base of a floret) is 3 to 3.5 mm (about 0.1 in) long and has a sharp, longitudinal ridge. The reddish brown grain-like fruit is elliptical to spindle-shaped and about 1.5 mm (0.06 in) long. All three native species of *Poa* in the Hawaiian Islands are endemic to the island of Kauai. *Poa mannii* is distinguished from both *Poa siphonoglossa* and *Poa sandvicensis* by its fringed ligule and from *Poa sandvicensis* by its shorter panicle branches (O'Connor 1990).

Poa mannii is found only on the northwestern and west-central portions of the island of Kauai. The four known populations extend over a distance of about 10.5 by 8.5 kilometers (km) (6.5 by 5.3 miles (mi)) and are found in Kalalau, Makaha, Koaie, and Waialae Valleys, all on State lands (David Lorence, National Tropical Botanical Garden, pers. comm., 1992). The species was formerly found in Olokele Gulch (O'Connor 1990). Approximately 125 individuals have been observed in the extant populations. This species typically grows on cliffs and rock faces at elevations between 460 and 1,150 meters (m) (1,510 and 3,770 feet (ft)) in lowland and montane mesic forests. Associated species include: *Chamaesyce* sp. ('akoko), *Exocarpos luteolus* (heau), *Labordia helleri* (kamakahala), and *Nototrichium* sp. in Kalalau Valley; *Cyrtandra wawrae* (ha'iwale) in Makaha Valley; *Acacia koa* (koa), *Alectryon macrococcus* (mahoe), and *Antidesma platyphyllum* (hame) in Koaie Valley; and *Bidens cosmoides* (po'ola nui), *Carex meyenii*, *Dodonaea viscosa* ('a'ali'i), and *Schiedea amplexicaulis* in Waialae Valley. Threats to *Poa mannii* include habitat damage, trampling, and browsing by feral goats (*Capra hircus*); competition with invasive alien plants, especially *Erigeron karvinskianus* (daisy fleabane), *Lantana camara* (lantana), and *Rubus argutus* (prickly Florida blackberry); landslides in the steep habitat; fire; and reduced reproductive vigor and/or extinction from stochastic events due to the small number of existing populations and individuals (D. Lorence and Ken Wood, Hawaii Plant Conservation Center, pers. comms., 1992).

Previous Federal Action

Federal action on *Poa mannii* began as a result of section 12 of the Act, which directed the Secretary of the Smithsonian Institution to prepare a report on plants considered to be endangered, threatened, or extinct in the United States. This report, designated as House Document No. 94–51, was presented to Congress on January 9, 1975. On July 1, 1975, the Service published a notice in the **Federal Register** (40 FR 27823) of its acceptance of the Smithsonian report as a petition within the context of section 4(c)(2) (now section 4(b)(3)) of the Act, and giving notice of its intention to review the status of the plant taxa named therein. As a result of that review, on June 16, 1976, the Service published a proposed rule in the **Federal Register** (41 FR 24523) to determine endangered status pursuant to section 4 of the Act for approximately 1,700 vascular plant species. The list of 1,700 plant taxa was assembled on the basis of comments and data received by the Smithsonian Institution and the Service in response to House Document No. 94–51 and the July 1, 1975, **Federal Register** publication. General comments received in response to the 1976 proposal are summarized in an April 26, 1978, **Federal Register** publication (43 FR 17909). In 1978, amendments to the Act required that all proposals over two years old be withdrawn. A one-year grace period was given to proposals already over two years old. On December 10, 1979, the Service published a notice in the **Federal Register** (44 FR 70796) withdrawing the portion of the June 16, 1976, proposal that had not been made final, including *Poa mannii*, along with four other proposals that had expired. The Service published updated notices of review for plants on December 15, 1980 (45 FR 82479), September 27, 1985 (50 FR 39525), and February 21, 1990 (55 FR 6183). *Poa mannii* was first included in the 1980 and 1985 notices of review as a category 1 species. Category 1 taxa are those for which the Service has on file substantial information on biological

vulnerability and threats to support preparation of listing proposals. In the 1990 notice of review, *Poa mannii* was considered a category 1* species. Category 1* taxa are those which are possibly extinct. Since the 1990 notice of review, three previously unknown populations of the species have been discovered, and a population has been found in an area in which the plant was formerly known.

Section 4(b)(3)(B) of the Act requires the Secretary to make findings on petitions that present substantial information indicating that the petitioned action may be warranted within 12 months of their receipt. Section 2(b)(1) of the 1982 amendments further required all petitions pending on October 13, 1982, be treated as having been newly submitted on that date. On October 13, 1983, the Service found that the petitioned listing of *Poa mannii* was warranted, but precluded by other pending listing actions, in accordance with section 4(b)(3)(B)(iii) of the Act; notification of this finding was published on January 20, 1984 (49 FR 2485). Such a finding requires the Service to consider the petition as having been resubmitted pursuant to section 4(b)(3)(C)(i) of the Act. The finding was reviewed in October of 1984, 1985, 1986, 1987, 1988, 1989, 1990, and 1991. Publication of the proposed rule constituted the final 1-year finding for this species.

On April 7, 1993, the Service published in the **Federal Register** (58 FR 18073) a proposal to list the plant *Poa mannii* as endangered. This proposal was based primarily on information supplied by Hawaii State Department of Land and Natural Resources unpublished reports and observations by botanists and naturalists. The Service now determines *Poa mannii* to be endangered with the publication of this rule.

Summary of Comments and Recommendations

In the April 7, 1993, proposed rule and associated notifications, all interested parties were requested to submit factual reports or information that might contribute to the development of a final rule. The public comment period ended June 7, 1993. Appropriate State agencies, county governments, Federal agencies, scientific organizations, and other interested parties were contacted and requested to comment. A newspaper notice inviting public comment was published in "The Honolulu Advertiser" on May 12, 1993, and "The Garden Isle" on May 16, 1993. No letters of comment were received.

Summary of Factors Affecting the Species

Section 4 of the Endangered Species Act (16 U.S.C. 1533) and regulations (50 CFR Part 424) promulgated to implement the Act set forth the procedures for adding species to the Federal Lists. A species may be determined to be an endangered species due to one or more of the five factors described in section 4(a)(1). These factors and their application to *Poa mannii* Munro ex Hillebr. (Mann's bluegrass) are as follows:

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

The area of Kauai in which *Poa mannii* is found has undergone extreme alteration because of past and present land management practices, including grazing, deliberate alien plant and animal introductions, water diversion, and recreational development (Wagner *et al.* 1985). Feral animals have had the greatest overall impact, altering and degrading the vegetation and habitats of the area; feral goats currently cause the greatest damage to the area.

Feral goats, which have inhabited the drier, more rugged areas of Kauai since the 1820s, consume native vegetation, trample roots and seedlings, cause erosion, and promote the invasion of alien plants (Cuddihy and Stone 1990). Feral goats on Kauai are managed as a game species with a limited hunting season (Tomich 1986), but their numbers are large enough to cause considerable habitat damage. *Poa mannii* survives only in very steep areas that are inaccessible to goats, suggesting that goat predation may have eliminated this species from more accessible locations, as is the case for other rare plants from northwestern Kauai (Corn *et al.* 1979). Populations of *Poa mannii* are affected by erosion and landslides, resulting, in part, from goat activities in surrounding areas (K. Wood, pers. comm., 1992).

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Unrestricted collecting for scientific or horticultural purposes and excessive visits by individuals interested in seeing rare plants could result from increased publicity. This is a potential threat to *Poa mannii* that could also promote erosion and greater ingress by competing alien species.

C. Disease or Predation

Poa mannii is not known to be unpalatable to goats, which inhabit the areas where all four known populations of *Poa mannii* grow. Predation is a probable reason that this species is currently found only on cliff faces inaccessible to goats (D. Lorence and K. Wood, pers. comms., 1992). Predation by goats constitutes a threat to the expansion of the extant populations of *Poa mannii*.

D. The Inadequacy of Existing Regulatory Mechanisms

All four populations of *Poa mannii* are located on State conservation district land, which, among other purposes, are regarded as necessary for the protection of endemic biological resources and the maintenance or enhancement of the conservation of natural resources. Activities permitted in the conservation district are chosen by considering how best to make multiple use of the land (HRS, sect. 205–2). Some uses, such as maintaining animals for hunting, are based on policy decisions, while others, such as preservation of endangered species, are mandated by both Federal and State laws. Requests for amendments to district boundaries or variances within existing classifications can be made by government agencies and private landowners (HRS, sect. 205–4). Before decisions on these requests are made, the impact of the proposed reclassification on "preservation or maintenance of important natural systems or habitat" (HRS, sects. 205–4, 205–17), as well as the maintenance of natural resources, is required to be taken into account (HRS, sects. 205–2, 205–4). For any proposed land use change that would occur on county or State land, that would be funded in part or whole by county or State funds, or that would occur within land classified as conservation district, an environmental assessment is required to determine whether or not the environment will be significantly affected (HRS, chapt. 343). If it is found that an action will have a significant effect, preparation of a full Environmental Impact Statement is required. Hawaii environmental policy and, thus, approval of land use, is required by law to safeguard "* * * the State's unique natural environmental characteristics * * *" (HRS, sect. 344–3(1)) and includes guidelines to "protect endangered species of individual plants and animals * * *" (HRS, sect. 344–4(3)(A)). However, the species is not presently protected as an endangered species under the State's endangered species provisions, and, despite provisions for conserving endemic resources, individual rare species may be overlooked during consideration of other land use priorities.

E. Other Natural or Manmade Factors Affecting Its Continued Existence

The existence of only four populations consisting of approximately 125 individuals of *Poa mannii* increases the potential for extinction from stochastic events. The limited gene pool may depress reproductive vigor, or a single human-caused or natural environmental disturbance, a disease, or predation could destroy an entire population and a significant percentage of the known individuals of the species. In the steep areas where *Poa mannii* grows, erosion and landslides due to natural weathering can result in the death of individual plants as well as habitat destruction. This process especially affects the continued existence of species or populations with limited numbers and/or narrow ranges, such as *Poa mannii*, and can be exacerbated by human disturbance and land use practices.

Competition by alien plant species is a threat to *Poa mannii*. Brought to Hawaii as a cultivated herbaceous plant, daisy fleabane has become naturalized in wetter regions of four islands (Wagner *et al.* 1990). Daisy fleabane has invaded Kalalau, Koaie, and Waialae Valleys, three of the four areas where *Poa mannii* occurs (K. Wood, pers. comm., 1992). Lantana, brought to Hawaii as an ornamental plant, is an aggressive, thicket-forming shrub that can now be found on all of the main islands in mesic forests, dry shrublands, and other dry, disturbed habitats (Wagner *et al.* 1990). Lantana threatens all known populations of *Poa mannii* (D. Lorence and K. Wood, pers. comms., 1992). Prickly Florida blackberry, an aggressive alien species in disturbed mesic to wet forests and subalpine grasslands on four islands, is considered a noxious weed by the State of Hawaii (Smith 1985, Wagner *et al.* 1990). Prickly Florida blackberry threatens the Kalalau and Waialae Valley populations of *Poa mannii* (K. Wood, pers. comm., 1992).

Fire is considered an immediate threat to the rare plants of the cliff faces and valleys of the Na Pali Coast, where the largest known population of *Poa mannii* occurs. Under dry conditions, human-set fires would spread rapidly and could destroy these plants, due to the strong prevailing winds and dry fuel load on cliff ledges. Fire could destroy dormant seeds as well as plants, even on steep cliffs (Clarke and Cuddihy 1980).

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by this species in finalizing this rule. Based on this evaluation, this rulemaking will list *Poa mannii* as endangered. This species numbers only approximately 125 individuals in four known extant populations. Threats to the continued existence of the species include habitat degradation and/or predation by goats, competition from alien plants, fire, landslides and erosion, and lack of legal protection or difficulty in enforcing laws that become effective with this listing action. Small population size and limited distribution make the species particularly vulnerable to extinction and/or reduced reproductive vigor from stochastic events. Because *Poa mannii* is in danger of extinction throughout all or a significant portion of its range, it fits the definition of endangered as defined in the Act.

Critical habitat is not being proposed for *Poa mannii* for reasons discussed in the "Critical Habitat" section of this final rule.

Critical Habitat

Section 4(a)(3) of the Act, as amended, requires that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time a species is determined to be endangered or threatened. The Service finds that designation of critical habitat is not presently prudent for *Poa mannii*. The publication of a map and precise description of critical habitat in the **Federal Register**, as required in a designation of critical habitat, would increase the degree of threat to this species from take or vandalism and, therefore, could contribute to its decline. The listing of this species as endangered publicizes the rarity of the plant and, thus, can make it attractive to researchers, curiosity seekers, or collectors of rare plants. All involved parties and the major landowner have been notified of the location and importance of protecting the habitat of this species, which will be addressed through the recovery process and through the section 7 consultation process. There are no known Federal activities within the currently known natural habitat of this species. Therefore, the Service finds that designation of critical habitat for this species is not prudent at this time, because such designation would increase the degree of threat from vandalism, collecting, or other human activities and because it is unlikely to aid in the conservation of this species.

Available Conservation Measures

Conservation measures provided to species listed as endangered under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain activities. Listing encourages conservation actions by Federal, State, and local agencies, private organizations, and individuals. The Act provides for possible land acquisition and cooperation with the State and requires that recovery plans be developed for listed species. The requirement for Federal agencies and the prohibitions against certain activities involving listed plants are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any taxon that is proposed or listed as endangered and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR Part 402.

Section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service. There are no known Federal activities that occur within the presently known habitat of *Poa mannii*.

The Act and its implementing regulations found at 50 CFR 17.61, 17.62, and 17.63 set forth a series of general prohibitions and exceptions that apply to all endangered plant species. With respect to *Poa mannii*, all prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.61, would apply. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export any endangered plant species to/from the United States; transport such species in interstate or foreign commerce in the course of a commercial activity; sell or offer for sale such species in interstate or foreign commerce; remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any area under Federal jurisdiction; or remove, cut, dig up, damage, or destroy any such species on any other area in knowing violation of any State law or regulation or in the course of any violation of a State criminal trespass law. Certain exceptions apply to agents of the Service and State conservation agencies. Section 10 of the Act and 50 CFR 17.62 also provide for the issuance of permits under certain circumstances to carry out activities involving

endangered plants that are otherwise prohibited by section 9.

It is the policy of the Service (59 FR 34272) to identify to the maximum extent practicable at the time a species is listed those activities that would or would not constitute a violation of section 9 of the Act. Such information is intended to clarify the potential impacts of a species' listing on proposed and ongoing activities within the species' range. The four known populations of *Poa mannii* occur on cliffs and rock faces located on State lands. The Service is not aware of any otherwise legal activities proposed or being conducted by the public at this time that will be affected by this listing and result in a violation of section 9. Questions regarding whether specific activities will constitute a violation of section 9 should be directed to the Field Supervisor of the Service's Pacific Islands Office (see **ADDRESSES** section). Requests for copies of the regulations concerning listed plants and general inquiries regarding prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Ecological Services, Endangered Species Permits, 911 N.E. 11th Avenue, Portland, Oregon 97232–4181 (503/231–2063; FAX 503/231–6243).

Hawaii State Law

Federal listing will automatically invoke listing under the State's endangered species act. Hawaii's endangered species act states, "Any species of aquatic life, wildlife, or land plant that has been determined to be an endangered species pursuant to the [Federal] Endangered Species Act shall be deemed to be an endangered species under the provisions of this chapter * * *" (HRS, sect. 195D–4(a)). Therefore, Federal listing will accord the species listed status under Hawaii State law. State law prohibits cutting, collecting, uprooting, destroying, injuring, or possessing any listed species of plant on State or private land, or attempting to engage in any such conduct. State law also encourages conservation of such species by State agencies and triggers other State regulations to protect the species (HRS, sect. 195D–4 and 5). Two populations of *Poa mannii* occur in forest reserves, which have rules and regulations for the protection of resources. State law mandates the development and implementation of programs concerning the conservation of biological resources, including this endangered species (HRS, sect. 195D–5(a)).

National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment or Environmental Impact Statement, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of all references cited herein is available, upon request, from the Field Supervisor, Pacific Islands Office (see **ADDRESSES** section).

Authors

The authors of this rule are Marie M. Bruegmann and Zella E. Ellshoff of the Pacific Islands Office (see **ADDRESSES** section), (808/541–3441).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Regulation Promulgation

Accordingly, part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, is amended as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. Section 17.12(h) is amended by adding the following, in alphabetical order under FLOWERING PLANTS, to the List of Endangered and Threatened Plants, to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
Flowering Plants							
*	*	*	*	*	*	*	*
Poa mannii	Mann's bluegrass	U.S.A. (HI)	Poaceae	E	558	NA	NA
*	*	*	*	*	*	*	*

Dated: September 9, 1994.

Mollie H. Beattie,

Director, Fish and Wildlife Service.

[FR Doc. 94–27301 Filed 11–9–94; 8:45 am]

BILLING CODE 4310–55–P

50 CFR Part 17

RIN 1018–AB94

Endangered and Threatened Wildlife and Plants; Endangered Status for 12 Plants From the Hawaiian Islands

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service (Service) determines endangered status pursuant to the Endangered Species Act of 1973, as amended (Act), for 12 species of Hawaiian plants: *Adenophorus periens* (pendant kihi fern), *Bonamia menziesii* (no common name (NCN)), *Diellia erecta* (NCN), *Flueggea neowawraea* (mehamehame), *Hibiscus brackenridgei* (ma'o hau hele), *Mariscus pennatiformis* (NCN), *Neraudia sericea* (ma'aloa), *Plantago princeps* (ale), *Sesbania tomentosa* ('ohai), *Solanum incompletum* (thorny popolo), *Spermolepis hawaiiensis* (NCN), and *Vigna o-wahuensis* (Oahu vigna). These 12 species are found on 1 or more of the following Hawaiian Islands: Laysan, Necker, Nihoa, Niihau, Kauai, Oahu, Molokai, Lanai, Kahoolawe, Maui, and Hawaii. The 12 species and their habitats have been variously affected or are currently threatened by one or more of the following: habitat degradation and/or predation by wild, feral, or domestic animals (pigs, goats, deer, cattle); competition for space, light, water, and nutrients by naturalized, introduced vegetation; habitat loss from

fires; human impacts from recreational activities; and insect infestations. Due to the small number of existing individuals and/or their very narrow distributions, these species and most of their populations are subject to an increased likelihood of extinction and/or reduced reproductive vigor from stochastic events. This rule implements the protection provisions provided by the Act for these plant taxa.

EFFECTIVE DATE: December 12, 1994.

ADDRESSES: The complete file for this rule is available for public inspection, by appointment, during normal business hours at the Pacific Islands Office, U.S. Fish and Wildlife Service, 300 Ala Moana Boulevard, Room 6307, P.O. Box 50167, Honolulu, Hawaii 96850.

FOR FURTHER INFORMATION CONTACT: Robert P. Smith, Field Supervisor, at the above address (808/541–2749).

SUPPLEMENTARY INFORMATION:

Background

Adenophorus periens, Bonamia menziesii, Diellia erecta, Flueggea neowawraea, Hibiscus brackenridgei, Mariscus pennatiformis, Neraudia sericea, Plantago princeps, Sesbania tomentosa, Solanum incompletum, Spermolepis hawaiiensis, and *Vigna o-wahuensis* are currently known from 11 Hawaiian Islands: Laysan, Necker, Nihoa, Niihau, Kauai, Oahu, Molokai, Lanai, Kahoolawe, Maui, and Hawaii. The current and historical distribution by island is presented in Table 1 for each of the 12 species.

TABLE 1.—SUMMARY OF ISLAND DISTRIBUTION OF THE PROPOSED SPECIES

Species	Hawaiian Island										
	La	Ne	N	Ni	K	O	Mo	L	Ka	M	H
Adenophorus periens	.....	.....	.....	.....	C	H	C	H	.....	H	C
Bonamia menziesii	.....	.....	.....	.....	C	C	H	C	.....	C	C
Diellia erecta	.....	.....	.....	.....	H	H	C	H	.....	C	C
Flueggea neowawraea	.....	.....	.....	.....	C	C	H	.....	.....	C	C
Hibiscus brackensridgei	.....	.....	.....	.....	C?	C	H	C	H	C	C
Mariscus pennatiformis	C	.....	.....	.....	H	H	.....	.....	.....	C?	H
Neraudia sericea	.....	.....	.....	.....	.....	.....	C	H	H	C	
Plantago princeps	.....	.....	.....	.....	C	C	C	.....	.....	C	H
Sesbania tomentosa	.....	C	C	C	C	C	C	C	C	C	C
Solanum incompletum	.....	.....	.....	.....	C?	.....	C?	H	.....	H	C
Spermolepis hawaiiensis	.....	.....	.....	.....	H	C	C	C	.....	C	C?
Vigna o-wahuensis	.....	.....	.....	H	H	H	C	C	C	H	C

C = current; population last observed within the past 50 years.
H = historical; population not seen for over 50 years.u
? = questionable locality or inconsistent information in sources.
La—Laysan
Ne—Necker
N—Nihoa
Ni—Niihau
K—Kauai
O—Oahu
Mo—Molokai
L—Lanai
Ka—Kahoolawe
M—Maui
H—Hawaii

The Hawaiian archipelago includes eight large volcanic islands (Niihau, Kauai, Oahu, Molokai, Lanai, Kahoolawe, Maui, and Hawaii), as well as offshore islets, shoals, and atolls set on submerged volcanic remnants at the northwest end of the chain (the Northwestern Hawaiian Islands). The archipelago covers a land area of about 16,600 square kilometers (sq km) (6,400 sq miles (mi)), extending roughly between latitude 18°50′ to 28°15′ N and longitude 154°40′ to 178°70′ W, and ranging in elevation from sea level to 4,200 meters (m) (13,800 feet (ft)) (Dept. of Geography 1983). The regional geological setting is a mid-oceanic volcanic island archipelago set in a roughly northwest to southeast line, with younger islands to the southeast. The youngest island, Hawaii, is volcanically active. The older islands are increasingly eroded, so that the basaltic portions of many of the northwesternmost islands (such as Laysan, Necker, and Nihoa) are entirely submerged, and coralline atolls and shoals are often all that remain above sea level (Macdonald *et al.* 1986). The topography of the Hawaiian Islands is extremely diverse. On the younger islands, Hawaii and Maui, gently sloping unweathered shield volcanoes with very poor soil development are juxtaposed with older, heavily weathered valleys with steep walls, well-developed streams, and gently sloped flood plains. The older islands to the northwest (i.e., Niihau, Kauai, Oahu, and Molokai) are generally more weathered. On a typical older island, sea cliffs and large amphitheater-headed valleys on the windward (northeast) side contrast with erosionally younger, dissected slopes on the leeward (southwest) side (Dept. of Geography 1983).

The climate of the Hawaiian Islands reflects the tropical setting buffered by the surrounding ocean (Dept. of Geography 1983). The prevailing winds are northeast trades with some seasonal fluctuation in strength. There are also winter storm systems and occasional hurricanes. Temperatures vary over the year on an average of 5° Celsius (C) (11° Fahrenheit (F)) or less, with daily variation usually exceeding seasonal variation in temperature. Temperature varies with elevation and ranges from a maximum recorded temperature of 37.7° C (99.9° F), measured at 265 m (870 ft) elevation, to a minimum of minus 12.7° C (9.1° F) recorded at 4,205 m (13,795 ft) elevation. Annual rainfall varies greatly by location, with marked windward to leeward gradients over short distances. Minimum average

annual rainfall is less than 250 millimeters (mm) (10 inches (in)); the maximum average precipitation is well in excess of 11,000 mm (450 in) per year. Precipitation is greatest during the months of October through April. A dry season is apparent in leeward settings, while windward settings generally receive tradewind-driven rainfall throughout the year (Dept. of Geography 1983).

The native-dominated vegetation of the Hawaiian Islands varies greatly according to elevation, moisture regime, and substrate. The most recent classification of Hawaiian natural communities recognizes nearly 100 native vegetation types (Gagne and Cuddihy 1990). Within these types are numerous island-specific or region-specific associations, comprising an extremely rich array of vegetation types within a very limited geographic area. Major vegetation formations include forests, woodlands, shrublands, grasslands, herblands, and pioneer associations on lava and cinder substrates.

There are lowland, montane, and subalpine forest types in Hawaii, extending from sea level to above 3,000 m (9,800 ft) in elevation. Coastal and lowland forests are generally dry or mesic and may be open- or closed-canopied. The stature of lowland forests is generally under 10 m (30 ft). Eleven species included in this ruling (*Adenophorus periens, Bonamia menziesii, Diellia erecta, Flueggea neowawraea, Hibiscus brackenridgei, Mariscus pennatiformis, Neraudia sericea, Plantago princeps, Solanum incompletum, Spermolepis hawaiiensis,* and *Vigna o-wahuensis*) have been reported from lowland forest habitat. Montane forests, occupying elevations between 1,000 and 2,000 m (3,000 and 6,000 ft), are dry to mesic on the leeward slopes of the islands of Kauai, Maui, and Hawaii. On those islands, as well as on Oahu, Molokai, and Lanai, mesic to wet montane forests occur on the windward slopes and summits. The dry and mesic forests may be open- to closed-canopied, and may exceed 20 m (65 ft) in stature. Of the species in this ruling, four (*Diellia erecta, Plantago princeps, Solanum incompletum,* and *Vigna o-wahuensis*) have been reported from montane mesic and dry forest habitats. Montane wet forests are usually dominated by several species of native trees and tree ferns. Three species (*Adenophorus periens, Mariscus pennatiformis,* and *Plantago princeps*) have been reported from montane wet forest habitat. At high montane and subalpine elevations, at and above 2,000 m (6,500 ft) elevation, are subalpine forests, usually open-canopied and forming a mosaic with surrounding grasslands and shrublands. Subalpine forests are known only from Haleakala on East Maui and from Hualalai, Mauna Kea, and Mauna Loa on Hawaii. *Solanum incompletum* has been reported from subalpine forest habitat.

Hawaiian shrublands are also found from coastal to alpine elevations. The majority of Hawaiian shrubland types are in dry and mesic settings, or on cliffs and slopes too steep to support trees. Wet montane shrublands are typically dominated by *Metrosideros* ('ohi'a). Taxa reported from native shrublands include *Bonamia menziesii, Hibiscus brackenridgei,* and *Sesbania tomentosa.* Hawaiian grassland types are found from coastal to subalpine settings. Coastal and lowland grasslands are known from the Northwestern Hawaiian Islands, Kauai, Oahu, Molokai, Lanai, Maui, and Hawaii. Both *Hibiscus brackenridgei* and *Vigna o-wahuensis* have been reported from native grasslands.

The land that supports these 12 plant species is owned by various private parties, the City and County of Honolulu, the County of Maui, the State of Hawaii (including State parks, forest reserves, natural area reserves, and Hawaiian Home Lands), and the Federal government (including national parks, national wildlife refuges, national historic sites, and property under the jurisdiction of the Department of Defense).

Discussion of the 12 Plant Taxa Included in This Final Rule

Adenophorus periens (pendant kihi fern) was first collected by Captain Fredrick William Beechey in the 1820s or 1830s. It was not formally described until 1974, when L. Earl Bishop published the name *Adenophorus periens.* Prior to its description, the names *Polypodium adenophorus* and *Adenophorus pinnatifidus* had been erroneously applied to the species represented by Beechey's specimen (Bishop 1974).

Adenophorus periens, a member of the grammitis family (Grammitidaceae), is a small, pendant, epiphytic (not rooted on the ground) fern. The rhizome (prostrate stem) is covered with small dark, stiff scales 2 to 4 centimeters (cm) (0.8 to 1.6 in) long. Its yellowish green fronds are usually between 10 and 40 cm (4 and 16 in) long and covered with hairs. The fronds have slightly hairy stalks less than 1 cm (0.4 in) long. Each frond is comprised of oblong or narrowly triangular pinnae (divisions or leaflets) 5 to 15 mm (0.2 to 0.6 in) long with margins that are smooth or toothed and lined with sparse hairs. The pinnae are situated perpendicular to the axis of the midrib, with each pinna twisted such that its upper surface faces upward. Round sori (groups of spore-producing bodies) usually develop in the central portion of the fertile frond, forming two regular rows on each pinna. This species differs from other species in this endemic Hawaiian genus by having hairs along the pinna margins, pinnae at right angles to the midrib axis, by the placement of the sori, and the degree of dissection of each pinna (Bishop 1970, 1974; Hillebrand 1888; Linney 1989).

Historically, *Adenophorus periens* was known from the following general areas: Halemanu on Kauai, the Koolau Mountains of Oahu, the summit of Lanai, Kula Pipeline on East Maui, and Hilo and Waimea on the island of Hawaii (Hawaii Heritage Program (HHP) 1992a1 to 1992a6, 1992a10 to 1992a13). Currently, *Adenophorus periens* is known from several locations on three islands. On Kauai, one population is known from the boundary of Hono O Na Pali Natural Area Reserve (NAR) and Na Pali Coast State Park on State land, one from Waioli on State land, and four are clustered in the Wahiawa area over a distance of 2 sq km (0.8 sq mi) on private land (HHP 1992a15 to 1992a17; Hawaii Plant Conservation Center (HPCC) 1991b, 1991c, 1992; Lorence and Flynn 1991). On Molokai, there is a single population of three plants on private land at Kamakou Preserve (HHP 1992a7). On the island of Hawaii, four populations are found at Olaa Tract, Kane Nui o Hamo Crater, Kahaualea NAR, and 2.4 km (1.5 mi) northwest of Puu Kauka on private, State, and Federal land (L. Cuddihy, National Park Service, *in litt.*, 1983, 1988; HHP 1992a8, 1992a9, 1992a14). The population at Kane Nui o Hamo has recently been affected by volcanic eruptions and drought and its status is uncertain (Hugo Huntzinger, National Park Service, *in litt.*, 1993). The statewide total of 11 current populations comprises approximately 1,280 individuals of this species; on Kauai, there are about 63 individuals; on Molokai, there are 3; and on Hawaii, there are approximately 1,215 (L. Cuddihy, *in litt.*, 1983, 1988; HHP 1992a7 to 1992a9, 1992a14 to 1992a17; HPCC 1991a to 1991c; Lorence and Flynn 1991).

Adenophorus periens is found in *Metrosideros polymorpha* ('Ohi'a)/*Cibotium glaucum* (Hapu'u) Lowland Wet Forest between 470 and 1,270 m (1,540 and 4,140 ft) in elevation (HHP 1992a7, 1992a8, 1992a14 to 1992a16). Associated species include *Broussaisia*

arguta (kanawao ke'oke'o), *Cheirodendron trigynum* ('olapa), *Dicranopteris linearis* (uluhe), *Freycinetia arborea* ('ie'ie), and *Psychotria hawaiiensis* (kopiko) (HHP 1992a7, 1992a8, 1992a15, 1992a16). The primary threats to *Adenophorus periens* are habitat degradation by pigs (*Sus scrofa*); competition for light, space, nutrients, and water with alien plant species; and habitat destruction by fires.

Asa Gray gave the name *Bonamia menziesii* (NCN) to a plant from the Sandwich Islands (Hawaii) in honor of its collector, Archibald Menzies (Gray 1862). Wilhelm Hillebrand (1888) placed the species into the segregate genus *Breweria*. Otto Degener (1932a, 1932b) described a new genus, *Perispermum*, and placed *Bonamia menziesii* in it. He also described another species of *Perispermum*, *P. albiflorum*. T. Myint and D.B. Ward (1968) recognized only one Hawaiian species and placed it in the genus *Bonamia*. They recognized two varieties: variety *menziesii* and a new variety, *rockii*. The current treatment (Austin 1990) recognizes only one species with no subspecific taxa.

Bonamia menziesii, a member of the morning-glory family (Convolvulaceae), is a vine with twining branches up to 10 m (33 ft) long that are fuzzy when young. The leathery, oblong to oval leaves measure 3 to 9 cm (1.2 to 3.5 in) in length and 1 to 4 cm (0.4 to 1.6 in) wide. The upper leaf surface is usually hairless or covered with sparse hairs and the lower surface is covered with dense fuzzy hairs. The white to greenish funnel-shaped flowers, each 2 to 2.5 mm (0.08 to 0.1 in) long, are produced singly or in clusters of three on stalks 1 to 2 cm (0.4 to 0.8 in) long with tiny bracts (modified leaves) at the base of each stalk. Stamens usually have glandular hairs at their bases. The flower has two styles that are separate or partly fused. The fruits are tan or yellowish brown capsules 1 to 1.5 cm (0.4 to 0.6 in) long that contain one or two oval seeds imbedded in black pulp. This species is the only member of the genus that is endemic to the Hawaiian Islands and differs from other genera in the family by its two styles, longer stems and petioles, and rounder leaves (Austin 1990).

Historically, *Bonamia menziesii* was known from the following general areas: scattered locations on Kauai, the Waianae Mountains of Oahu, scattered locations on Molokai, and the eastern sides of Maui and Hawaii (HHP 1992b3, 1992b4, 1992b10, 1992b11, 1992b13, 1992b15 to 1992b17, 1992b28, 1992b35). Currently, *Bonamia menziesii* is known from 28 populations on 5 islands. On Kauai, five populations are known from Kalalau, Paaiki Valley, Mount Kahili (all on State land), and Wahiawa drainage on private land (HHP 1992b25 to 1992b27, Lorence and Flynn 1991). On Oahu, *Bonamia menziesii* is known from both the Waianae and the Koolau Mountains. In the Waianae Mountains between Kuaokala and Nanakuli, 10 populations are spread over a distance of 24 km (15 mi) on Federal, private, and State land; 8 of these populations are clustered in the northernmost section over a distance of 8 km (5 mi) (HHP 1992b6, 1992b8, 1992b9, 1992b12, 1992b19, 1992b20, 1992b22, 1992b23, 1992b30, 1992b34). In the southeastern part of the Koolau Mountains, five populations are found over an area of 6 sq km (2.5 sq mi) on private and State land (HHP 1992b5, 1992b14, 1992b18, 1992b21, 1992b31). On Lanai, *Bonamia menziesii* is known from four scattered locations from Kanepuu to Puhielelu on private land (Garnett 1991; HHP 1992b1, 1992b2, 1992b32; HPCC 1991d). On Maui, one population is known from the western slopes of West Maui on private land and two populations are located on East Maui on private and State land (HHP 1992b24, 1992b29, 1992b33). On the island of Hawaii, a single population is located at Kaupulehu on private land (HHP 1992b7). The total current populations throughout the State consist of approximately 200 individuals, with the largest populations occurring on Oahu (HHP 1992b14, 1992b21, 1992b23, 1992b30). On Kauai, there are approximately 28 plants; on Oahu no more than 150; on Lanai approximately 9; on Maui a total of 10; and on the island of Hawaii at least 1 specimen has been collected (HHP 1992b1, 1992b2, 1992b5 to 1992b12, 1992b14, 1992b18 to 1992b27, 1992b29 to 1992b34; Lorence and Flynn 1991).

Bonamia menziesii is found on steep slopes in dry to mesic forest and sometimes in wet forest between the elevation of 150 and 625 m (492 and 2,051 ft) (Austin 1990). Associated species include 'ohi'a, *Canthium odoratum* (alahe'e), *Nestegis sandwicense* (olopua), *Pisonia* sp. (papala kepau), and *Sapindus oahuensis* (lonomea) (HHP 1992b1, 1992b2, 1992b4, 1992b7 to 1992b9, 1992b18 to 1992b20, 1992b22, 1992b23, 1992b25, 1992b27, 1992b30, 1992b31, 1992b33). The primary threats to *Bonamia menziesii* are habitat degradation and possible predation by wild and feral ungulates (pigs, goats (*Capra hircus*), axis deer (*Axis axis*), black-tailed deer (*Odocoileus hemionus*), and cattle (*Bos taurus*), competition with a variety of alien plant species, and fire.

Diellia erecta (NCN) was described by William Dunlop Brackenridge based on a specimen collected during the Wilkes Expedition in 1840 (Brackenridge 1854). He also described *Diellia pumila*, which subsequently has been considered a depauperate form of *D. erecta*. *Davallia alexandri* was published by Hillebrand in 1873. It has subsequently been considered a form of *Diellia erecta* with finely dissected fronds. *Diellia erecta* and *Davallia alexandri* had been placed in the genus *Lindsaya* by certain early authors, and *Diellia erecta* into the genus *Schizoloma*. Degener and Amy B. Greenwell (1950) published the new combination *Diellia erecta* var. *falcata* for a taxon originally described by Brackenridge as *Diellia falcata*. However, further study has established that *Diellia falcata* is best considered a separate species. *Diellia erecta* is now considered to be a species with no subspecific taxa (Wagner 1952, Wagner and Wagner 1992).

Diellia erecta, a member of the spleenwort family (Aspleniaceae), is a fern that grows in tufts of three to nine lance-shaped fronds, each 20 to 70 cm (8 to 28 in) long. The fronds emerge from a 1 to 2.5 cm (0.4 to 1 in) long rhizome covered with brown to dark gray scales. The frond stalks are reddish brown to black and smooth and glossy, 2 to 21 cm (0.8 to 8.3 in) long, and have a few stiff scales at their bases. Each frond has 15 to 50 lance-shaped pinnae arranged oppositely along the midrib. The pinnae are usually between 2 and 4 cm (0.8 and 1.6 in) long and 4 to 8 mm (0.2 to 0.3 in) wide. Ten to 20 sori, which may be separate or fused, are borne on each margin of the pinna. Each sorus is covered by an indusium (protective membrane) that falls short of the edge of the frond and runs parallel to the edge of each pinna. This species differs from other members of the genus in having brown or dark gray scales usually more than 2 cm (0.8 in) in length, fused or separate sori along both margins, shiny black midribs that have a hardened surface, and veins that do not usually encircle the sori (Degener and Greenwell 1950, Hillebrand 1888, Robinson 1912, Smith 1934, Wagner 1952).

Historically, *Diellia erecta* was known from the Kokee area on Kauai; the Koolau Mountains on Oahu; Pukoo, Pelekunu Valley, and Kaunakakai Gulch on Molokai; Mahana Valley and Hauola Gulch on Lanai; scattered locations on West Maui; and various locations on the island of Hawaii (HHP 1992c1 to 1992c3, 1992c6, 1992c8 to 1992c11, 1992c16, 1992c18 to 1992c26).

Currently, *Diellia erecta* is only known from Molokai, Maui, and Hawaii. On Molokai, there are four locations with an unknown number of individuals at Halawa Valley, Kahuaawi Gulch, Makolelau, and Puu Kolekole on private land (HHP 1992c12, 1992c14, 1992c15; Robert Hobdy, Hawaii State Division of Forestry and Wildlife (DOFAW), pers. comm., 1991). On Maui, there is a total of at least 38 individuals at 7 locations: 4 populations on West Maui at Iao Valley on private land, and Kanaha Stream, Manawainui Plant Sanctuary, and Papalaua Gulch on State land; and 3 populations on East Maui at Olinda, Waiopai Gulch, and near Makawao on State and private land (HHP 1992c4, 1992c5, 1992c7, 1992c13, 1992c17; HPCC 1990a; Joel Lau, HHP, and R. Hobdy, pers. comms., 1992). On the island of Hawaii, there are 2 populations on State land: 1 at Honomalino with over 20 plants, and 1 at Manuka NAR with at least 1 plant (J. Lau, pers. comm., 1992). Statewide, this species has a total of 13 populations and approximately 63 known individuals.

Diellia erecta is found in *Diospyros sandwicensis* (Lama)/'Ohi'a Lowland Mesic Forest between 210 and 1,590 m (700 and 5,200 ft) in elevation (HHP 1992c21; HPCC 1990a; R. Hobdy, pers. comm., 1992). Other associated plant species include *Dodonaea viscosa* ('a'ali'i), *Dryopteris unidentata*, *Pleomele auwahiensis* (halapepe), *Syzygium sandwicensis* ('ohi'a ha), and *Wikstroemia* sp. ('akia) (HPCC 1990a). The major threats to *Diellia erecta* are habitat degradation by pigs, goats, and cattle; competition with alien plant species; and stochastic extinction due to the small number of existing individuals.

In 1912, Joseph F. Rock collected the first specimens of *Flueggea neowawraea* (mehamehame) from Kapua on the island of Hawaii (Rock 1913). Based on his specimens, he established the monotypic genus *Neowawraea*, named for Dr. Heinrich W. Wawra, a colleague of Rock's. He named the species *Neowawraea phyllanthoides* because of its apparent resemblance to *Phyllanthus*, a member of the same family (Euphorbiaceae). Earl Edward Sherff (1939) later transferred the taxon to the genus *Drypetes*. W. John Hayden (1987), upon further investigation, placed the species in the genus *Flueggea*. Because retention of the specific epithet would result in a later homonym, Hayden chose to maintain the tribute to Wawra in the new epithet, *neowawraea*.

Flueggea neowawraea, a member of the spurge family (Euphorbiaceae), is a large tree up to 30 m (100 ft) tall and 2 m (7 ft) in diameter with white oblong pores covering its scaly, pale brown bark. The thin, papery, oval leaves, 4 to 14 cm (1.5 to 5.5 in) long and 2 to 9 cm (0.8 to 3.5 in) wide, are green on the upper surface and pale green on the lower surface. Plants are usually dioecious (having separate male and female plants) with unisexual flowers lacking petals. Male flowers, on stalks less than 4 mm (0.2 in) long, have five green sepals with brownish tips. The female flowers, on stalks 1 to 2.5 mm (0.04 to 0.1 in) long, have sepals of unequal length with irregular margins. The two-lobed stigma is positioned atop a 2.5 to 3 mm (0.1 in) long, round ovary with a nectary disk. The fleshy, round fruits, about 5 mm (0.2 in) in diameter, are reddish brown to black and contain two slightly curved seeds about 3 mm (0.1 in) long that are somewhat triangular in cross section. This species is the only member of the genus found in Hawaii and can be distinguished from other species in the genus by its large size; scaly bark; the shape, size, and color of the leaves; flowers clustered along the branches; and the size and shape of the fruits (Hayden 1990, Linney 1982, Neal 1965).

Historically, *Flueggea neowawraea* was known from Waihii near Kapuna on Molokai, but is now presumed extinct on that island (HHP 1992d25, Hayden 1990). This species was also known from Kealia Trail, Kahanahaiki Valley, and Pohakea Gulch in the Waianae Mountains of Oahu (HHP 1992d5, 1992d10, 1992d33). Currently, *Flueggea neowawraea* is known on Kauai from Limahuli Valley, Kalalau, Pohakuao, and from the Koaie and Poomau branches of Waimea Canyon (HHP 1992d17, 1992d18, 1992d30 to 1992d32; HPCC 1990b; J. Lau, pers. comm., 1992). Also, three individuals (some of which may be dead) are known from the two adjacent valleys of Mahanaloa and Paaiki, near Makaha Point, on State-owned land (HHP 1992d9, 1992d13). Only one unhealthy individual is known from Limahuli Valley on privately owned land (HHP 1992d17). One tree is known from Kalalau and 10 from Pohakuao on State-owned land (J. Lau, pers. comm., 1992). Sixteen trees are known from the Poomau branch of Waimea Canyon, and 40 to 80 individuals are known from 4 scattered populations along the Koaie branch of Waimea Canyon on State-owned land (HHP 1992d18, 1992d30, 1992d31; HPCC 1990b; J. Lau, pers. comm., 1992). On Oahu, *Flueggea neowawraea* is currently known from 15 locations with approximately 33 individuals in the Waianae Mountains. The populations are spread from East Kapuahikahi Gulch to Puumaialau Gulch over a distance of about 15.5 km (9.6 mi) on Federal, State, County, and private land (HHP 1992d1 to 1992d4, 1992d6 to 1992d8, 1992d11, 1992d12, 1992d14 to 1992d16, 1992d19, 1992d20, 1992d24, 1992d26, 1992d29; J. Lau, pers. comm., 1992). On East Maui, one or two individuals are known from Auwahi on the southwest slope of Haleakala at approximately 850 m (2,800 ft) elevation on privately owned land (HHP 1992d23). Five populations are known from the island of Hawaii in South Kona and Kau, extending over an area of about 10 by 5 km (6 by 3 mi) from Papa to Manuka, and numbering approximately 20 individuals, on State and private land (HHP 1992d21, 1992d22, 1992d27, 1992d28, 1992d34, 1992d35; J. Lau, pers. comm., 1990). A Hawaii Island population on private land at Huehue Ranch in North Kona consists of an unknown number of individuals (Hayden 1990). Statewide, the species totals 28 populations containing approximately 127 to 167 known individuals.

Flueggea neowawraea occurs in dry to mesic forest at 250 to 1,000 m (820 to 3,280 ft) elevation (Hayden 1990). Associated plant species include alahe'e, lama, *Aleurites moluccana* (kukui), *Antidesma pulvinatum* (hame), and *Streblus pendulina* (a'ia'i) (HHP 1992d3, 1992d7, 1992d9, 1992d12 to 1992d19, 1992d30, 1992d31, 1992d34). The primary threat to the continued existence of *Flueggea neowawraea* is the black twig borer (*Xylosandrus compactus*), that has affected all known *Flueggea neowawraea* plants. Other major threats include habitat degradation by feral and wild ungulates (pigs, goats, deer, and cattle), competition with alien plant species, and fire. The small number of individuals within any population and the scattered distribution of populations, compounded by a requirement for cross-pollination because the species is dioecious, must be considered a serious threat.

In 1838, Asa Gray described *Hibiscus brackenridgei* (ma'o hau hele) from a specimen collected on West Maui (Roe 1961). Then, in 1930, Edward Leonard Caum published two varieties, *molokaiana* and *kauaiana*, based upon type specimens from the islands of Molokai and Kauai (Caum 1930). An additional variety, var. *mokuleiana*, was named by Sister Margaret James Roe in 1961. In 1990, David Bates recognized two subspecific taxa: ssp. *mokuleianus* and ssp. *brackenridgei* (including var. *molokaiana*). He placed *Hibiscus brackenridgei* var. *kauaiana* in

synonymy with a non-Hawaiian species of *Hibiscus, H. calyphyllus.*

Hibiscus brackenridgei, a member of the mallow family (Malvaceae), is a sprawling to erect shrub or small tree up to 5 m (16 ft) tall. Most plant parts (young branches, leaves, and some flower parts) vary in the degree of hairiness. The leaves, about 5 to 15 cm (2 to 6 in) long and equally wide, have three to seven lobes but are generally heart-shaped in outline. Beneath each leaf stalk is a pair of very thin stipules (leaf-like appendages), 5 to 15 mm (0.2 to 0.6 in) long, that fall off early in development, leaving an elliptic scar. Flowers are borne singly or in small clusters. The petals, between 3.5 and 8 cm (1.4 and 3.1 in) long, are yellow, usually with a maroon spot in the center of the flower. Each triangular calyx lobe is reddish to yellow, and usually has a raised, elongated gland on the midrib. Seven to 10 bracts are attached below the calyx. The staminal column, which has anthers attached to the upper three-fourths or nearly to the base, extends beyond the petals. The fruits are somewhat round or oval capsules 1.1 to 2 cm (0.4 to 0.8 in) long that have a beak-like appendage at one end. This species differs from other members of the genus in having the following combination of characteristics: yellow petals, a calyx comprised of triangular lobes with raised veins and a single midrib often bearing a prominent elongated gland, 7 to 10 bracts attached below the calyx, and thin stipules 5 to 15 mm (0.2 to 0.6 in) long that fall off, leaving an elliptic scar (Bates 1990).

Hibiscus brackenridgei is currently known from Oahu, Lanai, Maui, and Hawaii; it may possibly occur on Kauai. Twelve populations are known to exist, containing approximately 60 individuals. The two recognized subspecies are discussed separately below. *Hibiscus brackenridgei* ssp. *brackenridgei* was known historically from Laau Point on Molokai (HHP 1992e7), from scattered locations on Lanai, and from Pohakea Gulch south to near McGregor Point on West Maui (HHP 1992e4, 1992e5, 1992e10 to 1992e13, 1992e15). *Hibiscus brackenridgei* was also collected from an unspecified site on Kahoolawe (HHP 1992e17). However, the specimen is unavailable, and the subspecies was not determined (Bates 1990). Currently, *Hibiscus brackenridgei* ssp. *brackenridgei* consists of about 7 populations containing probably fewer than 60 individuals on State and private land on the islands of Lanai, Maui, and Hawaii (HHP 1992e1 to 1992e3, 1992e6, 1992e9, 1992e14, 1992e16; HPCC 1990c, 1991e; J. Lau, pers. comm., 1992). On Lanai, only five or six plants remain near Keomuku Road at 275 m (900 ft) elevation on privately owned land (HHP 1992e14, HPCC 1991e). On West Maui, *Hibiscus brackenridgei* ssp. *brackenridgei* is known from two populations occurring at Kaunohua Gulch and the West Maui NAR (HHP 1992e2, 1992e3; J. Lau, pers. comm., 1992). The Kaunohua Gulch population, numbering approximately eight individuals, is found within a fenced area of 5 to 10 sq m (55 to 110 sq ft) on privately owned land (HHP 1992e3). The West Maui NAR population, consisting of 14 individuals, is located in the Lihau section at about 400 m (1,300 ft) elevation in lowland dry forest on State-owned land (HHP 1992e2; J. Lau, pers. comm., 1992). On East Maui, the known populations, which extend over a 6.25 sq km (2.4 sq mi) area, number no more than 20 individuals (HHP 1992e1, 1992e8; HPCC 1990c). These populations are near Puu o Kali between 249 and 440 m (800 and 1,450 ft) in elevation on State-owned land (HHP 1992e1, 1992e8). On the island of Hawaii, *Hibiscus brackenridgei* ssp. *brackenridgei* is known from two populations on State and private land: at Puu Anahulu Homesteads and Puu Huluhulu, approximately 3.5 km (2 mi) apart. These two populations contain no more than five individuals (HHP 1992e6, 1992e16; P. Q. Tomich, *in litt.,* 1991; K. Wallis, *in litt.,* 1993).

Hibiscus brackenridgei ssp. *mokuleianus* is currently known from five populations, possibly containing as few as six to eight individuals. Undocumented observations of this taxon have been reported from Lihue and Olokele Canyon on Kauai (Bates 1990). On Oahu, *Hibiscus brackenridgei* ssp. *mokuleianus* was known historically from scattered locations in the Waianae Mountains (HHP 1992e18, 1992e21, 1992e22, 1992e24). Within a 12 by 5 km (7.5 by 3 mi) area extending from Puu Pane to Kealia-Kawaihapai are three current populations (1992e19, 1992e20, 1992e23, 1992e25; HPCC 1990d). The northernmost population, consisting of three individuals and occupying an area of 10 to 100 sq m (110 to 1,080 sq ft), is in the mountains south of the Dillingham Military Reservation at an elevation of 170 m (560 ft) on privately owned land (HHP 1992e25, HPCC 1990d). Another population is known from two adjacent gulches between the Dupont Trail and Puu Iki at elevations between 120 and 240 m (400 and 800 ft) (HHP 1992e19, 1992e23). This population on privately owned land consists of three to five individuals in an area measuring not more than 0.25 sq km (0.1 sq mi) (HHP 1992e19, 1992e23). A population of *Hibiscus brackenridgei* ssp. *mokuleianus* reported from the Puu Pane area has not been seen for more than 40 years (HHP 1992e20).

Hibiscus brackenridgei occurs in lowland dry to mesic forest and shrubland from 130 to 800 m (425 to 2,625 ft) in elevation (Geesink *et al.* 1990; HHP 1992e1, 1992e4, 1992e5, 1992e8, 1992e14, 1992e19, 1992e25). Associated plant species include 'a'ali'i, alahe'e, *Erythrina sandwicensis* (wiliwili), *Reynoldsia sandwicensis* ('ohe), and *Sida fallax* ('ilima) (HHP 1992e1 to 1992e3, 1992e6, 1992e8, 1992e20, 1992e23, 1992e25). The primary threats to this species are habitat degradation and possible predation by pigs, goats, axis deer, and cattle; competition with alien plant species; road construction; and stochastic extinction and/or reduced reproductive vigor due to the small number of existing individuals.

In 1931, the name *Cyperus pennatiformis* was published by Georg Kukenthal based on a specimen collected from Hana on Maui (Christophersen and Caum 1931). He also described a variety of the species, variety *bryanii,* for plants collected from the Northwestern Hawaiian Island of Laysan. Tetsuo Koyama recombined the species under the genus *Mariscus* and maintained the two subspecific taxa as subspecies (Wagner *et al.* 1989).

Mariscus pennatiformis (NCN), a member of the sedge family (Cyperaceae), is a perennial plant with a woody root system covered with brown scales. The stout, smooth, three-angled stems are between 0.4 and 1.2 m (1.3 and 4 ft) long, slightly concave and 3 to 7 mm (0.1 to 0.3 in) in diameter in the lower part. The three to five linear, somewhat leathery leaves are 8 to 17 mm (0.3 to 0.7 in) wide and at least as long as the stem. Each flower cluster, umbrella-shaped and moderately dense, is 4 to 15 cm (1.5 to 6 in) long and 5 to 25 cm (2 to 10 in) wide. About 5 to 18 spikes, comprised of numerous spikelets, form each cluster. Each spikelet, measuring about 8 to 14 mm (0.3 to 0.6 in) in length, is yellowish brown or grayish brown and is comprised of 8 to 25 densely arranged flowers. The glumes (bracts beneath each flower), which are less than twice as long as wide, are spreading and overlap tightly. The lowest glume does not overlap the base of the uppermost glume. This species differs from other members of the genus by its three-sided, slightly concave, smooth stems; the length and number of spikelets; the leaf width; and the length and diameter of

stems. The two subspecies are distinguished primarily by larger and more numerous spikelets, larger achenes (dry, one-seeded fruits), and more overlapping and yellower glumes in ssp. *pennatiformis* as compared with ssp. *bryanii* (Koyama 1990).

Historically, *Mariscus pennatiformis* ssp. *pennatiformis* was known from six populations, located on Kauai at Halemanu in Kokee State Park, on Oahu in the Waianae Mountains on a ridge above Makaha Valley, on East Maui at Keanae Valley and Hana, and on the island of Hawaii at an unspecified location (HHP 1992f3 to 1992f6). *Mariscus pennatiformis* ssp. *pennatiformis* also exists in cultivation at the Maui Zoological and Botanical Gardens. The cultivated plants were originally from Nahiku, East Maui (J. Davis and R. Silva, Maui Zoological and Botanical Gardens, *in litt.*, 1978). It is not known whether the Nahiku population is still extant. The five current populations, with an unknown number of individuals, are at open sites in mesic forests and low elevation grasslands from sea level to 1,200 m (3,940 ft) in elevation. No historical locations are known for *Mariscus pennatiformis* ssp. *bryanii*. It is currently known only from federally managed Laysan Island. This subspecies is found on the southeast end of the central lagoon, and the west and northeast sides of the island (HHP 1992f1, 1992f2; Koyama 1990). These 3 locations are on sandy substrate at 5 m (16 ft) in elevation and contain approximately 30 individuals (HHP 1992f1, 1992f2; Koyama 1990). Associated species include *Cyperus laevigatus* (makaloa), *Eragrostis variabilis* (kawelu), and *Ipomoea* sp. (HHP 1992f1, Koyama 1990). The small number of individuals and fewer than six known populations of *Mariscus pennatiformis* make the species vulnerable to stochastic extinction and/or reduced reproductive vigor.

Neraudia sericea (ma'aloa) was published by Gaudichaud in 1851 (Cowan 1949). In 1888, Hillebrand reduced it to a variety of *N. melastomaefolia* (*N. melastomaefolia* var. *sericea*). He also described a new species, *N. kahoolawensis*, named for a specimen collected by J.M. Lydgate on the island of Kahoolawe. In the most current treatment (Wagner *et al.* 1990), the reduction of *N. sericea* to a variety of *N. melastomaefolia* is not accepted and *N. kahoolawensis* is considered a Kahoolawe population of *N. sericea*.

Neraudia sericea, a member of the nettle family (Urticaceae), is a 3 to 5 m (10 to 16 ft) tall shrub with densely hairy branches. The elliptic or oval leaves are between 4.3 and 13 cm (1.7 and 5.1 in) long and have smooth margins or slightly toothed margins on young leaves. The upper leaf surface is moderately hairy and the lower leaf surface is densely covered with irregularly curved, silky gray to white hairs up to 1 mm (0.04 in) long along the veins. The male flowers may be stalkless or have short stalks. The female flowers are stalkless and have a densely hairy calyx that is either toothed, collar-like, or divided into narrow unequal segments. The fruits are 1 mm (0.04 in) long achenes with the apical section separated from the basal portion by a deep constriction. Seeds are oval with a constriction across the upper half. *Neraudia sericea* differs from the other four closely related species of this endemic Hawaiian genus by the density, length, color, and posture of the hairs on the lower leaf surface and by its mostly entire leaf margins (Wagner *et al.* 1990).

Neraudia sericea was known historically from Kamalo and near Waianui on Molokai, from Kaiholena on central Lanai, Olowalu Valley on West Maui, the southern slopes of Haleakala on East Maui, and from an unspecified site on Kahoolawe (HHP 1992g1, 1992g3, 1992g4, 1992g6 to 1992g10). Currently, two populations of this species are known, from the slopes below Puu Kolekole on Molokai, specifically along the bottom and lower slopes of Makolelau Gulch, and from Pohakea Gulch on West Maui (HHP 1992g2, 1992g5, 1992g11). Both populations are on privately owned land. The Makolelau population contains an estimated 50 to 100 individuals growing in 'Ohi'a/'A'ali'i/*Styphelia tameiameiae* (Pukiawe) Lowland Dry Shrubland in an area of over 100 sq m (1,080 sq ft) (HHP 1992g11). The population size of the Pohakea population is undetermined (HHP 1992g2). *Neraudia sericea* generally occurs in lowland dry to mesic shrubland or forest between 670 and 1,370 m (2,200 and 4,500 ft) in elevation (HHP 1992g3, 1992g10, 1992g11; Wagner *et al.* 1990). Other associated plant species include 'ilima, lama, *Bobea* ('ahakea), *Coprosma* (pilo), and *Hedyotis* (HHP 1992g11). The primary threats to *Neraudia sericea* are habitat degradation by feral pigs and goats; competition with the alien plant, *Melinus minutiflora* (molasses grass); and stochastic extinction and/or reduced reproductive vigor due to the small number of existing populations and individuals.

In 1826, Louis Charles Adelbert von Chamisso and D.F.L. Schlectendal described the species *Plantago princeps* (ale) (Rock 1920a). In 1829, *P. queleniana* was described by Gaudichaud. An additional species, *P. fauriei*, was described by H. Leveille (1911) from a specimen collected by Abbe Urbain Jean Faurie from Hanapepe Falls on Kauai. Several varieties and forms of *P. princeps* have also been described. The currently accepted classification places *P. queleniana* and *P. fauriei* in synonymy with *P. princeps* and recognizes only four varieties: *anomala*, *laxifolia*, *longibracteata*, and *princeps* (Gaudichaud 1829, Gray 1862, Hillebrand 1888, Mann 1867, Rock 1920a, Wagner *et al.* 1990, Wawra 1874).

Plantago princeps, a member of the plantain family (Plantaginaceae), is a small shrub or robust perennial herb. Its erect or ascending stems are hollow, about 2 to 250 cm (1 to 100 in) long, and often branched with young internodes that are more or less woolly with reddish brown hairs. The oblong to elliptic, thick, leathery leaves are between 6 and 30 cm (2.4 and 12 in) long and up to 5 cm (2 in) wide and are tufted near the ends of stems. The leaves have smooth or minutely toothed margins, a pointed tip, and primary veins that converge at the base of the leaves. Numerous stalkless flowers are densely arranged in a cluster 11 to 28 cm (4.3 to 11 in) long with each cluster on a stalk 10 to 50 cm (4 to 20 in) long. Each flower spreads at an angle of nearly 90 degrees to the axis of the stalk or grows upright. The sepals are somewhat distinct and elliptic in shape. The fruits are capsules that contain three or four tiny black seeds; the surface of the seeds is apparently covered with a sticky membrane. This species differs from other native members of the genus in Hawaii by its large branched stems, flowers at nearly right angles to the axis of the flower cluster, and fruits that break open at a point two-thirds from the base. The four varieties (*anomala*, *laxiflora*, *longibracteata*, and *princeps*) are distinguished by the branching and pubescence of the stems; the size, pubescence, and venation of the leaves; the density of the inflorescence; and the orientation of the flowers (Wagner *et al.* 1990).

The four varieties of *Plantago princeps* were historically found on five islands, and now occur on Kauai, Oahu, Molokai, and Maui. A total of 18 populations containing approximately 300 to 1,200 individuals is currently known. The four varieties are discussed separately below. Historically, *Plantago princeps* var. *anomala* was known from Makaleha in the Waianae Mountains on Oahu, and a ridge west of Hanapepe

River on Kauai (HHP 1992i1, 1992i4). Currently on Kauai, 4 populations with 45 individuals are known from the south rim and upper reaches of Kalalau Valley on State land (HHP 1992i2; HPCC 1990e, 1990g, 1991g). Historically, *Plantago princeps* var. *laxiflora* was known from Waikolu, Olokui, Kamakou, and Pelekunu on the east side of Molokai; in back of Lahaina on West Maui; and Hamakua and Kohala on the island of Hawaii (HHP 1992i6, 1992i8 to 1992i11, 1992i16, 1992i17). Currently on Molokai, *Plantago princeps* var. *laxiflora* is known from one population with five individuals at Kawela Gulch on private land (HHP 1992i5). On Maui, it is known from 2 locations in Iao Valley on West Maui, and 4 locations within Haleakala National Park and adjacent Waikamoi Preserve on East Maui on Federal and private land, totalling about 100 plants on that island (HHP 1992i7, 1992i12 to 1992i15, 1992i18; HPCC 1990h to 1990j, 1991h, 1991i).

Plantago princeps var. *longibracteata* was historically known from Hanalei, the Wahiawa Mountains, and Hanapepe Falls on Kauai, and from Kaala and the Koolauloa Mountains on Oahu (HHP 1992i19, 1992i21, 1992i23, 1992i24, 1992i26). Currently, 2 populations are known from Kauai at Waioli Valley and Waialeale on State land; they are estimated to contain between 130 and more than 1,000 individuals (HHP 1992i25, 1992i27). On Oahu, two populations approximately 3.5 km (2.2 mi) apart are known from the Poamoho area on private and State land; the number of individuals is not known (HHP 1992i20, 1992i22). Historically, *Plantago princeps* var. *princeps* was known from Nuuanu Pali and Kalihi in the Koolau Mountains of Oahu (HHP 1992i28 to 1992i30). Three current populations of this taxon are known from Mount Tantalus in the Koolau Mountains and from North Palawai and Ekahanui gulches in the Waianae Mountains of Oahu. Between 16 and 20 individuals are known from the Waianae Mountains. The number of individuals at the Koolau site is not known, as it was last observed in 1948 (HHP 1992i3, 1992i28 to 1992i31; HPCC 1990f; J. Lau, pers. comm., 1992).

Plantago princeps is typically found on steep slopes, rock walls, or at bases of waterfalls from 480 to about 1,100 m (1,580 to 3,600 ft) in elevation (Wagner *et al.* 1990). Associated plant species include 'a'ali'i, kopiko, 'ohi'a, uluhe, and *Dubautia plantaginea* (HHP 1992i28; HPCC 1990e to 1990i, 1990k, 1991g to 1991i). The primary threats to *Plantago princeps* are habitat degradation by ungulates (pigs and goats) and competition with various alien plant species.

Sesbania tomentosa ('ohai) was first described by W.J. Hooker and G.A.W. Arnott in 1836 from collections from Oahu (Degener 1937); it was named for its silvery hairs. In 1920, Joseph F. Rock described an arborescent form of the species (*S. tomentosa* f. *arborea*) based on a Molokai specimen. Degener and Sherff (Sherff 1949) published a new variety, var. *molokaiensis*, based on plants from West Molokai. Nearly 30 years later, Otto and Isa Degener elevated that variety to the specific level (Degener and Degener 1978). At that time, the Degeners also described two new species, *S. hawaiiensis* and *S. hobdyi*. In the currently accepted classification by Geesink and others (1990), *S. arborea*, *S. hawaiiensis*, *S. hobdyi*, and *S. molokaiensis* are synonymized with *S. tomentosa*. However, they note that the arborescent form of the species found on the island of Molokai probably merits formal taxonomic recognition.

Sesbania tomentosa, a member of the pea family (Fabaceae), is typically a sprawling shrub with branches up to 14 m (45 ft) long but may also be a small tree up to 6 m (20 ft) in height. Each compound leaf is comprised of 18 to 38 oblong to elliptic leaflets, each 15 to 38 mm (0.6 to 1.5 in) long and 5 to 18 mm (0.2 to 0.7 in) wide, and is usually sparsely to densely covered with silky hairs. The flowers, in clusters of two to nine, are salmon tinged with yellow, orange-red, or scarlet, or rarely pure yellow. The petals are between 23 and 45 mm (0.9 and 1.8 in) long, the upper pair sometimes of a lighter color than the other petals. The calyx is about 7 to 12 mm (0.3 to 0.5 in) long. Fruits are slightly flattened pods 7 to 23 cm (2.8 to 9 in) long and about 5 mm (0.2 in) wide that contain about 6 to 27 olive to pale or dark brown, oblong seeds. *Sesbania tomentosa* is the only endemic Hawaiian species in the genus, differing from the naturalized *S. sesban* by the color of the flowers, the longer petals and calyx, and the number of seeds per pod (Geesink *et al.* 1990).

On Molokai, *Sesbania tomentosa* was known historically from Mahana on Mauna Loa, in the vicinity of the coast near Waiahewahewa Gulch, and on Molokai's west coast at Laau and Ilio Points (HHP 1992j16, 1992j18, 1992j23, 1992j26, 1992j37). On Oahu, *Sesbania tomentosa* was known historically from eastern Oahu at Ulupau Crater, and on the islets of Kaohikaipu and Mokulua (HHP 1992j3, 1992j6, 1992j34). This taxon was also known historically from western Oahu at an unspecified location along the Waianae coast (HHP 1992j10). On Lanai, *Sesbania tomentosa* was known historically from scattered locations on the south half of the island and on the east slope of the island at Kahinahina (HHP 1992j5, 1992j19 to 1992j22, 1992j42). *Sesbania tomentosa* was also known historically from an unspecified location on Kahoolawe (HHP 1992j24).

Currently, there are two populations of *Sesbania tomentosa* in the Northwestern Hawaiian Islands (HHP 1992j35, 1992j36). One population is on the island of Nihoa, which comprises 0.8 sq km (0.3 sq mi) and is under U.S. Fish and Wildlife Service management (Depart. of Geography 1983, HHP 1992j35). The Nihoa plants have been described as relatively common in some areas, with several thousand individuals known (HHP 1992j35). Another population is known from Necker Island, which is only 0.2 sq km (0.1 sq mi) in area, and like Nihoa is managed by the U.S. Fish and Wildlife Service (HHP 1992j36). Although there are no population estimates for Necker Island, *Sesbania tomentosa* is known to occur from 45 m (150 ft) elevation to the summit, growing on the tops of all hills of the main island with a few individuals found on the Northwest Cape (HHP 1992j36). On the privately owned island of Niihau, *Sesbania tomentosa* is known from the south tip of the island at the headland west of Kaumuhonu Bay. The size of this population has not been determined; in 1947 at least one collection was made at an elevation of 50 m (160 ft) (HHP 1992j14).

On Kauai, *Sesbania tomentosa* is found between Mana town and Mana Point and at Polihale State Park (HHP 1992j15, 1992j33; HPCC 1991L). The population on State-owned land at Polihale State Park consists of about 30 individuals growing in a lithified dune area at approximately 12 m (40 ft) elevation in an area of approximately 10 to 50 sq m (110 to 540 sq ft) (HHP 1992j33). The second population is approximately 6 km (4 mi) southwest of the Polihale State Park population, growing alongside a pond owned by the State (HHP 1992j15). The size of the population has not been determined. On Oahu, *Sesbania tomentosa* is currently known from 1 population of 50 to 100 individuals on State-owned land at Kaena Point (HHP 1992j1, 1992j2). This population is primarily within the Kaena Point NAR, growing in sand dunes in a Naupaka kahakai Mixed Coastal Dry Shrubland (HHP 1992j1, 1992j2; HPCC 1990o). However, scattered individuals are also located to the east for about 3.5 km (2.25 mi) along

the north coast (HHP 1992j1, 1992j2; Woodward *et al.* 1991).

On Molokai, *Sesbania tomentosa* is known from the south slopes of central Molokai from Kamiloloa to Makolelau and along Molokai's northwest coast from Moomomi to east of Hinanaulua. The 4 populations on private and State-owned land from Kamiloloa to Makolelau total fewer than 2,000 individuals and grow in a 7 by 3 km (4.5 by 2 mi) area (HHP 1992j11, 1992j13, 1992j25, 1992j27; HPCC 1990m, 1990n). The 3 populations from Moomomi to east of Hinanaulua consist of about 100 to 150 plants growing on State and private land from sea level to 60 m (200 ft) elevation in a 5 by 1 km (3 by 0.5 mi) area (HHP 1992j12, 1992j28, 1992j49; HPCC 1990L). On Lanai, *Sesbania tomentosa* is now restricted to the northern slopes of the island. This cluster of 3 populations between Paomai and Maunalei is on privately owned land and includes at least 12 individuals growing on arid slopes (HHP 1992j17, 1992j38, 1992j39).

On Maui, *Sesbania tomentosa* is only known from two areas on West Maui and two areas on East Maui. On West Maui, one plant is on State-owned land below Lihau Peak (HHP 1992j30). *Sesbania tomentosa* also occurs on a 6 km (4 mi) stretch of the northeast coast of West Maui, from the lighthouse near Nakalele Point to Puu Kahulianapa (HHP 1992j31, 1992j32, 1992j43, 1992j48; HPCC 1991m). This cluster of 4 populations contains an estimated 50 to 75 individuals on land owned by the State, the County of Maui, and private individuals (HHP 1992j31, 1992j32, 1992j43, 1992j48; R. Hobdy, pers. comm., 1992). On East Maui, two trees exist on privately owned land in Kamaole, but they appear to have been planted (Winona Char, Char & Associates, *in litt.*, 1993). *Sesbania tomentosa* also occurs on the southeastern slopes of Pimoe cinder cone between 450 and 500 m (1480 to 1640 ft) elevation. This population consists of 13 plants located on the Hawaii National Guard Kanaio Training Area (Sam Gon, The Nature Conservancy, *in litt.*, 1993). Off the south central coast of Kahoolawe, approximately 25 to 30 individuals of *Sesbania tomentosa* are found on the sparsely vegetated islet of Puu Koae, which is a State-owned seabird sanctuary (HHP 1992j29).

On the island of Hawaii, *Sesbania tomentosa* is known from two regions of the southeast coast and two areas along the northwestern coast. On the southeastern coast it occurs along 16 km (10 mi) of coastline between Ka Lae and Kaalela. This cluster of populations on State-owned land contains an estimated 260 individuals growing between sea level and 25 m (80 ft) elevation, with some populations occurring in 'Ilima Coastal Dry Shrubland (HHP 1992j7, 1992j9, 1992j44, 1992j45, 1992j50; HPCC 1991j, 1991k; W. Char, *in litt.*, 1993). The second cluster is in Hawaii Volcanoes National Park and consists of scattered populations within a 19 by 8 km (12 by 5 mi) area from above Kukalauula Pali to Kahue, at elevations between 10 and 850 m (30 and 2,800 ft). This cluster of populations on federally owned land contains at least 50 individuals (HHP 1992j4, 1992j8, 1992j40, 1992j41, 1992j46, 1992j47; H. Huntzinger, *in litt.*, 1993). On the northwestern coast, a single plant occurs at 30 m (100 ft) elevation on private land at Kaupulehua (W. Char, in litt., 1993). The other northwest coast population is also on private land at Waiakailio, and consists of eight plants with several seedlings at 300 m (1000 ft) elevation (W. Char, *in litt.*, 1993). The total currently known populations of *Sesbania tomentosa* on the 8 main Hawaiian islands (Niihau, Kauai, Oahu, Molokai, Lanai, Kahoolawe, Maui, and Hawaii) contain an estimated 2,000 to 3,000 individuals. In the Northwestern Hawaiian Islands, the largest population occurs on Nihoa and consists of several thousand individuals (HHP 1992j35).

Sesbania tomentosa is found on sandy beaches, dunes, soil pockets on lava, and along pond margins (Geesink *et al.* 1990). It commonly occurs in coastal dry shrublands and grasslands, but is also known from open 'ohi'a forests and Mixed Coastal Dry Cliffs (HHP 1992j2, 1992j4, 1992j5, 1992j7, 1992j14, 1992j27, 1992j28, 1992j35, 1992j49). Associated plant species include 'ilima, naupaka kahakai, *Heteropogon contortus* (pili), *Myoporum sandwicense* (naio), and *Sporobolus virginicus* ('aki'aki) (HHP 1992j1, 1992j2, 1992j7, 1992j8, 1992j12, 1992j13, 1992j25, 1992j28, 1992j31, 1992j33, 1992j40, 1992j45, 1992j49, 1992j50). The primary threats to *Sesbania tomentosa* are habitat degradation caused by axis deer and cattle, competition with various alien plant species, fire, and destruction by off-road vehicles.

A specimen collected by David Nelson in 1779 from the island of Hawaii was described and named *Solanum incompletum* (thorny popolo) by Dunal (1852). In 1888, Hillebrand described two varieties of the species: var. *glabratum* and var. *mauiense*. In 1969, Harold St. John described the species *S. haleakalaense* based on a specimen collected by Hillebrand on the south slope of Haleakala on Maui (St. John 1969). In the latest treatment, *S. haleakalaense* was synonymized with *S. incompletum* and no subspecific taxa of *S. incompletum* were recognized (Symon 1990).

Solanum incompletum, a member of the nightshade family (Solanaceae), is a woody shrub up to 3 m (10 ft) tall. Its stems and lower leaf surfaces are covered with prominent reddish prickles about 4 mm (0.2 in) long or sometimes with yellow fuzzy hairs on young plant parts and lower leaf surfaces. The oval to elliptic leaves, 10 to 15 cm (4 to 6 in) long and about 7 cm (2.8 in) wide, have prominent veins on the lower surface, and are on stalks up to 7 cm (2.8 in) long. The leaf margins are lobed with one to four lobes on each side. Numerous flowers grow in loose branching clusters with each flower on a stalk about 9 mm (0.4 in) long. The calyx and flowers generally lack prickles. The white petals form a star-shaped corolla about 2 cm (0.8 in) in diameter. The curved anthers, about 2 mm (0.08 in) long, top short filaments that do not extend beyond the petals. Fruits are round berries about 1.5 cm (0.6 in) in diameter that mature from yellow-orange to black. This species differs from others in the genus by being generally prickly and having loosely clustered white flowers, curved anthers about 2 mm (0.08 in) long, and berries 1 to 2 cm (0.4 to 0.8 in) in diameter (Symon 1990).

Historically, *Solanum incompletum* was known from central and northeastern Lanai and from scattered locations on Maui (HHP 1992k1, 1992k2, 1992k4, 1992k10 to 1992k13; Symon 1990). According to David Symon (1990), the known distribution of *Solanum incompletum* also extends to the islands of Kauai and Molokai. On the island of Hawaii, *Solanum incompletum* was known historically from the Kohala Mountains, Kona, Puu Waawaa, Puu Ikaaka Crater, and Omaokoili (HHP 1992k3, 1992k5, 1992k7 to 1992k9). The single remaining known population is from the island of Hawaii; it has not been seen for more than 40 years. This population is on State land at Puu Huluhulu and consists of perhaps two individuals at an approximate elevation of 2,040 m (6,700 ft) (HHP 1992k6). Associated species include naio, *Acacia koa* (koa), and *Sophora chrysophylla* (mamane) in dry mesic forest, diverse mesic forest, and subalpine forest at elevations from 300 to 2,040 m (1,000 to 6,700 ft) (HHP 1992k1, 1992k6; Symon 1990; J. Lau, pers. comm., 1992). The primary threats to the last remaining individuals of *Solanum incompletum* are stochastic extinction and reduced reproductive

vigor due to the extremely small number of existing plants, and competition with the alien plant, *Senecio mikanioides* (German ivy).

Spermolepis hawaiiensis (NCN) was first described by H. Wolff in 1921. In the past, this Hawaiian species had been confused with the European plants, *Apium echinatum* and *Caucalis daucoides* (Constance and Affolter 1990, Wolff 1921).

Spermolepis hawaiiensis, a member of the parsley family (Apiaceae), is a slender annual herb with few branches that grows to a height of 5 to 20 cm (2 to 8 in). Its leaves, dissected into narrow, lance-shaped divisions, are oblong to somewhat oval in outline and grow on stalks about 2.5 cm (1 in) long. Flowers are arranged in a loose, compound umbrella-shaped inflorescence arising from the stem, opposite the leaves. Each cluster consists of two to six flowers, with each flower on a stalk between 2 and 6 mm (0.08 and 0.2 in) long. The calyx is lacking in this species, but one to five bracts grow below the clusters of flowers. The fruits are oval and laterally compressed and constricted at the line where the two halves of the fruit meet. The fruits are 4 mm (0.2 in) long and 3 mm (0.1 in) wide, covered with curved bristles, and contain seeds that are marked with longitudinal grooves beneath oil tubes that are characteristic of the parsley family. *Spermolepis hawaiiensis* is the only member of the genus native to Hawaii. It is distinguished from other native members of the family by being a non-succulent annual with an umbrella-shaped inflorescence (Constance and Affolter 1990).

Historically, *Spermolepis hawaiiensis* was known from Waimea on Kauai, Koko Head on Oahu, Paomai and Kahinahina on Lanai, and Kipuka Kahali' on Hawaii (HHP 1992L3 to 1992L5, 1992L8, 1992L9; H. Huntzinger, *in litt.*, 1993). Currently, six populations are known on Oahu, Molokai, Lanai, and West Maui; one additional population may exist on Hawaii. On Oahu, on State land at Diamond Head (land leased to the Department of Defense at the Diamond Head Reservation), 10 plants were observed in 1992 during the dry season. In 1988, when the site was first visited, thousands of plants were seen over an area less than 50 sq m (several hundred sq ft) (Wayne Takeuchi, DOFAW, pers. comm., 1992). The population fluctuations probably reflect seasonal changes in precipitation. On Molokai, about 600 plants were reported from Kamalo on private land within an area of less than 400 sq m (0.1 ac) (HHP 1992L6). On Lanai, 2 populations of *S. hawaiiensis* are known on private land: 1 at Kapoho with 100 individuals and 1 west of Puu Manu with 50 to 100 individuals covering an area of about 0.1 ha (0.25 ac) (HHP 1992L7; R. Hobdy, pers. comm., 1992). On West Maui, 3 populations are known on State land: 1 in the Lihau section of the West Maui NAR, with 60 to 100 individuals within an area of about 0.4 ha (1 ac); 1 further east in the Lihau section of the West Maui NAR, with several hundred plants scattered over a distance of 0.7 km (0.4 mi); and 1 above Lahainaluna School, with several hundred individuals spread over an area of about 0.4 ha (1 ac) (HHP 1992L1, 1992L2; HPCC 1991n). On the island of Hawaii, a collection of *Spermolepis hawaiiensis* was made at an unspecified location in 1943; it is not known whether this population still exists (HHP 1992L9).

Spermolepis hawaiiensis is known from various vegetation types, including 'ohi'a forests, 'A'ali'i Lowland Dry Shrubland, cultivated fields, and pastures between about 300 and 600 m (1,000 and 2,000 ft) in elevation (HHP 1992L2, 1992L8, 1992L9; HPCC 1991n). Associated plant species include 'ilima, *Doryopteris* sp., *Gouania hillebrandii*, and the alien plant, *Leucaena leucocephala* (koa haole) (HHP 1992L1). The primary threats to *Spermolepis hawaiiensis* are habitat degradation by axis deer and competition with the alien plant, koa haole.

Vigna o-wahuensis (Oahu vigna) was described by T. Vogel in 1836 from a specimen from the Waianae Mountains of Oahu (Gray 1854). In 1854, Gray described another species, *Vigna sandwicensis*, for which Rock later designated two varieties: var. *heterophylla* and var. *sandwicensis* (Rock 1920b). The currently accepted treatment places *V. sandwicensis* in synonymy under *V. o-wahuensis* (Geesink *et al.* 1990).

Vigna o-wahuensis, a member of the pea family, is a slender twining annual or perennial herb with fuzzy stems that grows to 0.4 m (1.3 ft) in length. Each leaf is made up of three leaflets that vary in shape from round to linear, are 1.2 to 8 cm (0.5 to 3 in) long and 0.1 to 2.5 cm (0.04 to 1 in) wide, and are sparsely or moderately covered with coarse hairs. Flowers, in clusters of one to four, have thin, translucent, pale yellow or greenish yellow petals about 2 to 2.5 cm (0.8 to 1 in) long. The two lowermost petals are fused and appear distinctly beaked. The sparsely hairy calyx is 4 to 8 mm (0.2 to 0.3 in) long with asymmetrical lobes that measure about 3 mm (0.1 in) long. The fruits are long slender pods 4 to 9 cm (1.6 to 3.5 in) long and about 5 mm (0.2 in) wide, that may or may not be slightly inflated and contain 7 to 15 gray to black seeds less than 6 mm (0.2 in) long. This species differs from others in the genus by its thin yellowish petals, sparsely hairy calyx, and thin pods which may or may not be slightly inflated (Geesink *et al.* 1990).

Historically, *Vigna o-wahuensis* was known from Niihau and from an unspecified location on Kauai (HHP 1992m10, 1992m16). On Oahu, this taxon was known from between Waimanalo and Makapuu Point, the Mokulua Islets, and the Waianae Mountains (HHP 1992m13 to 1992m15, 1992m20). On Maui, *Vigna o-wahuensis* was known from an unspecified site on West Maui and from Makawao, Waiakoa, and Haleakala on East Maui (HHP 1992m2 to 1992m4, 1992m25). There are no currently known populations on Niihau, Kauai, Oahu, or Maui. On Molokai, *Vigna o-wahuensis* was known historically from the western end of the island in the vicinity of Ilio Point (HHP 1992m18). On Lanai, this species occurred historically at scattered locations across the island's southern half (HHP 1992m5, 1992m6, 1992m8, 1992m9, 1992m17). On the island of Hawaii, this taxon was known from Mauna Loa and Kau at unspecified sites (HHP 1992m1, 1992m19, 1992m24).

Currently, a total of fewer than 100 individuals of *Vigna o-wahuensis* is known from 7 populations on the islands of Molokai, Lanai, Kahoolawe, and Hawaii (HHP 1992m11, 1992m12, 1992m21 to 1992m23; HPCC 1991o; J. Lau, pers. comm., 1992). On Molokai, there are two populations separated by a distance of 4 km (2.5 mi). One population, south of Onini Gulch at about 850 m (2,800 ft) elevation on privately owned land, covers an area of 18 sq m (200 sq ft) in a forestry planting of *Fraxinus uhdei* (tropical ash) and *Pinus* (pine) (HHP 1992m11). The other Molokai population of about 10 individuals is on privately owned land at Makolelau (J. Lau, pers. comm., 1992). On Lanai, at least one individual of *Vigna o-wahuensis* is known from the arid windward slopes northeast of Kanepuu above Lapaiki at about 370 m (1,200 ft) elevation on privately owned land (HHP 1992m7, 1992m23). On the State-owned island of Kahoolawe, *Vigna o-wahuensis* grows between Makaalae and Lua Kealialalo at 140 m (460 ft) elevation, near the summit at about 400 m (1,300 ft) elevation, and about 0.8 km (0.5 mi) south of Hanakanaea near "Sailor's Hat" (HHP 1992m21, 1992m23; J. Lau, pers. comm., 1992). Only one individual is known from the

population between Makaalae and Lua Kealialalo in pili grassland (J. Lau, pers. comm., 1992). Near the summit, about 20 plants grow in a 9 sq m (100 sq ft) area with a few more plants scattered nearby (HHP 1992m22). The size of the population south of Hanakanaea has not been determined, but at least one collection has been made recently (HHP 1992m21). On the island of Hawaii, *Vigna o-wahuensis* is known only from Nohonaohae Cinder Cone on privately owned land. Ten plants are known from 'A'ali'i Lowland Dry Shrubland within an exclosure containing pasture grass (HHP 1992m12, HPCC 1991o).

Vigna o-wahuensis occurs in dry to mesic grassland and shrubland from 10 to 1,370 m (30 to 4,500 ft) in elevation (Geesink *et al.* 1990; HHP 1992m1 to 1992m3, 1992m5, 1992m11, 1992m12, 1992m15, 1992m22, 1992m24). Other associated plant species include 'ilima, *Chenopodium* ('aheahea), *Dubautia menziesii*, and *Osteomeles anthyllidifolia* (ulei) (HHP 1992m11, 1992m12, 1992m23; HPCC 1991o). The primary threats to *Vigna o-wahuensis* are habitat degradation by ungulates (pigs and axis deer), competition with various alien plant species, fire, and stochastic extinction and/or reduced reproductive vigor due to the small number of existing populations and individuals.

Previous Federal Action

Federal action on these plants began as a result of section 12 of the Act, which directed the Secretary of the Smithsonian Institution to prepare a report on plants considered to be endangered, threatened, or extinct in the United States. This report, designated as House Document No. 94–51, was presented to Congress on January 9, 1975. In that document, *Adenophorus periens, Bonamia menziesii, Flueggea neowawraea* (as *Drypetes phyllanthoides*), *Hibiscus brackenridgei* (as *H. b.* var. *brackenridgei*, var. *mokuleianus*, and var. "from Hawaii"), *Neraudia sericea, Plantago princeps* (as *P. p.* var. *elata*, var. *laxifolia*, and var. *princeps*), *Sesbania tomentosa* (as *S. t.* var. *tomentosa*), *Solanum incompletum* (as *S. i.* var. *glabratum*, var. *incompletum*, and var. *mauiensis*), *Vigna o-wahuensis* (also as *V. sandwicensis* var. *heterophylla* and *V. s.* var. *sandwicensis*) were considered to be endangered. *Diellia erecta* and *Plantago princeps* (as *P. p.* var. *acaulis*, var. *denticulata*, and var. *queleniana*) were considered to be threatened, and *Neraudia sericea* (as *N. kahoolawensis*) and *Solanum incompletum* (as *S. haleakalense*) were considered to be extinct.

On July 1, 1975, the Service published a notice in the **Federal Register** (40 FR 27823) of its acceptance of the Smithsonian report as a petition within the context of section 4(c)(2) (now section 4(b)(3)) of the Act, and giving notice of its intention to review the status of the plant taxa named therein. As a result of that review, on June 16, 1976, the Service published a proposed rule in the **Federal Register** (41 FR 24523) to determine endangered status pursuant to section 4 of the Act for approximately 1,700 vascular plant species, including all of the above taxa considered to be endangered or thought to be extinct, plus *Diellia erecta* (considered threatened). The list of 1,700 plant taxa was assembled on the basis of comments and data received by the Smithsonian Institution and the Service in response to House Document No. 94–51 and the July 1, 1975, **Federal Register** publication.

General comments received in response to the 1976 proposal are summarized in an April 26, 1978, **Federal Register** publication (43 FR 17909). In 1978, amendments to the Act required that all proposals over 2 years old be withdrawn. A 1-year grace period was given to proposals already over 2 years old. On December 10, 1979, the Service published a notice in the **Federal Register** (44 FR 70796) withdrawing the portion of the June 16, 1976, proposal that had not been made final, including the above taxa, along with four other proposals that had expired. The Service published updated notices of review for plants on December 15, 1980 (45 FR 82479), September 27, 1985 (50 FR 39525), and February 21, 1990 (55 FR 6183). In these notices, 11 of the taxa (including synonymous taxa) that had been in the 1976 proposed rule were treated as category 1 candidates for Federal listing. Category 1 taxa are those for which the Service has on file substantial information on biological vulnerability and threats to support preparation of listing proposals. Other than *Mariscus pennatiformis, Neraudia sericea* (as *N. kahoolawensis*), *Plantago princeps* (as *P. p.* var. *acaulis* and var. *queleniana*), *Sesbania tomentosa* (as *S. hobdyi*), *Solanum incompletum* (as *S. haleakalense*), and *Spermolepis hawaiiensis*, all the aforementioned taxa that were proposed as endangered in the June 16, 1976, proposed rule were considered category 1 candidates on all three notices of review. *Flueggea neowawraea* appeared as *Neowawraea phyllanthoides* in the 1980 and 1985 notices. In the 1980 and 1985 notices, *Sesbania tomentosa* (as *S. hobdyi*) and *Solanum incompletum* (as *S. haleakalense*) were considered category 1* species. Category 1* species are those that are possibly extinct. *Plantago princeps* (as *P. p.* var. *acaulis* and var. *queleniana*) appeared as a category 2 taxon and *Neraudia sericea* (as *N. kahoolawensis*) as a category 3A species in the 1980 and 1985 notices. Category 2 taxa are those for which there is some evidence of vulnerability, but for which there are not enough data to support listing proposals at the time. Category 3A taxa are those for which the Service has persuasive evidence of extinction. Through taxonomic revisions, each of the category 1*, 2, and 3A taxa were synonymized under category 1 taxa on the 1990 list. *Mariscus pennatiformis* (as *Cyperus p.* var. *bryanii*) first appeared on the 1985 notice of review as a category 1 taxon. *Spermolepis hawaiiensis* first appeared on the 1990 notice of review as a category 1 species after it was rediscovered in 1986.

Section 4(b)(3)(B) of the Act requires the Secretary to make findings on petitions that present substantial information indicating that the petitioned action may be warranted within 12 months of their receipt. Section 2(b)(1) of the 1982 amendments further requires all petitions pending on October 13, 1982, be treated as having been newly submitted on that date. On October 13, 1983, the Service found that the petitioned listing of these species was warranted, but precluded by other pending listing actions, in accordance with section 4(b)(3)(B)(iii) of the Act; notification of this finding was published on January 20, 1984 (49 FR 2485). Such a finding requires the Service to consider the petition as having been resubmitted, pursuant to section 4(b)(3)(C)(i) of the Act. The findings were reviewed in October of 1984, 1985, 1986, 1987, 1988, 1989, 1990, and 1991. The proposed rule published on September 14, 1993 (58 FR 48012) to list 12 species of plants from the Hawaiian Islands as endangered species constituted the final 1-year finding that was required for these species.

Based on comments and recommendations received in response to the proposal (see Comments and Recommendations, below), the Service now determines these 12 plant species to be endangered with the publication of this final rule.

Summary of Comments and Recommendations

In the September 14, 1993, proposed rule and associated notifications, all interested parties were requested to submit factual reports or information

that might contribute to the development of a final rule. The public comment period ended on November 15, 1993. Appropriate State agencies, county governments, Federal agencies, scientific organizations, and other interested parties were contacted and requested to comment. Newspaper notices inviting public comment were published in "The Maui News" on October 7, 1993, the "Hawaii Tribune-Herald" on October 8, 1993, and the "Honolulu Advertiser" on October 7, 1993.

Comments were received from three parties: One from an individual in support of the listing of *Spermolepis hawaiiensis*, but offering no additional information; one from an individual in support of the listing of *Spermolepis hawaiiensis*, *Adenophorus periens* and *Sesbania tomentosa*, and providing information on the possible extirpation of the population of *Adenophorus periens* at Kane Nui o Hamo by volcanic activity and drought, and indicating that the actual number of plants of *Sesbania tomentosa* in Hawaii Volcanoes National Park is more than 50; the third respondent provided information on three previously unknown populations of *Sesbania tomentosa*, one from the south coast of East Maui and two from the northwest coast of the island of Hawaii. The information provided by these respondents has been incorporated into this final rule. The information received does not indicate that any of these species are under less threat than previously thought.

Summary of Factors Affecting the Species

Section 4 of the Endangered Species Act (16 U.S.C. 1533) and regulations (50 CFR part 424) promulgated to implement the Act set forth the procedures for adding species to the Federal lists of endangered and threatened species. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1). The threats facing these 12 species are summarized in Table 2.

TABLE 2.—SUMMARY OF THREATS

Species	Feral animal activity				Alien plants	Fire	Human impacts	Insects	Limited numbers*
	Pigs	Goats	Deer	Cattle					
Adenophorus periens	X	.....	.....	.....	X	X	.....	.....	
Bonamia menziesii	X	X	X	X	X	X	.....	.....	
Diellia erecta	X	X	.....	X	X	.....	.....	.....	X[1]
Flueggea neowawraea	X	X	X	X	X	X	.....	X	
Hibiscus brackenridgei	X	X	X	X	X	.....	X	.....	X[1]
Mariscus pennatiformis	.....	.....	.....	.....	.....	.....	.....	.....	X[1]
Neraudia sericea	X	X	.....	.....	X	.....	.....	.....	X[1,2]
Plantago princeps	X	X	.....	.....	X	.....	.....	.....	
Sesbania tomentosa	.....	.....	X	X	X	X	X	.....	
Solanum incompletum	.....	.....	.....	.....	X	.....	.....	.....	X[2,3]
Spermolepis hawaiiensis	.....	.....	X	.....	X	.....	.....	.....	
Vigna o-wahuensis	X	.....	X	.....	X	X	.....	.....	X[1]

* No more than 100 individuals and/or fewer than five populations.
[1] No more than 100 individuals.
[2] Fewer than five populations.
[3] No more than 10 individuals.

These factors and their application to *Adenophorus periens* L.E. Bishop (pendant kihi fern), *Bonamia menziesii* A. Gray (no common name (NCN)), *Diellia erecta* Brack. (NCN), *Flueggea neowawraea* W. Hayden (mehamehame), *Hibiscus brackenridgei* A. Gray (ma'o hau hele), *Mariscus pennatiformis* (Kekunth.) T. Koyama (NCN), *Neraudia sericea* Gaud. (ma'aloa), *Plantago princeps* Cham. and Schlechtend. (ale), *Sesbania tomentosa* Hook. and Arnott ('ohai), *Solanum incompletum* Dunal (thorny popolo), *Spermolepis hawaiiensis* Wolff (NCN), and *Vigna o-wahuensis* Vogel (Oahu vigna) are as follows:

A. The Present or Threatened Destruction, Modification, or Curtailment of Their Habitat or Range

Native vegetation on all of the main Hawaiian Islands has undergone extreme alteration because of past and present land management practices including ranching, deliberate alien animal and plant introductions, and agricultural development (Cuddihy and Stone 1990, Wagner *et al.* 1985). The Northwestern Hawaiian Islands have undergone similar alteration, but to a lesser degree. The primary threats facing the 12 plant species included in this ruling are ongoing and threatened destruction and adverse modification of habitat by feral animals and competition with alien plants.

Eleven of the 12 species in this ruling are variously threatened by feral animals. (See Table 2.) Animals such as pigs, goats, axis deer, black-tailed deer, and cattle were introduced either by the early Hawaiians (pigs) or more recently by European settlers (all ungulate species) for food and/or commercial ranching activities. Over the 200 years following their introduction, their numbers increased and the adverse impacts of feral ungulates on native vegetation have become increasingly apparent. Beyond the direct effect of trampling and grazing native plants, feral ungulates have contributed significantly to the heavy erosion still taking place on most of the main Hawaiian islands.

Pigs (*Sus scrofa*), originally native to Europe, Africa, and Asia, were introduced to Hawaii by the Polynesian ancestors of Hawaiians, and later by western immigrants. The pigs escaped domestication and invaded primarily wet and mesic forests and grasslands of Kauai, Oahu, Molokai, Maui, and Hawaii. They presently threaten the existence of at least eight of the taxa in those habitats. While foraging, pigs root and trample the forest floor, encouraging the establishment of alien plants in the newly disturbed soil. Pigs also disseminate alien plant seeds through their feces and on their bodies, accelerating the spread of alien plants through native forest (Cuddihy and Stone 1990, Stone 1985). On Kauai, three populations each of *Adenophorus periens* and *Flueggea neowawraea* and a single population each of *Plantago princeps* var. *anomala* and *P. p.* var. *longibracteata* have sustained loss of individual plants and/or habitat as a

result of feral pig activities (HHP 1992d18, 1992i2; J. Lau, pers. comm., 1992). The following numbers of populations of the plants on Oahu are threatened by pigs: 4 populations of *Bonamia menziesii*, 15 of *Flueggea neowawraea*, 1 of *Hibiscus brackenridgei* ssp. *mokuleianus*, and 2 populations each of *Plantago princeps* var. *longibracteata* and *P. p.* var. *princeps*. On Molokai, one population each of *Diellia erecta*, *Plantago princeps* var. *laxiflora*, and *Vigna o-wahuensis*, and two populations of *Neraudia sericea* are also threatened by pigs. On East Maui, pigs are destroying the habitat of three populations of *Plantago princeps* var. *laxiflora* (HHP 1992i12; J. Lau, pers. comm., 1992). On the island of Hawaii, feral pigs are a major threat to species at the following locations: in Kahaualea NAR, Olaa Tract, and 2.4 km (1.5 mi) northwest of Puu Kauka, where at least three populations of *Adenophorus periens* occur; and in the regions of Manuka and Honomalino in the South Kona District, where one or more populations of *Diellia erecta* and *Flueggea neowawraea* remain (J. Lau, pers. comm., 1992).

Goats (*Capra hircus*), native to the Middle East and India, were first successfully introduced to the Hawaiian Islands in 1792. Feral goats now occupy a wide variety of habitats from lowland dry forests to montane grasslands on Kauai, Oahu, Molokai, Maui, and Hawaii, where they consume native vegetation, trample roots and seedlings, accelerate erosion, and promote the invasion of alien plants (Stone 1985, van Riper and van Riper 1982). Goats are significantly degrading the habitat of at least five species in this rule. On Kauai, goats contribute to the substantial decline of one population of *Bonamia menziesii*, four populations of *Flueggea neowawraea*, and one population of *Plantago princeps* var. *anomala* (HHP 1992d18, 1992d30, 1992d31, 1992i2; J. Lau, pers. comm., 1992). On Oahu, encroaching urbanization and hunting pressure tend to concentrate the goat population in the dry upper slopes of the Waianae Mountains, where one population of *Bonamia menziesii* and two populations of *Flueggea neowawraea* exist (HHP 1992d15; J. Lau, pers. comm., 1992). The goat population in the Waianae area is apparently increasing, becoming an even greater threat to the rare plants that grow there. On Molokai, two populations of *Diellia erecta* in Halawa Valley and Puu Kolekole and one population of *Neraudia sericea* at Makolelau are presently threatened by goats (HHP 1992c12, 1992c13; J. Lau, pers. comm., 1992). Until a few years ago, feral goats were a major threat to rare plants in Haleakala National Park on East Maui, but because of an active ungulate control program, the goat population was reduced to 100 by 1988. While they are no longer a significant threat, the future ingress and reestablishment of goats are still a possibility (Lloyd Loope, National Park Service (NPS), pers. comm., 1992) and could potentially affect the three populations of *Plantago princeps* var. *laxiflora* found in the park (J. Lau, pers. comm., 1992).

Eight individuals of axis deer (*Axis axis*), introduced to the island of Molokai in 1868, increased to thousands of animals within about 30 years (Tomich 1986). By the turn of the century, the herds so damaged the vegetation of Molokai that professional hunters were hired to control their numbers (Tomich 1986). By then, the native vegetation had suffered irreparable damage from overgrazing by axis deer. They degrade the habitat by trampling and overgrazing vegetation, which removes ground cover and exposes the soil to erosion (J. Lau, pers. comm., 1992). Activity of deer on Molokai has resulted in loss of habitat and/or individuals of at least six of the species. In the absence of a protective fence, axis deer continue to invade the unfenced areas and threaten to trample the plants. On both Molokai and Lanai, the axis deer populations are presently actively managed for recreational hunting by the Hawaii State Department of Land and Natural Resources. Extensive red erosional scars caused by decades of deer activity are evident on Lanai. The habitat of three Lanai populations of *Bonamia menziesii* and one population of *Hibiscus brackenridgei* ssp. *brackenridgei* on that island is negatively affected by axis deer (HHP 1992e1; J. Lau, pers. comm., 1992). Two populations of *Sesbania tomentosa* at Paomai and Mahana on Lanai were last seen in the mid-1950s (HHP 1992j17, 1992j38). Those areas have long supported axis deer, which probably pose the primary threat to those two *Sesbania* populations. Elsewhere on Lanai, one population of *Vigna o-wahuensis* above Lapaiki and one population of *Spermolepis hawaiiensis* at Kapoho are threatened by axis deer (HHP 1992L7, 1992m23). To control deer in what remains of Lanai's dry forests, The Nature Conservancy of Hawaii (TNCH) is presently erecting fenced exclosures to protect populations of rare taxa (including two populations of *Bonamia menziesii*) that occur within Kanepuu Preserve (Heidi Bornhorst, TNCH, and J. Lau, pers. comms., 1992). Although the fence is high enough to normally inhibit entry by deer, human pressure can force the deer to jump over the fence. On Maui, deer damaged plants of two populations of *Hibiscus brackenridgei* ssp. *brackenridgei* at Puu O Kali by stripping the bark and breaking limbs (HHP 1992e1, 1992e8).

Black-tailed deer (*Odocoileus hemionus*) were first introduced to Kauai in 1961 for the purpose of sport hunting and today probably number well over 500 animals. The deer are presently confined to the western side of the island, where they feed on a variety of native and alien plants (van Riper and van Riper 1982). On Kauai, one population of *Bonamia menziesii* in Paaiki Valley and the population of *Flueggea neowawraea* in Paaiki and Mahanaloa valleys are threatened by black-tailed deer (J. Lau, pers. comm., 1992).

Large-scale ranching of cattle (*Bos taurus*) in the Hawaiian Islands began in the middle of the 19th century on the islands of Kauai, Oahu, Maui, and Hawaii. Large ranches, tens of thousands of acres in size, developed on East Maui and Hawaii (Cuddihy and Stone 1990) where most of the State's large ranches still exist today. Degradation of native forests used for ranching activities became evident soon after full-scale ranching began. The negative impact of cattle on Hawaii's ecosystem is similar to that described for goats and deer (Cuddihy and Stone 1990, Stone 1985). Cattle grazing continues in several lowland regions in the northern portion of the Waianae Mountains of Oahu: in Lualualei, where one population of *Bonamia menziesii* exists, and in Kaumoku Gulch, where one population of *Hibiscus brackenridgei* ssp. *mokuleianus* remains (HHP 1992b30; J. Lau, pers. comm., 1992). On Molokai, cattle ranching is slowly recovering from setbacks caused by recent herd reductions enforced in an effort to eliminate bovine tuberculosis from domestic and feral stock. As cattle ranching becomes reestablished on Molokai and the number of cattle increases, the threat to the rare plant species that remain in those ranching areas will also likely increase. One population of *Sesbania tomentosa* located east of Moomomi Preserve grows in a grazing area. On Maui, cattle ranching is the primary agricultural activity on the west and southwest slopes of East Maui and in lowland regions of West Maui. On both East and West Maui, one or more populations of *Bonamia menziesii*, *Diellia erecta*, and *Hibiscus brackenridgei* ssp. *brackenridgei* and the only Maui

population of *Flueggea neowawraea* continue to be threatened by grazing cattle (HHP 1992c13; J. Lau, pers. comm., 1992). The *Flueggea neowawraea* population and one of the *Bonamia menziesii* populations grow within a fenced exclosure. Although probably minimal, the possibility of cattle entering the exclosure poses a potential threat. In the Kamaoa-Puueo and South Point regions of the island of Hawaii, cattle continue to graze in habitat currently occupied by most of the populations of *Sesbania tomentosa* on that island (J. Lau, pers. comm., 1992). In addition, one population of *Hibiscus brackenridgei* ssp. *brackenridgei* and the only known population of *Bonamia menziesii* on that island grow in regions currently used for cattle ranching (J. Lau, pers. comm., 1992).

Habitat disturbance caused by human activities threatens two of the taxa. On West Maui, all-terrain vehicles have driven over *Sesbania tomentosa* plants growing west of Nakalele Point lighthouse (HHP 1992j43). Continued off-road activity threatens to destroy a significant portion of that population. On the island of Hawaii, a dirt road runs through a population of *Sesbania tomentosa* located in the Kamaoa-Puueo region (HHP 1992j50). Off-road activity could damage a significant portion of that population as well. In the Puu Anahulu region on that island, a ranch road was bulldozed close to a plant of *Hibiscus brackenridgei* ssp. *brackenridgei* in 1989 (HHP 1992e6). Continued road development threatens to destroy the only known population of that taxon in the area.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Overutilization is not known to be a factor, but unrestricted collecting for scientific or horticultural purposes would seriously impact the six species whose low numbers make them especially vulnerable to disturbances (*Diellia erecta, Hibiscus brackenridgei, Mariscus pennatiformis, Neraudia sericea, Solanum incompletum,* and *Vigna o-wahuensis*).

C. Disease and predation.

Black twig borer (*Xylosandrus compactus*) has been cited as an immediate threat to all extant populations of *Flueggea neowawraea* (J. Lau, pers. comm., 1992). The black twig borer burrows into the branches and introduces a pathogenic fungus, pruning the host severely and often killing branches or whole plants (Howarth 1985). All known plants of *Flueggea neowawraea* suffer slight to severe defoliation and reduced vigor due to infestations of this alien insect.

Evidence of predation on two of the taxa by ungulates (cattle, deer, goats) is documented on Oahu, Lanai, and Maui. On Oahu, plants of *Bonamia menziesii* at Lualualei grow over native vegetation and drape well below the browse line of cattle, indicating the potential for cattle to feed on the plants (HHP 1992b30). On Lanai, axis deer are known to feed on this species, especially at Kanepuu. Depredation of *Hibiscus brackenridgei* ssp. *brackenridgei* by goats has been observed on Lanai and Maui. Goats are known to eat the branch tips and strip the bark of the plants (HHP 1992e14). While there is no evidence of predation on the other 11 species, none of them are known to be unpalatable to cattle, deer, or goats. Predation is therefore a probable threat to species growing at sites where those animals have been reported (*Diellia erecta, Flueggea neowawraea, Neraudia sericea, Plantago princeps, Sesbania tomentosa, Spermolepis hawaiiensis,* and *Vigna o-wahuensis*) (See Factor A.).

D. The Inadequacy of Existing Regulatory Mechanisms

Of the 12 species in this ruling, a total of 10 have populations located on private land, 2 on County land, 10 on State land, and 7 on Federal land. With the exception of *Neraudia sericea* which is restricted to private land, all of the other species occur in more than one of those ownership categories. The known populations of these species located on Federal lands are inadequate to ensure their long-term survival.

There are no State laws or existing regulatory mechanisms at the present time to protect or prevent further decline of these plants on private or State land. However, Federal listing would automatically invoke listing and associated protection under Hawaii State law.

E. Other Natural or Manmade Factors Affecting Their Continued Existence

Eleven of the 12 species are threatened by competition with one or more alien plant species. (See Table 2). The most significant of these appear to be *Schinus terebinthifolius* (Christmasberry), *Psidium cattleianum* (strawberry guava), *Melinus minutiflora* (molasses grass), *Pennisetum setaceum* (fountain grass), *Clidemia hirta* (Koster's curse), *Lantana camara* (lantana), *Leucaena leucocephala* (koa haole), *Prosopis pallida* (kiawe), *Toona ciliata* (Australian red cedar), *Cenchrus ciliaris* (buffelgrass), *Rubus argutus* (prickly Florida blackberry), *Passiflora mollissima* (banana poka), and *Rubus ellipticus* (Himalayan raspberry).

Many noxious alien plants such as Christmasberry have invaded the dry to mesic lowland regions of the Hawaiian Islands. Introduced to Hawaii before 1911, Christmasberry forms dense thickets that shade out and displace other plants (Cuddihy and Stone 1990). This fast-growing species is found in lowland areas of the major Hawaiian Islands (Smith 1985) and is currently expanding its range. Christmasberry is a major component of the mesic forests of the Waianae and Koolau Mountains of Oahu. For example, over half of the populations of *Bonamia menziesii*, 2 of the populations of *Plantago princeps* var. *princeps*, and all 15 populations of *Flueggea neowawraea* that occur on Oahu are negatively affected by this invasive plant (HHP 1992b18, 1992b22, 1992b31, 1992d3, 1992d15, 1992d16; J. Lau, pers. comm., 1992). In addition, one population of *Diellia erecta* at Halawa Valley on Molokai and one population of *Bonamia menziesii* on Lanai are also affected (J. Lau, pers. comm., 1992). On Maui, Christmasberry is spreading in Iao Valley and on the south slope of East Maui (Haleakala Volcano) and is one of the primary alien plant threats to one or more populations of *Bonamia menziesii, Diellia erecta,* and *Plantago princeps* var. *laxiflora* that exist there (J. Lau, pers. comm., 1992). On the island of Hawaii, Christmasberry continues to threaten at least two populations of *Diellia erecta* and *Flueggea neowawraea* in the regions of Manuka and Honomalino in the South Kona District (HHP 1992d34; J. Lau, pers. comm., 1992).

Strawberry guava, an invasive shrub or small tree native to tropical America, has become naturalized on all of the main Hawaiian islands. Like Christmasberry, strawberry guava is capable of forming dense stands that exclude other plant species (Cuddihy and Stone 1990) and is dispersed mainly by feral pigs and fruit-eating birds (Smith 1985). This alien plant grows primarily in mesic and wet habitats and provides food for several alien animal species, including feral pigs and game birds, which disperse the plant's seeds through the forest (Smith 1985, Wagner *et al.* 1985). Strawberry guava is considered one of the greatest alien plant threats to Hawaii's rain forests and is known to pose a direct threat to at least one population of *Adenophorus periens* and *Bonamia menziesii* on the island of Kauai (HHP 1992a16; J. Lau, pers. comm., 1992). Strawberry guava is a major invader of forests in the Waianae and Koolau Mountains of Oahu, where it often

forms single-species stands. It poses an immediate threat to 6 populations of *Bonamia menziesii*, 10 populations of *Flueggea neowawraea*, and 1 population of *Plantago princeps* var. *princeps* on that island (HHP 1992b5, 1992b14, 1992b18, 1992b21; J. Lau, pers. comm., 1992). On Molokai, the habitat of the Halawa Valley population of *Diellia erecta* is currently being invaded by strawberry guava (HHP 1992c12). On Maui, strawberry guava is beginning to invade the habitat of one population each of *Bonamia menziesii* and *Plantago princeps* var. *laxiflora* on West Maui and at least one population each of *Diellia erecta* and *Plantago princeps* var. *laxiflora* on East Maui (J. Lau, pers. comm., 1992). It is also a major threat to the habitat of *Adenophorus periens* in Kahaualea NAR on the island of Hawaii (HHP 1992a8).

First introduced to the Hawaiian Islands as cattle fodder, molasses grass was later planted for erosion control (Cuddihy and Stone 1990). This alien grass quickly spread to dry and mesic forests previously disturbed by ungulates. Molasses grass produces a dense mat capable of smothering plants (Smith 1985), essentially preventing seedling growth and native plant reproduction (Cuddihy and Stone 1990). Because it burns readily and often grows at the border of forests, molasses grass tends to carry fire into areas with woody native plants (Cuddihy and Stone 1990, Smith 1985). It is able to spread prolifically after a fire and effectively compete with less fire-adapted native plant species, ultimately creating a stand of alien grass where forest once stood. Molasses grass is becoming a major threat to seven of the species on four islands. In the Waianae Mountains of Oahu, three populations of *Bonamia menziesii* and one population of *Plantago princeps* var. *princeps* are immediately threatened by this grass. On Molokai, at least one population each of *Diellia erecta*, *Plantago princeps* var. *laxiflora*, and *Neraudia sericea* and all populations of *Vigna o-wahuensis* on the island are also negatively affected. Molasses grass is quickly spreading throughout the dry regions of West Maui, threatening two populations of *Diellia erecta* there. On Hawaii Island, a population of *Sesbania tomentosa* in Hawaii Volcanoes National Park is located in an area invaded by molasses grass (J. Lau, pers. comm., 1992).

Like molasses grass, fountain grass has greatly increased fire risk in some regions, especially on the dry slopes of Hualalai, Kilauea, and Mauna Loa volcanoes on the island of Hawaii. The effects of fountain grass invasion are similar to those discussed above for molasses grass. Fountain grass threatens the native vegetation on the leeward slopes of Hualalai in a region where at least one population of *Hibiscus brackenridgei* ssp. *brackenridgei* and the only known Hawaii Island populations of *Bonamia menziesii* and *Vigna o-wahuensis* exist (HHP 1992m12; J. Lau, pers. comm., 1992).

Koster's curse, a noxious shrub native to tropical America, was first reported on Oahu in 1941. It had spread through much of the Koolau Mountains by the early 1960s, and spread to the Waianae Mountains by 1970 (Cuddihy and Stone 1990). It poses a serious threat to two populations of *Plantago princeps* var. *longibracteata* in the Koolau Mountains. Koster's curse is widespread in Honouliuli and threatens two populations of *Flueggea neowawraea* that occur in that area of the Waianae Mountains. This prolific alien plant has recently spread to five other islands, including Kauai, where there are at least five small infestations totaling about 40 ha (100 ac) (Cuddihy and Stone 1990); one of these poses an immediate threat to one population of *Adenophorus periens* in Waioli Valley (J. Lau, pers. comm., 1992).

Lantana, a native of the West Indies, became naturalized in dry to mesic forests and shrublands of the Hawaiian Islands before 1871 (Cuddihy and Stone 1990). This shrub often forms thick cover and produces chemicals that inhibit the growth of other plant species (Smith 1985). On Kauai, lantana is a major component of the vegetation at Paaiki Valley and Waimea Canyon and is rapidly becoming established in Pohakuao. It poses a threat to populations of *Flueggea neowawraea* in those areas (HHP 1992d13, 1992d17, 1992d18, 1992d30, 1992d31). One population of *Bonamia menziesii* on Lanai and one on Maui are also negatively affected by this invasive plant (HHP 1992b1, 1992b24).

Koa haole, a shrub naturalized and often dominant in low elevation, dry, disturbed areas on all of the main Hawaiian Islands, threatens to degrade the habitat of six of the species. Koa haole is one of the major weeds found at Polihale on the island of Kauai, growing in the vicinity of a population of *Sesbania tomentosa* (HHP 1992j33; J. Lau, pers. comm., 1992). In the Waianae Mountains of Oahu, koa haole is one of the primary weed threats to half of the *Bonamia menziesii* populations and all of the *Hibiscus brackenridgei* ssp. *mokuleianus* populations found in the area (HHP 1992b12, 1992b19, 1992e23; J. Lau, pers. comm., 1992). Most of the Molokai populations of *Sesbania tomentosa* and one of the Kahoolawe populations of *Vigna o-wahuensis* are also negatively affected by koa haole (HHP 1992j13; J. Lau, pers. comm., 1992). On Maui, koa haole poses a threat to *Hibiscus brackenridgei* ssp. *brackenridgei* and *Spermolepis hawaiiensis* in the Lihau section of the West Maui NAR, and is probably also a threat to *Hibiscus brackenridgei* ssp. *brackenridgei* and *Sesbania tomentosa* elsewhere on West Maui (HHP 1992e3; J. Lau, pers. comm., 1992).

Kiawe, a deciduous thorny tree that can grow to 20 m (65 ft) in height, overshadows other plants and competes with associated vegetation for available water and space. At Polihale, on the island of Kauai, it is the primary alien plant threat to *Sesbania tomentosa*. Two Molokai populations of *Sesbania tomentosa* compete with kiawe for water and space on Moomomi's beaches. The primary alien plant threat to *Vigna o-wahuensis* on the island of Kahoolawe is kiawe (HHP 1992m21).

Australian red cedar is a fast-growing tree that was probably introduced to Hawaii for lumber. It is now found in many of Hawaii's extensively planted lowland forests and has become naturalized in mesic to wet forests (Wagner et al. 1990). Today, this tree is a definite threat to at least one population of *Bonamia menziesii* and most of the plants of *Flueggea neowawraea* in the Waianae Mountains of Oahu (J. Lau, pers. comm., 1992).

Buffelgrass forms continuous cover in dry habitats and provides excellent fuel for fire, from which it recovers quickly. Its seeds are easily dispersed by wind (Smith 1985). Buffelgrass threatens the habitat of two populations of *Sesbania tomentosa* on Molokai, and at least one population of *Vigna o-wahuensis* on Kahoolawe (J. Lau, pers. comm., 1992).

Prickly Florida blackberry was introduced to the Hawaiian Islands in the late 1800s (Haselwood and Motter 1983). The fruits are easily spread by birds to open areas where this plant can form dense, impenetrable thickets (Smith 1985). The Kauai population of *Adenophorus periens*, which is located at the boundary of Hono O Na Pali NAR and Na Pali Coast State Park, is threatened by this noxious weed (J. Lau, pers. comm., 1992).

A vine in the passionflower family, banana poka was introduced to the islands in the 1920s, probably as an ornamental. This vine is extremely detrimental to certain wet forest habitats of Kauai, Maui, and Hawaii. Heavy growth of this vine can cause damage or death to the native trees by overloading branches, causing breakage, or by forming a dense canopy cover, intercepting sunlight and shading out

native plants below. An infestation of this vine is located at Olaa Tract on the island of Hawaii, the site of one population of *Adenophorus periens* (J. Lau, pers. comm., 1992).

A recent introduction to the Hawaiian Islands, yellow Himalayan raspberry is rapidly becoming a major weed pest in wet forests, pastures, and other open areas on the island of Hawaii. It forms large thorny thickets and displaces native plants. Its ability to invade the understory of wet forests enables it to fill a niche presently unoccupied by any other major wet forest weed in Hawaii. This has resulted in an extremely rapid population expansion of this alien plant in recent years. One population of *Adenophorus periens* grows in Olaa Tract within Hawaii Volcanoes National Park in a region where yellow Himalayan raspberry is found in increasing numbers (J. Lau, pers. comm., 1992).

There are a number of other alien plant species that pose a significant threat to populations of the plants in this ruling. *Cynodon dactylon* (Bermuda grass) is a major threat to at least one population of *Sesbania tomentosa* at Moomomi on Molokai. *Senecio mikanioides* (German ivy), a noxious, wind-dispersed vine that forms localized mats of vegetation, is a threat to the only currently known population of *Solanum incompletum* on the island of Hawaii (J. Lau, pers. comm., 1992). This *Solanum incompletum* population is fenced and protected from ungulates; however, it is not protected from German ivy. *Syzygium cumini* (Java plum), a large evergreen tree, is an aggressive invader of undisturbed forests (Smith 1985). It threatens to shade out the only known populations of *Hibiscus brackenridgei* ssp. *mokuleianus* on Oahu (J. Lau, pers. comm., 1992). *Melia azedarach* (pride of India), a fast-growing deciduous tree that forms deep shade, grows in open dry habitats. A major infestation of this large tree in Waimea Canyon on Kauai poses an immediate threat to individuals of *Flueggea neowawraea* (HHP 1992d18, 1992d31).

Fire threatens six plant species growing in dry to mesic grassland, shrubland, and forests on five islands. On Oahu, fire is a potential threat to three populations of *Bonamia menziesii* and two populations of *Flueggea neowawraea* located adjacent to Makua Military Reservation, where current ordnance training exercises could unintentionally ignite fires (HHP 1992b12, 1992b19, 1992b20, 1992d12; J. Lau, pers. comm., 1992). The area has had a history of fires that may have burned through at least one of the populations of *Bonamia menziesii*, and burned to within a few tens of meters of another (HHP 1992b19, 1992b20). Fire is also a threat to the following populations: one population each of *Bonamia menziesii* and *Flueggea neowawraea* on Oahu, one population of *Bonamia menziesii* on Lanai, two populations of *Sesbania tomentosa* and one population of *Vigna o-wahuensis* on Molokai, all known populations of *Vigna o-wahuensis* on Kahoolawe, and at least one population each of *Bonamia menziesii* and *Sesbania tomentosa* on the island of Hawaii (HHP 1992d12; J. Lau, pers. comm., 1992). Of note is a population of *Adenophorus periens* in Kahaualea NAR on the island of Hawaii (HHP 1992a8). Tephra fallout and lava flows from Kilauea Volcano have affected the NAR over the past several years. Wildfires ignited by volcanic activity have destroyed some of the NAR's mesic and wet forests. In addition, tephra fallout and noxious volcanic gasses have caused extensive damage to surrounding native forests. Such catastrophic natural events threaten to destroy the region's largest population of *Adenophorus periens*.

The small number of populations and of individual plants of six of these species (*Diellia erecta, Hibiscus brackenridgei, Mariscus pennatiformis, Neraudia sericea, Solanum incompletum*, and *Vigna o-wahuensis*) increases the potential for extinction from stochastic events. The limited gene pool may depress reproductive vigor, or a single human-caused or natural environmental disturbance could destroy a significant percentage of the individuals or the only known extant population. For example, *Solanum incompletum* is known from a single population on the island of Hawaii and numbers only two individuals. Two of the species have fewer than 5 populations and 6 of the species are estimated to number no more than 100 individuals (See Table 2). All of the species in this ruling except *Sesbania tomentosa* either number fewer than 20 populations or total fewer than 200 individuals. The reproductive system of *Flueggia neowawraea* further exacerbates the problem of limited numbers. Since each tree bears only male or female flowers, they must be cross-pollinated from a different tree (Hayden 1990). If only a few trees flower at the same time, or if flowering trees are too widely separated for pollination by insects, no seed will be set. The survival of small, isolated populations, which probably are already experiencing depressed reproductive vigor, is therefore further threatened.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by these species in determining to make this rule final. Based on this evaluation, this rulemaking will list these 12 species as endangered: *Adenophorus periens, Bonamia menziesii, Diellia erecta, Flueggea neowawraea, Hibiscus brackenridgei, Mariscus pennatiformis, Neraudia sericea, Plantago princeps, Sesbania tomentosa, Solanum incompletum, Spermolepis hawaiiensis*, and *Vigna o-wahuensis*. These 12 species are threatened by one or more of the following: habitat degradation and/or predation by pigs, goats, deer, and cattle; competition for space, light, water, and nutrients by alien plants; habitat loss from fires; human impacts from recreational activities; and insect infestations. Six of the 12 species either number no more than about 100 individuals or are known from fewer than 5 populations. Small population size and limited distribution make all of these species particularly vulnerable to extinction from reduced reproductive vigor or from stochastic events. Because these 12 species are in danger of extinction throughout all or a significant portion of their ranges, they fit the definition of endangered as defined in the Act. Therefore, the determination of endangered status for these 12 species is warranted.

Critical habitat is not being proposed for the 12 species included in this rule, for reasons discussed in the "Critical Habitat" section of this rule.

Critical Habitat

Section 4(a)(3) of the Act, as amended, requires that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time the species are determined to be endangered or threatened. The Service finds that designation of critical habitat is not presently prudent for these species. Such a determination would result in no known benefit to the species. The species have low total populations and/or numbers of individuals and face anthropogenic threats. The publication of precise maps and descriptions of critical habitat in the **Federal Register**, as required for the designation of critical habitat, would increase the degree of threat to these plants from take or vandalism and could contribute to their decline. The listing of these species under the Act publicizes the rarity of the plants and, thus, can make these plants attractive to researchers, curiosity seekers, or collectors of rare plants. All involved parties and the major landowners have

been notified. Protection of the habitat of the species will be addressed through the recovery process and through the section 7 consultation process. Therefore, the Service finds that designation of critical habitat for these species is not prudent at this time, because such designation would increase the degree of threat from vandalism, collecting, or other human activities and because it is unlikely to aid in the conservation of these species.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain activities. Listing can encourage and result in conservation actions by Federal, State, and local agencies, and private organizations and individuals. The Endangered Species Act provides for possible land acquisition and cooperation with the State and requires that recovery plans be developed for listed species. The requirements for Federal agencies and the prohibitions against certain activities involving listed plants are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR Part 402. Section 7(a)(2) requires Federal agencies to insure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service.

Two taxa are located on Federal land in a national wildlife refuge on three Northwestern Hawaiian Islands: *Mariscus pennatiformis* ssp. *bryanii* grows only on the island of Laysan and *Sesbania tomentosa* grows on Necker and Nihoa. The national wildlife refuge is under the jurisdiction of the U.S. Fish and Wildlife Service. On the island of Hawaii, two species (*Adenophorus periens* and *Sesbania tomentosa*) are located in Hawaii Volcanoes National Park. Three populations of *Plantago princeps* var. *laxiflora* are located in Haleakala National Park on Maui. The two national parks on Maui and Hawaii are under the jurisdiction of the National Park Service. Federal laws protect all plants on the national wildlife refuges, national parks, and national historic sites from damage or removal.

Five of the species in this rule occur on land owned or leased by the U.S. Department of Defense. Populations of *Bonamia menziesii* and *Flueggea neowawraea* are located in the mountains of the Lualualei Naval Reservation. No military activities currently affect those populations. On the island of Oahu, *Flueggea neowawraea* is known to grow on lands owned by the U.S. Army in Schofield Barracks Military Reservation. One population of *Hibiscus brackenridgei* ssp. *mokuleianus* may possibly occur at Schofield Barracks as well. Three of the species are located on State-owned land currently leased to the U.S. military: On Oahu, *Bonamia menziesii* and *Flueggea neowawraea* are located within Makua Military Reservation and *Spermolepis hawaiiensis* is located in Diamond Head Reservation, leased by the Department of Defense. Portions of Makua Military Reservation are used by the Army and other branches of the military for ordnance training. The two species are not located inside the impact areas or adjacent buffer zones and, thus, are not directly affected by military activities. The Army has constructed firebreaks on the Makua Military Reservation to minimize damage from unintentional fires that occasionally result from the use of ordnance (Herve Messier, U.S. Army, Ft. Shafter, pers. comm., 1990). Plants of *Spermolepis hawaiiensis* are restricted to the outer slope of Diamond Head and are not in an area affected by military activities. One species, *Vigna o-wahuensis*, grows on the previously federally owned island of Kahoolawe where the Federal government is involved with ordnance disposal. Although periodic detonation of ordnance is required on the island, the populations of this species found there are at sites too remote to sustain impacts from such detonation (J. Lau, pers. comm., 1992). There are no other known Federal activities that occur within the presently known habitat of these 12 plant species.

The Act and implementing regulations at 50 CFR 17.61, 17.62, and 17.63 set forth a series of general prohibitions and exceptions that apply to all endangered plant species. With respect to the 12 plant species subject to this final rule, all prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.61 apply. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export any endangered plant species to/from the United States; transport such species in interstate or foreign commerce in the course of a commercial activity; sell or offer for sale such species in interstate or foreign commerce; remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any area under Federal jurisdiction; or remove, cut, dig up, damage, or destroy any such species on any other area in knowing violation of any State law or regulation or in the course of any violation of a State criminal trespass law. Certain exceptions apply to agents of the Service and State conservation agencies. Section 10 of the Act and 50 CFR 17.62 provide for the issuance of permits under certain circumstances to carry out activities involving endangered plants that are otherwise prohibited by section 9.

It is the policy of the Service (59 FR 34272) to identify to the maximum extent practicable at the time a species is listed those activities that would or would not be likely to constitute a violation of section 9 of the Act. Such information is intended to clarify the potential impacts of a species' listing on proposed and ongoing activities within the species' range. Seven of the twelve species in this rule are known to occur on lands under the jurisdiction of the Fish and Wildlife Service, National Park Service or Department of Defense. Collection, damage or destruction of these species on these lands is prohibited without a Federal endangered species permit. Such activities on non-Federal lands would constitute a violation of section 9 if conducted in knowing violation of Hawaii State law or regulations or in violation of State criminal trespass law (see Hawaii State Law section below).

Two of the listed species are of horticultural interest and both are currently in commercial trade. *Hibiscus brackenridgei* is a very attractive member of a genus known for its immense horticultural popularity and is the official State flower of Hawaii. *Sesbania tomentosa* also is an exceptionally attractive species that grows well in low elevation urban areas. Intrastate commerce (commerce within a State) is not prohibited under the Act. However, interstate and foreign commerce (sale or offering for sale across State or international boundaries), will require a Federal endangered species permit. (Endangered species may be advertised for sale provided the advertisement contains a statement that no sale may be consummated until a permit has been

obtained from the Service.) Other than possible interstate commerce, the Service is not aware of any other activities being conducted by the public that will be affected by this listing and result in a violation of section 9. Questions regarding whether specific activities will constitute a violation of section 9 should be directed to the Field Supervisor of the Service's Pacific Islands Office (see **ADDRESSES** section). Requests for copies of the regulations concerning listed plants and general inquiries regarding prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Ecological Services, Endangered Species Permits, 911 N.E. 11th Avenue, Portland, Oregon 97232–4181 (503/231–2063; FAX 503/231–6243).

Hawaii State Law

Federal listing would automatically invoke listing under Hawaii State law. Hawaii's Endangered Species Act (HRS, Sect. 195D–4(a)) states, "Any species of aquatic life, wildlife, or land plant that has been determined to be an endangered species pursuant to the [Federal] Endangered Species Act shall be deemed to be an endangered species under the provisions of this chapter and any indigenous species of aquatic life, wildlife, or land plant that has been determined to be a threatened species pursuant to the [Federal] Endangered Species Act shall be deemed to be a threatened species under the provisions of this chapter." The State law prohibits cutting, collecting, uprooting, destroying, injuring, or possessing any listed species of plant, or attempting to engage in any such conduct. The State law also encourages conservation by State agencies and triggers other State regulations to protect the species (HRS, sect. 195–4 and 5). The State may enter into agreements with Federal agencies to administer and manage any area required for the conservation, management, enhancement, or protection of endangered species (HRS, Sect. 195D–5(c)).

National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment or Environmental Impact Statement, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of all references cited herein is available upon request from the Pacific Islands Office (see **ADDRESSES** above).

Authors

The authors of this final rule are Joan E. Canfield, Derral R. Herbst, and Adam Asquith of the Pacific Islands Office (see **ADDRESSES** section) (808/541-3441).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Regulation Promulgation

Accordingly, part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, is amended as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. Section 17.12(h) is amended by adding the following, in alphabetical order under the plant families indicated, to the List of Endangered and Threatened Plants:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Family name	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
Flowering Plants							
*	*	*	*	*	*	*	
Spermolepis hawaiiensis.	None	U.S.A.(HI)	Apiaceae	E	559	NA	NA
*	*	*	*	*	*	*	
Diellia erecta	Asplenium-leaved diellia.	U.S.A. (HI)	Aspleniaceae	E	559	NA	NA
*	*	*	*	*	*	*	
Bonamia menziesii	None	U.S.A. (HI)	Convolvulaceae	E	559	NA	NA
*	*	*	*	*	*	*	
Mariscus pennatiformis.	None	U.S.A. (HI)	Cyperaceae	E	559	NA	NA
*	*	*	*	*	*	*	
Flueggea neowawraea.	Mehamehame	U.S.A. (HI)	Euphorbiaceae	E	559	NA	NA
*	*	*	*	*	*	*	
Sesbania tomentosa	'Ohai	U.S.A. (HI)	Fabaceae	E	559	NA	NA
*	*	*	*	*	*	*	
Vigna o-wahuensis	None	U.S.A. (HI)	Fabaceae	E	559	NA	NA
*	*	*	*	*	*	*	
Adenophorus periens	Pendant kihi fern	U.S.A. (HI)	Grammitidaceae	E	559	NA	NA

Species		Historic range	Family name	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
*	*	*	*	*	*		*
Hibiscus brackenridgei.	Ma'o hau hele	U.S.A. (HI)	Malvaceae	E	559	NA	NA
*	*	*	*	*	*		*
Plantago princeps	Laukahi kuahiwi	U.S.A. (HI)	Plantaginaceae	E	559	NA	NA
*	*	*	*	*	*		*
Solanum incompletum.	Popolo ku mai	U.S.A. (HI)	Solanaceae	E	559	NA	NA
*	*	*	*	*	*		*
Neraudia sericea	None	U.S.A. (HI)	Urticaceae	E	559	NA	NA
*	*	*	*	*	*		*

Dated: September 12, 1994.

Mollie H. Beattie,

Director, Fish and Wildlife Service.

[FR Doc. 94–27302; Filed 11–9–94; 8:45 am]

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Thursday
November 10, 1994

Part VIII

Department of Housing and Urban Development

Office of the Assistant Secretary for Public and Indian Housing

24 CFR Parts 905 and 906

Section 5(h) Homeownership Program for Public and Indian Housing; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Public and Indian Housing

24 CFR Parts 905 and 906

[Docket No. R–94–1529; FR–2810–F–03]

RIN 2577–AA90

Section 5(h) Homeownership Program for Public and Indian Housing

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Final rule.

SUMMARY: This final rule makes several changes in the interim rule for the Section 5(h) Homeownership Program for Public and Indian Housing. It responds to the public comments received on the interim rule that was published September 20, 1991, incorporating a few substantive modifications, as well as some clarifications and editorial revisions.

This rule provides separate regulatory codifications of the Section 5(h) Homeownership Program for public housing and for Indian housing, as appropriate for each. For Indian Housing Authorities (IHAs), the rule consists of subpart P of the Consolidated Program Regulations for Indian Housing (24 CFR Part 905); for Public Housing Agencies (PHAs), 24 CFR Part 906. The language of these two versions is identical, excepting only appropriate distinctions in terminology and phrasing, and in references to applicable Federal statutes and regulations on nondiscrimination and civil rights. In general, the Section 5(h) Homeownership Program works the same way for both PHAs and IHAs.

EFFECTIVE DATE: December 12, 1994.

FOR FURTHER INFORMATION CONTACT:

With regard to the PHA version of the rule: C. Wayne Hunter, Senior Homeownership Programs Advisor, Office of Resident Initiatives, Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, S.W., Room 4112, Washington, DC 20410. Telephone number, voice (202) 708–4233, TDD (202) 708–0850. (These are not toll-free numbers.)

With regard to the IHA version of the rule: Dominic Nessi, Director, Office of Native American Programs, Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, S.W., Room B–133, Washington, D.C. 20410. Telephone number, voice, (202) 755–0032, TDD (202) 708–0850. (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act Statement

The information collection requirements contained in this rule were submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501–3520) and have been approved under control number 2577–0201.

Public Comments

The interim rule for the Section 5(h) Homeownership Program for Public and Indian Housing was published September 20, 1991 (56 FR 47852), with an effective date of October 21, 1991.

Comments were received from 10 commenters, including six Public Housing Agencies (PHAs), one national association of PHAs, two legal services organizations, and one private consultant. All comments have been considered, as indicated by the discussion below.

Because the texts of the IHA rule (Part 905, subpart P) and the PHA rule (Part 906) follow a parallel format, with provisions that are substantially the same, the following discussion applies to both, except where noted. In most instances, dual section references are cited, with the section of the IHA regulation followed by the corresponding section of the PHA regulation, e.g., §§ 905.1001/906.1 through 905.1021/906.21. Except where differences in the IHA and PHA versions are indicated, the term "Housing Authority (HA)" is used in the following discussion as a common term of reference to both PHAs and IHAs.

In General: The Flexibility Issue

The extent to which the regulation should allow flexibility for Housing Authorities (HAs) and residents in the design of their local homeownership plans was the subject of greatest concern to the commenters. While a number of comments addressed this issue in the context of specific provisions of the regulation, as discussed below, some urged that the regulation as a whole afford the maximum flexibility permitted by the statute, pointing out that the statutory authorities for this program—Sections 5(h) and 6(c)(4)(D) of the United States Housing Act of 1937 (Act)—are clearly intended to authorize a high degree of local discretion. Some other commenters, however, argued for a more restrictive approach, suggesting that local discretion be curtailed and regulatory requirements be more rigidly detailed.

The changes that are incorporated in the final rule move in the direction of more local flexibility, as explained in the section-by-section analysis below. The overall approach is deliberately brief and simple, limited to a basic regulatory framework of essential standards and procedures. No attempt is made to specify the details of everything that might possibly be required or permitted in all the variety of local situations. Anything not specifically prohibited is permissible, if consistent with the three fundamental criteria stated in §§ 905.1004/906.4.

The Department intends to develop additional handbook materials to provide appropriate guidance and administrative instructions for HAs, residents, and HUD Field Offices concerning the development, processing and implementation of Section 5(h) homeownership plans.

Comments on Specific Sections

Sections 905.1002/906.2 (Applicability)

In paragraph (a) of §§ 905.1002/906.2 (*Applicability*), the final rule adds clarifying language to explain that, except where otherwise indicated by the context, the term "resident" includes Turnkey III homebuyers (and, in the IHA version, Mutual Help homebuyers as well), along with rental tenants of public or Indian housing and Section 8 residents. As suggested by one commenter, language has been added to make it clear that, unless otherwise indicated, references to sale, purchase, conveyance and ownership include the types of transactions and interests that are incident to cooperative ownership, such as cooperative shares, membership, and occupancy agreements.

As another point of clarification, paragraph (b) of this section adds an express declaration of nonretroactivity. This responds to one commenter's question about whether a Section 5(h) homeownership plan approved under the statutory authority, prior to publication of the interim rule, would have to be modified to conform to the requirements of the interim rule. Neither the interim nor final rule imposes any additional requirements for homeownership plans approved before the respective effective dates of each rule.

Sections 905.1003/906.3 (General Authority for Sale)

With regard to §§ 905.1003/906.3 (*General authority for sale*), one commenter observed that HUD Field Offices need instructions on how to release the declaration of trust upon sale of housing units under a HUD-approved

Section 5(h) homeownership plan. The Department agrees that such instructions are needed, and intends to provide them in the forthcoming processing handbook. In the IHA version of this section, the language of the interim rule concerning housing developments that are subject to project debt under the ACC has been deleted, because, as a result of loan forgiveness legislation, there are now no Indian housing developments which are subject to such indebtedness.

Sections 905.1004/906.4 (Fundamental Criteria for HUD Approval)

One commenter urged that resident consultation be added to §§ 905.1004/906.4 (*Fundamental criteria for HUD approval*) as a fourth criterion. The final rule does not adopt this recommendation. The three fundamental criteria that are established by this section merit special emphasis at the outset, because they go to the plan as a whole, serving as touchstones for weighing and linking the discrete requirements of all subsequent sections, including the specific requirements for resident consultation under §§ 905.1005/906.5.

Sections 905.1005/906.5 (Resident Consultation and Involvement)

Sections 905.1005/906.5 (*Resident consultation and involvement*) have been revised to clarify the requirements for resident input at the initial planning stage, in connection with the HA's development of its proposed homeownership plan for submission to HUD. This language responds to the observations of several commenters who aptly pointed out that the interim rule failed to indicate who must be consulted when the development is vacant. The final rule addresses this question by specifying that, where the plan involves an entirely vacant development, the HA must consult with the HA-wide resident organization, if any.

One commenter argued that no resident consultation at all should be required for newly-developed vacant units, but the Department sees no justification for exempting such units from the requirement that pertains to vacant units in general.

As a further provision in the direction of more local flexibility, the final rule deletes the interim rule's requirement for a public hearing, leaving it to the HA and the residents to work out methods of consultation that they find most appropriate and productive. While a public hearing may be advisable for larger undertakings, relatively informal consultation may be more appropriate in other situations.

One commenter mistakenly asserted that "there is no mention of resident involvement prior to implementation". On the contrary, the interim rule strongly emphasized the requirement for resident input during the planning stage, and that requirement remains unchanged in the final rule.

Sections 905.1006/906.6 (Property That May Be Sold)

In paragraph (a) of §§ 905.1006/906.6 (*Property that may be sold*), the final rule corrects the interim rule's unintended indication that only conventional rental units would be eligible for sale under the Section 5(h) Program. The final rule notes that a homeownership plan may provide for converting Turnkey III homes (and, in the case of an IHA, Mutual Help homes as well) to Section 5(h) homeownership, subject to the contractual rights of existing Turnkey III or Mutual Help homebuyers, and an appropriate ACC amendment. An HA might thus afford existing Turnkey III or Mutual Help homebuyers the option to terminate their Turnkey III or Mutual Help homebuyer agreements in favor of Section 5(h) purchase of their present homes, or might make vacant Turnkey III or Mutual Help units available for purchase under the terms of a Section 5(h) plan.

One of the public comments asked whether the regulation applies to newly-constructed housing. The answer is yes, as expressly stated in the interim rule and restated in the final rule at paragraph (a) of §§ 905.1006/906.6. As a clarification, however, the final rule adds a cautionary note regarding a question that may arise in rare situations where the HA wants to consider Section 5(h) sale of units developed as replacement housing for public or Indian housing demolished or disposed of under the regulations implementing section 18 of the Act (for IHAs, subpart M of 24 CFR part 905; for PHAs, 24 CFR part 970). This calls attention to the fact that the demolition-disposition regulations require selection of the initial occupants of such replacement units solely on the basis of the requirements governing rental occupancy (or, in the case of replacement of Indian housing with new Mutual Help units, the homebuyer occupancy requirements of the Mutual Help Program).

Paragraph (b) of these sections amplifies the provisions concerning the physical condition of the property, adding the Section 8 housing quality standards as an alternative measure for cases where no local code exists, along with a cross-reference to the regulatory requirements for accessibility by purchasers with disabilities. One commenter objected to the option for post-conveyance repair. The Department believes that this option should be retained, subject to the kind of protections for the homebuyer that are stipulated, including the final rule's addition of a maximum period of two years for completion of the work needed to satisfy the regulatory standard. As a further clarification, the option for a sound sweat equity arrangement has been added as another example of permissible means for making post-sale improvements.

Sections 905.1007/906.7 (Methods of Sale and Ownership)

In §§ 905.1007/906.7 (*Methods of sale and ownership*), language has been inserted in subparagraph (b)(2)(ii) to make it clear that, in the context of sale of a multifamily building or a group of single-family dwellings via a resident-controlled entity, the prohibition against encumbrances applies only to encumbrances by the resident entity, prior to conveyance of individual units to residents. Thus, it would not be necessary to obtain additional HA consent for mortgages or other encumbrances that are incident to the purchase and financing of individual units, pursuant to the provisions of the homeownership plan and the agreement between the HA and the resident-controlled entity.

Sections 905.1008/906.8 (Purchaser Eligibility and Selection)

Several changes have been made in §§ 905.1008/906.8 (*Purchaser eligibility and selection*). In response to comments, the final rule allows HAs more flexibility concerning how they may wish to formulate the particulars of the eligibility and preference provisions of their homeownership plans. It also incorporates a number of clarifications and editorial revisions, including reordering the paragraphs in a more logical sequence.

In paragraph (b) of these sections, language has been inserted to make it clear that Turnkey III homebuyers (and, in the case of IHAs, Mutual Help homebuyers as well) are within the overall class of public or Indian housing residents who are eligible to purchase under the Section 5(h) Homeownership Program, should they elect to terminate their existing homebuyer agreements in favor of purchase under a Section 5(h) plan. A homeownership plan might thus allow Turnkey III or Mutual Help homebuyers the individual option to

switch over to Section 5(h) purchase of their present homes. As another possibility, a plan might allow such a homebuyer to vacate the present Turnkey III or Mutual Help unit and purchase a vacant unit that is offered for sale under the Section 5(h) plan.

One comment objected to the option to include Section 8 residents. The Department believes that the statute was intended to allow that option, at HA discretion, subject to the minimum residency requirement and the requirements for admission to public or Indian housing.

One commenter objected to the 30-day minimum residency requirement, while another suggested that a minimum one-year period be prescribed. Because Section 5(h) of the Act authorizes an HA to sell to "its tenants", some initial period of public or Indian housing or Section 8 residency is a statutory precondition for purchaser eligibility, and the Department believes that 30 days is the shortest period that satisfies the statute. Each HA is, however, free to include in its homeownership plan a longer minimum period for such tenure.

One objection was expressed about the further option (as now reflected in paragraph (c) of these sections) for the HA to extend eligibility to applicants who are not public or Indian housing or Section 8 residents at the time of application, subject to the preference for existing public and Indian housing residents and the requirement for a minimum period of public or Indian housing residency prior to conveyance. The Department believes that the HA should have this option to extend eligibility to families on its waiting lists, or to other low-income families who may wish to apply, or to both of those categories, if the HA considers that they are needed to make up a sufficient pool of eligible applicants for purchase of the vacant units that will be offered for sale. Such nonresident applicants would also be subject to the requirements for admission to public or Indian housing, including the income limits and Federal preferences for admission, as prescribed by applicable regulations. (Those admission requirements do not, however, apply to applicants who are already residents of public or Indian housing.)

The first sentence of §§ 905.1008(d)/906.8(d) modifies the interim rule's provision restricting eligibility to applicants who have been current in their lease obligations for a period of at least six months. If a family has been in residence for less than six months, the homeownership plan may now allow eligibility on the basis of lease compliance for that lesser period. The final rule also adds language that is appropriate in this context to existing Turnkey III or Mutual Help homebuyers who may elect to terminate their present Turnkey III or Mutual Help homebuyer agreements in favor of purchase under a Section 5(h) homeownership plan.

In response to several comments, the affordability standard of §§ 905.1008(e)/906.8(e) has been modified. In the interim rule, the cost-to-income ratio—based on mortgage principal and interest, plus insurance and real estate taxes (PITI)—was 30 percent, but a percentage figure of 35 percent was allowed with special justification. As aptly pointed out by some commenters, the interim rule did not say what was required to justify the 35 percent exception ratio or how maintenance, utilities and (if applicable) common ownership fees were to be taken into account. The final rule's revised formula now states that the average monthly estimate for the total amount of all of the stated types of homeownership costs—including maintenance and utilities and (if applicable) cooperative, condominium or homeownership association fees, as well as PITI—may not exceed 35 percent of the applicant's adjusted income.

One commenter urged that separate affordability standards be adopted for single-family and multifamily properties, with the latter to take into account cooperative or condominium carrying charges, as well as debt service payments on individual mortgages or share loans. For single-family houses, this commenter recommended that a PITI cost-to-income ratio of more than 35 percent be authorized, citing the fact that, in the general housing market, the current ratio among first-time homebuyers tends to be higher. For multifamily properties, a two-part affordability standard was recommended: (1) the ability of homebuyers to meet their financial obligations on an individual family basis; and (2) the ability of the homebuyers involved to meet their financial obligations on an aggregated basis.

Because the prospective purchasers under the Section 5(h) Program are low-income families, the Department believes that it would be imprudent to allow a cost-income ratio of more than 35 percent for either single-family or multifamily housing. The final rule requires that, if applicable, cooperative, condominium or other homeownership association fees must be taken into account. This is sufficient to address the financial viability of multifamily properties on both an individual and aggregated basis.

Paragraph (g) of these sections simplifies the requirements concerning preference among the various residency-based categories of potentially eligible applicants. This affords each HA broad discretion in defining, on the basis of present residency status, which categories of residents are eligible to apply under the particular homeownership plan, and in establishing preferences among those categories.

For occupied units, the rule continues to require a preference for the existing occupants. If such occupants cannot meet the other eligibility requirements, or do not desire to purchase their units, a further provision of the rule (§§ 905.1010/906.10) prohibits their involuntary displacement to make the units available for sale to other families. Consequently, the question of other residency-based eligibility and preference categories is pertinent only if the homeownership plan contemplates sale of vacant units, or if an existing occupant voluntarily agrees to vacate and relocate, pursuant to §§ 905.1010/906.10.

For vacant units, the only residency-based preference category that is mandated by the final rule consists of residents of the HA's other public or Indian housing units. The HA may limit eligibility to applicants in that category only, in which case the question of further residency-based eligibility or preference categories will not arise.

Alternatively, subject to the preference for families who are already residents of public or Indian housing, the homeownership plan may, at the option of an HA, also allow application for purchase of vacant units by families in either or both of the other residency-based categories permitted under paragraphs (b) and (c) of this section: (1) Section 8 residents, and (2) other low-income families who are neither public or Indian housing nor Section 8 residents at time of application or selection, subject to their completion of the prescribed minimum period of public or Indian housing or Section 8 residence prior to conveyance. For example, families in the second category—families who are not presently public or Indian housing or Section 8 residents—would have to take occupancy of the Section 5(h) unit under a lease-purchase agreement, providing for completion of an initial period of public or Indian housing tenancy (30 days or more, as prescribed by the homeownership plan) prior to conveyance.

As noted in §§ 905.1008(h)/906.8(i), the rule does not preclude any other types of eligibility and preference factors that the HA may wish to establish in its homeownership plan, if consistent with statutory and regulatory requirements. For example, in a situation where vacant units comprising only a portion of an otherwise occupied development are to be offered for sale, the homeownership plan could limit eligibility to the other residents of the same development, or give them preference over the residents of other HA developments. As another example, with reference to families that are not already public or Indian housing or Section 8 residents, the HA would have the option to restrict eligibility to families who are already on the HA's waiting lists for other programs, or to give such waiting list families a preference over other nonresident applicants.

One question was raised about § 906.8(h) of the PHA rule, which mandates a preference for residents who have completed self-sufficiency and job training programs. (There is no parallel provision in the IHA rule). The commenter asked whether a resident who completes such a program in one PHA may qualify for the preference under another PHA's Section 5(h) homeownership plan. That is a matter for local determination. In general, a plan should allow for recognition of sound self-sufficiency and job training programs, regardless of where completed, but the regulation leaves each HA discretion to define the standards for acceptability.

Sections 905.1009/906.9 (Counseling, Training, and Technical Assistance)

One commenter recommended that HUD set minimum standards for counseling, in connection with the requirements of §§ 905.1009/906.9 (*Counseling, training, and technical assistance*).

Detailed regulatory requirements on this subject would be inappropriate for the wide variety of local situations that may be presented by particular Section 5(h) homeownership plans. While the rule establishes basic standards, it is intended to allow due flexibility for HAs to design the kinds of counseling, training and technical assistance activities that are necessary and appropriate for each local situation.

Sections 905.1010/906.10 (Nonpurchasing Residents)

Two commenters recommended that §§ 905.1010/906.10 (*Nonpurchasing residents*) be changed to delete the prohibition against involuntary displacement of nonpurchasing residents. The final rule retains that prohibition. Another commenter urged that assistance under the Uniform Relocation Assistance and Real Property Acquisition Act of 1970 (URA) be extended to residents who relocate voluntarily. The final rule does not adopt that recommendation. The rule mandates that nonpurchasing residents be provided the opportunity to relocate to another suitable and affordable unit, with counseling and advisory services, along with payment of moving expenses. However, it is noted that the rule also provides that a violation of the prohibition against involuntary displacement may trigger a requirement that the HA provide URA relocation assistance.

Some changes have nevertheless been made in this section, largely editorial revisions to clarify the requirements that were reflected in the interim rule. In paragraph (b) of the PHA version only, familial status has been added to the list of nondiscrimination factors. (The IHA version covers nondiscrimination by cross-reference to § 905.115.) In both the IHA and PHA versions, a new paragraph (c) has been added to clarify requirements for temporary relocation of nonpurchasing residents in connection with repair or rehabilitation.

This prohibition applies only against displacement for the specific purpose of making the unit available for Section 5(h) sale to another family. It is not intended to prohibit a permanent move for any other reason required or authorized by the existing occupant's lease (or homebuyer agreement), consistent with applicable statutes and HUD occupancy regulations. For example, where the size of the unit in relation to family size results in overhousing or underhousing, a family may be required to move to another unit of suitable size, pursuant to the HA's assignment policy.

Sections 905.1011/906.11 (Nonroutine Maintenance Reserve)

In §§ 905.1011/906.11 (*Nonroutine maintenance reserve*), the interim rule's references to "maintenance reserve" have been changed to "nonroutine maintenance". This clarifying change was prompted by the suggestion of one commenter that the term "capital improvement and replacement reserve" be used. Two other commenters objected to this section entirely as an undue restriction on local discretion. The Department believes that, considering the flexibility allowed, this reserve requirement is justified by the financial viability test that is implicit in Section 5(h) of the Act, and expressly stated in Sec. 6(c)(4)(D) of the Act.

Sections 905.1014/906.14 (Limitation on Resale Profit)

One commenter pointed out that the last sentence of paragraph (a) of §§ 905.1014/906.14 (*Limitation on resale profit*) seemed to contradict the authorization for limited equity or shared equity arrangements. In the final rule, this sentence has been revised to make it clear that, under a limited or shared equity arrangement, the resale provisions may limit the seller to a portion of the resale profit attributable to appreciation in value. Language to similar effect has also been inserted in the limited equity option under paragraph (c) of this section.

Another commenter urged that the regulation be modified to require or strongly encourage restriction of resale to low-income families only. The final rule does not adopt this recommendation. Although the regulation allows HA discretion to design limited equity arrangements with such resale restrictions, the statute does not authorize the Department to mandate that for all cases.

Sections 905.1016/906.16 (Replacement Housing)

With regard to §§ 905.1016/906.16 (*Replacement housing*), one commenter objected to the inclusion of replacement options other than development of additional public or Indian housing units. As an alternative to such a narrow restriction, the commenter suggested that the options included in the interim rule be given priority in the order listed. Other commenters objected to the options for rehabilitation of vacant public or Indian housing units and for use of Section 8 certificates and vouchers.

The final rule makes no change in the replacement options stated in the interim rule. Those options are statutory, and the Department has no authority to change them by regulation.

Two commenters addressed the question of funding for replacement housing. One recommended that such funding be built into the Section 5(h) Program itself, while another suggested a priority for Major Rehabilitation of Obsolete Projects (MROP) funding. The Department has not adopted those recommendations. Although special funding priorities for replacement housing in connection with Section 5(h) homeownership plans may be established in the contexts of the other HUD programs from which the funding becomes available, no provision for such funding is incorporated in the

Section 5(h) Homeownership Program itself.

One commenter recommended that the regulation set a time limit on the actual provision of replacement housing. In recognition of the different factual situations that may affect the time required to have replacement units ready for occupancy, the Department believes that it would be unwise to set a rigid time limitation by regulation. However, reasonable time frames for this and all other major steps must be established in the timetable to be included in the homeownership plan.

The same commenter argued against the flexibility afforded by the interim rule for the HA to address the community's current priority housing needs, urging that the regulation impose a rigid requirement to replace with units of the same sizes as those sold, regardless of current needs. The Department believes that such rigidity would risk absurd results, in those local situations where identical replacement would be at odds with intelligent prioritization by the HA of the community's current housing needs. One commenter urged that the replacement housing requirements be applied retroactively to plans approved or pending before publication of the interim rule. That point is addressed in paragraph (d) of this section, which, as in the interim rule, reflects the legislative mandate in Section 5(h) of the Act that the replacement housing provisions shall not apply to "applications" (proposed homeownership plans) that were submitted to HUD prior to October 1, 1990—the effective date of the legislation that added the replacement requirement to Section 5(h).

Section 906.17 (Records, Reports and Audits)

In § 906.17 of the PHA rule only (*Records, reports and audits*), language has been added to specify that, as evidence of compliance with fair housing and equal opportunity requirements, the sale and financial records maintained in the files of the PHA must contain information on the racial and ethnic characteristics of purchasers. (No such requirement applies to Indian housing.)

Sections 905.1018/906.18 (Submission and Review of Homeownership Plan)

In paragraph (b) of §§ 905.1018/906.18 (*Submission and review of homeownership plan*), the phrase, "in a format prescribed by HUD," has been inserted. While allowing for due flexibility, HUD will issue administrative instructions and guidelines regarding the format and processing of homeownership plans.

Sections 905.1020/906.20 (Content of Homeownership Plan)

In §§ 905.1020/906.20 (*Content of homeownership plan*), the order of some items has been changed, for a more logical sequence that places administrative items after those that describe the principal provisions of the plan. In the PHA rule only, a provision on affirmative marketing (applicable only if the plan allows purchase of vacant units by families who are not public housing residents or already on the PHA's waiting lists for those programs) has been added to paragraph § 906.20(c). (There is no affirmative marketing requirement for IHAs.)

Sections 905.1021/906.21 (Supporting Documentation)

In paragraph (a) of §§ 905.1021/906.21 (*Supporting documentation*), the final rule explains that the purpose of the property value estimate is merely to assist HUD in determining whether the plan adequately addresses the risks of fraud and abuse and the potential for windfall profit. For this item of supporting documentation, a rough estimate is sufficient, backed by information to support its reasonableness. Submission of a formal appraisal is not required at this point, because the Department does not believe that such an expense is justified for the purpose of HUD review of the proposed homeownership plan. (Note, however, that this is a matter involving only the initial process of preparation and review of the HA's proposal. It is not intended to contradict the rule's separate requirement, in §§ 905.1014(e)/906.14(e), for the appraisal of individual dwelling units at the point of sale, made with the distinct purpose of calculating the amount of resale profit that would be payable to the PHA by the individual purchaser.)

Section 906.21(f) (Nondiscrimination Certification)

In the PHA rule only, language has been inserted in § 906.21(f)—the requirement for the PHA's nondiscrimination certification—to add citations to Title VI of the Civil Rights Act of 1964, Executive Order 11063, and implementing regulations. (The parallel provision of the IHA rule (§ 905.1021(f)) remains unchanged, citing the different nondiscrimination requirements that apply to Indian housing under § 905.115.)

Comments on Other Issues

One commenter observed that the interim rule contained no explicit mention as to whether the Section 5(h) authority can be used in conjunction with other public housing homeownership programs, such as HOPE. Such questions will be addressed in the context of the other programs involved, on a case-by-case basis.

It was also observed that the interim rule contained no explicit mention of whether Section 5(h) can be used in conjunction with the Low-Income Housing Tax Credit (LIHTC). The Department believes that this is not an appropriate matter for rulemaking at this time. The Department has not received any Section 5(h) proposals involving LIHTCs, and no determination has been made as to whether it would be possible to design a feasible proposal of that nature. If warranted by future experience, the Department will consider this question for further rulemaking.

One commenter recommended that the rule incorporate a specific list of all statutes and regulations that must be complied with. A list of all of the multitude of Federal statutes and regulations that might possibly be applicable to all of the variety of possible features of all of the many possible types of homeownership plans would be excessively lengthy for inclusion in a regulation. While cross-references are cited for some especially important Federal requirements—notably, as to fair housing and nondiscrimination—the possible variations among local homeownership plans make it impossible to present a standard matrix of applicable legal requirements. As emphasized in the requirement for the HA to include in its supporting documentation a legal opinion from its own counsel (§§ 905.1021(g)/906.21(g)), it is the responsibility of the HA to ascertain for itself just what requirements of Federal, State, Tribal and local law are pertinent to the facts of each particular homeownership plan. Compliance with State, Tribal and local laws and regulations on real estate transactions is one of the critical points that must be carefully reviewed by the HA's counsel.

Other Matters

Environmental Review

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR Part 50, which implement Section 102(2)(C) of the National Environmental Policy Act of 1969. This finding is available for public

inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk, Office of the General Counsel, Department of Housing and Urban Development, Room 10276, 451 Seventh Street, SW., Washington, DC 20410.

Regulatory Planning and Review

This rule has been reviewed by the Office of Management and Budget (OMB) under Executive Order 12866, *Regulatory Planning and Review*. Any changes to the rule resulting from this review are available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk, room 10276, 451 Seventh Street, S.W., Washington, DC.

Impact on Small Entities

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule before publication and by approving it certifies that this rule does not have a significant economic impact on a substantial number of small entities. The rule creates homeownership opportunities for low-income residents of public and Indian housing with, at most, an incidental effect on small businesses.

Executive Order 12606, the Family

The General Counsel, as the Designated Official under Executive Order 12606, the Family, has determined that this rule would not have potential significant impact on family formation, maintenance, and general well-being and therefore is not subject to review under the order. The rule would have an indirect, though positive, impact on families to the extent that it would provide opportunities for families residing in public and Indian housing to own their own homes.

Executive Order 12612, Federalism

The General Counsel, as the Designated Official under Section 6(a) of Executive Order 12612, Federalism, has determined that this rule would not have substantial, direct effects on States, on their political subdivisions, or on their relationship with the Federal government, or on the distribution of power and responsibilities between them and other levels of government. The rule's major effects would be on individuals; any involvement of States or their political subdivisions is limited to their cooperative efforts in promoting homeownership among public and Indian housing residents.

This rule was listed as Item No. 1695 in the Department's Semiannual Agenda of Regulations published on April 25, 1994, (59 FR 20424, 20472) pursuant to Executive Order 12866 and the Regulatory Flexibility Act.

The Catalog of Federal Domestic Assistance program numbers are 14.146 and 14.147.

List of Subjects

24 CFR Part 905

Aged, Energy conservation, Grant programs—housing and community development, Grant programs—Indians, Indians, Individuals with disabilities, Lead poisoning, Loan programs—housing and community development, Loan programs—Indians, Low and moderate income housing, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 906

Grant programs—housing and community development, Low and moderate income housing, Public housing, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, parts 905 and 906 of title 24 of the Code of Federal Regulations are amended as set forth below.

PART 905—INDIAN HOUSING PROGRAMS

1. The authority citation for 24 CFR part 905 continues to read as follows:

Authority: 25 U.S.C. 450e(b); 42 U.S.C. 1437a, 1437aa, 1437bb, 1437cc, 1437ee, and 3535(d).

2. Subpart P of part 905 is revised to read as follows:

Subpart P—Section 5(h) Homeownership Program

Sec.

905.1001 Purpose.
905.1002 Applicability.
905.1003 General authority for sale.
905.1004 Fundamental criteria for HUD approval.
905.1005 Resident consultation and involvement.
905.1006 Property that may be sold.
905.1007 Methods of sale and ownership.
905.1008 Purchaser eligibility and selection.
905.1009 Counseling, training, and technical assistance.
905.1010 Nonpurchasing residents.
905.1011 Nonroutine maintenance reserve.
905.1012 Purchase prices and financing.
905.1013 Protection against fraud and abuse.
905.1014 Limitation on resale profit.
905.1015 Use of sale proceeds.
905.1016 Replacement housing.
905.1017 Records, reports, and audits.
905.1018 Submission and review of homeownership plan.
905.1019 HUD approval and IHA-HUD implementing agreement.
905.1020 Content of homeownership plan.
905.1021 Supporting documentation.

Subpart P—Section 5(h) Homeownership Program

§ 905.1001 Purpose.

This part codifies the provisions of the Section 5(h) Homeownership Program for Indian housing, as authorized by sections 5(h) and 6(c)(4)(D) of the United States Housing Act of 1937 (Act) and administered by the Department of Housing and Urban Development (HUD).

§ 905.1002 Applicability.

(a) *General applicability.* This subpart applies to low-income housing owned by Indian Housing Authorities (IHAs), subject to Annual Contributions Contracts (ACCs) under the Act. The terms "housing" or "low-income housing", as used in this subpart, refer to the types of properties described in the preceding sentence, except as indicated by the particular context. In reference to housing properties, "development" means the same as "project" (as defined in the Act). Except where otherwise indicated by the context, "resident" means the same as "tenant", as the latter term is used in the Act, including Mutual Help and Turnkey III homebuyers, as well as rental tenants of low-income housing and Section 8 residents, and references to sale, purchase, conveyance and ownership include the types of interests and transactions that are incident to cooperative ownership.

(b) *Nonretroactivity.* In the case of a Section 5(h) homeownership plan that was approved by HUD before the effective date of the interim rule under this subpart (October 21, 1991) no modifications or additional requirements will be imposed under the provisions of the interim or final rule, except for reasonable administrative procedures prescribed by HUD. Similarly, in the case of a plan that was approved under the interim rule, but before the effective date of the final rule (December 12, 1994), no modifications or additional requirements will be imposed under the provisions of the final rule, except for such reasonable administrative procedures.

§ 905.1003 General authority for sale.

An IHA may sell all or a portion of a development to eligible residents, as defined under § 905.1008, for purposes of homeownership, according to a homeownership plan approved by HUD under this subpart. Upon sale in accordance with the HUD-approved homeownership plan, HUD will execute a release of the title restrictions

prescribed by the ACC. Because the property will no longer be subject to the ACC after sale, it will cease to be eligible for further HUD funding for operating subsidies or modernization under the Act upon conveyance of title by the IHA. (That does not preclude any other types of post-sale subsidies that may be available, under other Federal, Tribal, State, or local programs, such as the possibility of available assistance under Section 8 of the Act, in connection with a plan for cooperative homeownership, if authorized by the Section 8 regulations.)

§ 905.1004 Fundamental criteria for HUD approval.

HUD will approve an IHA's homeownership plan if it meets all three of the following criteria:

(a) *Workability.* The plan must be practically workable, with sound potential for long-term success. Financial viability, including the capability of purchasers to meet the financial obligations of homeownership, is a critical requirement.

(b) *Legality.* The plan must be consistent with law, including the requirements of this part and any other applicable Federal, Tribal, State, and local statutes and regulations, and existing contracts. Subject to the other two criteria stated in this section, any provision that is not contrary to those legal requirements may be included in the plan, at the discretion of the IHA, whether or not expressly authorized in this subpart.

(c) *Documentation.* The plan must be clear and complete enough to serve as a working document for implementation, as well as a basis for HUD review.

§ 905.1005 Resident consultation and involvement.

(a) *Resident input.* In developing a proposed homeownership plan, and in carrying out the plan after HUD approval, the IHA shall consult with residents of the development involved, and with any resident organization that represents them, as necessary and appropriate to provide them with information and a reasonable opportunity to make their views and recommendations known to the IHA. If the plan contemplates sale of units in an entirely vacant development, the IHA shall consult with the IHA-wide resident organization, if any. While the Act gives the IHA sole legal authority for final decisions, as to whether or not to submit a proposed homeownership plan and the content of such a proposal, the IHA shall give residents and their resident organizations full opportunity for input in the homeownership planning process, and full consideration of their concerns and opinions.

(b) *Resident initiatives.* Where individual residents, a Resident Management Corporation (RMC), or another form of resident organization may wish to initiate discussion of a possible homeownership plan, the IHA shall negotiate with them in good faith. Joint development and submission of the plan by the IHA and RMC, or other resident organization, is encouraged. In addition, participation of an RMC or other resident organization in the implementation of the plan is encouraged. (Approved by the Office of Management and Budget under control number 2577–0201).

§ 905.1006 Property that may be sold.

(a) *Types of property.* Subject to the workability criterion of § 905.1004(a) (including, for example, consideration of common elements and other characteristics of the property), a homeownership plan may provide for sale of one or more dwellings, along with interests in any common elements, comprising all or a portion of one or more housing developments. A plan may provide for conversion of existing housing to homeownership or for homeownership sale of newly-developed housing. (However, for low-income housing units developed as replacement housing for units demolished or disposed of pursuant to subpart M of this part, that subpart requires that the initial occupants be selected solely on the basis of the requirements governing rental occupancy (or Mutual Help occupancy, if applicable), without reference to any additional homeownership eligibility or selection requirements under this subpart.) Mutual Help or Turnkey III homeownership units may be converted to Section 5(h) homeownership, upon voluntary termination by any existing Mutual Help or Turnkey III homebuyers of their contractual rights and amendment of the ACC, in a form prescribed by HUD.

(b) *Physical condition of property.* The property must meet local code requirements (or, if no local code exists, the housing quality standards established by HUD for the Section 8 Housing Assistance Payments Program for Existing Housing, under 24 CFR part 882) and the requirements for elimination of lead-based paint hazards in HUD-associated housing, under subpart C of 24 CFR part 35. When a prospective purchaser with disabilities requests accessible features, the features must be added in accordance with 24 CFR parts 8 and 9. Further, the property must be in good repair, with the major components having a remaining useful life that is sufficient to justify a reasonable expectation that homeownership will be affordable by the purchasers. This standard must be met as a condition for conveyance of a dwelling to an individual purchaser, unless the terms of sale include measures to assure that the work will be completed within a reasonable time after conveyance, not to exceed two years (*e.g.*, as a part of a mortgage financing package that provides the purchaser with a home improvement loan or pursuant to a sound sweat equity arrangement).

§ 905.1007 Methods of sale and ownership.

(a) *Permissible methods.* Any appropriate method of sale and ownership may be used, such as fee-simple conveyance of single-family dwellings or conversion of multifamily buildings to resident-owned cooperatives or condominiums.

(b) *Direct or indirect sale.* An IHA may sell dwellings to residents directly or (with respect to multifamily buildings or a group of single-family dwellings) through another entity established and governed by, and solely composed of, residents of the IHA's low-income housing, provided that:

(1) The other entity has the necessary legal capacity and practical capability to carry out its responsibilities under the plan.

(2) The respective rights and obligations of the IHA and the other entity will be specified by a written agreement that includes:

(i) Assurances that the other entity will comply with all provisions of the HUD-approved homeownership plan;

(ii) Assurances that the IHA's conveyance of the property to the other entity will be subject to a title restriction providing that the property may be resold or otherwise transferred only by conveyance of individual dwellings to eligible residents, in accordance with the HUD-approved homeownership plan, or by reconveyance to the IHA, and that the property will not be encumbered by the other entity without the written consent of the IHA;

(iii) Protection against fraud or misuse of funds or other property on the part of the other entity, its employees and agents;

(iv) Assurances that the resale proceeds will be used only for the purposes specified by the HUD-approved homeownership plan;

(v) Limitation of the other entity's administrative and overhead costs, and of any compensation or profit that may

be realized by the entity, to amounts that are reasonable in relation to its responsibilities and risks;

(vi) Accountability to the IHA and residents for the recordkeeping, reporting and audit requirements of § 905.1017;

(vii) Assurances that the other entity will administer its responsibilities under the plan in accordance with applicable civil rights statutes and implementing regulations, as described in § 905.115; and

(viii) Adequate legal remedies for the IHA and residents, in the event of the other entity's failure to perform in accordance with the agreement.

§ 905.1008 Purchaser eligibility and selection.

Standards and procedures for eligibility and selection of the initial purchasers of individual dwellings shall be consistent with the following provisions:

(a) *Applications.* Persons who are interested in purchase must submit applications for that specific purpose, and those applications shall be handled separately from applications for other IHA programs. For vacant units, applications shall be dated as received by the IHA and, subject to eligibility and preference factors, selection shall be made in the order of receipt. Application for homeownership shall not affect an applicant's place on any other IHA waiting list.

(b) *Eligibility threshold.* Subject to any additional eligibility and preference standards that are required or permitted under this section, a homeownership plan may provide for the eligibility of residents of low-income housing owned or leased by the seller IHA (including Mutual Help and Turnkey III homebuyers, who may elect to terminate their existing homebuyer agreements in favor of purchase under the Section 5(h) homeownership plan) and residents of other housing who are receiving housing assistance under Section 8 of the Act, under an ACC administered by the seller IHA; provided that the resident has been in lawful occupancy for a minimum period specified in the plan (not less than 30 days prior to conveyance of title to the dwelling to be purchased). For residents of other housing who are receiving housing assistance under Section 8, the minimum occupancy requirement may be satisfied in the unit for which the family is receiving Section 8 assistance or the Indian housing unit. If the family is to meet part or all of the minimum occupancy requirement in the Indian housing unit, the Section 8 assistance must be terminated before the family moves into the Indian housing unit. Indian housing units are ineligible for Section 8 certificate and voucher assistance as long as they remain under the ACC as Indian housing.

(c) *Applicants who do not meet minimum residency requirement for eligibility.* (1) A homeownership plan, at IHA discretion, may also permit eligibility for applicants who do not meet the minimum residency requirement of paragraph (b) of this section (30 days or more, as prescribed by the homeownership plan) at the time of application, provided that their selection is conditioned upon completion of the minimum residency requirement prior to conveyance of title. A plan may thus allow satisfaction of the threshold requirements for eligibility by:

(i) Existing low-income housing or Section 8 residents with less than the minimum period of residency;

(ii) Families who are already on the IHA's waiting lists; and

(iii) Other low-income families who are neither low-income housing nor Section 8 residents at the time of application or selection.

(2) Applicants who are not already low-income housing residents, however, must also satisfy the requirements for admission to such housing.

(d) *Compliance with lease obligations.* Eligibility shall be limited, however, to residents who have been current in all of their lease obligations (in the case of Mutual Help or Turnkey III homebuyers, obligations under their homebuyer agreements) over a period of not less than six months prior to conveyance of title (or, if so provided by the homeownership plan, such lesser period as has elapsed since the beginning of low-income housing or Section 8 tenure), including, but not limited to, payment of rents (or homebuyer's monthly payments) and other charges and reporting of all income that is pertinent to determination of rents (or homebuyer's monthly payments). At the IHA's discretion, the homeownership plan may allow a resident to remedy under-reporting of income, provided that proper reporting of income would not have resulted in ineligibility for admission to low-income housing or for Section 8 assistance, by payment of the resulting underpayment for rent (or homebuyer's monthly payments) prior to conveyance of title to the homeownership dwelling, either in a lump sum or in installments over a reasonable period. Alternatively, the plan may permit payment within a reasonable period after conveyance of title, under an agreement secured by a mortgage on the property.

(e) *Affordability standard.* Eligibility shall be further limited to residents who are capable of assuming the financial obligations of homeownership, under minimum income standards for affordability, taking into account the unavailability of operating subsidies and modernization funds after conveyance of the property by the IHA. A homeownership plan may, however, take account of any available subsidy from other sources (*e.g.*, in connection with a plan for cooperative ownership, assistance under Section 8 of the Act, if available and authorized by the Section 8 regulations). Under this affordability standard, an applicant must meet the following requirements:

(1) On an average monthly estimate, the amount of the applicant's payments for mortgage principal and interest, plus insurance, real estate taxes, utilities, maintenance, and other regularly-recurring homeownership costs (such as condominium, cooperative, or other homeownership association fees) will not exceed the sum of 35 percent of the applicant's adjusted income, as defined in this part.

(2) The applicant can pay any amounts required for closing, such as a downpayment (if any) and closing costs chargeable to the purchaser, in accordance with the homeownership plan.

(f) *Option to restrict eligibility.* A homeownership plan may, at the IHA's discretion, restrict eligibility to one or more residency-based categories (*e.g.*, for occupied units, eligibility may be restricted to the existing residents of the units to be sold; for vacant units, eligibility may be restricted to low-income housing residents only, or to low-income housing residents plus any one or more of the other residency-based categories that may be established under paragraphs (b) and (c) of this section), as may be reasonable in view of the number of units to be offered for sale and the estimated number of eligible applicants in various categories provided that the residency-based preferences mandated by paragraph (g) of this section are observed.

(g) *Residency-based preferences.* For occupied units, a preference shall be given to the existing residents of each of the dwellings to be sold. For vacant units (including units which are voluntarily vacated), a preference shall be given to residents of other low-income housing units owned or leased by the seller IHA (over any other residency-based categories that may be established by a homeownership plan for Section 8 residents or for nonresident applicants).

(h) *Other eligibility or preference standards.* If consistent with the other provisions of this section, a homeownership plan may include any other standards for eligibility or preference, or both, at the discretion of the IHA, that are not contrary to law.

(Approved by the Office of Management and Budget under control number 2577–0201).

§ 905.1009 Counseling, training, and technical assistance

Appropriate counseling shall be provided to prospective and actual purchasers, as necessary for each stage of implementation of the homeownership plan. Particular attention must be given to the terms of purchase and financing, along with the other financial and maintenance responsibilities of homeownership. In addition, where applicable, appropriate training and technical assistance shall be provided to any entity (such as an RMC, other resident organization, or a cooperative or condominium entity) that has responsibilities for carrying out the plan.

§ 905.1010 Nonpurchasing residents

(a) *Nonpurchasing resident's options.* If an existing resident of a dwelling authorized for sale under a homeownership plan is ineligible for purchase, or declines to purchase, the resident shall be given the choice of either relocation to other suitable and affordable housing or continued occupancy of the present dwelling on a rental basis, at a rent no higher than that permitted by the Act. Displacement (permanent, involuntary move), in order to make a dwelling available for sale, is prohibited. In addition to applicable program sanctions, a violation of the displacement prohibition may trigger a requirement to provide relocation assistance in accordance with the Uniform Relocation and Real Property Acquisition Act of 1970 and implementing regulations at 49 CFR part 24. Where continued rental occupancy by a nonpurchasing resident is contemplated after conveyance of the property, the homeownership plan must include provision for any rental subsidy required (*e.g.*, Section 8 assistance, if available and authorized by the Section 8 regulations). As soon as feasible after they can be identified, all nonpurchasing residents shall be given written notice of their options under this section.

(b) *Relocation assistance.* A nonpurchasing resident who chooses to relocate pursuant to this section shall be offered the following relocation assistance:

(1) Advisory services to assure full choices and real opportunities to obtain relocation within a full range of neighborhoods where suitable housing may be found, including timely information, counseling, and explanation of the resident's rights under applicable civil rights statutes and implementing regulations, as specified in § 905.115, and referrals to suitable, safe, sanitary and affordable housing (at a rent no higher than permitted by the Act), which is of the resident's choice, on a nondiscriminatory basis, in accordance with applicable civil rights statutes and implementing regulations, as specified in § 905.115. This requirement will be met if the applicant is offered the opportunity to relocate to another suitable unit in other low-income housing, under any of the housing assistance programs under Section 8 of the Act, or any other Federal, Tribal, State or local program that is comparable, as to standards of housing quality, admission and rent, to the programs under the Act, and provides a term of assistance of at least five years; and

(2) Payment for actual, reasonable moving and related expenses.

(c) *Temporary relocation.* A nonpurchasing resident who must relocate temporarily to permit work to be carried out shall be provided suitable, decent, safe and sanitary housing for the temporary period and reimbursed for all reasonable out-of-pocket expenses incurred in connection with the temporary relocation, including the cost of moving to and from the temporarily occupied housing and any increase in monthly rent and utility costs.

§ 905.1011 Nonroutine maintenance reserve.

(a) *When reserve is required.* A nonroutine maintenance reserve shall be established for all multifamily properties sold under a homeownership plan. For single-family dwellings, such a reserve shall not be required if the availability of the funds needed for nonroutine maintenance is adequately addressed under the affordability standard prescribed by the plan.

(b) *Purpose of reserve.* The purpose of this reserve shall be to provide a source of reserve funds for nonroutine maintenance (including replacement), as necessary to ensure the long-term success of the plan, including protection of the interests of the homeowners and the IHA. The amounts to be set aside, and other terms of this reserve, shall be as necessary and appropriate for the particular homeownership plan, taking into account such factors as prospective needs for nonroutine maintenance, the homeowners' financial resources, and any special factors that may aggravate or mitigate the need for such a reserve.

§ 905.1012 Purchase prices and financing.

(a) *Below-market terms.* To ensure affordability by eligible purchasers, by the standard adopted under § 906.8(e) of this chapter, a homeownership plan may provide for below-market purchase prices or below-market financing, or a combination of the two. Discounted purchase prices may be determined on a unit-by-unit basis, based on the particular purchaser's ability to pay, or may be determined by any other fair and reasonable method (*e.g.*, uniform prices for a group of comparable dwellings, within a range of affordability by a group of potential purchasers).

(b) *Types of financing.* Any type of private or public financing may be used (*e.g.*, conventional, Federal Housing Administration (FHA), Department of Veterans Affairs (VA), Farmers' Home Administration (FmHA), or a Tribal, State or local program). An IHA may finance or assist in financing purchase by any methods it may choose, such as purchase-money mortgages, guarantees of mortgage loans from other lenders, shared equity, or lease-purchase arrangements.

§ 905.1013 Protection against fraud and abuse.

A homeownership plan shall include appropriate protections against any risks of fraud or abuse that are presented by the particular plan, such as collusive purchase for the benefit of nonresidents, extended use of the dwelling by the purchaser as rental property, collusive sale that would circumvent the resale profit limitation of § 905.1014.

§ 905.1014 Limitation on resale profit.

(a) *General.* If a dwelling is sold to the initial purchaser for less than fair market value, the homeownership plan shall provide for appropriate measures to preclude realization by the initial purchaser of windfall profit on resale. "Windfall profit" means all or a portion of the resale proceeds attributable to the purchase price discount (the fair market value at date of purchase from the IHA less the below-market purchase price), as determined by one of the methods described in paragraphs (b) through (d) of this section. Subject to that requirement, however, purchasers should be permitted to retain any resale profit attributable to appreciation in value after purchase (or a portion of such profit under a limited or shared equity arrangement), along with any

portion of the resale profit that is fairly attributable to improvements made by them after purchase.

(b) *Promissory note method.* Where there is potential for a windfall profit because the dwelling unit is sold to the initial purchaser for less than fair market value, without a commensurate limited or shared equity restriction, the initial purchaser shall execute a promissory note, payable to the IHA, along with a mortgage securing the obligation of the note, on the following terms and conditions:

(1) The principal amount of indebtedness shall be the lesser of:

(i) The purchase price discount, as determined by the definition in paragraph (a) of this section and stated in the note as a dollar amount; or

(ii) The net resale profit, in an amount to be determined upon resale by a formula stated in the note. That formula shall define net resale profit as the amount by which the gross resale price exceeds the sum of:

(A) The discounted purchase price;

(B) Reasonable sale costs charged to the initial purchaser upon resale; and

(C) Any increase in the value of the property that is attributable to improvements paid for or performed by the initial purchaser during tenure as a homeowner.

(2) At the option of the IHA, the note may provide for automatic reduction of the principal amount over a specified period of ownership while the property is used as the purchaser's family residence, resulting in total forgiveness of the indebtedness over a period of not less than five years from the date of conveyance, in annual increments of not more than 20 percent. This does not require an IHA's plan to provide for any such reduction at all, or preclude it from specifying terms that are less generous to the purchaser than those stated in the foregoing sentence.

(3) To preclude collusive resale that would circumvent the intent of this section, the IHA shall (by an appropriate form of title restriction) condition the initial purchaser's right to resell upon approval by the IHA, to be based solely on the IHA's determination that the resale price represents fair market value or a lesser amount that will result in payment to the IHA, under the note, of the full amount of the purchase price discount (subject to any accrued reduction, if provided for by the homeownership plan pursuant to paragraph (b)(2) of this section). If so determined, the IHA shall be obligated to approve the resale.

(4) The IHA may, in its sole discretion, agree to subordination of the mortgage that secures the promissory note, in favor of an additional lien granted by the purchaser as security for a loan for home improvements or other purposes approved by the IHA.

(c) *Limited equity method.* As a second option, the requirement of this section may be satisfied by an appropriate form of limited equity arrangement, restricting the amount of net resale profit that may be realized by the seller (the initial purchaser and successive purchasers over a period prescribed by the homeownership plan) to the sum of:

(1) The seller's paid-in equity;

(2) The portion of the resale proceeds attributable to any improvements paid for or performed by the seller during homeownership tenure; and

(3) An allowance for a portion of the property's appreciation in value during homeownership tenure, calculated by a fair and reasonable method specified in the homeownership plan (*e.g.*, according to a price index factor or other measure).

(d) *Third option.* The requirements of this section may be satisfied by any other fair and reasonable arrangement that will accomplish the essential purposes stated in paragraph (a) of this section.

(e) *Appraisal.* Determinations of fair market value under this section shall be made on the basis of appraisal within a reasonable time prior to sale, by an independent appraiser to be selected by the IHA.

§ 905.1015 Use of sale proceeds.

(a) *General authority for use.* Sale proceeds may, after provision for sale and administrative costs that are necessary and reasonable for carrying out the homeownership plan, be retained by the IHA and used for housing assistance to low-income families (as such families are defined under the Act). The term "sale proceeds" includes all payments made by purchasers for credit to the purchase price (*e.g.*, earnest money, downpayments, payments out of the proceeds of mortgage loans, and principal and interest payments under purchase-money mortgages), along with any amounts payable upon resale under § 905.1014, and interest earned on all such receipts. (Residual receipts, as defined in the ACC, shall not be treated as sale proceeds.)

(b) *Permissible uses.* Sale proceeds may be used for any one or more of the following forms of housing assistance for low-income families, at the discretion of the IHA and as stated in the HUD-approved homeownership plan:

(1) In connection with the homeownership plan from which the funds are derived, for purposes that are justified to ensure the success of the plan and to protect the interests of the homeowners, the IHA and any other entity with responsibility for carrying out the plan. Nonexclusive examples include nonroutine maintenance reserves under Sec. 905.1011, a reserve for loans to homeowners to prevent or cure default or for other emergency housing needs; a reserve for any contingent liabilities of the IHA under the homeownership plan (such as IHA guaranty of mortgage loans); and a reserve for IHA repurchase, repair and resale of homes in the event of defaults.

(2) In connection with another HUD-approved homeownership plan under this part, for assistance to purchasers and for reasonable planning and implementation costs.

(3) In connection with a Tribal, State or local homeownership program for low-income families, as described in the homeownership plan, for assistance to purchasers and for reasonable planning and implementation costs. Under such programs, sales proceeds may be used to construct or acquire additional dwellings for sale to low-income families, or to assist such families in purchasing other dwellings from public or private owners.

(4) In connection with the IHA's other low-income housing that remains under ACC, for any purposes authorized for the use of operating funds under the ACC and applicable provisions of the Act and Federal regulations, as included in the HUD-approved operating budgets. Examples include maintenance and modernization, augmentation of operating reserves, protective services, and resident services. Such use shall not result in the reduction of the operating subsidy otherwise payable to the IHA for its other low-income housing.

(5) In connection with any other type of Federal, Tribal, State, or local housing program for low-income families, as described in the homeownership plan.

§ 905.1016 Replacement housing.

(a) *Replacement requirement.* As a condition for transfer of ownership under a HUD-approved homeownership plan, the IHA must obtain a funding commitment, from HUD or another source, for the replacement of each of the dwellings to be sold under the plan. Replacement housing may be provided by one or any combination of the following methods:

(1) Development by the IHA of additional low-income housing under

this part (by new construction or acquisition).

(2) Rehabilitation of vacant low-income housing owned by the IHA.

(3) Use of five-year, tenant-based certificate or voucher assistance under Section 8 of the Act.

(4) If the homeownership plan is submitted by the IHA for sale to residents through an RMC, resident organization or cooperative association which is otherwise eligible to participate under this subpart, acquisition of nonpublicly-owned housing units, which the RMC, resident organization or cooperative association will operate as rental housing, comparable to IHA-owned low-income housing as to term of assistance, housing standards, eligibility, and contribution to rent.

(5) Any other Federal, Tribal, State, or local housing program that is comparable, as to housing standards, eligibility and contribution to rent, to the programs referred to in paragraphs (a)(1) through (a)(3) of this section, and provides a term of assistance of not less than five years.

(b) *Funding commitments.* Although a HUD funding commitment is required if the replacement housing requirement is to be satisfied through any of the HUD programs listed in paragraph (a) of this section, HUD's approval of a Section 5(h) homeownership plan on the expectation that such a funding commitment will be forthcoming shall not constitute a binding obligation to make such a commitment. Where the requirement is to be satisfied under a Tribal, State or local program, or a Federal program not administered by HUD, a funding commitment shall be required from the proper authority.

(c) *Use of sale proceeds to fund replacement housing.* Sale proceeds that are generated under the homeownership plan may be used under some of the replacement housing options under paragraph (a) of this section (*e.g.*, rehabilitation of vacant public housing units, or an eligible local program). Where a homeownership plan provides for sale proceeds to be used for replacement housing, HUD approval of the plan and execution of the IHA–HUD implementing agreement shall satisfy the funding commitment requirement of paragraph (a) of this section, with regard to the amount of replacement housing to be funded out of sale proceeds.

(d) *Consistency with current housing needs.* Replacement housing may differ from the dwellings sold under the homeownership plan, as to unit sizes or family or elderly occupancy, if the IHA determines that such change is consistent with current local housing needs for low-income families.

(e) *Inapplicability to prior plans.* This section shall not apply to homeownership plans that were submitted to HUD under the Section 5(h) Homeownership Program prior to October 1, 1990.

§ 905.1017 Records, reports, and audits.

The IHA shall be responsible for the maintenance of records (including sale and financial records) for all activities incident to implementation of the homeownership plan. Until all planned sales of individual dwellings have been completed, the IHA shall submit to HUD annual sales reports, in a form prescribed by HUD. The receipt, retention, and expenditure of the sale proceeds shall be covered in the regular independent audits of the IHA's housing operations, and any supplementary audits that HUD may find necessary for monitoring. Where another entity is responsible for sale of individual units, pursuant to § 905.1007(b), the IHA must ensure that the entity's responsibilities include proper recordkeeping and accountability to the IHA, sufficient to enable the IHA to monitor compliance with the approved homeownership plan, to prepare its reports to HUD, and to meet its audit responsibilities. All books and records shall be subject to inspection and audit by HUD and the General Accounting Office (GAO).

(Approved by the Office of Management and Budget under control number 2577–0201)

§ 905.1018 Submission and review of homeownership plan.

Whether to develop and submit a proposed homeownership plan is a matter within the discretion of each IHA. An IHA may initiate a proposal at any time, according to the following procedures:

(a) *Preliminary consultation with HUD staff.* Before submission of a proposed plan, the IHA shall consult informally with the appropriate HUD Field Office to assess feasibility and the particulars to be addressed by the plan.

(b) *Submission to HUD.* The IHA shall submit the proposed plan, together with supporting documentation, in a format prescribed by HUD, to the appropriate HUD Field Office.

(c) *Conditional approval.* Conditional approval may be given, at HUD discretion, where HUD determines that to be justified. For example, conditional HUD approval might be a necessary precondition for the IHA to obtain the funding commitments required to satisfy the requirements for final HUD approval of a complete homeownership plan. Where conditional approval is granted, HUD will specify the conditions in writing.

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§ 905.1019 HUD approval and IHA–HUD implementing agreement.

Upon HUD notification to the IHA that the homeownership plan is approvable (in final form that satisfies all applicable requirements of this part), the IHA and HUD will execute a written implementing agreement, in a form prescribed by HUD, to evidence HUD approval and authorization for implementation. The plan itself, as approved by HUD, shall be incorporated in the implementing agreement. Any of the items of supporting documentation may also be incorporated, if agreeable to the IHA and HUD. The IHA shall be obligated to carry out the approved homeownership plan and other provisions of the implementing agreement without modification, except with written approval by HUD.

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§ 905.1020 Content of homeownership plan.

The homeownership plan must address the following matters, as applicable to the particular factual situation:

(a) *Property description.* A description of the property, including identification of the development and the specific dwellings to be sold.

(b) *Repair or rehabilitation.* If applicable, a plan for any repair or rehabilitation required under § 905.1006, based on the assessment of the physical condition of the property that is included in the supporting documentation.

(c) *Purchaser eligibility and selection.* The standards and procedures to be used for homeownership applications and the eligibility and selection of purchasers, consistent with the requirements of § 905.1008.

(d) *Sale and financing.* Terms and conditions of sale and financing (see, particularly, §§ 905.1011 through 905.1014).

(e) *Future consultation with residents.* A plan for consultation with residents during the implementation stage (See § 905.1005). If appropriate, this may be combined with the plan for counseling.

(f) *Counseling.* Counseling, training, and technical assistance to be provided in accordance with § 905.1009.

(g) *Sale via other entity.* If the plan contemplates sale to residents via an entity other than the IHA, a description of that entity's responsibilities and information demonstrating that the

requirements of § 905.1007 have been met or will be met in a timely fashion.

(h) *Nonpurchasing residents.* If applicable, a plan for nonpurchasing residents, in accordance with § 905.1010.

(i) *Sale proceeds.* An estimate of the sale proceeds and an explanation of how they will be used, in accordance with § 905.1015.

(j) *Replacement housing.* A replacement housing plan, in accordance with § 905.1016.

(k) *Administration.* An administrative plan, including estimated staffing requirements.

(l) *Recordkeeping, accounting and reporting.* A description of the recordkeeping, accounting and reporting procedures to be used, including those required by § 905.1017.

(m) *Budget.* A budget estimate, showing the costs of implementing the plan, and the sources of the funds that will be used.

(n) *Timetable.* An estimated timetable for the major steps required to carry out the plan.

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§ 905.1021 Supporting documentation.

The following supporting documentation shall be submitted to HUD with the proposed homeownership plan, as appropriate for the particular plan:

(a) *Estimate of value.* An estimate of the fair market value of the property, including the range of fair market values of individual dwellings, with information to support the reasonableness of the estimate. (The purpose of this information is merely to assist HUD in determining whether, taking into consideration the estimated fair market value of the property, the plan adequately addresses any risks of fraud and abuse, pursuant to § 905.1013, and windfall profit on resale, pursuant to § 905.1014. A formal appraisal need not be submitted with the proposed homeownership plan.)

(b) *Physical assessment.* An assessment of the physical condition of the property, based on the standards specified in § 905.1006.

(c) *Workability.* A statement demonstrating the practical workability of the plan, based on analysis of data on such elements as purchase prices, costs of repair or rehabilitation, homeownership costs, family incomes, availability of financing, and the extent to which there are eligible residents who are expected to be interested in purchase. (See § 905.1004(a).)

(d) *IHA commitment and capability.* Information to substantiate the commitment and capability of the IHA and any other entity with substantial responsibilities for implementing the plan.

(e) *Resident planning input.* A description of resident consultation activities carried out pursuant to § 905.1005 before submission of the plan, with a summary of the views and recommendations of residents and copies of any written comments that may have been submitted to the IHA by individual residents and resident organizations, and any other individuals and organizations.

(f) *Nondiscrimination certification.* The IHA's certification that it will administer the plan on a nondiscriminatory basis, in accordance with applicable civil rights laws and implementing regulations, as described in § 905.115 of this part, and will assure compliance with those requirements by any other entity that may assume substantial responsibilities for implementing the plan.

(g) *Legal opinion.* An opinion by legal counsel to the IHA, stating that counsel has reviewed the plan and finds it consistent with all applicable requirements of Federal, Tribal, State, and local law, including regulations as well as statutes. In addition, counsel must identify the major legal requirements that remain to be met in implementing the plan, if approved by HUD as submitted, indicating an opinion about whether those requirements can be met without special problems that may disrupt the timetable or other features contained in the plan.

(h) *Board resolution.* A resolution by the IHA's Board of Commissioners, evidencing its approval of the plan.

(i) *Other information.* Any other information that may reasonably be required for HUD review of the plan. Except for the IHA–HUD implementing agreement under § 905.1019, HUD approval is not required for documents to be prepared and used by the IHA in implementing the plan (such as contracts, applications, deeds, mortgages, promissory notes, and cooperative or condominium documents), if their essential terms and conditions are described in the plan. Consequently, those documents need not be submitted as part of the plan or the supporting documentation.

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3. Part 906, consisting of §§ 906.1 through 906.21, is revised to read as follows:

PART 906—SECTION 5(h) HOMEOWNERSHIP PROGRAM

Sec.

906.1 Purpose.
906.2 Applicability.
906.3 General authority for sale.
906.4 Fundamental criteria for HUD approval.
906.5 Resident consultation and involvement.
906.6 Property that may be sold.
906.7 Methods of sale and ownership.
906.8 Purchaser eligibility and selection.
906.9 Counseling, training, and technical assistance.
906.10 Nonpurchasing residents.
906.11 Nonroutine maintenance reserve.
906.12 Purchase prices and financing.
906.13 Protection against fraud and abuse.
906.14 Limitation on resale profit.
906.15 Use of sale proceeds.
906.16 Replacement housing.
906.17 Records, reports, and audits.
906.18 Submission and review of homeownership plan.
906.19 HUD approval and PHA–HUD implementing agreement.
906.20 Content of homeownership plan.
906.21 Supporting documentation.

Authority: 42 U.S.C. 1437c, 1437d and 3535(d).

§ 906.1 Purpose.

This part codifies the provisions of the Section 5(h) Homeownership Program for public housing, as authorized by sections 5(h) and 6(c)(4)(D) of the United States Housing Act of 1937 (Act) and administered by the Department of Housing and Urban Development (HUD).

§ 906.2 Applicability.

(a) *General applicability.* This part applies to public housing owned by public housing agencies (PHAs) (excluding Indian Housing Authorities (IHAs)) subject to Annual Contributions Contracts (ACCs) under the Act. In reference to housing properties, "development" means the same as "project" (as defined in the Act). Except where otherwise indicated by the context, "resident" means the same as "tenant", as the latter term is used in the Act, including Turnkey III homebuyers, if applicable, as well as rental tenants of public housing and Section 8 residents, and references to sale, purchase, conveyance and ownership include the types of interests and transactions that are incident to cooperative ownership.

(b) *Nonretroactivity.* In the case of a Section 5(h) homeownership plan that was approved by HUD prior to the effective date of the interim rule under this part (October 21, 1991), no modifications or additional requirements will be imposed under the provisions of the interim or final rule,

except for reasonable administrative procedures prescribed by HUD. Similarly, in the case of a plan that was approved under the interim rule, before the effective date of the final rule (December 12, 1994), no modifications or additional requirements will be imposed under the provisions of the final rule, except for such reasonable administrative procedures.

§ 906.3 General authority for sale.

A PHA may sell all or a portion of a public housing development to eligible residents, as defined under § 906.8, for purposes of homeownership, according to a homeownership plan approved by HUD under this part. If the development is subject to indebtedness under the ACC, HUD will continue to make any debt service contributions for which it is obligated under the ACC, and the property sold will not be subject to the encumbrance of that indebtedness. (In the case of a development with financing restrictions (such as a bond-financed development), however, sale is subject to the terms and conditions of the applicable restrictions.) Upon sale in accordance with the HUD-approved homeownership plan, HUD will execute a release of the title restrictions prescribed by the ACC. Because the property will no longer be subject to the ACC after sale, it will cease to be eligible for further HUD funding for public housing operating subsidies or modernization under the Act upon conveyance of title by the PHA. (That does not preclude any other types of post-sale subsidies that may be available, under other Federal, State, or local programs, such as the possibility of available assistance under Section 8 of the Act, in connection with a plan for cooperative homeownership, if authorized by the Section 8 regulations.)

§ 906.4 Fundamental criteria for HUD approval.

HUD will approve a PHA's homeownership plan if it meets all three of the following criteria:

(a) *Workability.* The plan must be practically workable, with sound potential for long-term success. Financial viability, including the capability of purchasers to meet the financial obligations of homeownership, is a critical requirement.

(b) *Legality.* The plan must be consistent with law, including the requirements of this part and any other applicable Federal, State, and local statutes and regulations, and existing contracts. Subject to the other two criteria stated in this section, any provision that is not contrary to those legal requirements may be included in the plan, at the discretion of the PHA, whether or not expressly authorized in this part.

(c) *Documentation.* The plan must be clear and complete enough to serve as a working document for implementation, as well as a basis for HUD review.

§ 906.5 Resident consultation and involvement.

(a) *Resident input.* In developing a proposed homeownership plan, and in carrying out the plan after HUD approval, the PHA shall consult with residents of the development involved, and with any resident organization that represents them, as necessary and appropriate to provide them with information and a reasonable opportunity to make their views and recommendations known to the PHA. If the plan contemplates sale of units in an entirely vacant development, the PHA shall consult with the PHA-wide resident organization, if any. While the Act gives the PHA sole legal authority for final decisions, as to whether or not to submit a proposed homeownership plan and the content of such a proposal, the PHA shall give residents and their resident organizations full opportunity for input in the homeownership planning process, and full consideration of their concerns and opinions.

(b) *Resident initiatives.* Where individual residents, a Resident Management Corporation (RMC), or another form of resident organization may wish to initiate discussion of a possible homeownership plan, the PHA shall negotiate with them in good faith. Joint development and submission of the plan by the PHA and RMC, or other resident organization, is encouraged. In addition, participation of an RMC or other resident organization in the implementation of the plan is encouraged.

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§ 906.6 Property that may be sold.

(a) *Types of property.* Subject to the workability criterion of § 906.4(a) (including, for example, consideration of common elements and other characteristics of the property), a homeownership plan may provide for sale of one or more dwellings, along with interests in any common elements, comprising all or a portion of one or more public housing developments. A plan may provide for conversion of existing public housing to homeownership or for homeownership sale of newly-developed public housing. (However, for public housing units developed as replacement housing for units demolished or disposed of pursuant to 24 CFR part 970, that part requires that the initial occupants be selected solely on the basis of the requirements governing rental occupancy, without reference to any additional homeownership eligibility or selection requirements under this part.) Turnkey III homeownership units may be converted to Section 5(h) homeownership, upon voluntary termination by any existing Turnkey III homebuyers of their contractual rights and amendment of the ACC, in a form prescribed by HUD.

(b) *Physical condition of property.* The property must meet local code requirements (or, if no local code exists, the housing quality standards established by HUD for the Section 8 Housing Assistance Payments Program for Existing Housing, under 24 CFR part 882) and the requirements for elimination of lead-based paint hazards in HUD-associated housing, under subpart C of 24 CFR part 35. When a prospective purchaser with disabilities requests accessible features, the features must be added in accordance with 24 CFR parts 8 and 9. Further, the property must be in good repair, with the major components having a remaining useful life that is sufficient to justify a reasonable expectation that homeownership will be affordable by the purchasers. These standards must be met as a condition for conveyance of a dwelling to an individual purchaser, unless the terms of sale include measures to assure that the work will be completed within a reasonable time after conveyance, not to exceed two years (*e.g.*, as a part of a mortgage financing package that provides the purchaser with a home improvement loan or pursuant to a sound sweat equity arrangement).

§ 906.7 Methods of sale and ownership.

(a) *Permissible methods.* Any appropriate method of sale and ownership may be used, such as fee-simple conveyance of single-family dwellings or conversion of multifamily buildings to resident-owned cooperatives or condominiums.

(b) *Direct or indirect sale.* A PHA may sell dwellings to residents directly or (with respect to multifamily buildings or a group of single-family dwellings) through another entity established and governed by, and solely composed of, residents of the PHA's public housing, provided that:

(1) The other entity has the necessary legal capacity and practical capability to carry out its responsibilities under the plan; and

(2) The respective rights and obligations of the PHA and the other entity will be specified by a written agreement that includes:

(i) Assurances that the other entity will comply with all provisions of the HUD-approved homeownership plan;

(ii) Assurances that the PHA's conveyance of the property to the other entity will be subject to a title restriction providing that the property may be resold or otherwise transferred only by conveyance of individual dwellings to eligible residents, in accordance with the HUD-approved homeownership plan, or by reconveyance to the PHA, and that the property will not be encumbered by the other entity without the written consent of the PHA;

(iii) Protection against fraud or misuse of funds or other property on the part of the other entity, its employees, and agents;

(iv) Assurances that the resale proceeds will be used only for the purposes specified by the HUD-approved homeownership plan;

(v) Limitation of the other entity's administrative and overhead costs, and of any compensation or profit that may be realized by the entity, to amounts that are reasonable in relation to its responsibilities and risks;

(vi) Accountability to the PHA and residents for the recordkeeping, reporting and audit requirements of § 906.17;

(vii) Assurances that the other entity will administer its responsibilities under the plan on a nondiscriminatory basis, in accordance with the Fair Housing Act and implementing regulations; and

(viii) Adequate legal remedies for the PHA and residents, in the event of the other entity's failure to perform in accordance with the agreement.

§ 906.8 Purchaser eligibility and selection.

Standards and procedures for eligibility and selection of the initial purchasers of individual dwellings shall be consistent with the following provisions:

(a) *Applications.* Persons who are interested in purchase must submit applications for that specific purpose, and those applications shall be handled separately from applications for other PHA programs. For vacant units, applications shall be dated as received by the PHA and, subject to eligibility and preference factors, selection shall be made in the order of receipt. Application for homeownership shall not affect an applicant's place on any other PHA waiting list.

(b) *Eligibility threshold.* Subject to any additional eligibility and preference standards that are required or permitted under this section, a homeownership plan may provide for the eligibility of residents of public housing owned or leased by the seller PHA (including Turnkey III homebuyers who may elect to terminate their existing Turnkey III homebuyer agreements in favor of purchase under the Section 5(h) homeownership plan) and residents of other housing who are receiving housing assistance under Section 8 of the Act, under an ACC administered by the seller PHA, provided that the resident has been in lawful occupancy for a minimum period specified in the plan (not less than 30 days prior to conveyance of title to the dwelling to be purchased). For residents of other housing who are receiving housing assistance under Section 8, the minimum occupancy requirement may be satisfied in the unit for which the family is receiving Section 8 assistance or the public housing unit. If the family is to meet part or all of the minimum occupancy requirement in the public housing unit, the Section 8 assistance must be terminated before the family moves into the public housing unit. Public housing units are ineligible for Section 8 certificate and voucher assistance as long as they remain under ACC as public housing.

(c) *Applicants who do not meet minimum residency requirement for eligibility.* (1) A homeownership plan, at PHA discretion, may also permit eligibility for applicants who do not meet the minimum residency requirement of paragraph (b) of this section (30 days or more, as prescribed by the homeownership plan) at the time of application, provided that their selection is conditioned upon completion of the minimum residency requirement prior to conveyance of title. (A plan may thus allow satisfaction of the threshold requirements for eligibility by:

(i) Existing public housing or Section 8 residents with less than the minimum period of residency;

(ii) Families who are already on the PHA's waiting lists; and

(iii) Other low-income families who are neither public housing nor Section 8 residents at the time of application or selection.)

(2) Applicants who are not already public housing residents, however, must also satisfy the requirements for admission to such housing.

(d) *Compliance with lease obligations.* Eligibility shall be limited to residents who have been current in all of their lease obligations (in the case of Turnkey III homebuyers, obligations under their Turnkey III homebuyer agreements) over a period of not less than six months prior to conveyance of title (or, if so provided by the homeownership plan, such lesser period as has elapsed since the beginning of public housing or Section 8 tenure), including, but not limited to, payment of rents (or homebuyer's monthly payments) and other charges, and reporting of all income that is pertinent to determination of rental charges (or homebuyer's monthly payments). At the PHA's discretion, the homeownership plan may allow a resident to remedy under-reporting of income, provided that proper reporting of income would not have resulted in ineligibility for admission to public housing or for Section 8 assistance, by payment of the resulting underpayment for rent (or homebuyer's monthly payments) prior to conveyance of title to the homeownership dwelling, either in a lump-sum or in installments over a reasonable period. Alternatively, the plan may permit payment within a reasonable period after conveyance of title, under an agreement secured by a mortgage on the property.

(e) *Affordability standard.* Eligibility shall be limited to residents who are capable of assuming the financial obligations of homeownership, under minimum income standards for affordability, taking into account the unavailability of public housing operating subsidies and modernization funds after conveyance of the property by the PHA. A homeownership plan may, however, take account of any available subsidy from other sources (*e.g.*, in connection with a plan for cooperative ownership, assistance under Section 8 of the Act, if available and authorized by the Section 8 regulations). Under this affordability standard, an applicant must meet the following requirements:

(1) On an average monthly estimate, the amount of the applicant's payments for mortgage principal and interest, plus insurance, real estate taxes, utilities, maintenance and other regularly recurring homeownership costs (such as condominium, cooperative, or other homeownership association fees) will not exceed the sum of:

(i) 35 percent of the applicant's adjusted income as defined in 24 CFR Part 913; and

(ii) Any subsidy that will be available for such payments.

(2) The applicant can pay any amounts required for closing, such as a downpayment (if any) and closing costs chargeable to the purchaser, in accordance with the homeownership plan.

(f) *Option to restrict eligibility.* A homeownership plan may, at the PHA's discretion, restrict eligibility to one or more residency-based categories (*e.g.*, for occupied units, eligibility may be restricted to the existing residents of the units to be sold; for vacant units, eligibility may be restricted to public housing residents only, or to public housing residents plus any one or more of the other residency-based categories that may be established under paragraphs (b) and (c) of this section), as may be reasonable in view of the number of units to be offered for sale and the estimated number of eligible applicants in various categories, provided that the residency-based preference requirements mandated by paragraph (g) of this section are observed.

(g) *Residency-based preferences.* For occupied units, a preference shall be given to the existing residents of each of the dwellings to be sold. For vacant units (including units which are voluntarily vacated), a preference shall be given to residents of other public housing units owned or leased by the seller PHA (over any other residency-based categories that may be established by the homeownership plan for Section 8 residents and any categories of nonresident applicants).

(h) *Self sufficiency preference.* For vacant units, a further preference shall be given to those applicants who have completed self-sufficiency and job training programs, as identified in the homeownership plan, or who meet equivalent standards of economic self-sufficiency, such as actual employment experience, as specified in the homeownership plan.

(i) *Other eligibility or preference standards.* If consistent with the other provisions of this section, a homeownership plan may include any other standards for eligibility or preference, or both, at the discretion of the PHA, that are not contrary to law.

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§ 906.9 Counseling, training, and technical assistance.

Appropriate counseling shall be provided to prospective and actual purchasers, as necessary for each stage of implementation of the homeownership plan. Particular attention must be given to the terms of purchase and financing, along with the other financial and maintenance responsibilities of homeownership. In addition, where applicable, appropriate training and technical assistance shall be provided to any entity (such as an RMC, other resident organization, or a cooperative or condominium entity) that has responsibilities for carrying out the plan.

§ 906.10 Nonpurchasing residents.

(a) *Nonpurchasing resident's options.* If an existing resident of a dwelling authorized for sale under a homeownership plan is ineligible for purchase, or declines to purchase, the resident shall be given the choice of either relocation to other suitable and affordable housing or continued occupancy of the present dwelling on a rental basis, at a rent no higher than that permitted by the Act. Displacement (permanent, involuntary move) in order to make a dwelling available for sale, is prohibited. In addition to applicable program sanctions, a violation of the displacement prohibition may trigger a requirement to provide relocation assistance in accordance with the Uniform Relocation Assistance and Real Property Acquisition Act of 1970 and implementing regulations at 49 CFR Part 24. Where continued rental occupancy by a nonpurchasing resident is contemplated after conversion of the property to cooperative or condominium ownership, the homeownership plan must include provision for any rental subsidy required (*e.g.*, Section 8 assistance, if available and authorized by the Section 8 regulations). As soon as feasible after they can be identified, all nonpurchasing residents shall be given written notice of their options under this section.

(b) *Relocation assistance.* A nonpurchasing resident who chooses to relocate pursuant to this section shall be offered the following relocation assistance:

(1) Advisory services to assure full choices and real opportunities to obtain relocation within a full range of neighborhoods where suitable housing may be found, in and outside areas of minority concentration, including timely information, counseling, explanation of the resident's rights under the Fair Housing Act, and referrals to suitable, safe, sanitary and affordable housing (at a rent no higher than permitted by the Act), which is of the resident's choice, on a nondiscriminatory basis, without regard to race, color, religion (creed), national origin, handicap, age, sex, or familial status, in compliance with applicable Federal and State law. This requirement will be met if the resident is offered the opportunity to relocate to other suitable housing under the Public Housing Program, any of the housing assistance programs under Section 8 of the Act, or any other Federal, State or local program that is comparable, as to standards of housing quality, admission and rent, to the programs under the Act, and provides a term of assistance of at least five years; and

(2) Payment for actual, reasonable moving and related expenses.

(c) *Temporary relocation.* A nonpurchasing resident who must relocate temporarily to permit work to be carried out shall be provided suitable, decent, safe and sanitary housing for the temporary period and reimbursed for all reasonable out-of-pocket expenses incurred in connection with the temporary relocation, including the cost of moving to and from the temporarily occupied housing and any increase in monthly rent and utility costs.

§ 906.11 Nonroutine maintenance reserve.

(a) *When reserve is required.* A nonroutine maintenance reserve shall be established for all multifamily properties sold under a homeownership plan. For single-family dwellings, such a reserve shall not be required if the availability of the funds needed for nonroutine maintenance is adequately addressed under the affordability standard prescribed by the plan.

(b) *Purpose of reserve.* The purpose of this reserve shall be to provide a source of reserve funds for nonroutine maintenance (including replacement), as necessary to ensure the long-term success of the plan, including protection of the interests of the homeowners and the PHA. The amounts to be set aside, and other terms of this reserve, shall be as necessary and appropriate for the particular homeownership plan, taking into account such factors as prospective needs for nonroutine maintenance, the homeowners' financial resources, and any special factors that may aggravate or mitigate the need for such a reserve.

§ 906.12 Purchase prices and financing.

(a) *Below-market terms.* To ensure affordability by eligible purchasers, by the standard adopted under § 906.8(e), a homeownership plan may provide for below-market purchase prices or below-market financing, or a combination of the two. Discounted purchase prices may be determined on a unit-by-unit basis, based on the particular purchaser's ability to pay, or may be determined by any other fair and reasonable method (*e.g.*, uniform prices for a group of comparable dwellings, within a range of affordability by a group of potential purchasers).

(b) *Types of financing.* Any type of private or public financing may be used (*e.g.*, conventional, Federal Housing Administration (FHA), Department of

Veterans Affairs (VA), Farmers' Home Administration (FmHA), or a State or local program). A PHA may finance or assist in financing purchase by any methods it may choose, such as purchase-money mortgages, guarantees of mortgage loans from other lenders, shared equity, or lease-purchase arrangements.

§ 906.13 Protection against fraud and abuse.

A homeownership plan shall include appropriate protections against any risks of fraud or abuse that are presented by the particular plan, such as collusive purchase for the benefit of nonresidents, extended use of the dwelling by the purchaser as rental property, or collusive sale that would circumvent the resale profit limitation of § 906.14.

§ 906.14 Limitation on resale profit.

(a) *General.* If a dwelling is sold to the initial purchaser for less than fair market value, the homeownership plan shall provide for appropriate measures to preclude realization by the initial purchaser of windfall profit on resale. "Windfall profit" means all or a portion of the resale proceeds attributable to the purchase price discount (the fair market value at date of purchase from the PHA less the below-market purchase price), as determined by one of the methods described in paragraphs (b) through (d) of this section. Subject to that requirement, however, purchasers should be permitted to retain any resale profit attributable to appreciation in value after purchase (or a portion of such profit under a limited or shared equity arrangement), along with any portion of the resale profit that is fairly attributable to improvements made by them after purchase.

(*b*) *Promissory note method.* Where there is potential for a windfall profit because the dwelling unit is sold to the initial purchaser for less than fair market value, without a commensurate limited or shared equity restriction, the initial purchaser shall execute a promissory note, payable to the PHA, along with a mortgage securing the obligation of the note, on the following terms and conditions:

(1) The principal amount of indebtedness shall be the lesser of:

(i) The purchase price discount, as determined by the definition in paragraph (a) of this section and stated in the note as a dollar amount; or

(ii) The net resale profit, in an amount to be determined upon resale by a formula stated in the note. That formula shall define net resale profit as the amount by which the gross resale price exceeds the sum of:

(A) The discounted purchase price;

(B) Reasonable sale costs charged to the initial purchaser upon resale; and

(C) Any increase in the value of the property that is attributable to improvements paid for or performed by the initial purchaser during tenure as a homeowner.

(2) At the option of the PHA, the note may provide for automatic reduction of the principal amount over a specified period of ownership while the property is used as the purchaser's family residence, resulting in total forgiveness of the indebtedness over a period of not less than five years from the date of conveyance, in annual increments of not more than 20 percent. This does not require a PHA's plan to provide for any such reduction at all, or preclude it from specifying terms that are less generous to the purchaser than those stated in the foregoing sentence.

(3) To preclude collusive resale that would circumvent the intent of this section, the PHA shall (by an appropriate form of title restriction) condition the initial purchaser's right to resell upon approval by the PHA, to be based solely on the PHA's determination that the resale price represents fair market value or a lesser amount that will result in payment to the PHA, under the note, of the full amount of the purchase price discount (subject to any accrued reduction, if provided for by the homeownership plan pursuant to paragraph (b)(2) of this section). If so determined, the PHA shall be obligated to approve the resale.

(4) The PHA may, in its sole discretion, agree to subordination of the mortgage that secures the promissory note, in favor of an additional lien granted by the purchaser as security for a loan for home improvements or other purposes approved by the PHA.

(c) *Limited equity method.* As a second option, the requirement of this section may be satisfied by an appropriate form of limited equity arrangement, restricting the amount of net resale profit that may be realized by the seller (the initial purchaser and successive purchasers over a period prescribed by the homeownership plan) to the sum of:

(1) The seller's paid-in equity;

(2) The portion of the resale proceeds attributable to any improvements paid for or performed by the seller during homeownership tenure; and

(3) An allowance for a portion of the property's appreciation in value during homeownership tenure, calculated by a fair and reasonable method specified in the homeownership plan (*e.g.*, according to a price index factor or other measure).

(d) *Third option.* The requirements of this section may be satisfied by any other fair and reasonable arrangement that will accomplish the essential purposes stated in paragraph (a) of this section.

(e) *Appraisal.* Determinations of fair market value under this section shall be made on the basis of appraisal within a reasonable time prior to sale by an independent appraiser, to be selected by the PHA.

§ 906.15 Use of sale proceeds.

(a) *General authority for use.* Sale proceeds may, after provision for sale and administrative costs that are necessary and reasonable for carrying out the homeownership plan, be retained by the PHA and used for housing assistance to low-income families (as such families are defined under the Act). The term "sale proceeds" includes all payments made by purchasers for credit to the purchase price (*e.g.*, earnest money, downpayments, payments out of the proceeds of mortgage loans, and principal and interest payments under purchase-money mortgages), along with any amounts payable upon resale under § 906.14, and interest earned on all such receipts. (Residual receipts, as defined in the ACC, shall not be treated as sale proceeds.)

(b) *Permissible uses.* Sale proceeds may be used for any one or more of the following forms of housing assistance for low-income families, at the discretion of the PHA and as stated in the HUD-approved homeownership plan:

(1) In connection with the homeownership plan from which the funds are derived, for purposes that are justified to ensure the success of the plan and to protect the interests of the homeowners, the PHA and any other entity with responsibility for carrying out the plan. Nonexclusive examples include nonroutine maintenance reserves under § 906.11; a reserve for loans to homeowners to prevent or cure default or for other emergency housing needs; a reserve for any contingent liabilities of the PHA under the homeownership plan (such as PHA guaranty of mortgage loans); and a reserve for PHA repurchase, repair and resale of homes in the event of defaults.

(2) In connection with another HUD-approved homeownership plan under this part, for assistance to purchasers and for reasonable planning and implementation costs.

(3) In connection with a State or local homeownership program for low-income families, as described in the homeownership plan, for assistance to

purchasers and for reasonable planning and implementation costs. Under such programs, sales proceeds may be used to construct or acquire additional dwellings for sale to low-income families, or to assist such families in purchasing other dwellings from public or private owners.

(4) In connection with the PHA's other public housing that remains under ACC, for any purposes authorized for the use of operating funds under the ACC and applicable provisions of the Act and Federal regulations, as included in the HUD-approved operating budgets. Examples include maintenance and modernization, augmentation of operating reserves, protective services, and resident services. Such use shall not result in the reduction of the operating subsidy otherwise payable to the PHA under 24 CFR part 990.

(5) In connection with any other type of Federal, State, or local housing program for low-income families, as described in the homeownership plan.

§ 906.16 Replacement housing.

(a) *Replacement requirement.* As a condition for transfer of ownership under a HUD-approved homeownership plan, the PHA must obtain a funding commitment, from HUD or another source, for the replacement of each of the dwellings to be sold under the plan. Replacement housing may be provided by one or any combination of the following methods:

(1) Development by the PHA of additional public housing under 24 CFR part 941 (by new construction or acquisition).

(2) Rehabilitation of vacant public housing owned by the PHA.

(3) Use of five-year, tenant-based certificate or voucher assistance under Section 8 of the Act.

(4) If the homeownership plan is submitted by the PHA for sale to residents through an RMC, resident organization or cooperative association which is otherwise eligible to participate under this part, acquisition of nonpublicly-owned housing units, which the RMC, resident organization or cooperative association will operate as rental housing, comparable to public housing as to term of assistance, housing standards, eligibility, and contribution to rent.

(5) Any other Federal, State, or local housing program that is comparable, as to housing standards, eligibility and contribution to rent, to the programs referred to in paragraphs (a)(1) through (a)(3) of this section, and provides a term of assistance of not less than five years.

(b) *Funding commitments.* Although a HUD funding commitment is required if the replacement housing requirement is to be satisfied through any of the HUD programs listed in paragraph (a) of this section, HUD's approval of a Section 5(h) homeownership plan on the expectation that such a funding commitment will be forthcoming shall not constitute a binding obligation to make such a commitment. Where the requirement is to be satisfied under a State or local program, or a Federal program not administered by HUD, a funding commitment shall be required from the proper authority.

(c) *Use of sale proceeds to fund replacement housing.* Sale proceeds that are generated under the homeownership plan may be used under some of the replacement housing options under paragraph (a) of this section (*e.g.*, rehabilitation of vacant public housing units, or an eligible local program). Where a homeownership plan provides for sale proceeds to be used for replacement housing, HUD approval of the plan and execution of the PHA–HUD implementing agreement shall satisfy the funding commitment requirement of paragraph (a) of this section, with regard to the amount of replacement housing to be funded out of sale proceeds.

(d) *Consistency with current housing needs.* Replacement housing may differ from the dwellings sold under the homeownership plan, as to unit sizes or family or elderly occupancy, if the PHA determines that such change is consistent with current local housing needs for low-income families.

(e) *Inapplicability to prior plans.* This section shall not apply to homeownership plans that were submitted to HUD under the Section 5(h) Homeownership Program prior to October 1, 1990.

§ 906.17 Records, reports, and audits.

The PHA shall be responsible for the maintenance of records (including sale and financial records, which must include information on the racial and ethnic characteristics of the purchasers) for all activities incident to implementation of the HUD-approved homeownership plan. Until all planned sales of individual dwellings have been completed, the PHA shall submit to HUD annual sales reports, in a form prescribed by HUD. The receipt, retention, and expenditure of the sale proceeds shall be covered in the regular independent audits of the PHA's public housing operations, and any supplementary audits that HUD may find necessary for monitoring. Where another entity is responsible for sale of individual units, pursuant to § 906.7(b), the PHA must ensure that the entity's responsibilities include proper recordkeeping and accountability to the PHA, sufficient to enable the PHA to monitor compliance with the approved homeownership plan, to prepare its reports to HUD, and to meet its audit responsibilities. All books and records shall be subject to inspection and audit by HUD and the General Accounting Office (GAO).

(Approved by the Office of Management and Budget under control number 2577–0201)

§ 906.18 Submission and review of homeownership plan.

Whether to develop and submit a proposed homeownership plan is a matter within the discretion of each PHA. A PHA may initiate a proposal at any time, according to the following procedures:

(a) *Preliminary consultation with HUD staff.* Before submission of a proposed plan, the PHA shall consult informally with the appropriate HUD Field Office to assess feasibility and the particulars to be addressed by the plan.

(b) *Submission to HUD.* The PHA shall submit the proposed plan, together with supporting documentation, in a format prescribed by HUD, to the appropriate HUD Field Office.

(c) *Conditional approval.* Conditional approval may be given, at HUD discretion, where HUD determines that to be justified. For example, conditional HUD approval might be a necessary precondition for the PHA to obtain the funding commitments required to satisfy the requirements for final HUD approval of a complete homeownership plan. Where conditional approval is granted, HUD will specify the conditions in writing.

(Approved by the Office of Management and Budget under control number 2577–0201)

§ 906.19 HUD approval and PHA–HUD implementing agreement.

Upon HUD notification to the PHA that the homeownership plan is approvable (in final form that satisfies all applicable requirements of this part), the PHA and HUD will execute a written implementing agreement, in a form prescribed by HUD, to evidence HUD approval and authorization for implementation. The plan itself, as approved by HUD, shall be incorporated in the implementing agreement. Any of the items of supporting documentation may also be incorporated, if agreeable to the PHA and HUD. The PHA shall be obligated to carry out the approved homeownership plan and other provisions of the implementing

agreement without modification, except with written approval by HUD.

(Approved by the Office of Management and Budget under control number 2577–0201)

§ 906.20 Content of homeownership plan.

The homeownership plan must address the following matters, as applicable to the particular factual situation:

(a) *Property description.* A description of the property, including identification of the development and the specific dwellings to be sold.

(b) *Repair or rehabilitation.* If applicable, a plan for any repair or rehabilitation required under § 906.6, based on the assessment of the physical condition of the property that is included in the supporting documentation.

(c) *Purchaser eligibility and selection.* The standards and procedures to be used for homeownership applications and the eligibility and selection of purchasers, consistent with the requirements of § 906.8. If the homeownership plan allows application for purchase of vacant units by families who are not presently public housing or Section 8 residents and not already on the PHA's waiting lists for those programs, the plan must include an affirmative fair housing marketing strategy for such families, including specific steps to inform them of their eligibility to apply, and to solicit applications from those in the housing market who are least likely to apply for the program without special outreach.

(d) *Sale and financing.* Terms and conditions of sale and financing (see, particularly, §§ 906.11 through 906.14).

(e) *Future consultation with residents.* A plan for consultation with residents during the implementation stage (See § 906.5). If appropriate, this may be combined with the plan for counseling.

(f) *Counseling.* Counseling, training, and technical assistance to be provided in accordance with § 906.9.

(g) *Sale via resident-controlled entity.* If the plan contemplates sale to residents via an entity other than the PHA, a description of that entity's responsibilities and information demonstrating that the requirements of § 906.7(b) have been met or will be met in a timely fashion.

(h) *Nonpurchasing residents.* If applicable, a plan for nonpurchasing residents, in accordance with § 906.10.

(i) *Sale proceeds.* An estimate of the sale proceeds and an explanation of how they will be used, in accordance with § 906.15.

(j) *Replacement housing.* A replacement housing plan, in accordance with § 906.16.

(k) *Administration.* An administrative plan, including estimated staffing requirements.

(l) *Records, accounts and reports.* A description of the recordkeeping, accounting and reporting procedures to be used, including those required by § 906.17.

(m) *Budget.* A budget estimate, showing the costs of implementing the plan, and the sources of the funds that will be used.

(n) *Timetable.* An estimated timetable for the major steps required to carry out the plan.

(Approved by the Office of Management and Budget under control number 2577–0201)

§ 906.21 Supporting documentation.

The following supporting documentation shall be submitted to HUD with the proposed homeownership plan, as appropriate for the particular plan:

(a) *Property value estimate.* An estimate of the fair market value of the property, including the range of fair market values of individual dwellings, with information to support the reasonableness of the estimate. (The purpose of this data is merely to assist HUD in determining whether, taking into consideration the estimated fair market value of the property, the plan adequately addresses any risks of fraud and abuse pursuant to § 906.13 and of windfall profit upon resale, pursuant to § 906.14. A formal appraisal need not be submitted with the proposed homeownership plan.)

(b) *Physical assessment.* An assessment of the physical condition of the property, based on the standards specified in § 906.6.

(c) *Workability.* A statement demonstrating the practical workability of the plan, based on analysis of data on such elements as purchase prices, costs of repair or rehabilitation, homeownership costs, family incomes, availability of financing, and the extent to which there are eligible residents who are expected to be interested in purchase. (See § 906.4(a)).

(d) *Commitment and capability.* Information to substantiate the commitment and capability of the PHA and any other entity with substantial responsibilities for implementing the plan.

(e) *Resident planning input.* A description of resident consultation activities carried out pursuant to § 906.5 before submission of the plan, with a summary of the views and recommendations of residents and copies of any written comments that may have been submitted to the PHA by individual residents and resident organizations, and any other individuals and organizations.

(f) *Nondiscrimination certification.* The PHA's certification that it will administer the plan on a nondiscriminatory basis, in accordance with the Fair Housing Act, Title VI of the Civil Rights Act of 1964, Executive Order 11063, and implementing regulations, and will assure compliance with those requirements by any other entity that may assume substantial responsibilities for implementing the plan.

(g) *Legal opinion.* An opinion by legal counsel to the PHA, stating that counsel has reviewed the plan and finds it consistent with all applicable requirements of Federal, State, and local law, including regulations as well as statutes. In addition, counsel must identify the major legal requirements that remain to be met in implementing the plan, if approved by HUD as submitted, indicating an opinion about whether those requirements can be met without special problems that may disrupt the timetable or other features contained in the plan.

(h) *Board resolution.* A resolution by the PHA's Board of Commissioners, evidencing its approval of the plan.

(i) *Other information.* Any other information that may reasonably be required for HUD review of the plan. Except for the PHA-HUD implementing agreement under § 906.19, HUD approval is not required for documents to be prepared and used by the PHA in implementing the plan (such as contracts, applications, deeds, mortgages, promissory notes, and cooperative or condominium documents), if their essential terms and conditions are described in the plan. Consequently, those documents need not be submitted as part of the plan or the supporting documentation.

Dated: September 20, 1994.

Joseph Shuldiner,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 94–27897 Filed 11–9–94; 8:45 am]

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Federal Register

Vol. 59, No. 217

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INFORMATION AND ASSISTANCE

Federal Register

Index, finding aids & general information	202–523–5227
Public inspection announcement line	523–5215
Corrections to published documents	523–5237
Document drafting information	523–3187
Machine readable documents	523–3447

Code of Federal Regulations

Index, finding aids & general information	523–5227
Printing schedules	523–3419

Laws

Public Laws Update Service (numbers, dates, etc.)	523–6641
Additional information	523–5230

Presidential Documents

Executive orders and proclamations	523–5230
Public Papers of the Presidents	523–5230
Weekly Compilation of Presidential Documents	523–5230

The United States Government Manual

General information	523–5230

Other Services

Data base and machine readable specifications	523–3447
Guide to Record Retention Requirements	523–3187
Legal staff	523–4534
Privacy Act Compilation	523–3187
Public Laws Update Service (PLUS)	523–6641
TDD for the hearing impaired	523–5229

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FEDERAL REGISTER PAGES AND DATES, NOVEMBER

54513–54786.....1
54787–55018.....2
55019–55198.....3
55199–55328.....4
55329–55570.....7
55571–55806.....8
55807–55984.....9
55985–56372.....10

CFR PARTS AFFECTED DURING NOVEMBER

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:
6752.....54513
6753.....55329
6754.....55805
6755.....55981
6756.....55983
March 21, 1917
(Revoked in part by PLO 7098).....55371
Executive Orders:
12710 (See Treasury Department final rule of October 11).....55209
12933.....54949
Administrative Orders:
Memorandums:
October 27, 1994.....54515
Notices:
October 12, 1994.....54785
Presidential Determinations:
No. 95–2 of November 1, 1994.....55979

5 CFR

532.....54787
576.....55807
1600.....55331
1605.....55331
1630.....55331
1631.....55331
1632.....55331
1650.....55331
Proposed Rules
211.....55212
230.....55212
300.....55212
301.....55212
307.....55212
310.....55212
316.....55212
330.....55212
333.....55212
339.....55212
340.....55212
351.....55212
353.....55212
831.....55211
842.....55211
930.....55212

7 CFR

905.....55332, 55571
927.....55333
928.....55334
929.....55336
931.....55337
932.....55338, 55985
934.....55338
944.....55571, 55985
955.....55019
966.....55020
997.....55808
1902.....54787
1941.....54787
1942.....54787
1943.....54787
1944.....54787
1945.....54787
1951.....54789
Proposed Rules:
68.....55067
929.....56007
956.....56254
1011.....55377
1030.....54952
1065.....54952
1068.....54952
1076.....54952
1079.....54952
1413.....55378

8 CFR

214.....55910

9 CFR

94.....55021

10 CFR

Proposed Rules:
20.....55224
35.....55068
50.....54843
55.....54843
73.....54843

12 CFR

5.....54789
16.....54789
208.....55987
211.....55026
225.....54801, 54805
262.....54805
701.....54517
Proposed Rules:
900.....55379

14 CFR

39.....54517, 55199, 55203, 55341, 55988, 55990, 55992, 55993, 55995, 56114
71.....55029, 55810
73.....55030, 55995, 55996
97.....55205, 55206
121.....55208
125.....55208
135.....55208
Proposed Rules:
23.....55225
35.....55070
39.....54535, 54847, 54849, 55380, 55382, 55383, 55595, 56008, 56011

16 CFR

410.....54809

17 CFR

240.....54812, 55006, 55342
249.....55342
250.....55573
405.....55910
Proposed Rules:
228.....55385
229.....55385
230.....55385
239.....55385
240.....55014, 55385
274.....55385

18 CFR

2.....55031
11.....54815
Proposed Rules:
Ch. I.....54851

19 CFR

12.....54817
133.....55996
171.....55997
Proposed Rules:
10.....54537
123.....56014
148.....56014

20 CFR

Proposed Rules:
638.....54539

21 CFR

520.....55999
522.....54517, 55999
558.....54518
Proposed Rules:
54.....55071
182.....55072
312.....55071
314.....55071
320.....55071
330.....55071
601.....55071
807.....55071
812.....55071
814.....55071
860.....55071
1309.....54949
1313.....54949

22 CFR

40.....55045

24 CFR

905.....56354
906.....56354
Proposed Rules:
38.....54984

26 CFR

Proposed Rules:
1.....55225

27 CFR

Proposed Rules:
9.....55226

28 CFR

Proposed Rules:
524.....54782

29 CFR

1601.....54818
1910.....55208
Proposed Rules:
1926.....54540

30 CFR

Proposed Rules:
Ch. II.....55597
42.....54855
48.....54855
70.....54855
71.....54855
75.....54855
77.....54855
90.....54855
913.....55597

31 CFR

565.....55209

32 CFR

701.....55348

33 CFR

100.....55583
117.....54518
165.....55583
168.....54519
Proposed Rules:
110.....55598
117.....55599, 55601
165.....55602, 55603
181.....55823

34 CFR

690.....54718
691.....54718

36 CFR

701.....55811

37 CFR

Proposed Rules:
1.....56015

40 CFR

52.....54521, 54523, 55045, 55053, 55059, 55368, 55584, 55585, 55586
70.....55813
82.....55912
180.....55589
271.....55368, 56000
272.....56114
Proposed Rules:
52.....54540, 54544, 54866, 55072, 55400, 55824, 56019
63.....54869
70.....54869
80.....54678
81.....55053, 55059
82.....56276
89.....55930
91.....55930
180.....54818, 54821, 54822, 54824, 54825, 54827, 54869, 54871, 54872, 55605, 56027
186.....54829
264.....55778
265.....55778
270.....55778
271.....55322, 55778
300.....54830, 55606
721.....54874
745.....54984
763.....54746

41 CFR

101–6.....54524

42 CFR

401.....56116
431.....56116
435.....56116
440.....56116
441.....56116
442.....56116
447.....56116
483.....56116
488.....56116
489.....56116
498.....56116

43 CFR

Public Land Orders:
7098.....55371
7099.....55371
7100.....55820
7101.....55821
Proposed Rules:
11.....54877

44 CFR

65.....56003
67.....55060, 55590
Proposed Rules:
67.....55607

45 CFR

1180.....55592

46 CFR

Proposed Rules:
171.....55232
514.....55826
540.....54878
552.....55232
580.....55826
581.....55826

47 CFR

2.....55372
15.....55372
24.....55209, 55372
73.....54532, 54533, 55374, 55375, 55593, 55594
97.....54831
Proposed Rules:
68.....54878
73.....54545, 55402, 56029
97.....55828

48 CFR

9903.....55746
9905.....55746

49 CFR

171.....55162
173.....55162
178.....55162
180.....55162
571.....54835
Proposed Rules:
571.....54881, 55073
580.....55404

50 CFR

17.....54840, 56330, 56333
20.....55531
32.....55182, 55190, 55194
285.....55821
625.....55821
630.....55060
638.....54841
672.....55066
675.....54842, 55822
678.....55066
681.....56004
Proposed Rules:
23.....55235, 55617
32.....55074
641.....56029
654.....55405
672.....54883
675.....54883, 55076

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws.**

Last List November 7, 1994

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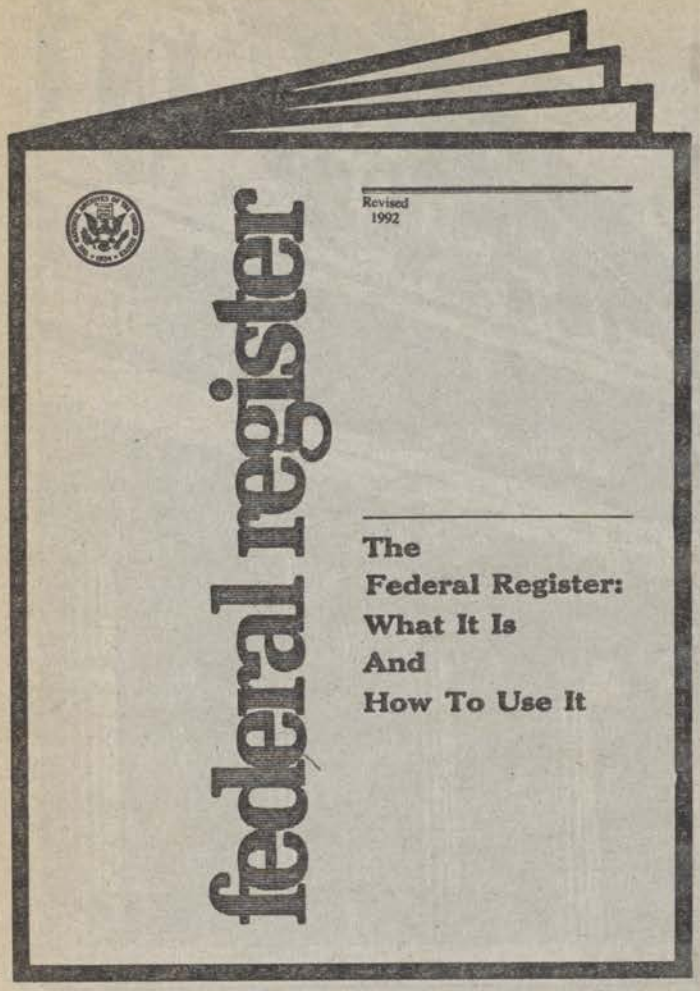
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