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Briefings on How To Use the Federal Register
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WHAT IT IS AND HOW TO USE IT

FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: The Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:
1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

NEW YORK, NY

WHEN: November 23, 9:00 am—12:00 pm

WHERE: National Archives—Northeast Region, 201 Varick Street, 12th Floor, New York, NY

RESERVATIONS: 1–800–347–1997

WASHINGTON, DC
(two briefings)

WHEN: November 30 at 9:00 am and 1:30 pm

WHERE: Office of the Federal Register, 7th Floor Conference Room, 800 North Capitol Street NW, Washington, DC (3 blocks north of Union Station Metro)

RESERVATIONS: 202–523–4538

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

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

MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1208

National Security Information Procedures

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: The Merit Systems Protection Board is amending Chapter II of Title 5 Code of Federal Regulations by removing part 1208. This action is taken in accordance with the policy announced in Executive Order 12866 of September 30, 1993, requiring agencies to insure that regulations are effective, consistent, sensible, and understandable.

EFFECTIVE DATE: November 22, 1993.

FOR FURTHER INFORMATION CONTACT: Robert E. Taylor, Clerk of the Board (202) 653-7200.

SUPPLEMENTARY INFORMATION: The Board has reviewed its regulations and determined that part 1208 merely restates policies and procedures in Executive Order 12356, ISOO Directive 1 and MSPB Order 1550.1, October 18, 1993, and is, therefore, duplicative. In addition, the Board does not have original classification authority, and only occasionally receives information classified by other agencies, and has thus concluded that National Security Information regulations are not necessary.

The Board is publishing this rule as a final rule pursuant to 5 U.S.C. 1204(h).

List of Subjects in 5 CFR Part 1208

Administrative practice and procedure; Classified information.

Accordingly, under the authority of 5 U.S.C. 1204(h), chapter II of title 5 Code of Federal Regulations is amended by removing part 1208.

Dated: November 16, 1993.

Robert E. Taylor,

Clerk of the Board.

[FR Doc. 93-28568 Filed 11-19-93; 8:45 am]

BILLING CODE 7400-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 93-NM-13-AD; Amendment 39-8707; AD 93-19-08]

Airworthiness Directives; Aerospatiale Model ATR42-200 and -300 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to all Aerospatiale Model ATR-42 series airplanes, that currently requires repetitive inspections to detect corrosion and/or fatigue cracking of the main landing gear (MLG) side brace lower arms, and replacement of discrepant parts. This amendment limits the applicability of the rule, revises the inspection procedure, and requires replacement of both MLG side brace lower arms as terminating action for the repetitive inspections. This amendment is prompted by a report of a failure of a MLG side brace lower arm. The actions specified by this AD are intended to prevent inadvertent retraction of the MLG.

DATES: Effective December 22, 1993.

The incorporation by reference of Aerospatiale Service Bulletin ATR42-32-0036, Revision 3, dated December 12, 1991; Aerospatiale Service Bulletin ATR42-32-0040, dated February 24, 1992; and Aerospatiale Service Bulletin ATR42-32-0040, Revision 1, dated January 18, 1993; as listed in the regulations, is approved by the Director of the Federal Register as of December 22, 1993.

The incorporation by reference of certain other publications listed in the regulations was approved previously by the Director of the Federal Register as of May 6, 1991 (56 FR 14462, April 10, 1991).

ADDRESSES: The service information referenced in this AD may be obtained from Aerospatiale, 316 Route de Bayonne, 31060 Toulouse, Cedex 03, France. 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: Gary Lium, Aerospace Engineer, Standardization Branch, ANM-113, FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington 98055-4056; telephone (206) 227-1112; fax (206) 227-1320.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations by superseding AD 91-08-10, Amendment 39-6953 (56 FR 14462, April 10, 1991), which is applicable to all Aerospatiale Model ATR-42 series airplanes, was published in the **Federal Register** on May 18, 1993 (58 FR 28939). That action proposed to limit the applicability of the rule, to require the use of an improved repetitive inspection procedure, and to require replacement of both main landing gear (MLG) side brace lower arms as terminating action for the repetitive inspections.

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.

Another commenter requests that the final rule be revised to exempt airplanes on which the MLG side brace lower arms have been modified previously in accordance with Aerospatiale Service Bulletin ATR42-32-0040, Revision 1, dated January 18, 1993, from the inspection requirements proposed in paragraph (c). The FAA has determined that the commenter's request is already satisfied. The applicability of the final rule excludes any Model ATR42-200 and -300 series airplane on which Modification 03226 has been installed, as described in Aerospatiale Service Bulletin ATR42-32-0040, dated February 24, 1992, or Revision 1, dated January 18, 1993. This modification is the same one to which the commenter has referred. The requirements of paragraph (c) of the final rule do not apply to airplanes that have been

modified previously in accordance with Revision 1 of Aerospatiale Service Bulletin ATR42–32–0040.

Aerospatiale has issued Revision 1 of Service Bulletin ATR42–32–0040. This revision of the service bulletin is essentially identical to the original issue, but clarifies procedures for installation of Modification 03226. Paragraph (e) of the final rule has been revised to include Revision 1 of the service bulletin as an additional source of service information.

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 as proposed.

The FAA estimates that 100 airplanes of U.S. registry will be affected by this AD, that it will take approximately 3 work hours per airplane to accomplish the required actions, and that the average labor rate is $55 per work hour. Required parts will be provided by the manufacturer at no cost to operators. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $16,500, or $165 per airplane.

The FAA has been advised that 25 U.S.-registered airplanes have been modified previously in accordance with the requirements of this AD. Therefore, the future economic cost impact of this rule on U.S. operators is now only $12,375.

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 "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) 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 14 CFR part 39 of the Federal Aviation Regulations 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 39–6953 (56 FR 14462, April 10, 1991), and by adding a new airworthiness directive (AD), amendment 39–8707, to read as follows:

93–19–08 Aerospatiale: Amendment 39–8707. Docket 93–NM–13–AD. Supersedes AD 91–08–10, Amendment 39–6953.

Applicability: Model ATR42–200 and –300 series airplanes on which Modification 03226 (as described in Aerospatiale Service Bulletin ATR42–32–0040, dated February 24, 1992, and Revision 1, dated January 18, 1993) has not been accomplished; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

Note 1: Paragraphs (a), (a)(1), and (a)(2) of this AD restate the initial and repetitive inspection requirements of AD 91–08–10, Amendment 39–6953, paragraphs A., A.1., and A.2. As allowed by the phrase, "unless accomplished previously," if the initial and repetitive inspections required by AD 91–08–10 have been accomplished previously, paragraphs (a), (a)(1), and (a)(2) of this AD do not require that those inspections be repeated.

To prevent inadvertent retraction of the main landing gear (MLG), accomplish the following:

(a) Perform an ultrasonic inspection of the MLG side brace lower arm in accordance with Aerospatiale Service Bulletin ATR42–32–0036, Revision 1, dated February 15, 1991, and Messier-Bugatti Service Bulletin 631–32–070, Revision 1, dated February 12, 1991, at the thresholds given in paragraphs (a)(1) and (a)(2) of this AD. Repeat the ultrasonic inspections thereafter at intervals not to exceed 1,000 landings until the inspection required by paragraph (b) of this AD is accomplished.

(1) For airplanes that have accumulated 6,000 or more total landings on either the left or right MLG side brace lower arms as of May 6, 1991 (the effective date of AD 91–08–10, Amendment 39–6953): Perform the initial inspection prior to the accumulation of 8,000 total landings on either the left or right MLG side brace lower arms, or within 14 days after May 6, 1991 (the effective date of AD 91–08–10, Amendment 39–6953), whichever occurs later.

(2) For airplanes that have accumulated less than 6,000 total landings on either the left or right MLG side brace lower arms as of May 6, 1991 (the effective date of AD 91–08–10, Amendment 39–6953): Perform the initial inspection prior to the accumulation of 6,000 total landings on either the left or right MLG side brace lower arms, or within 90 days after May 6, 1991 (the effective date of AD 91–08–10, Amendment 39–6953), whichever occurs later.

(b) For those airplanes that previously have accomplished the ultrasonic inspections in accordance with paragraph (a) of this AD: Within 1,000 landings after the last inspection required by paragraph (a) of this AD, or within 90 days after the effective date of this AD, whichever occurs later, perform the ultrasonic inspection procedure in accordance with Aerospatiale Service Bulletin ATR42–32–0036, Revision 3, dated December 12, 1991. Repeat this inspection thereafter at intervals not to exceed 1,000 landings. Accomplishment of the requirements of this paragraph constitutes terminating action for the repetitive ultrasonic inspections in accordance with Revision 1 of that service bulletin required by paragraph (a) of this AD.

(c) For those airplanes that have not previously accomplished the ultrasonic inspections in accordance with paragraph (a) of this AD: Prior to the accumulation of 6,000 total landings on either the left or right MLG side brace lower arms, or within 90 days after the effective date of this AD, whichever occurs later, perform an ultrasonic inspection of the MLG side brace lower arm in accordance with Aerospatiale Service Bulletin ATR42–32–0036, Revision 3, dated December 12, 1991. Repeat this inspection thereafter at intervals not to exceed 1,000 landings.

(d) If any ultrasonic inspection result exceeds the acceptance criteria specified in Aerospatiale Service Bulletin ATR42–32–0036, Revision 1, dated February 15, 1991, or Revision 3, dated December 12, 1991, prior to further flight, replace the discrepant MLG side brace lower arm with a new or serviceable part, in accordance with either service bulletin. Following replacement of discrepant parts, continue to repeat the ultrasonic inspection procedure in accordance with Aerospatiale Service Bulletin ATR42–32–0036, Revision 3, dated December 12, 1991, at intervals not to exceed 1,000 landings.

(e) Prior to the accumulation of 15,000 total landings, or within 12 months after the effective date of this AD, whichever occurs later, install Modification 03226, in accordance with Aerospatiale Service Bulletin ATR42–32–0040, dated February 24, 1992, or Revision 1, dated January 18, 1993. Installation of Modification 03226 constitutes terminating action for the repetitive ultrasonic inspections of the MLG side brace lower arm required by 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, 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.

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

(h) The actions shall be done in accordance with Aerospatiale Service Bulletin ATR42–32–0036, Revision 1, dated February 15, 1991; Aerospatiale Service Bulletin ATR42–32–0036, Revision 3, dated December 12, 1991; Aerospatiale Service Bulletin ATR42–32–0040, dated February 24, 1992; Aerospatiale Service Bulletin ATR42–32–0040, Revision 1, dated January 18, 1993; and Messier-Bugatti Service Bulletin 631–32–070, Revision 1, dated February 12, 1991. The incorporation by reference of Aerospatiale Service Bulletin ATR42–32–0036, Revision 1, dated February 15, 1991, and Messier-Bugatti Service Bulletin 631–32–070, Revision 1, dated February 12, 1991, was approved previously by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51 as of May 6, 1991 (56 FR 14462, April 10, 1991). The incorporation by reference of the remainder of the service documents listed above is 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 Aerospatiale, 316 Route de Bayonne, 31060 Toulouse, Cedex 03, France. 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.

(i) This amendment becomes effective on December 22, 1993.

Issued in Renton, Washington, on September 29, 1993.

David G. Hmiel,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 93–28558 Filed 11–19–93; 8:45 am]

BILLING CODE 4910–13–P

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14 CFR Part 39

[Docket No. 93–NM–17–AD; Amendment 39–8734; AD 93–22–10]

Airworthiness Directives; Aerospatiale Model ATR42 and ATR72 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to Aerospatiale Model ATR42 and ATR72 series airplanes, that currently requires inspections to detect defects in the aileron control system, and a revision to the Airplane Flight Manual (AFM) and installation of a warning placard to prohibit use of roll trim in certain situations. This amendment requires replacement of the automatic flight control system (AFCS) computer with a new AFCS computer and modification of its wiring, as terminating action for the AFM revision and warning placard. This amendment is prompted by the development of a new AFCS computer that improves roll out-of-trim indications and eliminates the risk of roll trim command. The actions specified by this AD are intended to prevent severely reduced controllability of the airplane.

DATES: Effective December 22, 1993.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 22, 1993.

ADDRESSES: The service information referenced in this AD may be obtained from Aerospatiale, 316 Route de Bayonne, 31060 Toulouse, Cedex 03, France. 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: Gary Lium, Aerospace Engineer, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (206) 227–1112; fax (206) 227–1320.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations by superseding AD 90–26–52, Amendment 39–6880 (56 FR 4532, February 5, 1991), which is applicable to Aerospatiale Model ATR42 and ATR72 series airplanes, was published in the **Federal Register** on May 24, 1993 (58 FR 29800). The action proposed to require replacement of the automatic flight control system (AFCS) computer with a new AFCS computer and modification of its wiring; when accomplished, these actions would constitute terminating action for the current requirements for an Airplane Flight Manual (AFM) revision and warning placard to prohibit use of roll trim in certain situations.

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 proposal.

Another commenter requests that the proposed rule be revised to extend the compliance time for the installation of the new AFCS computer and modification of its wiring, so that the required installation and modification can be accomplished without schedule interruption. This commenter, a U.S. operator, indicates that it is currently performing the required modifications on its affected fleet whenever an airplane is taken out of service for a scheduled "C" check. The scheduled "C" checks in this operator's program are accomplished at intervals longer than the proposed compliance time of 12 months, however. This commenter states that the adoption of the proposed compliance time of 12 months would require that it schedule special times for the accomplishment of these actions, at considerable additional expense. The FAA concurs with the commenter's request to extend the compliance time for the installation and modification requirements. Extending the compliance time to 24 months will not adversely affect safety, and will allow the modification to be performed at a base during regularly scheduled maintenance where special equipment and trained maintenance personnel will be available if necessary. In the interim, the currently required AFM revision and warning placard will provide an acceptable level of safety until the installation of the AFCS computer and modification of its wiring are accomplished. The final rule has been revised to specify a compliance time of 24 months.

This same commenter requests that the proposed rule be revised to eliminate the current requirement to submit written reports to the FAA describing any defects found during the required inspections. This commenter states that it has been submitting these reports regularly, and notes that no failures of consequence have been discovered during the inspections. Additionally, this commenter states that it has received no feedback from either the manufacturer or the FAA as to whether there are any concerns about what has been reported. The FAA concurs that the reporting requirement may be suspended. The manufacturer has advised, and the FAA agrees, that the submitted reports have been of little value in helping in the development of a modification or other action that could

serve as terminating action for the currently required inspections. In light of this, the FAA has revised the final rule to delete the requirement for submission of reports.

Since the issuance of the notice, the manufacturer has revised two of the referenced service bulletins: Aerospatiale Service Bulletin ATR42-22-0015, Revision 2, dated July 29, 1993; and Aerospatiale Service Bulletin ATR42-27-0058, Revision 2, dated July 5, 1993. These revisions are essentially identical to the earlier versions, which describe procedures for replacing the AFCS computer and modifying the wiring on Model ATR42 series airplanes. However, these revisions do contain certain minor editorial corrections and changes. The FAA has revised the final rule to include both of these revised service bulletins as alternative sources of appropriate service information.

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 99 airplanes of U.S. registry will be affected by this AD.

The inspections that were previously required by AD 90-26-52, and retained in this AD, take approximately 30 workhours per airplane to accomplish, at an average labor rate of $55 per work hour. Based on these figures, the total cost impact of this inspection requirement of this AD on U.S. operators is estimated to be $163,350, or $1,650 per airplane, per inspection cycle.

The AFM revision and warning placard installation that were previously required by AD 90-26-52, and retained in this AD, take approximately 1 work hour per airplane to accomplish, at an average labor rate of $55 per work hour. The cost of required parts (local manufacture of a placard) is negligible. Based on these figures, the total cost impact of these requirements of this AD on U.S. operators is estimated to be $5,445, or $55 per airplane. The FAA can arguably assume that almost all affected U.S. operators have previously accomplished these requirements; therefore, the future cost impact of these requirements is expected to be minimal.

The installation of the AFCS computer, as required by this AD, will take approximately 4 work hours to accomplish, at an average labor rate of $55 per work hour. The required parts will be provided by the manufacturer at no cost to the operator. Based on these figures, the total cost impact of the installation requirements of this AD on U.S. operators is estimated to be $21,780, or $220 per airplane. However, the FAA has been advised by one operator that the required AFCS computer has been installed on five of the airplanes of its affected fleet. Therefore, the future total cost impact of this AD on U.S. operators with regard to this requirement is now $20,680.

The wiring modification required by this AD will take approximately 64 work hours per airplane to accomplish, at an average labor rate of $55 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 wiring modification requirements of this AD on U.S. operators is estimated to be $193,600, or $3,520 per airplane. However, the FAA has been advised by one operator that the required wiring modification has been accomplished on five of the airplanes of its affected fleet. Therefore, the future total cost impact of this AD on U.S. operators with regard to this requirement is now $176,000.

The number of required work hours for each requirement of this AD, as indicated above, is presented as if the accomplishment of the 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 will be minimal in many instances. Additionally, any costs associated with special airplane scheduling are expected to be minimal.

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 14 CFR part 39 of the Federal Aviation Regulations 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 39-6880 (56 FR 4532, February 5, 1991), and by adding a new airworthiness directive (AD), to read as follows:

93-22-10 Aerospatiale: Docket 93-NM-17-AD. Supersedes AD 90-26-52, Amendment 39-6880, which superseded Telegraphic AD T90-24-51, issued on November 16, 1990.

Applicability: All Model ATR42 and ATR72 series airplanes, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

Note 1: Paragraph (b) of this AD restates the requirement for repetitive inspections contained in paragraph b. of AD 90-26-52. The first inspection required by this AD must be performed within the specified repetitive inspection interval after the last inspection performed in accordance with paragraph b. of AD 90-26-52.

Note 2: Paragraphs (a), (c), and (d) of this AD restate the requirements of paragraphs a., c., and d. of AD 90-26-52. As allowed by the phrase, "unless accomplished previously," if the requirements of paragraphs a., c., and d. of AD 90-26-52 have been accomplished previously, this AD does not require that they be repeated.

To prevent severely reduced controllability of the airplane, accomplish the following:

(a) Within 48 hours after February 19, 1991 (the effective date of AD 90-26-52, Amendment 39-6880), accomplish the following:

(1) Add the following to the Limitations Section of the FAA-approved Airplane Flight

Manual (AFM) and notify all crew members. This may be accomplished by inserting a copy of this AD in the AFM.

"Use of roll trim in excess of plus or minus one unit (one dot) with the autopilot engaged is prohibited except for an engine failure condition."

(2) Install a warning placard in the cockpit in full view of the pilot and co-pilot, which states:

"Warning—Do not exceed plus or minus one unit (one Dot) of roll trim with the autopilot engaged except for an engine failure condition."

(b) Prior to the accumulation of 1,000 total hours time-in-service on the airplane, or within 50 hours time-in-service after February 19, 1991 (the effective date of AD 90-26-52, Amendment 39-6880), whichever occurs later, and thereafter at intervals not to exceed 1,000 hours time-in-service, accomplish the following:

(1) Open all inspection plates in the wing which provide access to the aileron control system; perform a detailed inspection of the aileron control system in accordance with the manufacturer's Maintenance Manual and verify that there is freedom of movement without binding; and, for the Model ATR42, verify, in accordance with Aerospatiale Service Bulletin ATR42-27-0022, Revision 1, dated April 14, 1988, that there is no free play in excess of tolerances specified in the service bulletin.

(2) Perform a detailed visual inspection of all bearings of the aileron control system located in the wings for proper operation and the absence of physical defects.

(3) If any discrepancy is found, prior to further flight, repair or replace any defective part with a serviceable part, or otherwise correct the discrepancy, in accordance with the manufacturer's Maintenance Manual.

(c) For airplanes on which the rudder and/or elevator tab rods have been replaced in accordance with Aerospatiale Service Bulletin ATR42-27-0046, dated June 11, 1990, or ATR42-27-0049, dated September 14, 1990 (for Model ATR42 series airplanes); or Aerospatiale Service Bulletin ATR72-27-1008, dated June 11, 1990, or ATR72-27-1012, dated October 29, 1990 (for Model ATR72 series airplanes); accomplish the following:

(1) If either of the conditions specified in paragraph (c)(1)(i) or (c)(1)(ii) of this AD apply, within 15 days after February 19, 1991 (the effective date of AD 90-26-52, Amendment 39-6880), perform a flight check in accordance with Paragraph C. of Aerospatiale Service Bulletin ATR42-27-0050 (for Model ATR42 series airplanes) or ATR72-27-1013 (for Model ATR72 series airplanes), both dated November 22, 1990. The flight check must not be performed during commercial flight.

(i) If, as a result of the flight check required by telegraphic AD T90-24-51 (issued November 16, 1990), the trim settings were determined to be outside the acceptable values specified in the telegraphic AD; or

(ii) If that flight check has not been accomplished as of February 19, 1991 (the effective date of AD 90-26-52, Amendment 39-6880).

(2) If one or more of the trim indications are out of tolerance, prior to further flight, repair in accordance with a method approved by the Manager, Standardization Branch, ANM-113, FAA, Transport Airplane Directorate.

(3) If the flight check required by paragraph C. of telegraphic AD T90-24-51 has been performed, and the trim settings were within the acceptable values specified in that telegraphic AD, no further action is required by this paragraph.

(d) For airplanes on which the rudder tab rods have been replaced in accordance with Aerospatiale Service Bulletin ATR42-27-0046, dated June 11, 1990, or ATR42-27-0049, dated September 14, 1990 (for Model ATR42 series airplanes); or replaced in accordance with Aerospatiale Service Bulletin ATR72-27-1008, dated June 11, 1990, or ATR72-27-1012, dated October 29, 1990 (for Model ATR72 series airplanes); accomplish the following:

(1) Within 7 days after February 19, 1991 (the effective date of AD 90-26-52, Amendment 39-6880), perform a ground inspection to detect incorrect rudder and trim tab settings, in accordance with Aerospatiale Service Bulletins ATR42-27-0051 (for Model ATR42 series airplanes) or AT72-27-1014 (for Model ATR72 series airplanes), both dated November 22, 1990.

(2) If any discrepancy is found, prior to further flight, repair or replace the defective part in accordance with the applicable service bulletin.

(e) Within 24 months after the effective date of this AD, accomplish the following:

(1) Replace the automatic flight control system (AFCS) computer with a new AFCS computer in accordance with Aerospatiale Service Bulletin ATR42-22-0015, Revision 1, dated March 6, 1992, or Revision 2, dated July 29, 1993 (for Model ATR42 series airplanes); or Aerospatiale Service Bulletin ATR72-22-1004, Revision 1, dated March 6, 1992 (for Model ATR72 series airplanes); and

(2) Modify the wiring in accordance with Aerospatiale Service Bulletin ATR42-27-0058, Revision 1, dated February 27, 1992, or Revision 2, dated July 5, 1993 (for Model ATR42 series airplanes); or Aerospatiale Service Bulletin ATR72-27-1019, Revision 1, dated March 20, 1992 (for Model ATR72 series airplanes).

(f) Following accomplishment of the replacement of the AFCS computer and the modification of the wiring, required by paragraph (e) of this AD, the changes to the flight manual and the placard required by paragraph (a) of this AD may be removed.

(g) 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 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Standardization Branch, ANM-113.

(h) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

(i) The verification, flight check, ground inspection, replacement, and modification shall be accomplished in accordance with the following applicable Aerospatiale service bulletins, which contain the indicated list of effective pages:

Service bulletin and issue date	Page No.	Revision level indicated on page	Date indicated on page
ATR42-27-0022, Revision 1, April 14, 1988	1	1	Apr. 14, 1988.
	2-13	(Original)	Jan. 12, 1988.
ATR42-27-0050, November 22, 1990	1-5	(Original)	Nov. 22, 1990.
ATR72-27-1013, November 22, 1990	1-5	(Original)	Nov. 22, 1990.
ATR42-27-0051, November 22, 1990	1-6	(Original)	Nov. 22, 1990.
AT72-27-1014, November 22, 1990	1-6	(Original)	Nov. 22, 1990.
ATR42-22-0015, Revision 1, March 6, 1992	1-4	1	Mar. 6, 1992.
	5-9	(Original)	Oct. 10, 1991.
ATR42-22-0015, Revision 2, July 29, 1993	1-3	2	July 29, 1993.
	4	1	Mar. 6, 1992.
	5-9	(Original)	Oct. 10, 1991.
ATR72-22-1004, Revision 1, March 6, 1992	1-2	1	Mar. 6, 1992.
	3-8	(Original)	Oct. 10, 1991.
ATR42-27-0058, Revision 1, February 27, 1992	1-5, 14, 16-20, 39-42, 49-56, 60	1	Feb. 27, 1992.
	6-13, 15, 21-38, 43-48, 57-59	(Original)	Nov. 4, 1991.
ATR42-27-0058, Revision 2, July 5, 1993	1, 3, 7, 11-12, 34-35, 37-42, 49-50	2	July 5, 1993.

Service bulletin and issue date	Page No.	Revision level indicated on page	Date indicated on page
	2, 4–5, 14, 16–20, 51–56, 60	1	Feb. 27, 1992.
	6, 8–10, 13, 15, 21–33, 36, 43–48, 57–59	(Original)	Nov. 4, 1991.
ATR72–27–1019, Revision 1, March 20, 1992	1–4, 6, 11–14, 23–29	1	Mar. 20, 1992.
	5, 7–10, 15–22	(Original)	Nov. 4, 1991.

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 Aerospatiale, 316 Route de Bayonne, 31060 Toulouse, Cedex 03, France. 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.

(j) This amendment becomes effective on December 22, 1993.

Issued in Renton, Washington, on November 9, 1993.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 93–28140 Filed 11–19–93; 8:45 am]

BILLING CODE 4910–13–P

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14 CFR Part 39

[Docket No. 93–NM–39–AD; Amendment 39–8737; AD 93–23–03]

Airworthiness Directives; McDonnell Douglas Model DC–9 and Model DC–9–80 Series Airplanes, Equipped With BFGoodrich Evacuation Slides

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain McDonnell Douglas Model DC–9 and Model DC–9–80 series airplanes, that requires modification of certain regulators on evacuation slides on the forward entry/service, aft service, and tailcone exit doors. This amendment is prompted by reports indicating that, under certain conditions, some evacuation slides could fail to inflate immediately. The actions specified by this AD are intended to prevent delayed inflation of an evacuation slide, which could delay or impede the evacuation of passengers during an emergency.

DATES: Effective December 22, 1993.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 22, 1993.

ADDRESSES: The service information referenced in this AD may be obtained from BFGoodrich, Aircraft Evacuation Systems, 3414 South 5th Street, Phoenix, Arizona 85040. 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: Andrew Gfrerer, Aerospace Engineer, Systems and Equipment Branch, ANM–130L, FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California 90806–2425; telephone (310) 988–5338; fax (310) 988–5210.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations to include an airworthiness directive (AD) that is applicable to certain McDonnell Douglas Model DC–9 and Model DC–9–80 series airplanes, equipped with BFGoodrich evacuation slides, was published in the **Federal Register** on May 25, 1993 (58 FR 30003). That action proposed to require modification of certain regulators on evacuation slides located at the forward entry/service, aft service, and tailcone exit doors.

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 proposal.

One commenter requests that the proposed compliance time of 12 months be shortened to 6 months, due to the degree of urgency of the unsafe condition addressed. The FAA does not concur. In developing an appropriate compliance time for this action, the FAA considered not only the safety implications, but parts availability and normal maintenance schedules for timely accomplishment of the modification in the fleet. In consideration of these items, the FAA has determined that one year represents the maximum interval of time allowable wherein the modifications can reasonably be accomplished and an acceptable level of safety can be maintained.

Further, to reduce the compliance time of the proposal would necessitate (under the provisions of the Administrative Procedure Act) reissuing the notice, reopening the period for public comment, considering additional comments received, and eventually issuing a final rule; the time required for that procedure may be as long as four additional months. In comparing the actual compliance date of the final rule after completing such a procedure to the compliance date of this final rule as issued, the increment in time is minimal. In light of this, and in consideration of the amount of time that has already elapsed since issuance of the original notice, the FAA has determined that further delay of this final rule action is not appropriate. However, if additional data is presented that would justify a shorter compliance time, the FAA may consider further rulemaking on this issue.

Several other commenters request that the proposed compliance time of 12 months be extended to 36 months. These commenters state that mandating a compliance time of 12 months will have a significant adverse impact on costs to affected operators, since it will require that the slides be removed and overhauled "prematurely" (prior to regular overhaul schedules). These commenters consider their requested extension is justified, since the slides have been in use for over 10 years and there have been no in-service incidents of the delayed slide inflation problem. The FAA does not concur with the commenters' request. First, although there have been no in-service reports of delayed slide inflation, sufficient data exist to indicate that the potential for this problem still exists when the subject regulator valve is installed in a slide. This AD action addresses that potential unsafe condition. Second, as explained previously, the compliance time, as proposed, was determined to be appropriate in consideration of the safety implications, the average utilization rate of the affected fleet, the

practical aspects of an orderly modification of the fleet during regular maintenance periods, and the availability of required modification parts. The 12-month compliance time should allow ample time for the modification to be accomplished coincidentally with scheduled major airplane inspection and maintenance activities, thereby minimizing the costs associated with special airplane scheduling. However, under the provisions of paragraph (b) of the final rule, the FAA may approve requests for adjustments to the compliance time if data are submitted to substantiate that such an adjustment would provide an acceptable level of safety.

One commenter questions why the proposed AD is applicable to McDonnell Douglas airplanes rather than to BFGoodrich slides, since it clearly addresses a problem associated with the slides and not specifically with the airplanes. This commenter contends that it is "unfair for the FAA to issue AD's of this nature against the aircraft model manufacturer, as AD's serve to blemish the reputation of a given aircraft (hence possibly affecting salability and marketability of the aircraft)." The FAA responds by noting that its general policy is that, when an unsafe condition results from the installation of an appliance or other item that is installed in only one particular make and model of aircraft, the AD is issued so that it is applicable to the aircraft, rather than the item. The reason for this is simple: Making the AD applicable to the airplane model on which the item is installed ensures that operators of those airplanes will be notified directly of the unsafe condition and the action required to correct it. While it is assumed that an operator will know the models of airplanes that it operates, there is a potential that the operator will not know or be aware of specific items that are installed on its airplanes. Therefore, calling out the airplane model as the subject of the AD prevents "unknowing non-compliance" on the part of the operator. The FAA recognizes that there are situations when an unsafe condition exists in an item that is installed in many different aircraft. In those cases, the FAA considers it impractical to issue AD's against each aircraft; in fact, many times, the exact models and numbers of aircraft on which the item is installed may not be known. Therefore, in those situations, the AD is issued so that it is applicable to the item; furthermore, those AD's usually indicate that the item is known to be installed on, but not limited to, various aircraft models.

As for an AD acting as a "blemish" to the salability and marketability of the airplane towards which it is applicable, the FAA responds by noting that the "blemish" is the unsafe condition addressed, regardless of where it is or what it is caused by. The purpose of an AD is to correct that unsafe condition. In essence, the AD serves to protect the flying public from the consequences of the unsafe condition. The AD also serves to protect the manufacturer from the liability that would be faced should the unsafe condition not be corrected. Given the fact that all transport category airplanes worldwide have had AD's issued applicable to them, it is unrealistic to think that any transport would be "immune" from the kinds of unsafe conditions that warrant AD's.

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 as proposed.

There are approximately 400 BFGoodrich evacuation slides installed on McDonnell Douglas Model DC-9 and Model DC-9-80 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 240 evacuation slides are installed on airplanes of U.S. registry that are affected by proposed AD. It will take approximately 3 work hours per slide to accomplish the required modification actions, at an average labor rate of $55 per work hour. Required parts are expected to cost approximately $660 per slide. Based on these figures, the total cost impact of this AD on U.S. operators is estimated to be $198,000, or $825 per slide. This total cost figure assumes that no operator has yet accomplished the requirements of this AD.

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 14 CFR part 39 of the Federal Aviation Regulations 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:

93-23-03 McDonnell Douglas: Amendment 39-8737. Docket 93-NM-39-AD.

Applicability: Model DC-9 and Model DC-9-80 series airplanes; equipped with BFGoodrich evacuation slides, as listed in BFGoodrich Service Bulletin 4A3106/4A3153-25-258, dated March 29, 1993, having regulator part number 4A3106-1, -2, or 4A3153; certificated in any category.

Compliance: Required as indicated, unless accomplished previously. To prevent delayed inflation of the evacuation slide, which could delay or impede the evacuation of passengers during an emergency, accomplish the following:

(a) Within 12 months after the effective date of this AD, modify BFGoodrich evacuation slides having regulator part number (P/N) 4A3106-1, -2, or 4A3153, installed on forward entry/service, aft service, and tailcone exit doors, in accordance with BFGoodrich Service Bulletin 4A3106/4A3153-25-258, dated March 29, 1993.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Los Angeles 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 Manager, Los Angeles ACO.

(c) Special flight permits may be issued in accordance with FAR 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 BFGoodrich Service Bulletin 4A3106/4A3153-25-258, dated March 29, 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 BFGoodrich, Aircraft Evacuation Systems, 3414 South 5th Street, Phoenix, Arizona 85040. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(e) This amendment becomes effective on December 22, 1993.

Issued in Renton, Washington, on November 15, 1993.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 93-28518 Filed 11-19-93; 8:45 am]

BILLING CODE 4910-13-P

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14 CFR Part 39

[Docket No. 93-NM-181-AD; Amendment 39-8735; AD 93-23-01]

Airworthiness Directives; Nordskog Water Heaters and Coffee Makers as Installed in Various Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to certain Nordskog water heaters and coffee makers. This action requires an inspection to determine whether certain discrepant pressure relief valves have been installed in certain galley water heaters and coffee makers; and either replacement of the discrepant valves, or discontinued use and installation of placards. This amendment is prompted by reports of injuries to cabin crew members that resulted from explosions of galley water heaters. The actions specified in this AD are intended to prevent explosions of galley water heaters and coffee makers, and subsequent injuries to passengers or cabin crew members.

DATES: Effective December 7, 1993.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 7, 1993.

Comments for inclusion in the Rules Docket must be received on or before January 21, 1994.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 93-NM-181-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

The service information referenced in this AD may be obtained from Nordskog Industries, Inc., 16000 Strathern Street, Van Nuys, California 91406. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office (ACO), 3229 E. Spring Street, Long Beach, California 90806-2425; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Walter Eierman, Systems and Equipment Branch, ANM-131L, FAA, Transport Airplane Directorate, Los Angeles ACO, 3229 East Spring Street, Long Beach, California 90806-2425; telephone (310) 988-5336; fax (310) 988-5210.

SUPPLEMENTARY INFORMATION: The FAA recently has received reports of injuries to cabin crew members that resulted from explosions of galley water heaters. One report stemmed from an incident in which a water heater exploded in the galley, tore a hole through the galley wall, and landed in the cockpit, resulting in injuries to two flight attendants. In another incident, a flight attendant received second degree burns from a water heater explosion. Investigation of one of these occurrences has revealed that the "O" ring jammed the poppet of the pressure relief valve, resulting in overpressurization. The cause of the overpressurization of the pressure relief valve has been attributed to a design problem. Both of these incidents involved water heaters of the design addressed by Nordskog Industries, Inc., Service Bulletin SB-93-34, dated October 21, 1993. This condition, if not corrected, could result in explosions of galley water heaters and coffee makers and subsequent injuries to passengers or cabin crew members.

The subject relief valve is also used in other Nordskog water heaters and coffee makers that are addressed by Nordskog Industries, Inc., Service Bulletin SB-93-35, dated October 21, 1993. The FAA is evaluating the need for AD action to address these additional installations and any other installations that use the same pressure relief valve design.

The FAA has reviewed and approved Nordskog Industries, Inc., Service Bulletin SB-93-34, dated October 21, 1993, that describes procedures for an inspection to determine whether certain NUPRO pressure relief valves have been installed in certain Nordskog galley water heaters and coffee makers; and replacement of those NUPRO pressure relief valves with new, improved NUPRO pressure relief valves. The manufacturer has advised that the discrepant pressure relief valve has been installed in certain Nordskog galley water heaters and coffee makers that either were manufactured between January 1990 and July 1991, or that have been serviced since January 1990. The manufacturer has also advised the FAA that this problem has been corrected on the new model number pressure relief valves installed by Nordskog since July 1991.

Since an unsafe condition has been identified that is likely to exist or develop on other components of the same type design installed on airplanes, this AD is being issued to prevent explosions of galley water heaters and coffee makers and subsequent injuries to passengers or cabin crew members. This AD requires an inspection to determine whether certain NUPRO pressure relief valves have been installed in certain Nordskog galley water heaters and coffee makers. This AD also requires either replacement of those NUPRO pressure relief valves with new, improved NUPRO pressure relief valves, or discontinued use of certain Nordskog galley water heaters and coffee makers and installation of placards stating, "Not to be used." The replacement action, if accomplished, is required to be performed in accordance with the service bulletin described previously.

Since a situation exists that requires the immediate adoption of this regulation, it is found that notice and opportunity for prior public comment hereon are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified under the caption "ADDRESSES." All communications received on or before

the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 93-NM-181-AD." The postcard will be date stamped and returned to the commenter.

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

The FAA has determined that this regulation is an emergency regulation that must be issued immediately to correct an unsafe condition in aircraft, and is not a "significant regulatory action" under Executive Order 12866. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket. A copy of it, if filed, may be obtained from the Rules Docket at the location provided under the caption "ADDRESSES."

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

93-23-01 Nordskog Industries, Inc.: Amendment 39-8735. Docket 93-NM-181-AD.

Applicability: Nordskog water heaters and coffee makers, as listed in Nordskog Industries, Inc., Service Bulletin SB-93-34, dated October 21, 1993; as installed in, but not limited to Boeing Model 727, 737, 747, 757, and 767 series airplanes; McDonnell Douglas Model DC-9, DC-9-80, and DC-10 series airplanes, and MD-11 airplanes; Lockheed Model L-1011 series airplanes; Airbus Industrie Model A300, A310, and A320 series airplanes; Gulfstream Model G-1159 series airplanes and Model G-IV airplanes; de Havilland, Inc., Model DHC-8 series airplanes; Dassault-Aviation Model Mystere-Falcon 50 and 900 series airplanes; Canadair Model CL-600-1A11 (CL-600), CL-600-2A12 (CL-601), and CL-600-2B16 (CL-601-3A and -3R) and CL-600-2B19 series airplanes; and Fokker Model F27 and F28 series airplanes; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent explosions of galley water heaters and coffee makers and subsequent injuries to passengers or cabin crew members, accomplish the following:

(a) Within 30 days after the effective date of this AD, perform a one-time inspection to determine whether a NUPRO pressure relief valve having part number (P/N) SS-2C4-65 has been installed, in accordance with Nordskog Industries, Inc., Service Bulletin SB-93-34, dated October 21, 1993. If any NUPRO pressure relief valve having P/N SS-2C4-65 has been installed, prior to further flight, accomplish either paragraph (a)(1) or (a)(2) of this AD.

(1) Remove the NUPRO pressure relief valve having P/N SS-2C4-65 and install a new, improved NUPRO pressure relief valve having P/N SS-CHF2-65, in accordance with the service bulletin. Or

(2) Deactivate any Nordskog water heater or coffee maker listed in the service bulletin on which a NUPRO pressure relief valve having P/N SS-2C4-65 has been installed, and install a placard stating, "Not to be used."

(b) As of the effective date of this AD, no person shall install a NUPRO pressure relief valve having P/N SS-2C4-65 on any airplane.

(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 FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

(e) The inspection and replacement shall be done in accordance with Nordskog Industries, Inc., Service Bulletin SB-93-34, dated October 21, 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 Nordskog Industries, Inc., 16000 Strathern Street, Van Nuys, California 91406. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles ACO, 3229 E. 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 7, 1993.

Issued in Renton, Washington, on November 15, 1993.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 93-28519 Filed 11-19-93; 8:45 am]

BILLING CODE 4910-13-P

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14 CFR Part 39

[Docket No. 93-NM-180-AD; Amendment 39-8736; AD 93-23-02]

Airworthiness Directives; Jetstream Aircraft Limited Model 4101 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to certain Jetstream Aircraft Limited Model 4101 airplanes. This action requires an inspection to detect damage of the electrical loom in the main entrance door, replacement of any damaged loom, and modification of the loom routing and support. This amendment is prompted by a report that the electrical loom in the main entrance

door became trapped between the inner skin of the door and the speedlock solenoid. The actions specified in this AD are intended to prevent the inability of passengers to evacuate the airplane through the main entrance door in an emergency.

DATES: Effective December 7, 1993.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 7, 1993.

Comments for inclusion in the Rules Docket must be received on or before January 21, 1994.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 93-NM-180-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

The service information referenced in this AD may be obtained from Jetstream Aircraft, Inc., P.O. Box 16029, Dulles International Airport, Washington, DC 20041-6029. This information may be examined 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.

FOR FURTHER INFORMATION CONTACT: Bud 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: The Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom, recently notified the FAA that an unsafe condition may exist on certain Jetstream Aircraft Limited Model 4101 airplanes. The CAA advises that the electrical loom in the main entrance door became trapped between the inner skin of the door and the speedlock solenoid on a Model 4101 airplane. This condition caused the speedlock solenoid to jam in the locked position. This condition, if not corrected, could result in the inability of passengers to evacuate the airplane through the main entrance door in an emergency.

Jetstream Aircraft Limited has issued Alert Service Bulletin J41-A52-021, dated August 24, 1993, that describes procedures for a detailed visual inspection to detect damage of the electrical loom in the main entrance door, and replacement of any damaged loom with a new loom. The alert service bulletin also describes procedures for modification of the loom routing and support. The modification involves re-routing the electrical loom clear of the speedlock solenoid and the inner skin of the door, an operational test of the main entrance door warning system, and a functional test of the main entrance door. During the functional test, the clearance between the speedlock solenoid and the door inner skin is examined to ensure that the electrical loom cannot become trapped between those parts. The CAA classified this service bulletin as mandatory.

This airplane model is manufactured in the United Kingdom and is type certificated for operation in the United States under the provisions of § 21.29 of the Federal Aviation Regulations and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the CAA has kept the FAA informed of the situation described above. The FAA has examined the findings of the CAA, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, this AD is being issued to prevent the inability of passengers to evacuate the airplane through the main entrance door in an emergency. This AD requires a detailed visual inspection to detect damage of the electrical loom in the main entrance door, replacement of any damaged loom, and modification of the loom routing and support. The actions are required to be accomplished in accordance with the service bulletin described previously.

Since a situation exists that requires the immediate adoption of this regulation, it is found that notice and opportunity for prior public comment hereon are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified under the caption "ADDRESSES." All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 93-NM-180-AD." The postcard will be date stamped and returned to the commenter.

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

The FAA has determined that this regulation is an emergency regulation that must be issued immediately to correct an unsafe condition in aircraft, and is not a "significant regulatory action" under Executive Order 12866. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket. A copy of it, if filed, may be obtained from the Rules Docket at the location provided under the caption "ADDRESSES."

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

93-23-02 Jetstream Aircraft Limited: Amendment 39-8736. Docket 93-NM-180-AD.

Applicability: Model 4101 airplanes; as listed in Jetstream Aircraft Limited Alert Service Bulletin J41-A52-021, dated August 24, 1993; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent the inability of passengers to evacuate the airplane through the main entrance door in an emergency, accomplish the following:

(a) Within 30 days after the effective date of this AD, perform a detailed visual inspection to detect damage of the electrical loom in the main entrance door in accordance with Jetstream Aircraft Limited Alert Service Bulletin J41-A52-021, dated August 24, 1993.

(b) If any damage is found during the inspection required by paragraph (a) of this AD, prior to further flight: Replace the loom with a new loom; modify the electrical loom routing and support by re-routing the loom and support clear of the speedlock solenoid and the inner skin of the door; perform an operational test of the main entrance door warning system; and perform a functional test of the main entrance door, examining the clearance between the speedlock solenoid and the door inner skin to ensure that the electrical loom cannot become trapped between those parts; in accordance with Jetstream Aircraft Limited Alert Service Bulletin J41-A52-021, dated August 24, 1993.

(c) If no damage is found during the inspection required by paragraph (a) of this AD, prior to further flight, modify the electrical loom routing and support by re-routing the loom and support clear of the speedlock solenoid and the inner skin of the door; perform an operational test of the main entrance door warning system; and perform a functional test of the main entrance door, examining the clearance between the speedlock solenoid and the door inner skin to ensure that the electrical loom cannot become trapped between those parts; in accordance with Jetstream Aircraft Limited Alert Service Bulletin J41-A52-021, dated August 24, 1993.

(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 FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

(f) The inspection, replacement, modification, and tests shall be done in accordance with Jetstream Aircraft Limited Alert Service Bulletin J41-A52-021, dated August 24, 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 Jetstream Aircraft, Inc., 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.

(g) This amendment becomes effective on December 7, 1993.

Issued in Renton, Washington, on November 15, 1993.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 93-28547 Filed 11-19-93; 8:45 am]

BILLING CODE 4910-13-P

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14 CFR Part 71

[Airspace Docket No. 91-AWA-6]

Alteration of Long Island MacArthur Airport Class C Airspace Area; Islip, NY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action alters the Long Island MacArthur Airport, Islip, NY, Class C airspace area by removing areas of regulatory airspace north, east, and west of the Long Island MacArthur Airport. This action will reduce the Class C airspace area along the northern shore of Long Island, increase that airspace allocated for ingress/egress to/from the Brookhaven Airport, and realign the airspace west of MacArthur Airport to coincide with prominent landmarks. This action also clarifies that the effective dates and times of operation for the Class C airspace area will coincide with the hours of operation of the Long Island MacArthur Airport tower.

EFFECTIVE DATE: 0901 UTC, December 9, 1993.

FOR FURTHER INFORMATION CONTACT: Patricia P. Crawford, Airspace and Obstruction Evaluation Branch (ATP-240), Airspace-Rules and Aeronautical Information Division, Air Traffic Rules and Procedures Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267-9255.

SUPPLEMENTARY INFORMATION:

History

On December 8, 1992, the FAA published a Notice of Proposed Rulemaking (NPRM) proposing to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) to alter the Long Island MacArthur Airport, Airport Radar Service Area (57 FR 58116). The Airspace Reclassification Final Rule, effective September 16, 1993, redesignated airport radar service areas as Class C airspace areas.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. The coordinates for this airspace docket are based on North American Datum 83. Class C airspace area designations are published in Paragraph 4000 of FAA Order 7400.9A dated June 17, 1993, and effective September 16, 1993, which is incorporated by reference in 14 CFR 71.1 (58 FR 36298, July 6, 1993). The Class C airspace area listed in this document will be published subsequently in the Order.

Discussion of Comments

The Federal Aviation Administration received five written comments supporting the proposed action. Furthermore, two of the commenters, Long Island Pilots Association (LIPA) and Aircraft Owners and Pilots Association (AOPA) provided the following recommendations:

LIPA and AOPA recommended raising the floor from 1,500 feet to 2,000 feet mean sea level (MSL) between the 5- and 10-mile radius of the Long Island MacArthur Airport. Both organizations stated that raising the floor would provide additional altitude for obstacle clearance for non-participating aircraft. LIPA further stated that raising the floor would reduce radio communications and prevent interference with traffic in the Class C airspace area. In lieu of

raising the floor, AOPA recommended that FAA establish letters of agreement with the Islip training schools to allow training in the area south of the Class C airspace area. AOPA also suggested that a special transponder code and frequency could be utilized by pilots conducting training in that area.

The FAA has decided that the floor between the 5- and 10-mile radius of MacArthur Airport will remain at 1,500 feet MSL. A thorough analysis of this recommendation has concluded that raising the floor of the outer core would lead to unrealistic descent profiles for aircraft operating under these conditions. In addition, the 1,500 feet MSL floor will ensure that safety is not compromised because of the close proximity of arrival aircraft descending into MacArthur Airport and aircraft operating under visual flight rules (VFR) outside or below that airspace.

The FAA believes that modifying the Islip Class C airspace area will meet the users' needs as well as serve the area's training schools. Letters of agreement will not be necessary because the modifications to the airspace will allow a sufficient area for training activity. Due to the high level of traffic and the limitation of available air traffic control frequencies, we are unable to accommodate AOPA's recommendation for a special transponder code and frequency in that area.

The Rule

This amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) alters the Class C airspace area at the Long Island MacArthur Airport, Islip, NY. The Long Island MacArthur Airport is a public airport with an operating control tower serviced by the New York Terminal Radar Approach Control facility. The Class C airspace area at MacArthur Airport will be reduced to the north, along the northern shore of Long Island; to the east, to increase that airspace allotted for ingress and egress for the Brookhaven Airport; and to the west, to realign the airspace west of MacArthur Airport to coincide with prominent landmarks.

The airspace designation in the NPRM contained an error identifying the point of beginning for the outer boundary along the 10-mile radius. This point should have been 1.5 miles northwest of the Runway 24 localizer course instead of northeast of the course. This change is reflected in this final rule. Also, this action clarifies that the effective dates and times of operation for the Class C airspace area will coincide with the hours of operation of the Long Island MacArthur tower.

I find that good cause exists, pursuant to 5 U.S.C. 553(d), for making this amendment effective in less than 30 days in order to promote the safe and efficient handling of air traffic in the area.

Regulatory Evaluation Summary

The FAA has determined that this rulemaking is not a "significant regulatory action" as defined by Executive Order 12866 and a regulatory impact analysis has not been performed. The FAA has also determined that this regulation is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). The FAA has evaluated the anticipated costs and benefits which are summarized below. (A detailed discussion of costs and benefits is contained in the full evaluation in the docket for this final rule).

Costs

The FAA estimates that the total cost of implementing this final rule will be zero. The Long Island MacArthur Class C airspace area alteration is cost-relieving in nature. It will neither impose any additional costs on the FAA for either personnel or equipment nor on aircraft operators for additional avionics equipment or circumnavigation.

Contracting the Class C airspace area around Long Island MacArthur Airport will not result in a reduction in air safety in terms of an increased risk of a midair collision. The FAA has determined that it can provide the same level of safety and aircraft separation in the modified Class C airspace area as it does under the existing airspace area.

Benefits

This final rule will produce potential benefits primarily in the forms of both increased operational and navigational efficiency for aircraft operators. Specifically, the benefits include:

- Enhanced operational efficiency by increasing accessibility to the Brookhaven Airport;
- Enhanced operational efficiency for pilots operating in the vicinity of Port Jefferson and Stony Brook who wish to remain clear of the Class C airspace area; and
- Class C airspace area boundaries that are aligned with discernable landmarks (the Sagtikos State and Sunken Meadow State Parkways) for easier navigation.

Comparison of Costs and Benefits

This final rule will not impose any costs on aircraft operators in the vicinity of Long Island MacArthur Airport since it will reduce the amount of Class B airspace. However, there will be no reduction in aviation safety for aircraft operators or the flying public. The potential benefits of this final rule will be increased operational and navigational efficiency for aircraft operators. Consequently, the FAA has determined that this final rule is cost beneficial.

Final Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress to ensure that small entities are not unnecessarily and disproportionately burdened by government regulations. The RFA requires government agencies to determine whether rules would have "a significant economic impact on a substantial number of small entities" and, in cases where they would, to conduct a regulatory flexibility analysis.

The FAA has determined that this final rule will not have a significant economic impact on a substantial number of small entities. This determination is based on the expectation that none of the small entities, such as air taxi operators, will incur additional equipment or operating costs. In addition, this final rule is cost-relieving in nature and will not increase costs to operators.

International Trade Impact Assessment

This final rule will only affect U.S. terminal airspace operating procedures in the vicinity of Islip, NY. This final rule will not impose a competitive trade disadvantage on foreign firms in the sale of either foreign aviation products or services in the United States. In addition, domestic firms will not incur a competitive trade disadvantage in either the sale of U.S. aviation products or services in foreign countries.

Federalism Implications

The regulation adopted will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, preparation of a Federalism assessment is not warranted.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71, as follows:

PART 71—[AMENDED]

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

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

§71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9A, Airspace Designations and Reporting Points, dated June 17, 1993, and effective September 16, 1993, is amended as follows:

Paragraph 4000—Subpart C-Class C Airspace

* * * * *

AEA NY C Long Island MacArthur Airport, Islip, NY [Revised]

Long Island MacArthur Airport
(lat. 40°47'44" N., long. 73°05'59" W.)
Bayport Aerodrome
(lat. 40°45'30" N., long. 73°03'13" W.)
Brookhaven Airport
(lat. 40°49'00" N., long. 72°51'43" W.)

That airspace extending upward from the surface to and including 4,100 feet MSL within a 5-mile radius of the Long Island MacArthur Airport, excluding that airspace from the surface to but not including 700 feet MSL within 1 mile west of Bayport Aerodrome and parallel to Runway 18/36 from south of the Sunrise Highway southbound to the 5-mile radius of the Long Island MacArthur Airport, counterclockwise to south of Nichols Road thence northbound along Nichols Road to south of and parallel to the Sunrise Highway westbound to the beginning point; and that airspace extending upward from 1,500 feet MSL to 4,100 feet MSL within a 10-mile radius of the Long Island MacArthur Airport beginning clockwise from a point along the 10-mile radius 1.5 miles northwest of the Long Island MacArthur Airport Runway 24 localizer course (lat. 40°55'53" N., long. 72°58'20" W.) then clockwise along the 10-mile radius to intersect the 3-mile arc northwest of the Brookhaven Airport then counterclockwise along the 3-mile arc to intersect the 10-mile radius of the Long Island MacArthur Airport then clockwise along the 10-mile radius to intersect the north shore of Fire Island then west along the north shore to intersect the 10-mile radius then clockwise to the Sagtikos State Parkway north along the Sagtikos and the Sunken Meadow State Parkway to intersect the 10-mile radius at the north shore of Long Island then a straight line east to the point of origin, excluding that airspace overlying Long Island Sound. This Class C airspace area is effective during the specific days and hours of operation of the Long Island MacArthur Tower as established in advance by a Notice to Airmen. The effective dates and times will thereafter be continuously published in the Airport/Facility Directory.

* * * * *

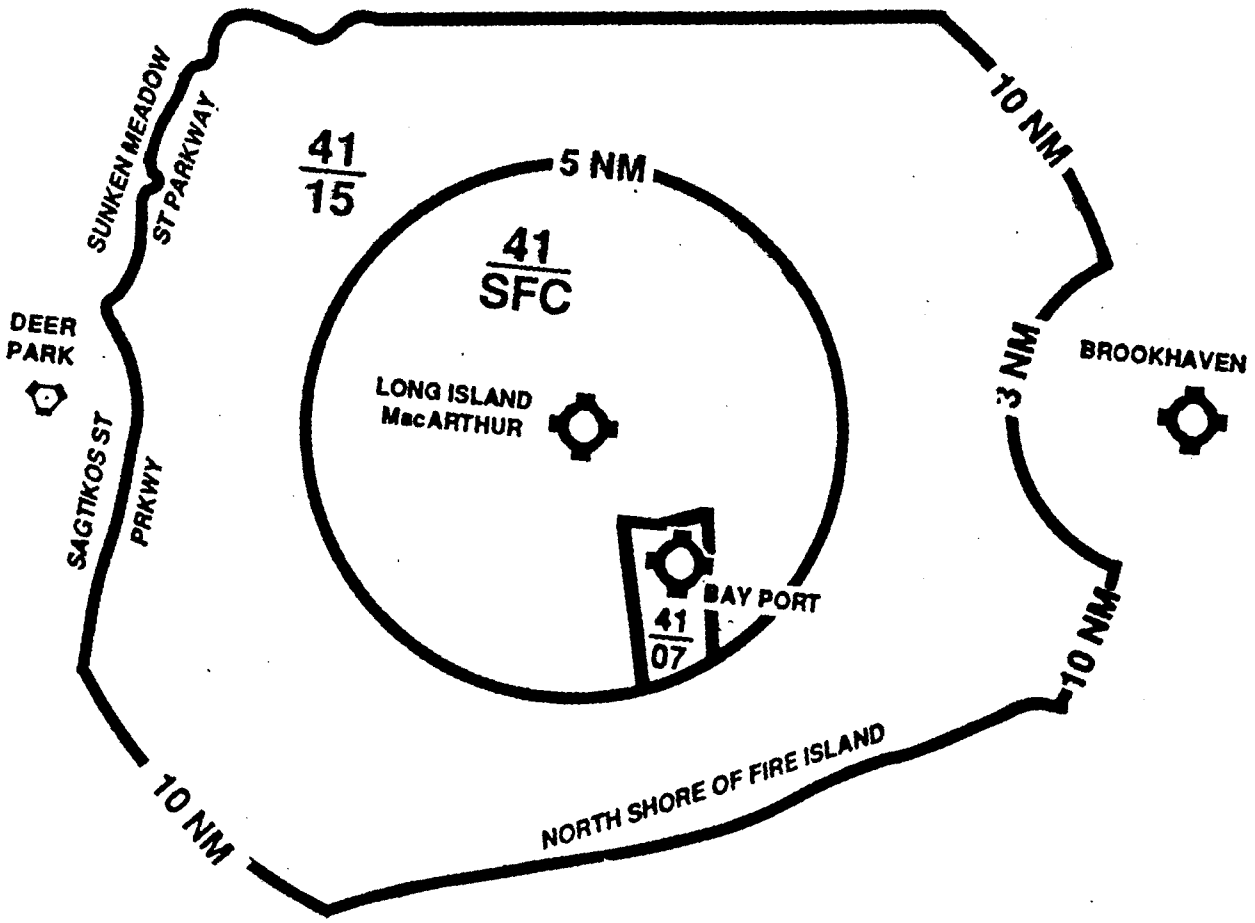
Issued in Washington, DC, on November 9, 1993.

Harold W. Becker,

Manager; Airspace—Rules and Aeronautical Information Division.

BILLING CODE 4910-13-M

ISLIP, NY CLASS C AIRSPACE
LONG ISLAND MacARTHUR AIRPORT
AIRPORT ELEVATION 99 FEET
(NOT TO BE USED FOR NAVIGATION)



Prepared by the
FEDERAL AVIATION ADMINISTRATION
Cartographic Standards Branch
ATP-220

[FR Doc. 93-28269 Filed 11-19-93; 8:45 am]
BILLING CODE 4910-13-C

DEPARTMENT OF ENERGY

48 CFR Part 970

RIN 1991-AA73

Acquisition Regulation; Implementation of Requirements of Major Fraud Act of 1988

AGENCY: Department of Energy (DOE).

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) is issuing regulations amending its Acquisition Regulation to implement the requirements of the Major Fraud Act of 1988, enacted November 19, 1988, hereafter referred to as the "Act." The intended effect of this rulemaking is to establish, for incorporation in all of DOE management and operating (M&O) contracts, awarded or extended after November 19, 1988, mandatory contract provisions prohibiting, in specified circumstances, the reimbursement of certain costs related to legal and other proceedings. This Final Rule amends the Department of Energy Acquisition Regulation (DEAR) to formally establish policies, procedures and contract provisions to apply the Act's provisions in cases where a criminal, civil or administrative proceeding is brought by a Federal, State, local or foreign government against a M&O contractor.

EFFECTIVE DATE: This rule will be effective December 22, 1993.

FOR FURTHER INFORMATION CONTACT:

Michael L. Righi, Business and Financial Policy Division (PR-122), U.S. Department of Energy, Washington, DC 20585, (202) 586-8175

Laura Fullerton, Office of the Assistant General Counsel for Procurement and Finance (GC-34), U.S. Department of Energy, Washington, DC 20585, (202) 586-1900

SUPPLEMENTARY INFORMATION:

I. Background
II. Discussion of Comments Received
III. Procedural Requirements
A. Regulatory Review
B. Review Under the Regulatory Flexibility Act
C. Review Under the Paperwork Reduction Act
D. Review Under Executive Order 12612
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I. Background

On January 13, 1993, DOE published a Notice of Proposed Rulemaking (NOPR) addressing the applicability of the Major Fraud Act of 1988 (Pub. L. 100-700) (the Act) to its management and operating contracts (58 FR 4141). The NOPR provided an opportunity for comment. Nine sets of comments were received, reviewed and considered by DOE.

The purpose of today's notice is to respond to the comments received and to make minor adjustments to the language of the proposed rule. These changes do not substantively alter the proposed text.

This Final Rule amends the DEAR to establish polices, procedures and contract provisions to apply the Act's provisions where a criminal, civil or administrative proceeding is brought by a Federal, State, local or foreign government against an M&O contractor. The DEAR amendments include provisions for determining the allowability of an M&O contractor's costs incurred in connection with such a proceeding.

II. Discussion of Comments Received

Following is a summary of the comments received and DOE response to the issues and concerns raised by the commenters.

Retroactive Effect

Six commenters stated that DOE could not unilaterally change its contract provisions and that the contracts awarded prior to the issuance of these regulations must be renegotiated before the regulations would be applicable.

Response: Section 8(e) of the Major Fraud Act provides that the amendments to the Federal Property and Administrative Services Act "shall take effect with respect to contracts awarded after the date of the enactment of this Act." The statute was enacted on November 19, 1988, and, consequently, is effective for any contract awarded after that date. No contractual provision is necessary for implementation or effectiveness of the Act's requirements. Since, for the most part, the regulations proposed today simply restate statutory requirements, DOE is not proposing "retroactive" application of a regulation to existing contracts. A management and operating contract entered into after November 19, 1988, is subject to the requirements of the Major Fraud Act whether or not the contract contains a specific reference to the Act's applicability.

Nevertheless, DOE has determined that two of the provisions contained in the proposed regulation, and not contained in the statute, will only affect contracts entered into after the effective date of this Final Rule. This exception will apply to costs related to a proceeding brought by a local or foreign government under a contract entered into before the effective date of this Final Rule. This exception will also apply to paragraph (f) of the new DEAR 970.5204-61, which prohibits reimbursement of contractor costs incurred in connection with the defense of a suit brought under the whistleblower protection provisions of section 2 of the Act.

Five commenters stated that DOE M&O contract extension procedures did not legally result in the award of a new contract, but instead resulted in an execution of a contract modification. Under this reasoning, commenters take the position that the Act is not applicable to most M&O contracts since these contracts have merely been modified to extend the time period of the existing M&O contract.

Response: The Department does not agree with the opinion expressed that contracts extended under DOE extend/compete process are not new contracts for purposes of Major Fraud Act coverage. As is set forth below, the Department's position is based on application of the statute to specific contract provisions, governmentwide and Departmental regulations, and agency practice.

Each M&O contract contains a specified period for performance in the Statement of Work, which typically is for a period of five years or less. Similarly, under the terms of the contract, a contract termination clause generally indicates that the contract is set to expire after a stated period of time, unless sooner terminated. Thus, a new contract is required before a mutually binding legal relationship will exist requiring contract performance after the stated terminal date, except of course for residual obligations stemming from the completed period of performance.

Federal Acquisition Regulation (FAR) 17.605 and DEAR 917.605, both entitled "Award, renewal and extension," describe the management and operating contractor extend/compete procedures and use the terms renewal and extension synonymously. The DEAR describes in some detail the process necessary to support a decision to "extend or compete" a management and operating contract. A decision to "extend" the current contract simply means that DOE will not solicit proposals that might yield a new contractor, but instead will attempt to negotiate a new contract with the current contractor to continue to operate and manage the site or facility for a specified contract period. Neither party is obliged to enter into an extension of the contract. If negotiations for an extension are unsuccessful, the

incumbent M&O is left with no contractual rights or obligations to continue contract performance—the contract expires by its own terms. If the negotiations are successful, the M&O may assert contractual rights based on the new contract, not on the old contract. Consistent with FAR 17.602(a), the extension decision is supported by the appropriate justification for contracting without full and open competition. FAR 17.605(b) specifies that each M&O contract must be reviewed at least once every five years and an extension or renewal must be authorized at a level within the agency no lower than the level the "original contract" was authorized consistent with FAR 17.602(a) (i.e., the head of the agency).

Once the "extend/compete" decision is made, the contracting officer is authorized to "negotiate an extension to the contract." The contracting officer is then required to "submit the negotiated contract to Headquarters for the approval of the Procurement Executive prior to execution." DEAR 917.605(d). The proposed contract document, when submitted for Headquarters' approval, must be accompanied by several items, including a list of any significant changes from the "existing contract." Clearly, the regulations contemplate two contract instruments: An existing contract and the newly negotiated contract.

The level of approval required for both the "extend or compete" decision and the renewed contract can be contrasted with the annual negotiations which are conducted during the term of the existing, original contract. These annual negotiations (which cover matters like the award fee pool and statement of work for the upcoming year) are executed in the form of contract modifications, but they are within the term of the original contract. These annual negotiations do not require the high level of approval or documentation required for the renewal contract.

For administrative reasons, renewals or extensions of M&O contracts are often designated as modifications rather than new contracts, and some contracts still bear contract numbers originally assigned thirty or forty years ago. However, substantively and legally, these contract actions constitute an award of a new contract and, as a matter of agency practice, new legislation enacted during the prior period of performance which affects newly awarded contracts is implemented in the extended contract.

Local or Foreign Government Proceeding Costs

Nine commenters felt that the terms of the regulation should not include "local or foreign governments" in describing proceeding costs which will be disallowed, since this goes beyond statutory requirements.

Response: Commenters have taken issue with the extension of the Act's coverage in the cost principle to a proceeding commenced by local or foreign government with regard to violation of a local or foreign statute or regulation. Section 8 of the Act addressed only proceedings commenced by a Federal or a State government with regard to a federal or state statute or regulation. DOE has decided to retain the prohibition against reimbursement of proceeding costs related to violations of local and foreign laws and regulations. Inclusion of these terms is consistent with a DOE related statute covering reimbursement of fines and penalties which prohibits "[p]ayments of fines and penalties resulting from violations of, or failure to comply with, Federal, State, local, or foreign laws and regulations * * *." 42 U.S.C. 7256a(a)(4).

However, DOE has decided to amend the DEAR to permit a determination to provide for more than 80 percent cost reimbursement for a proceeding commenced by a State, local, or foreign government, if the determination explicitly considers the 80 percent limitation. This amendment results in equal treatment for determinations regarding proceedings commenced by State, local, or foreign governments and agreements regarding proceedings commenced by the Federal Government.

Whistleblower Protection

Three commenters stated that it was improper to extend the coverage of unallowable costs to include costs incurred by a contractor in connection with the defense of a suit brought by an employee under section 2 of the Act. Section 2 of the Act contains whistleblower protection provisions.

Response: Inclusion of this provision is a logical implementation of Congressional intent to protect whistleblowers reporting contracting fraud. Disallowing contractor costs for defense of suits brought by employees for redress from retaliation, where the contractor is found liable or settled, provides an incentive to contractors to refrain from retaliation and to settle such claims on an informal basis at a level where the cost could still be reimbursed.

Other Issues

One commenter felt the Accountability Rule liability cap and ceiling should apply to costs disallowed under this rulemaking but not specifically addressed in the original statute.

Response: DEAR 970.5204–55(c) excludes Major Fraud Act proceedings costs from inclusion under the liability cap or calculation of the ceiling. There is no policy or legal justification for different treatment of a subset of those costs in implementing the provisions of the Accountability Rule.

Some flexibility is provided under the terms of the new clause because costs arising from proceedings by local or foreign governments may receive the same treatment as unallowable costs resulting from a State government's proceedings. The new DEAR 970.5204–61(d) provides that "the Contracting Officer may allow the costs incurred in such proceeding, provided the Procurement Executive determines that the costs were incurred as a result of compliance with a specific term or condition of the contract, or specific written direction of the Contracting Officer."

Additional flexibility is provided in proposed DEAR 970.5204–61, paragraph (e)(4), to include determinations made under paragraph (d) in the exclusion from the 80 percent reimbursement limitation for allowable proceeding costs.

One commenter stated that the limitation on reimbursement of allowable proceeding costs to 80 percent was illegal.

Response: This provision is mandated by the Act and is not a new requirement created under DOE proposed rule.

Two commenters stated that the extension of proceeding costs to "the costs of the services of accountants, consultants, or others retained by the contractor to assist it" was improper.

Response: This is not a substantive change from the terms of the Act and this provision has been retained.

One commenter stated it was improper to extend covered dispositions, where proceedings costs would be unallowable, in the proposed DEAR 970.5204–61(b)(6), to include other actions where the "underlying alleged contractor misconduct was the same."

Response: This language is not a substantive addition to the Act's requirements since it is already contained in section 306(e)(3) of the Federal Property and Administrative Services Act.

Two commenters expressed concern about the M&O non-profit contractors'

ability to pay costs made unallowable under this regulation.

Response: The Act contained no distinction in treatment between for-profit contractors and non-profit contractors, and, therefore, both are covered by the Act.

Procedural Issues

Two commenters stated that Executive Order 12778, section 2, requires the agency to specify how existing regulations will be affected. Commenters were particularly concerned about the role of the Accountability Rule in combination with this proposed rule.

Response: The Accountability Rule amending 48 CFR part 970 appearing in the **Federal Register** on February 7, 1991 (56 FR 5064) already stated DOE position on this issue. Relevant language from the preamble follows:

> Statutorily mandated nonreimbursable costs cannot be limited by an administratively established ceiling. To permit any costs which are otherwise unallowable to be included in the calculation of a liability ceiling, the purpose of which was to limit exposure resulting from this rule, would subvert that policy. Only those unallowable Avoidable Costs created by this Interim Final Rule will be included in and subject to the liability cap. All other unallowable costs, whether mandated by statute, such as the Major Fraud Act of 1988 or the Price Anderson Amendments Act of 1988, or regulations not resulting from this Final Rule, will not be included in determining when the liability ceiling has been reached.

One commenter stated that DOE must issue other regulations and cited the need for a new contract clause for a new accounting system.

Response: DOE is not persuaded that "other regulations" are necessary for implementation of these proposed provisions. This rulemaking is intended to clarify Major Fraud Act requirements as they apply to M&O contracts rather than impose new or additional requirements not already in effect. Additionally, a new accounting system is not required since M&O contractors are already required to segregate unallowable costs.

A number of commenters also felt that Paperwork Reduction Act issues had not been adequately addressed and expressed concern that cost records would have to be reconstructed if there is retroactive application of these provisions. Additionally, commenters stated that the cost segregation requirements for compliance with these provisions would be difficult and impractical.

Response: As discussed previously, DOE is not proposing to apply the Act's requirements retroactively. The prohibitions and requirements in the proposed rule are mandated by statute. While compliance with the law may cause some inconvenience or additional expense, this does not relieve DOE of its obligation to carry out the law or the contractor of its obligation to comply with the law. Additionally, new cost segregation requirements are not required since M&O contractors are already required to segregate unallowable costs.

III. Procedural Requirements

A. Regulatory Review

Today's regulatory action has been determined not to be a "significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review," (58 FR 51735, October 4, 1993). Accordingly, today's action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs.

B. Review Under the Regulatory Flexibility Act

This rule was reviewed under the Regulatory Flexibility Act of 1980, Public Law 96–354, which requires preparation of a regulatory flexibility analysis for any rule that is likely to have a significant economic impact on a substantial number of small entities. This rule will have no impact on interest rates, tax policies or liabilities, the cost of goods or services, or other direct economic factors. It will also not have any indirect economic consequences such as changed construction rates. DOE certifies that this rule will not have a significant economic impact on a substantial number of small entities and, therefore, no regulatory flexibility analysis has been prepared.

C. Review Under the Paperwork Reduction Act

No new information collection or recordkeeping requirements are imposed by this rule. Accordingly, no OMB clearance is required under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

D. Review Under Executive Order 12612

Executive Order 12612, entitled "Federalism," 52 FR 41685 (October 30, 1987), requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on states, on the relationship between the Federal government and the states, or in the distribution of power and responsibilities among various levels of Government. If there are sufficient substantial direct effects, then the Executive Order requires preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a policy action. This rule will apply to state agencies that contract with DOE; however, none of the revisions is substantive in nature.

E. National Environmental Policy Act

DOE has concluded that this rule would not represent a major Federal action having significant impact on the human environment under the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321, *et seq.*) (1976) or the Council on Environmental Quality Regulations (40 CFR parts 1500–1508) and, therefore, does not require an environmental impact statement or an environmental assessment pursuant to NEPA.

F. Review Under Executive Order 12778

Section 2 of Executive Order 12778 instructs each agency subject to Executive Order 12291 to adhere to certain requirements in promulgating new regulations and reviewing existing regulations. These requirements, set forth in sections 2 (a) and (b), include eliminating drafting errors and needless ambiguity, drafting the regulations to minimize litigation, providing clear and certain legal standards for affected conduct, and promoting simplification and burden reduction. Agencies are also instructed to make every reasonable effort to ensure that the regulation specifies clearly any preemptive effect, effect on existing Federal law or regulation, and retroactive effect; describes any administrative proceedings to be available prior to judicial review and any provisions for the exhaustion of such administrative proceedings; and defines key terms. DOE certifies that today's rule meets the requirements of sections 2 (a) and (b) of Executive Order 12778.

List of Subjects in 48 CFR Part 970

Government procurement.

For the reasons set out in the preamble, part 970 of chapter 9 of title 48 of the Code of Federal Regulations is amended as set forth below.

Issued in Washington, DC on October 8, 1993.

G.L. Allen,

Acting Deputy Assistant Secretary for Procurement and Assistance Management.

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

1. The authority citation for part 970 continues to read as follows:

Authority: Sec. 161 of the Atomic Energy Act of 1954 (42 U.S.C. 2201); sec. 644 of the Department of Energy Organization Act, Public Law 95–91 (42 U.S.C. 7254); sec. 201 of the Federal Civilian Employee and Contractor Travel Expenses Act of 1985 (41 U.S.C. 420); and sec. 1534 of the Department of Defense Authorization Act, 1986, Public Law 99–145 (42 U.S.C. 7256a), as amended.

2. Section 970.3102–20 is revised to read as follows:

970.3102–20 Cost prohibitions related to legal and other proceedings.

(a) Contractor costs incurred in connection with a criminal, civil or administrative proceeding involving contractor violation of, or failure to comply with, a Federal, State, local or foreign statute or regulation are subject to the allowable costs limitations established in section 8 of the Major Fraud Act of 1988, Public Law 100–700 (see 41 U.S.C. 256).

(b) Implementation of the Major Fraud Act's contract cost limitations is specified in the applicable cost principles clauses at 970.5204–13(e)(33) or 970.5204–14(e)(31). Definitive cost principle criteria for determining the allowability of an M&O contractor's costs incurred in connection with a criminal, civil or administrative proceeding are set forth in the contract clause at 970.5204–61. Any change made to the cost principle criteria specified therein constitutes a deviation requiring Procurement Executive approval pursuant to 970.3100–3.

3. Section 970.3103, Contract clauses, is amended by adding paragraph (c) to read as follows:

970.3103 Contract clauses.

* * * * *

(c) The clause setting forth cost prohibitions related to legal and other proceedings at 970.5204–61 shall be included in all M&O contracts.

4. Section 970.5204–13, Allowable costs and fixed-fee (management and operating contracts), is amended by revising paragraph (e)(33) to read as follows:

970.5204–13 Allowable costs and fixed-fee (management and operating contracts).

* * * * *

(e) * * *

(33) Costs incurred in connection with any criminal, civil or administrative proceeding commenced by the Federal Government or a State, local or foreign government, as provided in the clause titled "Cost prohibitions related to legal and other proceedings" incorporated elsewhere in this contract.

* * * * *

5. Section 970.5204–14, Allowable costs and fixed-fee (support contracts), is amended by revising paragraph (e)(31) to read as follows:

970.5204–14 Allowable costs and fixed-fee (support contracts).

* * * * *

(e) * * *

(31) Costs incurred in connection with any criminal, civil or administrative proceeding commenced by the Federal Government or a State, local or foreign government, as provided in the clause titled "Cost prohibitions related to legal and other proceedings" incorporated elsewhere in this contract.

* * * * *

6. Section 970.5204–61, Cost prohibitions related to legal and other proceedings, is added as follows:

970.5204–61 Cost prohibitions related to legal and other proceedings.

(a) *Definitions.*

Conviction, as used in this section, means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a conviction due to a plea of *nolo contendere.*

Costs include, but are not limited to, administrative and clerical expenses; the cost of legal services, whether performed by in-house or private counsel; the costs of the services of accountants, consultants, or others retained by the contractor to assist it; all elements of compensation, related costs, and expenses of employees, officers and directors; and any similar costs incurred before, during, and after commencement of a proceeding which bears a direct relationship to the proceeding.

Fraud, as used herein, means

(i) Acts of fraud or corruption or attempts to defraud the Government or to corrupt its agents,

(ii) Acts which constitute a cause for debarment or suspension under FAR 9.406-(2)(a) and FAR 9.407–(2)(a), and

(iii) Acts which violate the False Claims Act, 31 U.S.C. 3729–3731, or the Anti-kickback Act, 41 U.S.C. 51 and 54.

Penalty does not include restitution, reimbursement, or compensatory damages.

Proceeding includes an investigation.

(b) Except as otherwise described in this section, costs incurred in connection with any criminal, civil or administrative proceeding commenced by the Federal Government, or a State, local or foreign government, are not allowable if the proceeding relates to a violation of, or failure to comply with, a Federal, State, local or foreign statute or regulation by the contractor, and results in any of the following dispositions:

(1) In a criminal proceeding, conviction.

(2) In a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of contractor liability.

(3) In the case of any civil or administrative proceeding, the imposition of a monetary penalty.

(4) A final decision by an appropriate Federal official to debar or suspend the contractor, to rescind or void a contract, or to terminate a contract for default by reason of a violation of or failure to comply with a law or regulation.

(5) A disposition by consent or compromise, if the action could have resulted in any of the dispositions described in paragraphs (b) (1), (2), (3) or (4) of this section.

(6) Not covered by paragraphs (b)(1) through (5) of this section, but where the underlying alleged contractor misconduct was the same as that which led to a different proceeding whose costs are unallowable by reason of paragraphs (b)(1) through (5) of this section.

(c) If a proceeding referred to in paragraph (b) of this section is commenced by the Federal Government and is resolved by consent or compromise pursuant to an agreement entered into by the contractor and the Federal Government, then the costs incurred by the contractor in connection with such proceeding that are otherwise unallowable under paragraph (b) of this section may be allowed to the extent specifically provided in such agreement.

(d) If a proceeding referred to in paragraph (b) of this section is commenced by a State, local or foreign government, the Contracting Officer may allow the costs incurred in such proceeding, provided the Procurement Executive determines that the costs were incurred as a result of compliance with a specific term or condition of the contract, or specific written direction of the Contracting Officer.

(e) Costs incurred in connection with a proceeding described in paragraph (b) of this section, but which are not made unallowable by that paragraph, may be allowed by the Contracting Officer only to the extent that:

(1) The total costs incurred are reasonable in relation to the activities required to deal with the proceeding and the underlying cause of action;

(2) Payment of the costs incurred, as allowable and allocable contract costs, is not prohibited by any other provision(s) of this contract;

(3) The costs are not otherwise recovered from the Federal Government or a third party, either directly as a

result of the proceeding or otherwise; and

(4) The amount of costs allowed does not exceed 80 percent of the total costs incurred and otherwise allowable under the contract. Such amount that may be allowed (up to the 80 percent limit) shall not exceed the percentage determined by the Contracting Officer to be appropriate, considering the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the United States as a party, and such other factors as may be appropriate. However, where an agreement reached under paragraph (c) of this section, or a determination made under paragraph (d) of this section, explicitly considered this 80 percent limitation, then an amount up to the full amount of costs specifically provided in such agreement or determination may be allowed.

(f) Contractor costs incurred in connection with the defense of suits brought by employees or ex-employees of the contractor under section 2 of the Major Fraud Act of 1988, including the cost of all relief necessary to make such employee whole, where the contractor was found liable or settled, are unallowable.

(g) Costs which may be unallowable under this clause, including directly associated costs, shall be differentiated and accounted for by the contractor so as to be separately identifiable. During the pendency of any proceeding covered by paragraphs (b) and (f) of this section, the Contracting Officer shall generally withhold payment and not authorize the use of funds advanced under the contract for the payment of such costs. However, the Contracting Officer may, in appropriate circumstances, provide for conditional payment upon provision of adequate security, or other adequate assurance, and agreements by the contractor to repay all unallowable costs, plus interest, if the costs are subsequently determined to be unallowable.

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BILLING CODE 6450-01-P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1807, 1815, 1852, and 1870

Acquisition Streamlining Techniques

AGENCY: Office of Procurement, Procurement Policy Division, National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: NASA has amended the NASA FAR Supplement to incorporate a number of techniques that will streamline the acquisition planning and competitive source selection processes.

DATES: This interim rule is effective upon publication. Comments are due no later than January 6, 1994.

ADDRESSES: Comments should be addressed to Tom O'Toole, NASA Headquarters, Office of Procurement, Procurement Policy Division (Code HP), Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Tom O'Toole, Telephone: (202) 358-0482.

SUPPLEMENTARY INFORMATION:

Background

On February 16, 1990, NASA identified a number of techniques and initiatives designed to shorten and improve the acquisition process, and issued them in the Streamlined Acquisition Handbook (SAH). To ensure that all NASA procurement policy is in the appropriate regulation, the more successful of these techniques are now being incorporated into the NASA FAR Supplement. Once this is accomplished, the SAH will be rescinded. Included among these streamlining techniques are internal acquisition planning improvements, greater delegation of authority to NASA field installations, 120 day source selection schedules, streamlined proposal evaluation procedures, and limitations on solicitation and proposal pages, evaluation factors, NASA proposal evaluators, and field pricing requests.

These revisions are issued as an interim rule to ensure immediate improvement in NASA acquisition leadtimes and also to standardize existing practices.

Availability of NASA FAR Supplement

The NASA FAR Supplement, of which this proposed coverage will become a part, is codified in 48 CFR, chapter 18, and is available in its entirety on a subscription basis from the Superintendent of Documents, Government Printing Office, Washington, DC 20402. Cite GPO Subscription Stock Number 933-003-00000-1. It is not distributed to the public, either in whole or in part, directly by NASA.

Impact

NASA certifies that this regulation will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. *et seq.*). This rule does not impose any reporting or recordkeeping requirements subject to the Paperwork Reduction Act.

List of Subjects in 48 CFR Parts 1807, 1815, 1852, 1870

Government procurement.

Deidre A. Lee,

Associate Administrator for Procurement.

Accordingly, 48 CFR Parts 1807, 1815, 1852, and 1870 are amended as follows:

1. The authority citation for 48 CFR parts 1807, 1815, 1852, and 1870 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1).

PART 1807—ACQUISITION PLANNING

1807.103 [Amended]

2. In section 1807.103 paragraphs (a)(1) and (b) are revised to read as follows:

1807.103 Agency-head responsibilities.

(a) *Requirement for preparation of procurement plans.*

(1) Except as otherwise authorized by paragraph (a)(2) of this section and 1807.170-4(a), the contracting officer shall prepare a procurement plan, with the advice and assistance of the cognizant technical division, for each negotiated procurement expected to exceed $2,500,000. The estimated dollar amounts shall include all options and later phases contemplated for the same program or project. The plan shall be prepared before soliciting proposals for the initial phase or increment of the program or project.

(2) * * *

(b) *Approval of procurement plans.*

(1) For procurements selected for Headquarters review and approval in accordance with the Master Buy Plan procedure, the procurement plan shall be submitted for the signature of the head of the installation after reviews and written concurrences by the director or assistant director of the cognizant technical directorate, the cognizant program/project manager (or the cognizant staff official, as applicable, reporting directly to the head of the installation), and by the procurement officer. The procurement plan shall be submitted in original and five copies to the Associate Administrator for Procurement (Attention: Code HS) for approval.

(2) For procurements not selected for Headquarters review and approval, and for procurements within the installation's Master Buy Plan limitations, the procurement plan shall be approved in accordance with installation procedures.

(3) The position title shall be shown for each individual signing a procurement plan.

(4) Approval of a procurement plan does not constitute approval of any special conditions, or special clauses that may be required unless the plan so specifies, and the individual having approval authority is a signatory of the plan. All required deviations shall be approved through the procedures described in FAR subpart 1.4 and NFS subpart 1801.4.

3. In section 1807.170–1, paragraph (b)(11) is amended by adding text at the end of the paragraph to read as follows:

1807.170–1 Procurement plans requiring approval by NASA Headquarters.

* * * * *

(b) * * *

(11) * * * Normally, the goal of all competitive procurements should be to complete activities from receipt of proposal to contract award in not more than 120 calendar days. There may be instances when this goal cannot be attained even when all applicable streamlining techniques are used, for example, in procurements of unusual complexity or when a large number of proposals is anticipated. In these cases, a schedule longer than the 120-day goal should be planned, consistent with the exercise of good judgement.

4. In section 1807.170–1, paragraph (d)(1)(i) is revised to read as follows:

1807.170–1 Procurement plans requiring approval by NASA Headquarters.

* * * * *

(d) Additional pages.

(1) * * *

(i) Identify any deviations from the FAR or NFS (see 1807.103(b)(4));

* * * * *

5. Section 1807.170–4 is added to read as follows:

1807.170–4 Acquisition Strategy Meeting (ASM).

(a) The ASM is a meeting in which all NASA offices with an interest in the procurement come together to discuss its significant aspects, resolve major issues, and agree on the acquisition strategy. When an ASM is conducted, formal written minutes shall be prepared to summarize the decisions, actions, and conclusions of the ASM members. The approved minutes serve as the formal procurement plan required by 1807.103(a).

(b) ASMs may be held at Headquarters or field installations. Headquarters ASMs will be selected through the Master Buy Plan procedure. the Code HS analyst responsible for the procurement will schedule the meeting and will coordinate attendance with the installation's procurement office. The following offices will normally participate:

(1) Headquarters: cognizant program office; procurement; comptroller; safety and mission assurance; general counsel; management systems and facilities; and small disadvantaged business utilization.

(2) Installation: project office; procurement; and other offices as determined by the installation.

(c) Headquarters ASMs will be chaired by the Associate Administrator for Procurement or his/her designee. The Code HS analyst will prepare the minutes of Headquarters ASMs and distribute them to all attendees for review prior to approval by the ASM chairperson.

(d) For procurements within field installation approval levels, or for which procurement plan approval authority has been delegated from Headquarters, ASMs may be held at the installation and the minutes approved in accordance with installation procedures.

(e) ASMs, whether held at Headquarters or field installations, shall address the mandatory procurement plan topics specified in 1807.170. The briefing charts discussing these topics shall be appended to the approved ASM minutes and included in the contract file to serve as a record of satisfaction of the formal procurement plan requirement.

(f) Use of an ASM in lieu of a formal procurement plan does not in itself constitute approval of any deviations, special conditions, or special clauses that may be required, unless these items are specifically discussed at the ASM, agreed to by the individual having approval authority, and included in the ASM minutes. For deviations to be approved through the ASM process, all the information required by subpart 1801.4 must be presented and discussed.

1807.7102 [Amended]

6. In section 1807.7102, paragraph (a) is amended by removing the parenthetical reference "(see 1807.103(b)(1))" in the first sentence.

1807.7103–1 and 1807.7103–2 [Amended]

7. In section 1807.7103–1, paragraph (b), and in 1807.7103–2, paragraph (a), the reference "1807.7107" is revised to read "1807.7106" in each instance.

1807.7105 [Removed]

8. Section 1807.7105 is removed.

1807.7106 and 1807.7107 [Redesignated]

9. Sections 1807.1706 and 1807.7107 are redesignated 1807.7105 and 1807.7106, respectively.

10. Newly redesignated section 1807.7105 is revised to read as follows:

1807.7105 Procurement documents not selected for Headquarters review and approval.

(a) Procurement documents or actions not selected for Headquarters review and approval shall be processed at the installation level and approved in accordance with installation procedures.

(b) Procurement documents authorized to be processed at the installation level will be subject to after-the-fact reviews by Headquarters during normal procurement management surveys or other special reviews. Procurement delegations may subsequently be rescinded if a Headquarters review is deemed appropriate.

PART 1815—CONTRACTING BY NEGOTIATION

11. Section 1815.406 is amended by adding paragraphs (c) and (d) to read as follows:

1815.406 Preparing requests for proposals (RFPs) and requests for quotations (RFQs).

* * * * *

(c) Technical and contracting personnel will mutually agree on page limitations for their respective portions of an RFP. Unless approved in writing by the Procurement Officer, the page limitation for the contracting portion of an RFP (all sections except section C, Description/specifications/work statement) shall not exceed 150 pages, and the page limitation for the technical portion (Section C) shall not exceed 200 pages. Attachments to the RFP count as part of the section to which they relate. In determining page counts, a page is defined as one side of a sheet, 8½" x 11", with at least one inch margins on all asides, using not less than 12 characters per inch or equivalent type. Foldouts count as an equivalent number of 8½" x 11" pages. The metric standard format most closely approximating the described standard 8½" x 11" size may also be used.

(d) Page limitations shall also be established for proposals submitted in competitive procurements. Accordingly, technical and contracting personnel will mutually agree on page limitations for each portion of the proposal. Unless a different limitation is approved in writing by the Procurement Officer, the total initial proposal, excluding title pages, tables of content, and cost/price

information, shall not exceed 500 pages using the page definition of 1815.406(c). Firm page limitations shall also be established for Best and Final Offers (BAFOs), if requested. The appropriate BAFO page limitations should be determined by considering the complexity of the procurement and the extent of any written or oral discussions. The same BAFO page limitations shall apply to all offerors. Pages submitted in excess of the specified limitations for the initial proposal and BAFO will not be evaluated by the Government and will be returned to the offeror.

12. Section 1815.407–70 is amended by adding paragraphs (j) and (k) to read as follows:

1815.407–70 NASA solicitation provisions.

* * * * *

(j) The contracting officer shall insert the provision at 1852.215–81, Proposal Page Limitations, in all competitive requests for proposals.

(k) The contracting officer shall insert the provision at 1852.215–82, Offeror Oral Presentations, in competitive requests for proposals when the Government intends to allow offerors to make oral presentations prior to commencement of the Government's formal evaluation.

13. In section 1815.613–71, paragraph (b)(4) is revised to read as follows:

1815.613–71 Evaluation and negotiation of procurements conducted in accordance with source evaluation board (SEB) procecures.

* * * * *

(b) * * *

(4) Initial evaluation, scoring, and determination of competitive range.

(i) After initial identification of proposals not considered acceptable per 1815.613–71(b)(3), the SEB shall conduct an initial evaluation of all remaining proposals. This process is accomplished through either of two procedures. In the standard method, the SEB will complete its initial evaluation of the entire proposal in accordance with the evaluation factors, subfactors, and elements, and determine strong and weak points. This evaluation will be fully documented, including scoring or ranking proposals in accordance with the numerical and adjectival standards identified in the RFP and this handbook, except cost which is neither scored nor ranked. After this evaluation and scoring is completed, the proposals shall be reviewed to determine which are within the competitive range; namely those having a reasonable chance of being selected for final award. In making this determination, the SEB, together with the contracting officer, shall evaluate the potential for offerors to improve the competitive position of their proposals by written or oral discussions conducted in accordance with paragraph (b)(5) of this section. For those offerors remaining in the competitive range, the SEB will then develop questions for written and oral discussions.

(ii) An alternate method of initial evaluation dispenses with initial scoring. Although its use is a option reserved by NASA on all SEBs, the determination to use it on a given procurement cannot be pre-planned. It normally may only be used when two conditions exist: (A) relatively few (e.g., two or three) proposals are received; and (B) a full scoring or ranking of proposals is not required to make the determination that all offerors are in the competitive range. Whether a procurement satisfies the first qualification is obvious. To determine the second, however, the SEB must begin to evaluate the entire proposal against the evaluation factors, subfactors, and elements just as in the standard method. If during this evaluation process it becomes apparent that all offerors will be in the competitive range, the SEB may then elect to use the alternate method of initial evaluation by making this competitive range determination without formally scoring or ranking the proposals or generating the extensive documentation required to support this scoring or ranking. Once the alternate method is chosen, the initial evaluation is completed when the SEB determines strong and weak points for all proposals and develops questions for written and oral discussions. The SEB will then proceed directly to the discussion phase of the evaluation process. Only the BAFO is fully scored and ranked, and the results of this scoring or ranking are presented to the SSO to assist the selection decision. The principal benefit in using the alternate scoring method is the reduced time and resources associated with not performing two separate and complete proposal scorings along with the attendant documentation.

(iii) Regardless of which evaluation method is used, the competitive range consists of the proposals with a reasonable chance of being selected for award, considering mission suitability, cost or price, relevant experience and past performance, and other considerations. When there is doubt as to whether a proposal is within the competitive range, that doubt shall be resolved by including it.

(iv) The initial number of offerors whose proposals are considered as being within the competitive range may be narrowed as a result of the written or oral discussions. However, a proposal initially included in the competitive range should not be rejected without giving the offeror an opportunity to submit a revised proposal to serve as the basis for establishing the new competitive range, unless the discussions relating to an ambiguity or omission make it clear that the proposal should not have been included in the competitive range.

* * * * *

14. Section 1815.613–72 is amended by revising the section heading, designating the existing paragraph as paragraph (a), and adding paragraph (b) to read as follows:

1815.613–72 NASA solicitation provisions.

(a) * * *

(b) The contracting officer shall insert the provision at 1852.215–83, Alternate Method of Scoring Proposals, in all solicitations using formal SEB procedures.

PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

1852.215–70 [Amended]

15. Section 1852.215–70 is amended by revising the prescription reference "1815.613–72" to read "1815.613–72(a)".

1852.215–81, 1852.215–82, 1852.215–83 [Added]

16. Sections 1852.215–81, 1852.215–82, and 1852.215–83 are added to read as follows:

1852.215–81 Proposal Page Limitations.

As prescribed in 1815.407–70(j), insert the following provision:

Proposal Page Limitations

(October 1993)

(a) The following page limitations are established for each portion of the proposal submitted in response to this solicitation.

Proposal section	Page limit
(List each volume or section)	(Specify limit)

(b) A page is defined as one side of a sheet, 8½" x 11", with at least one inch margins on

all sides, using not less than 12 characters per inch (or equivalent) type. Foldouts count as an equivalent number of 8½" x 11" pages. The metric standard format most closely approximately the described standard 8½" x 11" size may also be used.

(c) Title pages and tables of contents are excluded from the page counts specified in paragraph (a) of this provision. In addition, the Cost section of your proposal is not page limited. However, this section is to be strictly limited to cost and price information. Information that can be construed as belonging in one of the other sections of the proposal will be so construed and counted against that section's page limitation.

(d) If Best and Final Offers (BAFOs) are requested, separate page limitations will be specified in the Government's request for that submission.

(e) Pages submitted in excess of the limitations specified in this provision will not be evaluated by the Government and will be returned to the offeror.

(End of provision)

1852.215–82 Offeror Oral Presentations.

As prescribed in 1815.407–70(k), insert the following provision:

Offeror Oral Presentations

(November 1993)

(a) Offerors are invited to give an oral presentation to the Government on the structure and general content of their proposals. These presentations are intended to assist Government evaluation by providing a "roadmap" to understanding proposals, i.e., an overview of the proposed organization and layout, and where required information and elements are located. Although the offeror's basic approach to satisfying solicitation requirements may be explained, it is to be done so only in general terms and only to expedite the Government's formal evaluation.

(b) The Government will not engage in any discussions during the oral presentation, and no proposal revisions will be accepted as part of the presentation. The Government's evaluation of offeror proposals will be based on the contents of the initial proposal, and any information not included in the initial proposal that is provided at the oral presentation will not be evaluated.

(c) Offerors should indicate in their proposals if they wish to give an oral presentation. These presentations are not mandatory, and electing not to give a presentation will not, in itself, affect proposal evaluation.

(d) Because the presentations are intended to assist the Government's evaluation, they will be scheduled to take place prior to commencement of the formal initial evaluation, normally within three days after proposal receipt. Offerors unable to accommodate this schedule forfeit their opportunity to provide a presentation.

(e) The presentations will consist of an offeror briefing not to exceed *[insert 1 or 2]* hours to be followed by a question and answer period. The order of offeror presentations will be determined at random. The exact time and place of the presentation, along with any other guidance, will be provided to the offeror by the contracting officer or his/her representative.

(f) Presentation materials are not required, but if used, the Government will retain one copy in its official file as a historical record of the presentation even though these materials will not be used in the Government's evaluation process.

(End of provision)

1852.215–83 Alternate Method of Scoring Proposals.

As prescribed in 1815.613–72(b), insert the following provision:

Alternate Method of Scoring Proposals

(November 1993)

NASA reserves the right to evaluate proposals received in response to this solicitation under either of the two scoring methods described in NASA FAR Supplement 1815.613–71(b)(4) and 1870.303, App. I, paragraph 407.6.d. Under the standard method, proposals are scored at the completion of initial evaluations and again upon completion of evaluations of Best and Final Offers (BAFOs). Under the alternate method, proposals are scored only after completion of BAFO evaluation.

(End of provision)

PART 1870—NASA SUPPLEMENTARY REGULATIONS

1870.303, Appendix I [Amended]

17. In section 1870.303, Appendix I, chapter 1, paragraph 101 is amended by adding paragraph 4.k. to read as follows:

Appendix I to 1870.303 NASA SOURCE EVALUATION BOARD PROCEDURES (HANDBOOK)

* * * * *

Chapter 1—Key Participants in the Source Evaluation Board Process

* * * * *

101 *Cognizant Management Responsibilities*

* * * * *

4. * * *

(k) Ensure that the activities of the SEB are carefully planned, all key events identified and scheduled, and progress monitored. Normally, the goal of all SEBs should be to complete activities from receipt of proposal to contract award in not more than 120 calendar days. Realization of this goal can be furthered through the synergism of acquisition streamlining techniques such as RFP and proposal page limitations, reduced SEB memberships, and limitation of evaluation sub-factors and elements to key discriminators. However, there may be instances when this goal cannot be attained even when these streamlining techniques are used, for example, in procurements of unusual complexity or when a large number of proposals is anticipated. In these cases, a schedule longer than the 120-day goal should be planned, consistent with the exercise of good judgment.

* * * * *

18. In section 1870.303, Appendix I, chapter 1, paragraph 102 is amended by adding text at the end of paragraph 102.1 to read as follows:

* * * * *

102 *Source Selection Official*

1. * * * When source selection official authority is at the installation level, either by delegation from Headquarters or by virtue of a procurement value under the installation Master Buy Plan limitation, the head of the installation may further delegate this authority to the lowest reasonable level.

* * * * *

19. In section 1870.303, Appendix I, chapter 2, paragraph 201 is amended by revising paragraph 201.1.f., redesignating the old paragraph 201.1.g. as paragraph 201.1.h., and adding a new paragraph 201.1.g to read as follows:

Chapter 2—Membership, Organization, and Responsibilities

* * * * *

201 *Membership*

1. *Composition*

* * * * *

f. SEB membership shall be limited to a maximum of 7 voting individuals. Wherever feasible, an assignment to SEB membership as a voting member shall be on a full-time basis. Where this is not feasible, SEB membership shall take precedence over other duties.

g. If additional support is needed, committees and panels may be used to assist in the evaluation. The total of all such evaluators (committees, panels, etc., excluding SEB voting members and ex officio members) shall be limited to a maximum of 20 individuals, unless approved in writing by the Procurement Officer.

h. The number of nonvoting ex officio (advisory) members shall be kept as small as the nature of the procurement allows. Ex officio members should be selected for the experience and expertise they can provide to the SEB. Since their advisory role may require access to highly sensitive SEB material and findings, ex officio membership for persons other than those identified in paragraph 3.b. should be carefully considered.

* * * * *

20. In section 1870.303, Appendix I, chapter 3, paragraph 301 is amended by revising paragraph 301.1.e.(1) to read as follows:

Chapter 3—Evaluation Factors, Subfactors and Elements

* * * * *

301 *Mission Suitability*

1. *Evaluation Subfactors*

* * * * *

e. (1) In structuring evaluation subfactors and elements, emphasis should be placed on identification of significant discriminators, or "key swingers"—the essential information required to support a source selection decision. Too many subfactors and elements are detrimental to effective evaluation of proposals and may result in a leveling or averaging out of scores over all proposals. To avoid this negative effect, the number of subfactors under Mission Suitability shall be no more than 4 and the number of elements no more than 8. Other evaluation factors shall also be limited to only essential subfactors and elements. Further, care should be taken to avoid overlap and redundancy by clearly defining each evaluation subfactor and element. Avoiding such overlap assures an offeror is not scored in two or more areas for the same work.

* * * * *

21. In section 1870.303, Appendix I, chapter 3, paragraph 302 is amended by revising the introductory paragraph of 302.2 to read as follows:

* * * * *

302 *Cost*

* * * * *

2. In the Cost factor evaluation, the SEB shall analyze the proposed costs or prices of all offerors in accordance with the criteria in FAR 15.805. The SEB may use any or all tools available in performing these analyses, including information in the Armed Services Pricing Manual (ASPM). If field pricing/audit support is requested, the request should be tailored to reduce the time required for the support and still enable the SEB to properly review proposals. Whenever possible and appropriate, pricing/audit support should be limited to that information specifically required for the SEB deliberation process. All pricing/audit support requests should specifically identify the limited areas for which pricing assistance is required and should also specify the response date required for timely accomplishment of SEB proceedings. At the conclusion of its analyses, the SEB shall advise the SSO concerning—

* * * * *

22. In section 1870.303, Appendix I, chapter 4, paragraph 404 is amended by adding text at the end of paragraph 404.1, revising paragraph 404.2.m, and adding paragraph 404.2.n, to read as follows:

Chapter 4—SEB Operating Procedures for Solicitation and Evaluation

* * * * *

404 *Request for Proposals (RFPs)—Review and Approval*

1. * * * To streamline the solicitation review cycle, use of the Solicitation Review Board (SRB) technique, or its functional equivalent, is encouraged as an alternative to the traditional procedure of serial or sequential coordination of the solicitation with reviewing offices. The SRB is a meeting in which all offices having review and approval responsibilities meet to discuss the solicitation and their concerns. Individual reviewers should be given a reasonable amount of time to review the document prior to the meeting. At the conclusion of the meeting, recommendations for changes are made and the solicitation is formally approved or disapproved. Afterwards, formal written minutes reflecting the agreement of the SRB members shall be prepared and included in the contract file. Use of this technique not only expedites the review and approval process, but it also encourages the synergism of a number of acquisition professionals discussing their concerns in one forum.

* * * * *

2. * * *

m. Limitations on pages and the number of copies of offerors' initial proposals shall be included in accordance with NFS 1815.406(d). In no case shall the total proposal, excluding cost/price information, exceed 500 pages using the page definition of 1815.406(c), unless a different limitation is approved in writing by the Procurement Officer. Firm page limitation shall also be established for BAFOs, if requested. The appropriate BAFO page limitations should be determined by considering the complexity of the procurement and the extent of any written or oral discussions. The same BAFO page limitations shall apply to all offerors. Proposal pages exceeding the specified maximums shall be removed from the proposal or BAFO and not evaluated. One copy of these pages shall be retained for the official contract file and the remaining copies returned to the offeror. When excess pages are returned to the offeror, cite the Proposal Page Limitations provision of the solicitation.

n. When applicable, a notice is included that offerors are invited to give oral presentations after receipt of proposals but before initial evaluation.

* * * * *

23. In section 1870.303, Appendix I, chapter 4, paragraph 405 is amended by revising paragraphs 405.1 and 405.2 to read as follows:

* * * * *

405 *Preproposal Conference*

1. A preproposal conference to brief prospective offerors may be conducted after a solicitation has been issued but before proposals are received, in accordance with FAR 15.409. The contracting officer, in conjunction with the SEB, shall make a determination prior to issuance of the solicitation whether a preproposal conference will be held. Conferences should be held only when their value to the Government and prospective offerors is apparent, and the specifics of any given procurement should be carefully considered in assessing this value. Generally, these conferences are of most value in complex acquisitions where it is necessary to ensure that complicated specifications or requirements are fully and clearly understood. These conferences can also be of value in major on-site service contracts to familiarize offerors with the center organization and its physical layout, as well as the specific contract tasks. (In these latter cases site visits and observation of on-going operations should also be considered). In more routine, less complex procurements, however, the preproposal conference offers far less value and should normally not be used.

2. When a preproposal conference is held, the solicitation shall include the Preproposal/Pre-Bid Conference provision at 1852.215–77, indicating the time and place of the conference. The conference shall be scheduled to permit prospective offerors sufficient time after the issuance of the solicitation to become familiar with its requirements but not too late to allow meaningful use of the information obtained at the conference.

* * * * *

24. Section 1870.303, Appendix I, chapter 4, is amended by redesignating paragraphs 406 and 407 as paragraphs 407 and 408, respectively; adding a new paragraph 406; and adding paragraph

6.d. to newly designated paragraph 407 to read as follows:

* * * * *

406 *Offeror Oral Presentations*

1. In some cases, offeror oral presentations may expedite the evaluation and provide insight into the proposals. These presentations are of particular value in procurements when the proposal content is expected to be complex or when the proposal will include an unusually large number of volumes. The SEB should consider the specifics of a given procurement in assessing the value of offeror oral presentations, and should utilize them only when their value is apparent.

2. If offeror oral presentations are held, they should be conducted before commencement of initial evaluation of proposals, normally not more than three days after receipt. The offerors should be instructed that the presentations are to be a "roadmap" to understanding their proposals, i.e., a discussion of the proposal organization and layout, and where required information and elements are located. Although the offeror's basic approach to satisfying solicitation requirements may be explained, it is to be done so only in general terms and only to expedite the Government's formal evaluation. The presentation is not intended for the offerors to provide additional information or supporting rationale that was not included in the proposal, nor is it to be a forum to "market" the proposal. Government attendees shall not engage in any discussions during the oral presentation, and no proposal revisions may be accepted as part of the presentation. The Government's evaluation of offeror proposals is be based on the contents of the initial proposal, and any information not included in the initial proposal that is provided at the oral presentation shall not be evaluated.

3. A typical presentation consists of a strictly enforced one to two hour briefing period followed by a question and answer period. Government evaluators may ask questions about the proposal "roadmap" only and should not engage in detailed discussions over the value or validity of the offeror's proposed approach to satisfying solicitation requirements. All offerors must be afforded the same opportunity to brief and the same briefing groundrules. If considered appropriate, limitations may be placed on the number of offeror and Government attendees to ensure the presentation meets its intended purpose. The order of presentation should be determined at random.

4. The SEB may determine which of the Government participants in the evaluation may attend the offeror oral presentations. However, to eliminate bias and to ensure objectivity during the evaluation process, any individual who attends one presentation must attend all presentations, unless prevented from doing so by emergency or other unforeseen event. The SEB shall retain one copy of all briefing materials (if any) used in the presentation, as well as SEB-prepared minutes of the meeting, as historical records for the official contract file. However, the briefing materials and minutes shall not be used in the formal evaluation process.

407 *Initial Evaluation*

* * * * *

6. SEB Findings

* * * * *

d. Proposals may also be evaluated and scored under an alternate method that does not require scoring after initial evaluation of proposals. It normally may only be used when two conditions exist: (1) relatively few (e.g., two or three) proposals are received; and (2) a full scoring or ranking of proposals is not required to make the determination that all offerors are in the competitive range. If during the initial evaluation of proposals, it becomes apparent that all offerors will be in the competitive range, the SEB may then elect to use the alternate method of initial evaluation by making this competitive range determination without formally scoring or ranking the proposals or generating the extensive documentation required to support this scoring or ranking. Once the alternate method is chosen, the initial evaluation is completed when the SEB determines strong and weak points for all proposals and develops questions for written and oral discussions. The SEB will then proceed directly to the discussion phase of the evaluation process. Only the BAFO is fully scored and ranked, and the results of this scoring or ranking are presented to the SSO to assist the selection decision. The principal benefit in using the alternate scoring method is the reduced time and resources associated with not performing two separate and complete proposal scorings along with the attendant documentation.

* * * * *

[FR Doc. 93-28544 Filed 11-19-93; 8:45 am]

BILLING CODE 7510-01-M

Proposed Rules

Federal Register
Vol. 58, No. 223
Monday, November 22, 1993

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 TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 93-NM-166-AD]

Airworthiness Directives; Jetstream Aircraft Limited Model ATP Airplanes

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 Jetstream Model ATP airplanes. This proposal would require replacement of certain circuit breakers on the left- and right-hand AC generator panel assemblies with new circuit breakers. This proposal is prompted by reports of failures due to localized overheating of the electric power circuit for the air conditioning recirculation fan in the environmental control system (ECS). The actions specified by the proposed AD are intended to prevent the recirculation fan circuit from overheating, which could lead to smoke and/or flame in the fuselage.

DATES: Comments must be received by January 24, 1994.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 93-NM-166-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Jetstream Aircraft, Inc., P.O. Box 16029, Dulles International Airport, Washington, DC 20041-6029. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

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:

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 93-NM-166-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. 93-NM-166-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

Discussion

The Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom, recently notified the FAA that an unsafe condition may exist on certain Jetstream Model ATP airplanes. The CAA advises that reports have been received of failures of the electric power circuit for the air conditioning recirculation fan in the environmental control system (ECS). Investigation revealed that these failures were caused by localized overheating of the recirculation fan circuit. This localized overheating has been attributed to certain Texas Instrument circuit breakers that fail to protect the electrical power circuit properly when a recirculation fan electrical circuit overload condition exists. Circuit breaker failure and resultant recirculation fan circuit overheating could lead to smoke and/or flame in the fuselage.

Jetstream has issued Service Bulletin ATP-21-24-10306A, dated July 30, 1993, that describes procedures for replacement of Texas Instrument circuit breakers 1HG3 and 2HG3 having part number (P/N) 6TC4-10, on the left- and right-hand AC generator panel assemblies at zones 131-05-00 and 132-05-00, respectively. The service bulletin recommends replacement with Genelco circuit breakers having P/N 4330-014-10, which incorporate design features that will assure opening of the circuit breaker under all expected excessive current conditions. Such opening will prevent overheating of the recirculation fan circuit. The service bulletin recommends that the replacement of the circuit breakers be accomplished within 1,500 hours time-in-service. The CAA classified this service bulletin as mandatory.

This airplane model is manufactured in the United Kingdom and is type certificated for operation in the United States under the provisions of § 21.29 of the Federal Aviation Regulations and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the CAA has kept the FAA informed of the situation described above. The FAA has examined the findings of the CAA, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require replacement of certain Texas Instrument circuit breakers on the left- and right-hand AC generator panel assemblies

with certain Genelco circuit breakers. The actions would be required to be accomplished in accordance with the service bulletin described previously. However, based upon the potential for smoke/flame in fuselage and the adverse consequences of such a condition, the FAA has determined that the proposed replacement must be accomplished within a more timely time frame than 1,500 hours time-in-service, as is recommended in the referenced service bulletin. Therefore, this action proposes that the replacement be accomplished within 600 hours time-in-service.

The replacement circuit breakers have been installed during production on airplanes beginning with serial number 2066. Therefore, this proposed rule would be applicable only to airplanes having serial numbers 2002 through 2065 inclusive.

The FAA estimates that 10 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 2 work hours per airplane to accomplish the proposed actions, and that the average labor rate is $55 per work hour. Required parts would cost approximately $225 per airplane. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $3,350, or $335 per airplane. This total cost figure assumes that no operator has yet accomplished the proposed requirements of this AD action.

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 14 CFR part 39 of the Federal Aviation Regulations 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:

Jetstream Aircraft Limited (Formerly British Aerospace): Docket 93–NM–166–AD.

Applicability: Model ATP airplanes, serial numbers 2002 through 2065 inclusive, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent the recirculation fan circuit from overheating, which could lead to smoke and/or flame in the fuselage, accomplish the following:

(a) Within 600 hours time-in-service after the effective date of this AD, replace Texas Instrument circuit breakers 1HG3 and 2HG3 having part number (P/N) 6TC4–10, on the left- and right-hand AC generator panel assemblies at zones 131–05–00 and 132–05–00, respectively, with Genelco circuit breakers having P/N 4330–014–10, in accordance with Jetstream Service Bulletin ATP–21–24–10306A, dated July 30, 1993.

(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: 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 FAR 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 16, 1993.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 93–28575 Filed 11–19–93; 8:45 am]

BILLING CODE 4910–13–P

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14 CFR Part 39

[Docket No. 93–NM–159–AD]

Airworthiness Directives; Dassault Aviation Model Mystere-Falcon 50 Series Airplanes

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 Dassault Aviation Model Mystere-Falcon 50 series airplanes. This proposal would require replacement of certain attachment clamps installed on the engine exhaust ducts with improved clamps. This proposal is prompted by reports of failures of certain attachment clamps due to fatigue cracking. The actions specified by the proposed AD are intended to prevent such failures, which could cause exhaust gas to leak and, subsequently, could trigger a false engine fire alarm.

DATES: Comments must be received by Janaury 24, 1994.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 93–NM–159–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Falcon Jet Corporation, Customer Support Department, Teterboro Airport, Teterboro, New Jersey 07608. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Stephen Slotte, Aerospace Engineer, ANM–113, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (206) 227–2797; fax (206) 227–1320.

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 93–NM–159–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. 93–NM–159–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, recently notified the FAA that an unsafe condition may exist on certain Dassault Aviation Model Mystere-Falcon 50 series airplanes. The DGAC advises that there have been numerous reports of failures of certain attachment clamps installed on the engine exhaust ducts. Subsequent to some of these incidents, exhaust gas leaked from the engine exhaust duct and triggered a false engine fire alarm. A false engine fire alarm could prompt the flight crew to unnecessarily deploy fire extinguishing agent. Such action may reduce the concentration of the agent to levels below that required to extinguish an engine fire. Subsequent investigation revealed that these clamps (v-band clamps), which connect the engine exhaust duct to the aft body of the airplane, failed due to fatigue cracking. This condition, if not corrected, could cause exhaust gas to leak and, subsequently, could trigger a false engine fire alarm. (However, there have been no reports of any engine fire occurring in service that has been due to the failure of these attachment clamps.)

Dassault Aviation has issued Service Bulletin F50–229 (F50–54–13), Revision 1, dated July 21, 1993, that describes procedures for replacing certain attachment clamps installed on the engine exhaust ducts with improved attachment clamps. Because the improved clamps have a larger and thicker band, they are less susceptible to fatigue cracking. The DGAC classified this service bulletin as mandatory and issued French Airworthiness Directive 93–113–013(B), dated July 21, 1993, in order to assure the continued airworthiness of these airplanes in France.

This airplane model is manufactured in France and is type certificated for operation in the United States under the provisions of § 21.29 of the Federal Aviation Regulations and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. The FAA has examined the findings of the DGAC, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require replacement of certain attachment clamps installed on the engine exhaust ducts with improved clamps. The replacement would be required to be accomplished in accordance with the service bulletin described previously.

The proposed AD also would require inspections of certain other attachment clamps installed on the engine exhaust ducts to verify if the clamp screw is straight, to verify if the tightening torque value of the clamp screw is accurately marked on the attachment clamp, and to verify that the clamp screw is tightened to the correct torque value. If any discrepancy is detected, the proposed AD also would require replacement of the clamp, correction of the marking, or tightening of the clamp screw.

The FAA estimates that 133 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 1 work hour per airplane to accomplish the proposed actions, and that the average labor rate is $55 per work hour. Required parts would be provided by the manufacturer at no cost to operators. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $7,315, or $55 per airplane. This total cost figure assumes that no operator has yet accomplished the proposed requirements of this AD action.

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 14 CFR part 39 of the Federal Aviation Regulations 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:

Dassault Aviation: Docket 93–NM–159–AD.

Applicability: Model Mystere-Falcon 50 series airplanes, serial numbers 2 through 216 inclusive; equipped with exhaust duct attachment clamps, part number (P/N) NH1002299–10 or P/N NH1007763–10; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent failure of attachment clamps installed on the engine exhaust ducts, which could cause exhaust gas to leak and, subsequently, could trigger a false engine fire alarm, accomplish the following:

(a) For airplanes equipped with exhaust duct attachment clamps having P/N NH1002299–10: Within 300 flight hours after the effective date of this AD, or within 6 months after the effective date of this AD, whichever occurs first, replace attachment clamps having P/N NH1002299–10 with attachment clamps having P/N NH1007763–10, in accordance with Dassault Aviation Service Bulletin F50–229 (F50–54–13), Revision 1, dated July 21, 1993.

(b) For airplanes equipped with exhaust duct attachment clamps having P/N NH1007763–10: Within 1,400 flight hours after the effective date of this AD, inspect the attachment clamps installed on the engine exhaust ducts to verify if the clamp screw is straight (not bent).

(1) If the clamp screw is straight, prior to further flight, verify if the tightening torque value of the screw is marked on the attachment clamp as follows: "Normal Net Torque 100–120 IN-LBS."

(i) If the marking is as specified in paragraph (b)(1) of this AD, no further action is required.

(ii) If the marking is not as specified in paragraph (b)(1) of this AD, prior to further flight, erase the incorrect marking and replace it with the correct tightening torque value.

(iii) After correcting the marking, prior to further flight, ensure that the clamp screw is secured to the tightening torque value specified in paragraph (b)(1) of this AD.

(2) If the clamp screw is bent, prior to further flight, replace the discrepant attachment clamp with a new attachment clamp having the same part number, in accordance with the Accomplishment Instructions of Dassault Aviation Service Bulletin F50–229 (F50–54–13), Revision 1, dated July 21, 1993.

(c) As of the effective date of this AD, no person shall install an exhaust duct attachment clamp having P/N NH1007763–10 on any airplane, unless that attachment clamp is marked "Normal Net Torque 100–120 IN-LBS."

(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 FAR 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 16, 1993.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 93–28576 Filed 11–19–93; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 701, 784, and 817

RIN 1029–AB69

Permanent Regulatory Program; Underground Mining Permit Application Requirements; Underground Mining Performance Standards

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

ACTION: Proposed rule; extension of public comment.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) of the U.S. Department of the Interior (DOI) extends until January 24, 1994, the public comment period on the proposed rule published in the September 24, 1993, **Federal Register** (58 FR 50174). This will provide more time in which to comment on the proposed rule.

DATES: *Written Comments:* OSM will accept written comments on the proposed rule until 5 p.m. Eastern time on January 24, 1994.

ADDRESSES: *Written Comments:* Hand deliver to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, room 660, 800 North Capitol St., Washington, DC; or mail to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, room 660 NC, 1951 Constitution Avenue NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Nancy R. Broderick, Branch of Federal and Indian Programs, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240; telephone (202) 208–2564.

SUPPLEMENTARY INFORMATION: On September 24, 1993 (58 FR 50174), OSM published a proposed rule which would require all underground coal mining operations conducted after October 24, 1992, to promptly repair or compensate for material damage to non-commercial buildings and occupied residential dwellings and related structures as a result of subsidence due to underground coal mining operations; rehabilitate, restore, or replace identified structures and compensate owners in the full amount of the diminution in value resulting from the subsidence; replace water supplies which have been adversely affected by underground coal mining operations; perform a pre-subsidence survey and repair or compensate for subsidence-related damage caused by underground mining activities to structures or facilities; and provide, when necessary, an additional performance bond to cover subsidence-related material damage. The proposed rule provides for broader protection of structures by removing the provision that imposes a State law limitation on an underground coal mine operator's liability for damage to structures. Performance standards required by the Energy Policy Act of 1992 would be enforceable nationwide immediately upon the effective date of the final rule.

The comment period for the proposed rule was scheduled to close on November 23, 1993. However, an extension was requested in order to provide more time in which to comment on the proposed rule. Therefore, OSM is extending the comment period. Comments will now be accepted until 5 p.m. local time on January 24, 1994.

Dated: November 16, 1993.

Brent Wahlquist,

Assistant Director, Reclamation and Regulatory Policy.

[FR Doc. 93–28605 Filed 11–19–93; 8:45 am]

BILLING CODE 4310–05–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 16

[FRL–4804–6]

Privacy Act of 1974; Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to amend its regulations implementing the Privacy Act of 1974, as amended, by exempting a new system of records from compliance with certain subsections of the Act. The new EPA–30 system of records, which was published recently

in the **Federal Register**, is called "OIG Hotline Allegation System—EPA/OIG" and is maintained by the Office of Inspector General (OIG). The proposed rule will add this new system of records to the other systems of records for which EPA has already claimed a specific exemption under the Privacy Act. This amendment is made to maintain the efficiency and integrity of OIG investigations, audits, or referrals that result from complaints concerning the possible existence of activities constituting a violation of law, rules, or regulations, mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to the public health or safety.

DATES: Comments must be submitted on or before December 22, 1993.

ADDRESSES: Interested persons may submit written comments to: John C. Jones, Assistant Inspector General for Management, Office of Inspector General (A-109), Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

Comments received on this proposed rule will be available for reviewing and copying from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays, in Rm. NE314, Environmental Protection Agency, 401 M Street, SW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: John C. Jones, (202) 260-4912.

SUPPLEMENTARY INFORMATION: On July 2, 1986, EPA's final rule exempting several systems of records from compliance with certain subsections of the Privacy Act of 1974 was published in the **Federal Register** (51 FR 24145). EPA claimed a specific exemption for four systems of records under the authority of 5 U.S.C. 552a(k)(2). The exempted systems of records are identified at 51 FR 24146 and 24148 and are codified at 40 CFR 16.14(a)(1).

EPA has proposed to add a new system of records to those systems of records for which exemptions have already been claimed. This new EPA-30 system of records is called "OIG Hotline Allegation System—EPA/OIG." A notice describing that system of records was published in the **Federal Register** recently.

Under the Inspector General Act of 1978, as amended, 5 U.S.C. app., EPA's Inspector General has the duty to recommend policies for and to conduct, supervise, and coordinate activities in EPA and between EPA and other Federal, State, and local governmental agencies with respect to: (1) The prevention and detection of fraud in programs and operations administered or financed by EPA, and (2) the identification and prosecution of participants in such fraud. In addition, whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law, the Inspector General must report the matter expeditiously to the Attorney General.

The OIG Hotline Allegation System, which is operated and maintained by the OIG, Office of Management, Program Management Division, contains complaints and allegations received from employees of EPA, employees of other Federal agencies, employees of State and local agencies, and private citizens concerning the possible existence of fraud relating to Agency programs and operations. The system has been created in major part to support the criminal law enforcement activities assigned by the Inspector General to the Assistant Inspector General for Investigations.

In addition to its principal function pertaining to the enforcement of criminal laws, the OIG Hotline Allegation System contains complaints and allegations received from various sources concerning the possible existence of activities constituting a noncriminal violation of law, rules, or regulations, mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to the public health or safety. Such complaints and allegations are referred to investigators or auditors in the OIG, to other components of EPA, or to other Federal, State, or local governmental agencies, as appropriate.

Under 5 U.S.C. 552a(k)(2), the head of any agency may exempt a system of records from certain subsections of the Privacy Act of 1974 if it contains investigatory material compiled for law enforcement purposes, other than material within the scope of 5 U.S.C. 552a(j)(2), subject to certain restrictions.

Accordingly, EPA proposes to exempt this system of records to the extent that it contains investigatory material compiled for law enforcement purposes, other than material within the scope of 5 U.S.C. 552a(j)(2), from the following subsections of the Privacy Act of 1974, as permitted by 5 U.S.C. 552a(k)(2): 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f).

Reasons for exemptions: EPA proposes to exempt this system of records from the above requirements of the Privacy Act of 1974 to accomplish the law enforcement functions of the OIG (e.g., to prevent subjects of investigations from frustrating the investigatory process by discovering the scope and progress of an investigation; to prevent the disclosure of investigative techniques; to fulfill commitments made to protect confidentiality of sources; to maintain access to sources of information; and to avoid endangering these sources and law enforcement personnel). Additional reasons for exempting this system of records are set forth in EPA's final rule pertaining to Privacy Act exemptions published in the **Federal Register** of July 2, 1986 (51 FR 24145).

Executive Order 12866

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the 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 result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely effect in a material way the economy, 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 entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866.

However, OMB will review this rule during the public comment period and provide EPA with any comments.

Paperwork Reduction Act

This proposed rule does not constitute an information collection request within the meaning of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* Therefore, this proposed rule is not subject to the requirements of the Paperwork Reduction Act of 1980.

Regulatory Flexibility Act

Section 603 of the Regulatory Flexibility Act, 5 U.S.C. 603, requires EPA to prepare and make available for comment an initial regulatory flexibility analysis in connection with any rulemaking for which EPA must publish a general notice of proposed rulemaking. The initial regulatory flexibility analysis must describe the

impact of the proposed rule on small business entities.

Section 605(b) of the Act, however, provides that section 603 of the Act "shall not apply to any proposed or final rule if the head of the Agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), EPA certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule, which exempts the OIG Hotline Allegation System from certain provisions of the Privacy Act of 1974, will not have any economic impact on small entities.

List of Subjects in 40 CFR Part 16

Environmental protection, Privacy.

Dated: October 22, 1993.

Carol M. Browner,

Administrator.

Therefore, it is proposed that 40 CFR part 16 be amended as follows:

PART 16—[AMENDED]

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

Authority: 5 U.S.C. 552a.

2. Section 16.14 is amended by revising paragraph (a)(1) to read as follows:

§ 16.14 Specific exemptions.

(a) *Exemptions under 5 U.S C. 552a(k)(2).*—(1) *Systems of records affected.*

EPA–2 General Personnel Records—EPA.
EPA–4 OIG Criminal Investigative Index and Files—EPA/OIG.
EPA–5 OIG Personnel Security Files—EPA/OIG.
EPA–17 NEIC Criminal Investigative Index and Files—EPA/NEIC/OCI.
EPA–30 OIG Hotline Allegation System—EPA/OIG.

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[FR Doc. 93–28620 Filed 11–19–93; 8:45 am]
BILLING CODE 6560–50–P

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40 CFR Part 51

[AD-FRL–4516–3]

Preparation, Adoption, and Submittal of State Implementation Plans: Methods for Measurement of Visible Emissions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule and notice of public hearing.

SUMMARY: EPA is today proposing three methods for State Implementation Plan (SIP) applications. The three proposed methods are visible emission test procedures that are to be included as Methods 203A, 203B, and 203C in appendix M. The data reduction procedures in existing visible emission methods are not sufficient for all SIP applications. This action provides States with an expanded array of data reduction procedures to determine compliance with various types of State implementation plan (SIP) opacity regulations. These data reduction procedures constitute the primary difference between the existing method, Method 9 of appendix A of 40 CFR part 60 (Standards of Performance for New Stationary Sources) and Methods 203A, 203B, and 203C of appendix M of part 51 (Requirements for Preparation, Adoption, and Submittal of Implementation Plans). This action is necessary because SIP opacity regulations may have certain opacity data reduction provisions that are not consistent with the data averaging procedures specified in Method 9 of part 60.

DATES: *Comments:* Comments must be received on or before January 21, 1994.

Public Hearing. If anyone contacts EPA requesting to speak at a public hearing by December 13, 1993, a public hearing will be held on December 22, 1993, beginning at 10 a.m. Persons interested in attending the hearing should contact Ms. Shelby Journigan of EPA at (919) 541–5543 to verify that a hearing will be held. If a hearing is held, a verbatim transcript will be placed in the docket.

Request to Speak at Hearing. Persons wishing to present oral testimony must contact the Branch secretary at (919) 541–5543 by December 13, 1993.

ADDRESSES: *Comments.* Comments should be submitted (in duplicate if possible) to: Air Docket Section (LE–131), Attention, Docket No. A–84–22, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

Public Hearing. If anyone contacts EPA requesting a public hearing, it will be held at EPA's Emission Measurement Laboratory Building, Research Triangle Park, North Carolina 27711. Persons interested in attending the hearing or wishing to present oral testimony should notify Ms. Shelby Journigan, Emission Measurement Branch (MD–19), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, (919) 541–5543.

Background Information Documents. The Background Information Document (BID) for the proposed standard may be obtained from the docket or from the U.S. EPA library (MD–35), Research Triangle Park, North Carolina 27711, telephone number (919) 541–2777.

Docket. Docket No. A–84–22, containing supporting information used in developing the proposed methods, is available for public inspection and copying between 8:30 a.m. and 3:30 p.m., Monday through Friday, at the EPA's Air Docket Section, Waterside Mall, room 1500, 1st Floor, 401 M Street SW., Washington, DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: For further information concerning the proposed rule, contact Mr. Roy Huntley at (919) 541–1060 or Mr. Peter Westlin at (919) 541–1058, Emission Measurement Branch (MD–19), Technical Support Division, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711.

SUPPLEMENTARY INFORMATION: The information presented in this preamble is organized as follows:

I. Background
A. Introduction
B. Summary of the 1986 Proposal
C. Comments on the 1986 Proposal
D. 1990 Promulgation of Part 51, Appendix M
E. Additional Technical Work Since the 1986 Proposal
F. Accuracy of Methods
II. Proposed Revisions to the 1986 Proposal
A. Summary of Proposed Revisions
B. Rationale for Revisions to Proposed Method F–1
C. Rationale for Proposal as a Recommended Method in 40 CFR Part 51
D. Rationale for Proposed Procedures for Fugitive Emissions Applications
III. Administrative Requirements
A. Docket
B. Office of Management and Budget Reviews
C. Regulatory Flexibility Act Compliance

I. Background

A. Introduction

Section 110 of the Clean Air Act (CAA), as amended (42 U.S.C. 7410), specifies that States are to submit plans for the approval of EPA that provide for the attainment and maintenance of air quality standards through control programs directed at sources of air pollutants. Many SIP's include regulations limiting pollutant emissions by limiting opacity (i.e., visible emissions).

The only general visible emission observation test procedure in 40 CFR part 60 is Method 9 of appendix A. Method 9 contains procedures for the training and certification of observers,

field procedures for the determination of plume opacity, and a data reduction procedure.

The EPA revised Method 9 on November 12, 1974 (39 FR 39872). In the preamble to that revision, EPA recognized that the Method 9 data reduction techniques were not appropriate for some types of SIP opacity regulations. The preamble also stated EPA's intent to propose procedures to enforce SIP limitations that were not adequately addressed by Method 9. Such SIP limitations include those with time-exception provisions (a limit incorporating an allowance of a specified number of minutes in an hour in which the opacity limit may be exceeded), as well as those that specify averaging times other than 6 minutes. Also, Method 9 did not address data reduction procedures for instantaneous limitations (sometimes called caps) on visible emissions which are included in some SIP's.

A 1983 report, "Opacity Regulations: Summary of State Regulations and Rulemaking Status" (Docket No. A-84-22), indicated that State regulations incorporating opacity limits include a variety of types of opacity limits. The limits generally specify a maximum opacity that a source is allowed to emit, as determined by a trained observer. Some regulations limit opacity for a specified number of minutes in an hour (time exception), others limit opacity levels as averaged over a specified number of minutes (time averaged), and others specify limits that are never to be exceeded (instantaneous limitation).

In order to provide appropriate data reduction procedures for opacity limits that are inconsistent with Method 9, EPA proposed new visible emission test procedures for evaluating compliance with opacity standards on August 29, 1986 (51 FR 31076).

B. Summary of the 1986 Proposal

The 1986 **Federal Register** notice proposed to incorporate a new method, Method F-1, into a new appendix F (51 FR 31076, August 29, 1986). Part 52 of 40 CFR provides regulations for various SIP requirements, such as the Federal prevention of significant deterioration (PSD) program, and other control program elements. Proposed Method F-1 contained field and observer certification procedures identical to those of Method 9. Proposed Method F-1 and Method 9 differed only in data reduction procedures for determining compliance with SIP regulations that contain time-exception, time-averaged (2 minutes or greater), and instantaneous limitations. The data reduction procedures in proposed Method F-1 were based on a number of method studies. The 1986 notice also discussed the accuracy of each of the new procedures (51 FR 31079, August 29, 1986).

The 1986 proposal indicated EPA would select the visible emission test method and data reduction procedures in part 52 that best ensured enforcement of the SIP visible emission standard in a manner consistent with the original language in the Federally-approved or promulgated SIP. Further, EPA would assume that a State intended a 6-minute averaging time for SIP opacity regulations with no specific reference to time-exception, time-averaged, or instantaneous limitations.

C. Comments on the 1986 Proposal

The EPA solicited public comments on proposed Method F-1 and received 24 comment letters from parties representing industry, utilities, trade associations, State and local air pollution control agencies, and one Federal agency. Commenters addressed many different issues, some of which have contributed to the changes incorporated in today's proposed methods. All comments addressing either the originally-proposed Method F-1 or today's action will be addressed at the time of promulgation, and only those comments directly related to the changes made to proposed Method F-1 for incorporation into Methods 203A, 203B, and 203C are summarized in this section.

Proposed Use of Method F-1 Affecting Existing State Implementation Plans

Some commenters on proposed Method F-1 argued that using a new method in determining compliance with existing opacity standards would constitute a change in the standards themselves. Therefore, they argued that incorporation of the new method constituted improper rulemaking procedures, since previously-approved SIP's would be amended without adequate notice and hearings. The commenters further argued that because existing SIP's either specified a test method or assumed the use of Method 9, the new test method, if applied to existing SIP's, could render existing SIP opacity standards more stringent than originally intended. Several commenters expressed particular concern that the application of the proposed Method F-1 would make compliance with time-exception regulations more difficult than intended by the SIP's.

Data Reduction Techniques

Some commenters stated that for time-exception standards, Method F-1 would eliminate the intended leniency afforded by Method 9's 6-minute averaging. Other commenters stated that for instantaneous standards, the 2-minute averaging time called for in Method F-1 would be inadequate for enforcement, and a shorter averaging time was recommended.

Admissibility of Evidence

The Method F-1 proposal stated that promulgation of test methods in part 52 or 60 of 40 CFR is not intended to alter the conditions of admissibility of evidence to prove violation. Two commenters stated that including the statement on admissibility of evidence was inappropriate. The commenters stated that decisions on admissibility of evidence must be made by the courts.

Nonprocess Fugitive Dust Emissions

One-third of the Method F-1 commenters stated that the application of the proposed method to nonprocess fugitive dust emissions was premature. The commenters recommended further evaluation of the accuracy of Method F-1 for these emissions; modification of observation procedures, and averaged rather than aggregated data reduction procedures. Commenters referred to the difference in the character of the fugitive emissions plume and the increased complexity of taking visual observations for fugitive emissions.

D. 1990 Promulgation of Part 51, Appendix M

In a separate action, on April 17, 1990 (55 FR 14246), EPA promulgated Methods 201 and 201A for the measurement of stack particulate matter with an aerodynamic diameter of a nominal 10 micrometers (μm) (0.000393 inches (in.)) or less (PM_{10}). These methods were included in the new appendix M of 40 CFR part 51. The new appendix M was designated as a repository for recommended test methods for SIP's. Under the same action, EPA also revised subpart K, 40 CFR part 51, to direct States to appendix M for recommended test methods, and to emphasize the requirement that States must include enforceable test methods with each emission limit in the SIP.

Appendix M is entitled "Recommended Test Methods for State Implementation Plans" and contains recommended test methods for inclusion in SIP's. Recommended test methods are methods that are not specifically required by Federal regulations but are promulgated by EPA and are available for use by States. States may incorporate appropriate appendix M test methods into their

SIP's, or they may choose an alternate method, subject to review and approval by the Administrator, as stated in 40 CFR 51.212(c). States may also use any appropriate method in appendix A of 40 CFR part 60 (40 CFR 51.212(c)).

E. Additional Technical Work Since the 1986 Proposal

During the interim between the proposal of Method F–1 and proposal of Methods 203A, 203B and 203C, technical work has continued in several areas. First, the technical analysis of fugitive dust procedures, underway at the time of the initial proposal, was completed, and these procedures are included in Methods 203A, 203B, and 203C. Second, EPA completed a collaborative study of the effect of shorter observation intervals begun in 1986, and a report of the study's conclusions was added to the docket (Docket No. A–84–22). Finally, EPA has developed several implementation tools, including, a revised sample visible emissions observation (VEO) form, to assist States in specifying the appropriate test method for the opacity limit proposed in the SIP or SIP revision.

F. Accuracy of Methods

The data reduction procedures included in Methods 203A, 203B, and 203C differ from Method 9; therefore, EPA has evaluated field studies and other information to determine the accuracy of the test procedures for time-averaged, time-exception, and instantaneous limitation regulations. A characterization of the error associated with each method and discussions of the consideration of error in establishing opacity regulations are included in Docket No. A–84–22.

Accuracy of Method 203A (Time-Averaged Regulations)

The accuracy of test procedures for time-averaged regulations was evaluated through field studies and other information. The results indicated that both positive and negative error may occur while using Method 203A test procedures to read plumes under contrasting conditions.

To evaluate potential positive error, EPA conducted a series of field experiments under controlled field conditions, using light and dark visible plumes generated by a smoke generator and a transmissometer meeting the specifications of Method 9. During these evaluation tests, panels of qualified observers (who had been certified by Method 9 procedures) read the generated plumes in 5-percent opacity increments and at 15-second intervals, except for one test that included only 5-second intervals. The data were reduced by averaging over varying lengths of time. Data from earlier field trials, conducted in developing Method 9, were also evaluated. Observer measurements were then compared to the reference values measured by the smoke generator transmissometer. These data indicate that both positive and negative error occur for time-averaged test procedures over averaging periods of 2 to 6 minutes.

Analysis of these data shows that, as the time interval for averaging increases, the positive error decreases. For example, over a 2-minute time period, 90 percent of the data have positive error of 9.5 percent opacity or less, while over a 6-minute time period, 90 percent of the data have positive error of 7.5 percent opacity or less.

Overall, the field studies demonstrated a negative bias. Over a 2-minute time period, 57 percent of the data have zero or negative error, and over a 6-minute time period, 58 percent of the data have zero or negative error. This means that observers are more likely to assign opacity values that are below, rather than above, the actual opacity value. Consequently, a larger percentage of noncompliance periods will be reported as compliant periods rather than compliant periods reported as violations. States are advised to take into consideration both the potential for some positive error and the overall negative bias of the procedure when setting and enforcing opacity standards in SIP's.

Accuracy of Method 203B (Time-Exception Regulations)

Field studies to determine the accuracy of the test procedures for time-exception regulations indicated that both positive and negative error may occur while using the test procedures of Method 203B to read plumes under contrasting conditions.

To evaluate potential positive error, EPA conducted a series of field experiments under controlled field conditions using light and dark visible plumes generated by a smoke generator and a transmissometer meeting the specifications of Method 9. During these evaluation tests, panels of qualified observers (who had been certified by Method 9 procedures) read the generated plumes in 5-percent opacity increments and at 15-second intervals. The data were reduced for time-exception provisions by aggregating the readings above a given opacity within the time period. Observer measurements were then compared to the reference values measured by the smoke generator transmissometer. These data are included in Docket No. A–84–22.

The field experiments indicate a range of observer errors in determining duration of visible emissions for time-exception test procedures. Error was derived by comparing observed opacity with transmissometer readings.

No positive error occurred in 70 percent of the data reduced using Method 203B procedures, i.e., 70 percent of the data sets matched or underestimated the total time of excess opacity compared to the aggregated time of excess opacity recorded by the transmissometer. Overall, visual determination of opacity of emissions was shown to have a negative bias (i.e., certified observers are more likely to assign opacity values that are below actual opacity than above actual opacity). Because of this negative bias of visual determination, the reported period of exceedance is more likely to be shorter, not longer, than the actual period of exceedance. States are advised to take into consideration both the potential for some positive error and the overall negative bias of the procedure when setting opacity standards and establishing time-exception intervals in their SIP's.

Accuracy of Method 203C (Instantaneous Regulations)

The evaluation of field studies and other information to determine the accuracy of the test procedure for instantaneous limitation regulations indicated that both positive and negative error may occur while using the test procedures of Method 203C to read plumes under contrasting conditions.

For an instantaneous limitation, observations are taken over a shorter time period and may also be taken at shorter intervals. The method proposes a 1-minute averaging period to balance the desired short time period implied by an instantaneous limitation with the improved accuracy achieved by multiple readings. Further, the shorter, 5-second interval between observations has been shown to maintain comparable accuracy.

Data from 5-second observation intervals have been assembled since 1986 when EPA proposed Method F–1. The EPA used positive error evaluation data for sets of 12 observations at 5-second intervals to assess observation error for instantaneous opacity measurement. An analysis of the field test data indicates that error for Method 203C is nearly identical to that of Method 9 and strongly indicates that no significant difference exists between observation of opacity at 5- and 15-

second intervals over a 1-minute averaging period. Results of studies conducted by EPA indicate that error increases by only 2 percent when four rather than 12 observations are averaged. The EPA considers these data to be adequate for assessing the positive error associated with Method 203C.

Data, reduced according to the procedures provided in Method 203C, will reflect an overall negative bias (i.e., observers are more likely to assign opacity values that are below the actual opacity value rather than above the actual opacity value). States are advised to take into consideration both the potential for some positive error and the overall negative bias of the procedure when setting opacity standards and establishing instantaneous limitation regulations in their SIP's.

II. Proposed Revisions to the 1986 Proposal

In response to the comments discussed above and the decisions regarding test methods for visible emissions made by EPA since the 1986 proposal, EPA is today proposing visible emission test procedures slightly modified from those introduced in proposed Method F–1. Today's procedures are proposed Methods 203A, 203B, and 203C for inclusion in appendix M of 40 CFR part 51. Other revisions, based on the additional technical work discussed above, are discussed in the following text.

A. Summary of Proposed Revisions

Revisions to Method F–1

Today's proposal divides the procedures proposed as Method F–1 in 1986 into three distinct methods. This will allow a State to specify the exact data reduction procedures to be used in compliance determinations. The three methods incorporate the certification procedures for observers from Method 9 of appendix A of 40 CFR part 60 without change. The only procedural differences between Methods 203A, 203B, and 203C and Method 9 are in the provisions for recording observations and data reduction and the inclusion of fugitive emissions applications in the newly proposed methods. The addition of procedures for fugitive emission applications is described in the section entitled, "Additional Procedures for Fugitive Emissions."

The procedures for recording observations have been revised to: (a) Reflect recording intervals appropriate to each method individually, and (b) indicate that the overall time span for recording observations must be appropriate to the time span specified in the State regulation. For example, Method 203B specifies that, in order to determine that a source is in compliance with a time-exception regulation in which 10 percent opacity may be exceeded for no more than 3 minutes per hour, collection of readings for an entire hour is indicated. However, more than twelve 15-second readings above 10 percent opacity in less than 1 hour, either consecutive or nonconsecutive, would indicate a violation of the time-exception limit. In such a case, a State may elect not to require collection of additional data after a violation is indicated.

The data reduction procedures in proposed Method 203C specify a 1-minute averaging period and require the recording of opacity observations at either 15-second or 5-second intervals.

Summary of Proposal as a Recommended Method in Part 51

In addition to the revisions to the previously proposed Method F–1 discussed earlier, today's proposed methods will be included in appendix M of part 51, rather than part 52, as originally proposed. Under today's proposal, a State would specify the appropriate method when needed in a SIP revision. Also, the language concerning "rules of evidence," which was proposed in 1986 for § 52.23, has been deleted.

Additional Procedures for Fugitive Emissions

EPA added procedures for determining opacity of fugitive emissions to Method 203A. These procedures are also cited in Methods 203B and 203C. By the addition of these procedures, EPA is expanding the guidance available to visible emissions observers, as well as State and local regulators, regarding the observation of visible emissions from sources of fugitive emissions. Procedures, based on State agency studies and current State and Federal regulations, were compiled and incorporated into the proposed methods.

Inclusion of an Implementation Tool

Included with the proposed test methods is a revised sample Visible Emissions Observation (VEO) form for opacity observations. This form is appended to Method 203A and is included to assist States in effectively using the proposed methods in enforcing SIP opacity limits. The sample form is intended to help States to establish a consistent recording and reporting format, thereby, improving program effectiveness.

The sample VEO form will help ensure that all necessary compliance information is recorded during opacity observations. This includes information other than the actual readings, such as time of day, approximate wind speed and direction, and presence and color of clouds.

A memorandum that considers error, associated with opacity observations, has been placed in Docket No. A–84–22. The memorandum includes a discussion of the effect of observation error on compliance determinations for each method. EPA considers that this information would be useful to the States in setting and enforcing opacity standards.

B. Rationale for Revisions to Proposed Method F–1

Proposal as Three Distinct Methods

Three distinct methods for determination of opacity of emissions are being proposed in order to provide data reduction procedures that are consistent with various types of opacity regulations included in SIP's. Opacity regulations fall into three general categories: Time-averaged regulations, time-exception regulations, and instantaneous limitation regulations. The existing available method, Method 9 of 40 CFR part 60, appendix A, calls for averaging 24 consecutive 15-second interval observations for a 6-minute average. These specifications are sometimes inconsistent with the requirements in SIP opacity regulations. The proposed array of methods enables States to specify methods that are consistent with actual SIP regulations and appropriate for accurate compliance determination.

Proposed Method 203A for visual determination of opacity of emissions for time-averaged regulations calls for opacity readings at 15-second intervals, averaged over a time period of 2 minutes or more as specified by the State regulation. This proposed method allows States to specify averaging periods other than 6 minutes.

Method 203B for visual determination of opacity of emissions for time-exception regulations also calls for opacity readings at 15-second intervals. However, the data are reduced by aggregating all observations above the level of the opacity standard. This proposed method allows States to specify a method consistent with time-exception regulations.

Method 203C for visual determination of opacity of emissions for instantaneous limitation regulations allows a State to specify either 15- or 5-second observation intervals with a 1-

minute averaging period. This proposed method uses a shorter averaging period consistent with the intent of an instantaneous limit. If a 5-second interval is not specified by the State, the 15-second interval will be used. The selection of the observation interval allows the State to either increase the number of observations averaged for the period or maintain the same observation interval used for other opacity standards. This proposed method allows States to specify a method developed specifically for instantaneous limitation regulations.

Proposed Changes to Data Reduction Procedures

Only two technical changes have been made to the data reduction procedures of the proposed methods.

First, the State has flexibility in specifying the interval between observations for Method 203C (for instantaneous limitation regulations) and the overall time period for which observations are averaged has also been reduced to 1 minute. This approximates more closely a truly "instantaneous" determination of opacity, while maintaining accuracy at about the level provided by the typical 6-minute average. EPA has received information from various States, since the proposal of Method F–1, which indicates that several visible emissions observation methods, developed at the State level, include a 5-second observation interval. Accordingly, EPA evaluated the accuracy of observations recorded at 5-second intervals. A collaborative study performed with a group of certified observers, demonstrated that an average of 12 observations, taken at 5-second intervals, has about the same level of accuracy as an average of 24 observations taken at 15-second intervals. The results of the study are presented in "Collaborative Study of Opacity Observations at Five-Second Intervals by Certified Observers" (Docket No. A–84–22).

Some States may, however, prefer to avoid specifying a different observation interval than is already in use in many SIP's, even though the shorter averaging period is warranted. For this reason, EPA considered the effect of averaging only four observations. Further analysis of earlier data indicates that the accuracy of the averaging of four 15-second observations is comparable to that of twelve 15-second observations. States are advised to consider the relative accuracy of the two observation intervals when specifying Method 203C and indicate which interval will be required.

C. Rationale for Proposal as a Recommended Method in 40 CFR Part 51

Method F–1 was first proposed for inclusion in appendix F of part 52 (51 FR 31076, August 29, 1986). Since that time, the new appendix M of part 51 was promulgated. As described in section II.D of this preamble, appendix M is the designated repository for recommended test methods for use in SIP's.

Methods in appendix M are available for States to specify in their SIP's without further review by EPA. EPA revised subpart K of 40 CFR part 51 to emphasize that States must include enforceable test methods in their SIP's for each emission limit and directed States to appendix M for recommended test methods for use in determining compliance (55 FR 14249, April 17, 1990). States are expected to specify a test method for each standard in their SIP's. All new or revised SIP's should include compliance test methods. The test method and the associated error can affect the implementation and stringency of any SIP-specified regulation. The specification of test methods within SIP regulations will ensure that test method procedures and accuracy are fully considered.

Because part 52 addresses Federal approval of proposed SIP's, while part 51 addresses development of SIP's, recommended test methods are most appropriately included in part 51. Today's proposed Methods 203A, 203B, and 203C are recommended test methods intended for use in SIP's and, therefore, clearly should be included in appendix M.

D. Rationale for Proposed Procedures for Fugitive Emissions Applications

Fugitive emissions are those emissions that are emitted directly into the air from unenclosed sources such as stockpiles, roadways, and open railcars or truckbeds, or those which leak into the atmosphere from industrial sources or buildings. Another source of fugitive emissions is open burning. Typical industrial sources of fugitive emissions include loading and transfer operations, coke oven pushing, sizing, crushing, milling, and sandblasting operations. Silvaculture contributes to fugitive emissions through both cutting and clearing activities.

Fugitive emissions may not always be in the form of a distinct plume, but instead, may be in the form of a cloud or cover a broad area. In some instances, fugitive emissions may represent only a part of a facility's overall emissions, as would be the case for a large petrochemical complex. Many situations exist in which fugitive emissions are the dominant source of air pollution. Examples include quarries, sawmills, and roadways or parking lots.

Many SIP's include opacity limits for various industrial and commercial operations that include sources of fugitive emissions. For example, regulations in Ohio require that visible emissions be observed and recorded at coke oven doors during pushing operations; regulations in Tennessee require that industrial roads and parking lots meet an opacity limit of 10 percent in any area previously designated nonattainment for particulate matter. In some cases, as in the Ohio coke oven regulation, the opacity limit serves to indicate good operation and maintenance procedures, or to highlight equipment deterioration. In others, such as the Tennessee road/parking lot regulation, the opacity limit serves to accomplish a specific air quality goal, such as conforming to national ambient air quality standards or reversing visibility impairment near an historic or scenic site. The inclusion of guidance and procedures for reading visible emissions from fugitive sources in Methods 203A, 203B and 203C will assist States in achieving many of these goals.

The procedures for fugitive emissions, included in Method 203A, 203B, and 203C, have been assembled from current State regulations (e.g., Ohio and Tennessee), national standards, and studies conducted in Florida and elsewhere. Since the promulgation of Method 9, understanding of the special considerations, necessary when observing visible emissions from fugitive sources, has grown. Currently, efforts are underway in several States, such as Illinois, to develop opacity methods that are applicable to specific source types or local concerns. These efforts may be time and resource intensive, and EPA hopes to reduce some of this burden through promulgation of these recommended methods.

The principal studies and regulations that EPA considered are summarized below, followed by a summary of general principles based on these and other studies.

Data, Information and Analyses

Tennessee visible emission evaluation Method 1. The State of Tennessee developed a visible emissions reading technique for roads and parking lots in 1982 as part of an effort to bring a total suspended particulate (TSP), nonattainment area, into compliance through the use of a stringent opacity

standard of 10 percent. Field studies were conducted by the Tennessee Division of Air Pollution Control to determine what modifications to Method 9 would be necessary. These field studies resulted in the promulgation of Tennessee Visible Emissions Evaluation Method 1. The 15-second reading interval and many other procedures from Method 9 were retained, but the averaging period was shortened to 2 minutes. Also, additional procedural guidance for visible emissions observations from short-term sporadic or intermittent emission sources was provided.

Nonmetallic mineral processing plants new source performance standard. This new source performance standard (NSPS) requires the use of Method 9 procedures with the following additional provisions:

1. Observations should be made at a minimum of 5 meters (m) (15 feet (ft)) from the source;
2. The position of the observer should be selected to minimize interference from other emission sources; and
3. When water mist is present in the plume, the observation should be made at a point in the plume where the mist is no longer visible.

1989 Draft Ohio method for roads and parking lots. This draft method borrows heavily from the Tennessee method above, but adds two additional conditions: (1) Observations should be made at the point of highest opacity within the plume, usually immediately above or downwind of the source; and (2) observers are to be certified for a period of 8 months, rather than 6 months as is the case for both Method 9 and Tennessee Method 1.

Collaborative study of opacity observations of fugitive emissions from unpaved roads by certified observers. This study by Eastern Technical Associates (ETA) involved visible observations of opacity of fugitive emissions, specifically, fugitive emissions from unpaved roads, using Method 9 procedures over averaging periods of 15 seconds to 8 minutes. Opacity observations, taken by visible emission observers, were compared to measurements taken by a transmissometer. The purpose of the study was to compare the accuracy of opacity observations of fugitive emissions to the accuracy of opacity observations of stationary source emissions.

The study found that, depending on averaging time, from 74 to 80 percent of all averages had either no positive error or had positive error of less than 5 percent opacity, and from 90 to 98 percent had 10 percent or less positive opacity error. These results represented error only marginally above that seen when using Method 9 procedures on stack emissions. A second analysis was performed in this study to consider the accuracy of Method 9 certified observers in reading opacity for time-exception regulations. In this analysis, time above the level of the standard, reported by the observer, was compared to that of the transmissometer. The analysis showed that from 58 to 88 percent of the time, the observer either matched the time above the level of the standard, as determined by the transmissometer, or understated the time above the level of the standard. Stated another way, the study demonstrated a strong negative bias.

Principles of Observation of Fugitive Emission Sources

Fugitive emissions present special conditions for observers. Fugitive emissions may be generated by multiple sources in close proximity to one another. These emissions may be less distinguishable from the background than are point-source emissions. Since the overall purpose of visible opacity observation is to determine the effect of the emission on the observer's view of the background, the observer must stand at a distance and in a position that provides a clear view of the background, both through the emission, and beside the emission. The provisions, incorporated in the nonmetallic mineral processing plants NSPS, are intended to ensure that the observer clearly distinguishes the plume from other emission sources and, in the case of water mist, includes only the portion of concern. Often, even for roadways and parking lots, when fugitive emissions are plentiful or generated by multiple sources or source types in close proximity to one another, the contrast between a given plume or the emissions, due to a specific source and the background opacity, is diminished.

While the minimum distance of 5 m (15 ft) ensures the observer can adequately segregate the emission from the background, care should be taken to select a distance from the source relative to the size of the emission.

When visibility at the specified observation interval is momentarily blocked (e.g., by a passing vehicle, etc.), the recording sheet should be so marked, and the set of observations extended to include an appropriate number of data points for averaging. In some cases, an extended length of time, for which visibility is blocked, may render the set unusable. Discretion must be used to decide when an averaging set should be repeated because of a long interruption.

Storage piles. When making observations across storage piles, the observer should look across a specific point in the pile and not follow a moving plume. In the case of a continuously-generated dust plume, where vigorous wind activity is continuously adding to the upward movement of dust, observations should continue at the same point and height above the pile as initially read.

A second caution involves the situation where water spray is used for dust suppression. The observer should assure that, while reading at the densest portion of the plume, the opacity recorded is not from the water spray.

Roads and parking areas. The Tennessee and Ohio methods include a condition requiring that a series of opacity readings may include only plumes generated by vehicles traveling in the same direction. The observer is to select a target area for viewing and is to read the opacity at that area for the entire averaging period, even when multiple vehicles pass through the area traveling in the same direction. In some cases, a vehicle will be in the line of sight when a given reading is to be taken. For these rules, the observation is suspended for any interval in which a vehicle is directly in the line of sight. The space for recording that observation is marked with a "V." Observations are to be resumed at the next interval as if following the last recorded observation, so long as the vehicle is traveling in the same direction as the vehicle which initiated the fugitive emissions.

If another vehicle passes through the area in the opposite direction, readings must be suspended. A new set of readings can begin after the plume, generated by the vehicle moving in the opposite direction, has settled and a new plume is generated. The disrupted set is then discarded.

An additional concern for Tennessee is that the series of readings be representative of the roadway or parking lot conditions. Therefore, readings are not to be taken during a period of time or in an area which is not representative because of highly unusual circumstances (e.g., a broken bag of cement or bale of hay on the roadway). Highly unusual circumstances must not only be atypical of operation conditions, they must also be infrequent. Therefore, a State might require that all readings be recorded and that agency discretion be used in deciding whether all readings are to be included in the average for purposes of compliance.

III. Administrative Requirements

A. Docket

The docket is an organized and complete file of all the information submitted to or otherwise considered by EPA in the development of this proposed rulemaking. The docket is a dynamic file since material is added throughout the rulemaking development. The docketing system is intended to allow members of the public and industries involved to identify and locate documents so that they can effectively participate in the rulemaking process. Along with the statement of basis and purpose of the proposed and promulgated standards and EPA responses to significant comments in the **Federal Register** notices and background documents, the contents of the docket, except for interagency review materials, will serve as the record in case of judicial review (section 307(d)(7)(A)).

B. Executive Order 12291

Under Executive Order 12291, EPA was required to judge whether a regulation was "major" and therefore subject to the requirement of a Regulatory Impact Analysis (RIA).

This action did not require any revision to existing SIPs or changes to any SIP regulation. This proposed regulation was not a major rule under E.O. 12291 because it will neither have an effect on the economy of $100 million or more, nor will it result in an increase in costs or prices to industry. There will be no adverse impact on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets. Because this amendment was not a major regulation, no RIA was conducted. This regulation was submitted to the Office of Management and Budget (OMB) for review under Executive Order 12291.

C. Regulatory Flexibility Act Compliance

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), whenever an agency is required to publish a general notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a Regulatory Flexibility Analysis (RFA) which requires EPA to consider potential impacts of proposed regulations on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). The Administrator may certify, however, that the rule will not have a significant economic impact on a substantial number of small entities.

These methods will have no adverse economic impact on small entities. No new SIP regulations are being proposed. Since this proposal does not significantly change the status quo for such entities, I hereby certify that this proposed regulation will not have a significant economic impact on a substantial number of small entities. This proposed regulation therefore does not require an RFA.

List of Subjects in 40 CFR Part 51

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: November 11, 1993.

Carol Browner,

Administrator.

EPA proposes to amend title 40, chapter I, part 51 of the Code of Federal Regulations as follows:

PART 51—[AMENDED]

1. The authority citation for part 51 continues to read as follows:

Authority: 42 U.S.C. 7410(a)(2), 7475(e), 7502(a) and (b), 7503, 7601(a)(1) and 7620, unless otherwise noted.

2. Appendix M is amended by adding Methods 203A, 203B and 203C and by adding the following method titles to the table of contents to read as follows:

Appendix M to Part 51—Recommended Test Methods for State Implementation Plans

* * * * *

Method 203A—Visual Determination of Opacity of Emissions From Stationary Sources for Time-Averaged Regulations.

Method 203B—Visual Determination of Opacity of Emissions From Stationary Sources for Time-Exception Regulations.

Method 203C—Visual Determination of Opacity of Emissions From Stationary Sources for Instantaneous Limitation Regulations

* * * * *

Method 203A—Visual Determination of Opacity of Emissions From Stationary Sources for Time-Averaged Regulations

Method 203A is virtually identical to EPA's Method 9 except for the data-reduction procedures, which provide for averaging times other than 6 minutes. That is, using Method 203A with a 6-minute averaging time would be the same as following EPA Method 9. Additionally, Method 203A provides procedures for fugitive dust applications. The certification procedures provided in section 3 are virtually identical to Method 9 and are provided here, in full, for clarity and convenience. A sample visible emission observation form and instructions for its use are appended to this method.

1. Applicability and Principle

1.1 Applicability. This method is applicable for the determination of the opacity of emissions from sources of visible emissions for time-averaged regulations. A time-averaged regulation is any regulation that requires averaging visible emission data to determine the opacity of visible emissions over a specific time period.

1.2 Principle. The opacity of emissions from sources of visible emissions is determined visually by an observer qualified according to the procedures of section 3.

2. Procedures

An observer qualified in accordance with section 3 of this method shall use the following procedures for visually determining the opacity of emissions.

2.1 Procedures for Emissions from Stationary Sources. These procedures are applicable for visually determining the opacity of stack emissions by a qualified observer. The qualified observer should do the following:

2.1.1 Position. Stand at a distance sufficient to provide a clear view of the emissions with the sun oriented in the 140-degree sector to the observer's back. Consistent with maintaining the above requirement as much as possible, make opacity observations from a position such that the line of vision is approximately perpendicular to the plume direction, and when observing opacity of emissions from rectangular outlets (e.g., roof monitors, open baghouses, noncircular stacks), approximately perpendicular to the longer axis of the outlet. Do not include more than one plume in the line of sight at a time when multiple plumes are involved and, in any case, make opacity observations with the line of sight perpendicular to the longer axis of such a set of multiple stacks (e.g., stub stacks on baghouses).

2.1.2 Field Records. Record the name of the plant, emission location, type of facility, observer's name and affiliation, a sketch of the observer's position relative to the source, and the date on a field data sheet. A sample visible emission observation form is included in appendix 1 of Method 203A. Record the time, estimated distance to the emission location, approximate wind direction, estimated wind speed, description of the sky condition (presence and color of clouds), and plume background on the field data sheet at the time opacity readings are initiated and completed.

2.1.3 Observations. Make opacity observations at the point of greatest opacity in that portion of the plume where condensed water vapor is not present.

Do not look continuously at the plume but, instead, observe the plume momentarily at 15-second intervals.

2.1.3.1 Attached Steam Plumes. When condensed water vapor is present within the plume as it emerges from the emission outlet, make opacity observations beyond the point in the plume at which condensed water vapor is no longer visible. Record the approximate distance from the emission

outlet to the point in the plume at which the observations are made.

2.1.3.2 Detached Steam Plumes. When water vapor in the plume condenses and becomes visible at a distinct distance from the emission outlet, evaluate the opacity of emissions at the emission outlet prior to the condensation of water vapor and the formation of the steam plume.

2.2 Procedures for Fugitive Process Dust Emissions. These procedures are applicable for the determination of the opacity of fugitive emissions by a qualified observer. The qualified observer should do the following:

2.2.1 Position. Stand at a position at least 5 meters from the fugitive source in order to provide a clear view of the emissions with the sun oriented in the 140-degree sector to the back. Consistent as much as possible with maintaining the above requirements, make opacity observations from a position such that the line of vision is approximately perpendicular to the plume and wind direction. As much as possible, if multiple plumes are involved, do not include more than one plume in the line of sight at one time.

2.2.2 Field Records. Record the name of the plant or site, fugitive source location, source type [pile, stack industrial process unit, incinerator, open burning operation, activity, material handling (transfer, loading, sorting, etc.)], method of control used, if any, observer's name, certification date and affiliation, a sketch of the observer's position relative to the fugitive source, and date on a field data sheet, such as the sample visible emission observation form included in appendix 1. Also, record the time, estimated distance to the fugitive source location, approximate wind direction, estimated wind speed, description of the sky condition (presence and color of clouds), observer's position relative to the fugitive source, and color of the plume and type of background on the visible emission observation form when opacity readings are initiated and completed. For roads, storage piles, parking lots, record a description of the surface conditions (presence of moisture).

2.2.3 Observations. Make opacity observations, to the extent possible, using a contrasting background that is perpendicular to the line of vision. For roads, storage piles, and parking lots, make opacity observations approximately 1 meter above the surface from which the plume is generated. For other fugitive sources, make opacity observations at the point of greatest opacity in that portion of the plume where condensed water vapor is not present. For intermittent sources, the initial observation should begin immediately after a plume has been created above the surface involved. Do not look continuously at the plume but, instead, observe the plume momentarily at 15-second intervals.

2.3 Recording Observations. Record the opacity observations to the nearest 5 percent every 15 seconds on an observational record sheet such as the visible emission observation form included in appendix 1. Each momentary observation recorded represents the average opacity of emissions for a 15-second period. The overall length of time for which observations are recorded shall be appropriate to the averaging time specified in the State regulation.

2.4 Data Reduction for Time-Averaged Regulations. A set of observations is composed of an appropriate number of consecutive observations determined by the averaging time specified. Divide the recorded observations into sets of appropriate time lengths for the specified averaging time. Sets must consist of consecutive observations; however, observations immediately preceding and following interrupted observations shall be deemed consecutive. Sets need not be consecutive in time and in no case shall two sets overlap, resulting in multiple violations. For each set of observations, calculate the appropriate average opacity.

3. Qualification and Testing

3.1 Certification Requirements. To receive certification as a qualified observer, a candidate must be tested and demonstrate the ability to assign opacity readings in 5 percent increments to 25 different black plumes and 25 different white plumes, with an error not to exceed 15 percent opacity on any one reading and an average error not to exceed 7.5 percent opacity in each category. Candidates shall be tested according to the procedures described in paragraph 3.2. Any smoke generator used pursuant to paragraph 3.2 shall be equipped with a smoke meter which meets the requirements of paragraph 3.3. Certification tests that do not meet the requirements of paragraphs 3.2 and 3.3 are not valid.

The certification shall be valid for a period of 6 months, and after each 6-month period, the qualification procedures must be repeated by an observer in order to retain certification.

3.2 Certification Procedure. The certification test consists of showing the candidate a complete run of 50 plumes, 25 black plumes and 25 white plumes, generated by a smoke generator. Plumes shall be presented in random order within each set of 25 black and 25 white plumes. The candidate assigns an opacity value to each plume and records the observation on a suitable form. At the completion of each run of 50 readings, the score of the candidate is determined. If a candidate fails to qualify, the complete run of 50 readings must be repeated in any retest. The smoke test may be administered as part of a smoke school or training program, and may be preceded by training or familiarization runs of the smoke generator during which candidates are shown black and white plumes of known opacity.

3.3 Smoke Generator Specifications. Any smoke generator used for the purpose of paragraph 3.2 shall be equipped with a smoke meter installed to measure opacity across the diameter of the smoke generator stack. The smoke meter output shall display in-stack opacity, based upon a path length equal to the stack exit diameter on a full 0 to 100 percent chart recorder scale. The smoke meter optical design and performance shall meet the specifications shown in Table 1. The smoke meter shall be calibrated as prescribed in paragraph 3.3.1 prior to conducting each smoke reading test. At the completion of each test, the zero and span drift, shall be checked, and if the drift exceeds ±1 percent opacity, the condition shall be corrected prior to conducting any subsequent test runs. The smoke meter shall be demonstrated at the time of installation to meet the specifications listed in Table 1. This demonstration shall be repeated following any subsequent repair or replacement of the photocell or associated electronic circuitry including the chart recorder or output meter, or every 6 months, whichever occurs first.

3.3.1 Calibration. The smoke meter is calibrated after allowing a minimum of 30 minutes warm-up by alternately producing simulated opacity of 0 percent and 100 percent. When stable response at 0 percent or 100 percent is noted, the smoke meter is adjusted to produce an output of 0 percent or 100 percent, as appropriate. This calibration shall be repeated until stable 0 percent and 100 percent readings are produced without adjustment. Simulated 0 percent and 100 percent opacity values may be produced by alternately switching the power to the light source on and off while the smoke generator is not producing smoke.

3.3.2 Smoke Meter Evaluation. The smoke meter design and performance are to be evaluated as follows:

3.3.2.1 Light Source. Verify from manufacturer's data and from voltage measurements made at the lamp, as installed, that the lamp is operated within ±5 percent of the nominal rated voltage.

3.3.2.2 Spectral Response of Photocell. Verify from manufacturer's data that the photocell has a photopic response; i.e., the spectral sensitivity of the cell shall closely approximate the standard spectral-luminosity curve for photopic vision which is referenced in (b) of Table 1.

3.3.2.3 Angle of View. Check construction geometry to ensure that the total angle of view of the smoke plume, as seen by the photocell, does not exceed 15 degrees. Calculate the total angle of view as follows:

$$\phi v = 2 \tan^{-1} d/2L,$$

where:

ϕv=total angle of view;
d=the photocell diameter + the diameter of the limiting aperture; and
L=distance from the photocell to the limiting aperture.

The limiting aperture is the point in the path between the photocell and the smoke plume where the angle of view is most restricted. In smoke generator smoke meters, this is normally an orifice plate.

3.3.2.4 Angle of Projection. Check construction geometry to ensure that the total angle of projection of the lamp on the smoke plume does not exceed 15 degrees. Calculate the total angle of projection as follows:

$$\phi p = 2 \tan^{-1} d/2L$$

where:

ϕp=total angle of projection;
d=the sum of the length of the lamp filament + the diameter of the limiting aperture; and
L=the distance from the lamp to the limiting aperture.

3.3.2.5 Calibration Error. Using neutral-density filters of known opacity, check the error between the actual response and the theoretical linear response of the smoke

meter. This check is accomplished by first calibrating the smoke meter according to 3.3.1 and then inserting a series of three neutral-density filters of nominal opacity of 20, 50, and 75 percent in the smoke meter path length. Use filters calibrated within ±2 percent. Care should be taken when inserting the filters to prevent stray light from affecting the meter. Make a total of five nonconsecutive readings for each filter. The maximum opacity error on any one reading shall be ±3 percent.

3.3.2.6 Zero and Span Drift. Determine the zero and span drift by calibrating and operating the smoke generator in a normal manner over a 1-hour period. The drift is measured by checking the zero and span at the end of this period.

3.3.2.7 Response Time. Determine the response time by producing the series of five simulated 0 percent and 100 percent opacity values and observing the time required to reach stable response. Opacity values of 0 percent and 100 percent may be simulated by alternately switching the power to the light source off and on while the smoke generator is not operating.

4. References

1. U.S. Environmental Protection Agency. Standards of Performance for New Stationary Sources; appendix A; Method 9 for Visual Determination of the Opacity of Emissions from Stationary Sources. Final Rule. 39 FR 219. Washington, DC. U.S. Government Printing Office. November 12, 1974.

2. Office of Air and Radiation. "Quality Assurance Guideline for Visible Emission Training Programs." EPA-600/S4-83-011. Quality Assurance Division. Research Triangle Park, N.C. May 1982.

3. "Method 9—Visible Determination of the Opacity of Emissions from Stationary Sources." February 1984. Quality Assurance Handbook for Air Pollution Measurement Systems. Volume III, section 3.1.2. Stationary Source Specific Methods. EPA-600-4-77-027b. August 1977. Office of Research and Development Publications, 26 West Clair Street, Cincinnati, OH.

4. Office of Air Quality Planning and Standards. "Opacity Error for Averaging and Nonaveraging Data Reduction and Reporting Techniques." Final Report SR-1-6-85. Emission Measurement Branch, Research Triangle Park, N.C. June 1985.

5. The U.S. Environmental Protection Agency. Preparation, Adoption, and Submittal of State Implementation Plans. Methods for Measurement of PM_{10} Emissions from Stationary Sources. Final Rule. **Federal Register**. Washington, DC. U.S. Government Printing Office. Volumes 55. No. 74. pps. 14246-14279. April 17, 1990.

Method 203B—Visual Determination of Opacity of Emissions From Stationary Sources for Time-Exception Regulations

Method 203B is virtually identical to EPA's Method 9, except for the data-reduction procedures, which have been modified for application to time-exception regulations. Additionally, Method 203B provides procedures for fugitive dust applications which were unavailable when Method 9 was promulgated. The certification procedures in section 3 are identical to those in Method 9 and are provided in Method 203A as well. Therefore, the certification procedures have not been repeated within this method. As an additional aid for observers, a sample visible emission observation form has been appended to Method 203A.

1. Applicability and Principle

1.1 Applicability. This method is applicable for the determination of the opacity of emissions from sources of visible emissions for time-exception regulations. A time-exception regulation means any regulation that allows predefined periods of opacity above the otherwise applicable opacity limit.

1.2 Principle. The opacity of emissions from sources of visible emissions is determined visually by a qualified observer.

2. Procedures

The observer qualified in accordance with section 3 of this method shall use the following procedures for visually determining the opacity of emissions.

2.1 Procedures for Emissions From Stationary Sources. Same as in 2.1, Method 203A.

2.2 Procedures For Fugitive Process Dust Emissions. Same as 2.2, Method 203A.

2.3 Recording Observations. Record opacity observations to the nearest 5 percent at 15-second intervals on an observational record sheet. Each momentary observation recorded represents the average opacity of emissions for a 15-second period. The overall length of time for which observations are recorded shall be appropriate to the applicable regulation for which opacity is being measured.

2.4 Data Reduction for Time-Exception Regulations. For a time-exception regulation, reduce opacity observations as follows: count the number of observations above the applicable standard and multiply that number by 0.25 to determine the minutes of emissions above the target opacity.

3. Qualification and Testing. Same as section 3, Method 203A.

4. References. Same as Section 4, Method 203A.

Method 203C—Visual Determination of Opacity of Emissions From Stationary Sources for Instantaneous Limitation Regulations

Method 203C is virtually identical to EPA's Method 9, except for the data-reduction procedures, which have been modified for application to instantaneous limitation regulations. Additionally, Method 203C provides procedures for fugitive dust applications, which were unavailable when Method 9 was promulgated. The certification procedures in section 3 are identical to Method 9. These certification procedures are provided in Method 203A as well, and, therefore, have not been repeated in this method. As an additional aid for observers, a sample visible emission observation form has been appended to Method 203A.

1. Applicability and Principle

1.1 Applicability. This method is applicable for the determination of the opacity of emissions from sources of visible emissions for instantaneous limitations. An instantaneous limitation regulation is an opacity limit which is never to be exceeded.

1.2 Principle. The opacity of emissions from sources of visible emissions is determined visually by a qualified observer.

2. Procedures

The observer qualified in accordance with section 3 of this method shall use the following procedures for visually determining the opacity of emissions.

2.1 Procedures for Emissions From Stationary Sources. Same as 2.1, Method 203A.

2.1.1 Position. Same as 2.1.1, Method 203A.

2.1.2 Field Records. Same as 2.1.2, Method 203A.

2.1.3 Observations. Make opacity observations at the point of greatest opacity in that portion of the plume where condensed water vapor is not present.

Do not look continuously at the plume, instead, observe the plume momentarily at the interval specified in the subject regulation. Unless otherwise specified, a 15-second observation interval is assumed.

2.1.3.1 Attached Steam Plumes. Same as 2.1.3.1, Method 203A.

2.1.3.2 Detached Steam Plumes. Same as 2.1.3.1, Method 203A.

2.2 Procedures for Fugitive Process Dust Emissions.

2.2.1 Position. Same as section 2.2.1, Method 203A.

2.2.2 Field Records. Same as section 2.2.2, Method 203A.

2.2.3 Observations.

2.2.3.1 Observations for 15-second Observation Interval Regulations. Same as section 2.2.3, Method 203A.

2.2.3.2 Observations for 5-second Observation Internal Regulations. Same as section 2.2.3, Method 203A, except, observe the plume momentarily at 5-second intervals.

2.3 Recording Observations. Record opacity observations to the nearest 5 percent at the prescribed interval on an observational record sheet. Each momentary observation recorded represents the average of emissions for the prescribed period. If a 5-second observation period is not specified in the applicable regulation, a 15-second interval is assumed. The overall time for which recordings are made shall be of a length appropriate to the regulation for which opacity is being measured.

2.3.1 Recording Observations for 15-second Observation Interval Regulations. Record opacity observations to the nearest 5 percent at 15-second intervals on an observational record sheet. Each momentary observation recorded represents the average of emissions for a 15-second period.

2.3.2 Recording Observations for 5-second Observation Interval Regulations. Record opacity observations to the nearest 5 percent at 5-second intervals on an observational record sheet. Each momentary observation recorded represents the average of emissions for 5-second period.

2.4 Data Reduction for Instantaneous Limitation Regulations. For an instantaneous limitation regulation, a 1-minute averaging time will be used. Divide the observations

recorded on the record sheet into sets of consecutive observations. A set is composed of the consecutive observations made in 1 minute. Sets need not be consecutive in time, and in no case shall two sets overlap. Reduce opacity observations by dividing the sum of all observations recorded in a set by the number of observations recorded in each set.

2.4.1 Data Reduction for 15-second Observation Intervals. Reduce opacity observations by averaging four consecutive observations recorded at 15-second intervals. Divide the observations recorded on the record sheet into sets of four consecutive observations. For each set of four observations, calculate the average by summing the opacity of the four observations and dividing this sum by four.

2.4.2 Data Reduction for 5-second Observation Intervals. Reduce opacity observations by averaging 12 consecutive observations recorded at 5-second intervals. Divide the observations recorded on the record sheet into sets of 12 consecutive observations. For each set of 12 observations, calculate the average by summing the opacity of the 12 observations and dividing this sum by 12.

3. Qualification and Testing

Same as section 3, Method 203A.

4. References

Same as section 4, Method 203A.

Method 203C—Visual Determination of Opacity of Emissions From Stationary Sources for Instantaneous Limitation Regulations

Method 203C is virtually identical to EPA's Method 9, except for the data-reduction procedures, which have been modified for application to instantaneous limitation regulations. Additionally, Method 203C provides procedures for fugitive dust applications, which were unavailable when Method 9 was promulgated. The certification procedures in section 3 are identical to Method 9. These certification procedures are provided in Method 203A as well, and, therefore, have not been repeated in this method. As an additional aid for observers, a sample visible emission observation form has been appended to Method 203A as well.

1. Applicability and Principle

1.1 Applicability. This method is applicable for the determination of the opacity of emissions from sources of visible emissions for instantaneous limitations. An instantaneous limitation regulation is an opacity limit which is never to be exceeded.

1.2 Principle. The opacity of emissions from sources of visible emissions is determined visually by a qualified observer.

2. Procedures

The observer qualified in accordance with section 3 of this method shall use the following procedures for visually determining the opacity of emissions.

2.1 Procedures for Emissions From Stationary Sources. Same as 2.1, Method 203A.

2.1.1 Position. Same as 2.1.1, Method 203A.

2.1.2 Field Records. Same as 2.1.2, Method 203A.

2.1.3 Observations. Make opacity observations at the point of greatest opacity in that portion of the plume where condensed water vapor is not present.

Do not look continuously at the plume, instead, observe the plume momentarily at the interval specified in the subject regulation. Unless otherwise specified, a 15-second observation interval is assumed.

2.1.3.1 Attached Steam Plumes. Same as 2.1.3.1, Method 203A.

2.1.3.2 Detached Steam Plumes. Same as 2.1.3.2, Method 203A.

2.2 Procedures for Fugitive Process Dust Emissions. 2.2.1 Position. Same as section 2.2.1, Method 203A.

2.2.2 Field Records. Same as section 2.2.2, Method 203A.

2.2.3 Observations.

2.2.3.1 Observations for 15-second Observation Interval Regulations. Same as section 2.2.3, Method 203A.

2.2.3.2 Observations for 5-second Observation Interval Regulations. Same as section 2.2.3, Method 203A, except, observe the plume momentarily at 5-second intervals.

2.3 Recording Observations. Record opacity observations to the nearest 5 percent at the prescribed interval on an observational record sheet. Each momentary observation recorded represents the average of emissions for the prescribed period. If a 5-second observation period is not specified in the applicable regulation, a 15-second interval is assumed. The overall time for which recordings are made shall be of a length appropriate to the regulation for which opacity is being measured.

2.3.1 Recording Observations for 15-second Observation Interval Regulations. Record opacity observations to the nearest 5 percent at 15-second intervals on an observational record sheet. Each momentary observation recorded represents the average of emissions for a 15-second period.

2.3.2 Recording Observations for 5-second Observation Interval Regulations. Record opacity observations to the nearest 5 percent at 5-second intervals on an observational record sheet. Each momentary observation recorded represents the average of emissions for a 5-second period.

2.4 Data Reduction for Instantaneous Limitation Regulations. For an instantaneous limitation regulation, a 1-minute averaging time will be used. Divide the observations recorded on the record sheet into sets of consecutive observations. A set is composed of the consecutive observations made in 1 minute. Sets need not be consecutive in time, and in no case shall two sets overlap. Reduce opacity observations by dividing the sum of all observations recorded in a set by the number of observations recorded in each set.

2.4.1 Data Reduction for 15-second Observation Intervals. Reduce opacity observations by averaging four consecutive observations recorded at 15-second intervals. Divide the observations recorded on the record sheet into sets of four consecutive observations. For each set of four observations, calculate the average by summing the opacity of the four observations and dividing this sum by four.

2.4.2 Data Reduction for 5-second Observation Intervals. Reduce opacity observations by averaging 12 consecutive observations recorded at 5-second intervals. Divide the observations recorded on the record sheet into sets of 12 consecutive observations. For each set of 12 observations, calculate the average by summing the opacity of the 12 observations and dividing this sum by 12.

3. Qualification and Testing

Same as section 3, Method 203A.

4. References

Same as section 4, Method 203A.

TABLE 1.—SMOKE METER DESIGN AND PERFORMANCE SPECIFICATIONS

Parameter	Specification
a. Light source	Incandescent lamp operated at nominal rated voltage.
b. Spectral response of photocell.	Photopic (daylight spectral response of the human eye—Reference 4.1 of section 4).
c. Angle of view	15 degrees maximum total angle.
d. Angle of projection	15 degrees maximum total angle.
e. Calibration error	±3-percent opacity, maximum.
f. Zero and span drift	±1-percent opacity, 30 minutes.
g. Response time	≤5 seconds.

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40 CFR Part 721

[OPPTS-50610; FRL-4186-2]

RIN 2070-AB27

Significant New Uses of Certain Acrylate Esters

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing a significant new use rule (SNUR) under section 5(a)(2) of the Toxic Substances Control Act (TSCA) for all acrylate esters falling within the definition proposed in this rule (acrylate substances). Persons wishing to manufacture, or import such substances, not appearing upon the TSCA Chemical Substances Inventory (the Inventory) as of the proposed date of this rule, for a significant new use, would be able to submit a combined Premanufacture (PMN) and Significant New Use Notice (SNUN). These persons wishing to manufacture, import, or process, for a significant new use, an acrylate substance subsequently placed

on the Inventory and subject to this SNUR would be required to submit only a SNUN. EPA has determined that these substances may be hazardous and that the uses described in this proposed rule may result in significant human exposure. This proposed rule would require persons who intend to manufacture, import, or process any of these substances to notify EPA at least 90 days before commencing the manufacturing, importing, or processing of the substance for uses designated by the SNUR as a significant new use. The required notice would provide EPA with the opportunity to evaluate the intended use, and if necessary, to prohibit or limit that activity before it occurs.

DATES: Written comments must be received by December 22, 1993.

ADDRESSES: All comments must be sent in triplicate to: TSCA Document Receipt Office (7407), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E-G99, 401 M St., SW., Washington, DC 20460. Comments that are confidential must be clearly marked confidential business information (CBI). If CBI is claimed, three additional sanitized copies must also be submitted. Nonconfidential versions of comments on this proposed rule will be placed in the rulemaking record and will be available for public inspection. Comments should include the docket control number. The docket control number for the chemical substance in this SNUR is OPPTS-50610. Unit XII. of this preamble contains additional information on submitting comments containing CBI.

FOR FURTHER INFORMATION CONTACT: Susan B. Hazen, Director, Environmental Assistance Division (7408), Office of Pollution Prevention and Toxics Environmental Protection Agency, Rm. E-543B, 401 M St., SW., Washington, DC 20460, Telephone: (202) 554-1404, TDD: (202) 554-0551.

SUPPLEMENTARY INFORMATION:

I. Authority

Section 5(a)(2) of TSCA (15 U.S.C. 2604(a)(2)) authorizes EPA to determine that a use of a chemical substance is a "significant new use." EPA must make this determination by rule after considering all relevant factors, including those listed in section 5(a)(2). Once EPA determines that a use of a chemical substance is a significant new use, section 5(a)(1)(B) of TSCA requires persons to submit a notice to EPA at least 90 days before they manufacture, import, or process the substance for that use. The mechanism for reporting under this requirement is established under 40 CFR 721.25.

II. Applicability of General Provisions

General provisions for SNURs appear under subpart A of 40 CFR part 721. These provisions describe persons subject to the rule, recordkeeping requirements, exemptions to reporting requirements, and applicability of the rule to uses occurring before the effective date of the final rule. Rules on user fees appear at 40 CFR part 700. Persons subject to this SNUR would comply with the same notice requirements and EPA regulatory procedures as submitters of PMNs under section 5(a)(1)(A) of TSCA. In particular, these requirements include the information submission requirements of section 5(b) and 5(d)(1), the exemptions authorized by section 5(h)(1), (2), (3), and (5), and the regulations at 40 CFR part 720. Once EPA receives a SNUN, EPA may take regulatory action under section 5(e), 5(f), 6, or 7 as appropriate to control the activities for which it has received the SNUN. If EPA does not take action, EPA is required under section 5(g) to explain in the **Federal Register** its reasons for not taking action.

Persons who intend to export a substance identified in a proposed or final SNUR are subject to the export notification provisions of TSCA section 12(b). The regulations that interpret section 12(b) appear at 40 CFR part 707. Persons who intend to import a chemical substance identified in a final SNUR are subject to the TSCA section 13 import certification requirements, which are codified at 19 CFR 12.118 through 12.127 and 127.28. Such persons must certify that they are in compliance with the SNUR requirements. The EPA policy in support of the import certification appears at 40 CFR part 707.

III. Summary of This Proposed Rule

The chemical substances which are the subject of this proposed rule are identified generically as acrylate esters having an estimated or measured number-average molecular weight of 1,000 amu (amu is the unified atomic mass unit referenced to the mass of Carbon 12) or less, or having an estimated or measured number average molecular weight of over 1,000 amu but containing more than 2 percent by weight acrylate esters with a molecular weight of 500 amu or less. Any substance meeting these criteria and not on the Inventory as of the original proposed date of this rule is intended to be included within this definition.

A person wishing to manufacture or import an acrylate substance within the scope of this proposed rule and not on the Inventory, would be required to submit a Premanufacture Notice (PMN) because all acrylates not appearing on the Inventory are new chemical substances and would remain subject to PMN reporting requirements. Persons wishing to manufacture or import for a significant new use of a new acrylate substance, which would be subject to this proposed SNUR and not on the TSCA inventory, would be required to submit a combined PMN and SNUN. A combined PMN and SNUN would contain the same information typically found or required in a PMN. The combined notice would also identify the significant new use and any additional pertinent information that could be used to evaluate the significant new use. Those persons wishing to manufacture, import, or process for a significant new use of an acrylate substance placed on the Inventory and subject to this SNUR would be required to submit only a SNUN.

In addition, any acrylate substance not on the Inventory before the date of the proposed rule that is not subject to the rule because it falls outside the molecular weight definition, may at any time in the future become subject to this SNUR, if its molecular weight changes and falls within the molecular weight definition. As TSCA Inventory listings of substances are not defined by molecular weight, persons manufacturing, importing, and processing an acrylate substance whose molecular weight may vary should note that the SNUR's applicability to the substance would depend on the molecular weight of the substance as manufactured or imported. EPA is proposing to designate the following as significant new uses of the substances:

1. Consumer use.

2. Any manner or method of manufacturing, importing, or processing associated with any use without establishing a program whereby:

a. Persons who may be dermally exposed wear impervious gloves, chemical safety goggles or equivalent eye protection, and clothing which covers any other exposed areas of the arms, legs, and torso.

b. Persons who may be exposed to dust, mist, or smoke shall, in addition to the above dermal protection, wear a category 23C air purifying respirator as described in 40 CFR 721.63(a)(5)(xi).

c. Persons who may be exposed are provided with information on the substance, in writing and through training, at the time of their initial assignment to work areas where the substance is present, and whenever the

substance is introduced into their work area.

d. The substances are labeled both for the workplace and for distribution in commerce, as described in 40 CFR 721.72(b).

e. A material safety data sheet (MSDS) is obtained or developed as described in 40 CFR 721.72(c).

IV. Background

Subsequent to the enactment of TSCA and the initiation of the PMN review process, EPA began to assemble a subset of data on certain acrylates. These data increasingly pointed toward the possibility that acrylates, as a class, possess certain toxicologic properties. By 1983, EPA believed that under certain conditions of use and exposure, specific acrylates might pose an unreasonable risk to human health. EPA began systematically negotiating consent orders under section 5(e) of TSCA for certain new acrylates for which a PMN was required under section 5(a) of TSCA. Since 1983, EPA has negotiated section 5(e) consent orders or the PMN submitters have withdrawn their notices in the face of potential Agency action under section 5(e) for these substances. Since 1990, consistent with its policy to link SNURs to section 5(e) consent orders, SNURs for these acrylate substances have been promulgated by EPA.

As a result of EPA's experience in regulating acrylates over this 10-year period, and by virtue of the issuance of these section 5(e) consent orders and individual chemical SNURs governing reporting for specified significant new uses of certain acrylates, the terms of such regulation have been standardized. Thus, EPA already routinely regulates on a case-by-case basis the acrylate chemicals defined in this proposed rule. The Agency has yet to acquire sufficient test data to enable it to make a reasoned evaluation of the potential risks associated with exposure to acrylate substances as a class. However, the Agency believes that those data currently available are sufficient to warrant regulation including the promulgation of a category SNUR based on the potential unreasonable risk of cancer from uncontrolled exposure to acrylates. In addition, EPA's finding for acrylates is consistent with section 26(c) of TSCA which provides that any action authorized or required by TSCA for a chemical substance may also apply to a category of chemical substances.

This proposed rule would establish uniform notification criteria for all persons wishing to manufacture, import, or process a subject acrylate substance not appearing on the Inventory as of the proposed date of this rule. EPA believes this approach is advantageous to both the affected industry and to the Agency. Persons wishing to introduce a new acrylate into commerce would be apprised of the Agency's concerns prior to submission of a PMN. It is likely that these persons, given this knowledge, would be able to avoid delays incurred through the negotiation of section 5(e) consent orders. Absent any additional concerns presented by a new acrylate substance, PMN submitters utilizing the worker exposure controls specified in the SNUR would be free to commence their manufacturing or importation activities immediately upon the conclusion of the 90-day PMN review period. Subsequent to the addition of a substance to the Inventory, and provided that EPA has not imposed any further regulations, other persons would be free to commence activities consistent with the SNUR, and could do so without delay if they complied with control measures specified in the SNUR. Unless there were additional concerns presented by a new acrylate substance, EPA would be relieved of the obligation to negotiate section 5(e) orders and promulgate chemical specific SNURs.

An additional advantage to this proposed category SNUR would be the relative uniformity of compliance programs for all future acrylate substances. Because EPA is currently, and is proposing in this rule to continue regulating acrylates uniformly, persons in compliance with the SNUR for one substance would be assured of being in compliance with regard to the manufacture, importation, and processing of most future acrylates if they employ the same processes and controls. There would normally be no need to vary the control measures, established recordkeeping procedures, employee training programs, or any other aspect of the generic acrylate SNUR compliance program established for a prior substance.

V. Category Definition

The Agency considered several category definitions prior to selecting that which appears in proposed § 721.340(a)(1) and (b)(3)(A) of the regulatory text. In arriving at the proposed definition, the Agency considered not only the data available relative to toxicity and exposure, but also took into consideration the regulatory history of acrylates and the role of a SNUR within that regulatory history.

The proposed definition includes only acrylates although EPA has also regulated methacrylates in TSCA section 5(e) consent orders and SNURs. EPA is not proposing to generically regulate methacrylates at this time for several reasons. First, EPA regulates only a few methacrylate substances per year. In addition, there is an ongoing acrylates testing program sponsored by a group of specialty acrylate manufacturers, and as a result, triethylene glycol diacrylate and triethylene glycol dimethacrylate are currently being tested in long-term dermal bioassays. After the testing results of this methacrylate/ acrylate pair are submitted to and evaluated by EPA, the Agency will consider appropriate generic regulation, if any, for methacrylates.

The proposed category establishes two critera for inclusion based upon number-average molecular weight. Throughout the PMN screening process, molecular weight has been one of the determinants dictating whether or not the Agency initiated regulatory action for acrylates under sections 5(e) or 5(a)(2) of TSCA. The Agency has utilized molecular weight as a surrogate measure of the absorption potential of a given acrylate and hence, its potential for causing adverse health effects as a result of dermal and inhalation exposure.

In selecting the molecular weight ranges for its proposed category, EPA considered several criteria. EPA believes that its proposed first criterion of a number-average molecular weight less than 1,000 amu reflects a reasoned consideration of available data and generally accepted scientific principles. In general, lower molecular weight species are more readily absorbed and, hence, pose the greatest potential for causing adverse health effects. The Agency believes that, in a related series of analogous substances, such as acrylates, a sufficient increase in molecular weight of a molecule decreases the flux, or rate of dermal penetration to an insignificant level.

The second criterion of the proposed definition would encompass any substance of a number-average molecular weight greater than 1,000 amu but containing 2 percent or more of an acrylate ester having a number-average molecular weight of less than 500 amu. In the absence of definitive data, the Agency selected a molecular weight of 500 amu for an upper bound, reasoning that the potential for absorption would be mitigated by the selected concentration factor of less than 2 percent.

A more complete discussion of the Agency's evaluation of available absorption and metabolism data may be obtained from EPA's toxicity support document which can be found in the

public record established for this proposed rule. The Agency encourages public comment on this proposed acrylate category definition as well as the significant new uses described under paragraph (a)(2) of the proposed § 721.340.

VI. Summary of Health and Exposure Concerns

As stated in Unit IV., EPA routinely makes a may present an unreasonable risk to health finding when regulating new acrylate chemicals under section 5(e) of TSCA. This finding is based on toxicity data on structurally similar chemicals that indicate potential health effects and that the Agency has insufficient data to make a reasoned evaluation of those health effects. The Agency has concluded that certain acrylates may present a risk of cancer. This conclusion is based primarily upon data available for a subset of acrylates (one gavage and four dermal bioassays on acrylates) which have demonstrated positive results. (NTP 1983, USEPA 1979, and USEPA 1982). Based upon these data and upon the criteria established in the EPA carcinogenicity assessment guidelines (USEPA 1987), the Agency has determined that for mono-, di-, and triacrylates there is sufficient information to raise a carcinogenicity hazard concern.

An epidemiology study on workers exposed to ethyl acrylate and methyl methacrylate also appears to indicate an increased incidence of colorectal cancer (Rohm and Haas 1987). Based upon this limited epidemiology data and positive results in certain of the available bioassays on the mono-, di-, and triacrylates (discussed in detail in the toxicity support document available in the public record for this proposed rulemaking) and the lack of correlation between structure and oncogenicity of acrylates that can be derived from the currently available data, EPA has concluded that all acrylate chemicals may present a human carcinogenicity hazard.

The potential for dermal and inhalation exposure to acrylates exists during their manufacture, processing, and use. Dermal exposure may reach 3,900 mg/day in the absence of protective equipment, in particular, impervious gloves. Inhalation exposure is limited to particulates (mist) during use of coating via spray application, and to vapors from low molecular weight acrylates. Inhalation exposure to mist is expected to be in the tens of milligrams per day depending on the concentration of the acrylate in the product and the total mist level. Based on previous PMNs, inhalation exposure to vapors has been estimated to be negligible for the majority of acrylates, although for several acrylates (with vapor pressures above 0.001 mm Hg) exposures of 1–2 mg/day have been estimated.

VII. Determination of Proposed Significant New Uses

To determine what would constitute significant new uses of these chemical substances, EPA considered relevant information about the toxicity of the substances, likely exposures/releases associated with possible uses, and the four factors listed in section 5(a)(2) of TSCA.

Section 5(a)(2) of TSCA provides that EPA's determination that a use of a chemical substance is a significant new use must be made after a consideration of all relevant factors including:

1. The projected volume of manufacturing and processing of a chemical substance.
2. The extent to which a use changes the type or form of exposure of human beings or the environment to a chemical substance.
3. The extent to which a use increases the magnitude and duration of exposure of human beings or the environment to a chemical substance.
4. The reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of a chemical substance.

EPA construes the statute to allow consideration of any other relevant factors, in addition to those enumerated in section 5(a)(2)(A) through (D).

When designating a significant new use of an acrylate substance to be any manufacturing, importing, or processing without the hazard communication program specified in § 721.340 (a)(2)(ii) of the proposed SNUR, EPA considered that an effective hazard communication program, that includes such provisions as warning statements on the label and MSDS and worker training, addresses such factors in section 5(a)(2) as type, form, duration, and magnitude of exposure as well as methods of manufacturing, processing, and use.

When designating a significant new use of a new acrylate substance to be any manufacturing, importing, or processing, without the protective equipment specified in § 721.340(a)(2)(i) of the proposed SNUR, EPA considered that an effective program that includes provisions for personal protective equipment for persons who are exposed to a new acrylate substance, addresses such factors in section 5(a)(2) as type, form, duration, and magnitude of exposure as well as methods of manufacturing, processing, and use.

When designating a significant new use of an acrylate substance to be consumer use, EPA considered that consumer use of a new acrylate substance addresses such factors in section 5(a)(2) as type, form, duration, and magnitude of exposure.

Based on these considerations, EPA proposes to define the significant new uses of acrylate substances falling within the category definition as set forth in paragraph (a)(2) of the proposed § 721.340.

VIII. Specific Issues

Although EPA is seeking public comment on all aspects of this proposed rulemaking, it is soliciting comment more specifically on issues which are unique to the proposed acrylate SNUR. These issues are discussed below.

The proposed acrylate category purposefully excludes acrylates on the Inventory prior to the proposed date of this rule. Although the Agency still has concerns for these substances and could expand the scope of the proposed definition to include existing acrylates meeting the category definition, as a matter of policy, the Agency is choosing to focus on new acrylate substances. Thus, the Agency is proposing to develop a more comprehensive understanding of the hazards and risks of both new and existing acrylate substances via a series of activities focused on new chemical acrylates. Consult Unit V. of this proposed rule and the public docket established for this rule for further information on ongoing testing and assessment of acrylate and methacrylate substances. The Agency specifically requests comments on this and other issues related to the acrylate category definition.

IX. Determining When a Substance is the Subject of This Rule

Unlike most previous SNURS in which specific chemical substances were masked by generic names due to associated TSCA CBI claims, this SNUR defines a category. Persons wishing to manufacture, import, or process any acrylate ester falling within the defined category should know whether or not the substance meets the technical definition, thereby making it potentially subject to this rule. However, it may be difficult to discern whether or not a specific acrylate ester was listed on the Inventory prior to the proposed date of this SNUR due to the significant number of substances listed with generic chemical identities.

All acrylates not appearing on the Inventory remain subject to PMN reporting requirements. All acrylate

substances which have previously been the subject of SNURs promulgated by the Agency remain subject to those requirements as established in the original SNURs.

Acrylate esters meeting the category definition will be added to the Inventory and will be flagged denoting they appear in the SNUR appendix to the Inventory where manufacturers, importers, and processors can find out that the substance is subject to this rule. The specific chemical identity of many acrylate substances listed both prior and subsequent to the date of this proposed rule will be confidential. Any person who proposes to manufacture or import one of these substances is unlikely to know that the substance is on the Inventory and, therefore, would need to submit a bona fide request under either 40 CFR 710.7(g) or 720.25(b) to determine whether the substance is on the Inventory. If EPA determines that the person has a bona fide intent to manufacture or import the substance and that the substance the person proposes to manufacture or import is both on the Inventory and the subject of this proposed rule, EPA will inform the person that the substance is subject to this rule.

X. Test Data and Other Information

EPA recognizes that section 5 of TSCA does not require the development of any particular test data before submission of a SNUN. Persons are required only to submit test data in their possession or control and to describe any other data known to or reasonably ascertainable by them. However, EPA recommends a 2-year, two-species bioassay according to the guidelines in 40 CFR 798.3300 to address the potential carcinogenicity associated with acrylates. EPA is currently involved in a research initiative with certain acrylate manufacturers affected by the regulation of acrylates as a category. The goal of the research initiative is to conduct toxicity testing and develop greater understanding of metabolism and mechanisms of action of acrylates so that the potential risks of specific acrylates can be better characterized.

EPA will be better able to evaluate SNUNs which provide detailed information on:

1. Human exposure and environmental release that may result from the significant new use of the chemical substance.
2. Potential benefits of the substance.
3. Information on risks posed by the substance compared to risks posed by potential substitutes.

Data on potential exposures to or releases of the substance, testing other than that specified for the substance, or studies on analogous substances, which may demonstrate that the significant new uses being reported are unlikely to present an unreasonable risk, may be included with a SNUN. Persons submitting a SNUN must comply with the same notice requirements and EPA regulatory procedures as submitters of PMNs as stated in 40 CFR 721.1(c), including submission of test data on health and environmental effects as described in 40 CFR 720.50.

XI. Economic Analysis

EPA has evaluated the potential costs of establishing significant new use notice requirements for potential manufacturers, importers, and processors of the chemical substance subject to this rule. EPA's complete economic analysis is available in the public record for this rule (OPPTS-50610).

XII. Rulemaking Record

EPA has established a record for this rulemaking (docket control number OPPTS-50610) which includes information considered by EPA in developing this rule. The record includes the following information:

1. The economic analysis of this rule.
2. The toxicity support document.
3. A reference to the TSCA section 4 test rules docket number 42091 for acrylates which contains an extensive history of EPA's existing chemical assessment, public meetings, public comments, and regulation of acrylates.

A public version of the record, without any CBI, is available in the TSCA Nonconfidential Information Center (NCIC), also known as, TSCA Public Docket Office, from 8 a.m. to 12 noon and 1 p.m. to 4 p.m., Monday through Friday, except legal holidays. NCIC is located in Rm. E-G102, 401 M St., SW., Washington, DC 20460.

Any person who submits comments claimed as CBI must mark the comments as "confidential", "trade secret", or other appropriate designation. Comments not claimed as confidential at the time of submission will be placed in the public file. Any comments marked as confidential will be treated in accordance with the procedures in 40 CFR part 2. Any person submitting comments claimed to be confidential must prepare and submit a nonconfidential public version of the comments in triplicate that EPA can place in the public file.

XIII. References

(1) NTP. 1983. National Toxicology Program. NTP Technical Report on the carcinogenisis bioassay of ethyl acrylate in F344/N rats and B6C3F1 mice (gavage study). HHS.PHS. National Institutes of Health NTP Publication Number 82-2515. NTP82-077.

(2) Rohm and Haas 1987. Mortality Study of Bristol Plant Employees Hired Prior to 1946. Unpublished Report. Rohm and Haas Corporation.

(3) USEPA. 1979. Carnegie-Mellon Institute of Research. 1979. Evaluation of the dermal carcinogenic potential of neopentyl glycol diacrylate. Union Carbide Corporation. TSCA section 8(e) submission. 8EHQ-1179-0029 to USEPA.

(4) USEPA 1982. Celanese. 1982. Chronic mouse dermal studies with pentaerythritol triacrylate, tetraethylene glycol diacrylate, and triethyleneglycol diacrylate. Kettering Lab. TSCA 8(e) submission 8EHQ-0882-0454 and 8EHQ-0882-0410/0411 to USEPA.

(5) USEPA 1987. The Risk Assessment Guidelines of 1986. EPA Office of Research and Development. EPA/600/8-87/045. August 1987.

XIV. Regulatory Assessment Requirements

A. Executive Order 12291

Under Executive Order 12291, EPA must judge whether a rule is "major" and therefore requires a Regulatory Impact Analysis. EPA has determined that this rule would not be a "major" rule because it would not have an effect on the economy of $100 million or more, and it would not have a significant effect on competition, costs, or prices. While there is no precise way to calculate the total annual cost of compliance with this rule, EPA estimates that the cost for submitting a significant new use notice would be between $7,198 to $8,170, including a $2,500 user fee payable to EPA to offset EPA costs in processing the notice. EPA believes that, because of the nature of the rule and the substances involved, there will be few SNUR notices submitted.

This proposed regulation was submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12291.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (5 U.S.C. 605(b)), EPA has determined that this rule would not have a significant impact on a substantial number of small businesses. EPA has not determined whether parties affected by this rule would likely be small

businesses. However, EPA expects to receive few SNUNs for the substances. Therefore, EPA believes that the number of small businesses affected by this rule would not be substantial, even if all of the SNUN submitters were small firms.

C. Paperwork Reduction Act.

The information collection requirements contained in this rule have been approved by OMB under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), and have been assigned OMB control number 2070–0012.

Public reporting burden for this collection of information is estimated to vary from 30 to 170 hours per response, with an average of 100 hours per response, including 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 the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief, Information Policy Branch, (2131), U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; and to the Office of Management and Budget, Paperwork Reduction Project (2070–0012), Washington, DC 20503.

List of Subjects in 40 CFR Part 721

Environmental protection, Chemicals, Hazardous materials, Reporting and recordkeeping requirements, Significant new uses.

Dated: November 15, 1993.

Victor J. Kimm,

Acting Assistant Administrator for Prevention, Pesticides and Toxic Substances.

Therefore, it is proposed that 40 CFR part 721 be amended as follows:

PART 721—[AMENDED]

1. The authority citation for part 721 would continue to read as follows:

Authority: 15 U.S.C. 2604, 2607, and 2625(c)

2. By adding new § 721.340 to subpart E to read as follows:

§ 721.340 Acrylate esters.

(a) *Chemical substances and significant new uses subject to reporting.* (1) Chemical substances falling within the acrylate ester category definition and not on the TSCA Inventory as of [Insert proposed date of this rule] are subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The acrylate ester category shall include any ester of an acrylate, as defined in paragraph (b)(3)(i) of this section having:

(i) A measured number-average molecular weight of 1,000 amu (amu is the unified atomic mass unit referenced to the mass of Carbon 12) or less.

(ii) A measured number-average molecular weight of over 1,000 amu and containing more than 2 percent by weight of any acrylate ester with a molecular weight of 500 amu or less.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (a)(2)(i), (a)(2)(iii), (a)(2)(iv), (a)(3), (a)(4), (a)(5)(xi), (a)(6)(i), (a)(6)(ii), (a)(6)(iv), (b) (concentration set at 0.1 percent), and (c).

(ii) *Hazard communication program.* Requirements as specified in § 721.72(a), (b), (c), (d), (e) (concentration set at 0.1 percent), (f), (h)(1)(i)(A), (h)(1)(i)(B), (h)(1)(i)(C), (h)(1)(iii)(A), (h)(1)(vi), (h)(2)(i)(B), (h)(2)(i)(C), and (h)(2)(i)(D).

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(o).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping requirements.* Recordkeeping requirements as specified in § 721.125(a) through (i) are applicable to manufacturers, importers, and processors of these substances.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Definitions.* (i) *Acrylate* means those chemical substances (including combinations of chemical substances that are not mixtures) whose structures contain one or more covalently bound substructures which are described as terminal or pendant acrylate groups. Such chemical substances are considered to contain a functional acrylate moiety. The functional nature of these chemical substances is attributed to the conjugated carbon to carbon double bond present in the acrylate. Functional acrylate substructures may be produced from several types of reactions. Regardless of the synthetic route, the unsaturated bond of the acrylate group(s) remains present and unreacted. Functional acrylate substructures are typically but not always produced from reactions between mono- or polyhydric alcohols and acrylic acid in which the –OH radical(s) from the alcohol combines with the –COOH radical of the acrylic acid to form acrylate esters. This reaction mechanism ensures that the double bond remains intact. The substructures produced from the possible chemical reaction types are diagramed below; the free valence is the location of covalent linkage to the rest of the molecule:

$-O-(-C=O)CH=CH_2$

Acrylate Group (2-Propenoate Group)

(ii) [Reserved]

[FR Doc. 93–28611 Filed 11–19–93; 8:45 am]

BILLING CODE 6560–50–F

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40 CFR Part 799

[OPPTS–42150, FRL 4010–2]

RIN No. 2070–AB07

Acetophenone, Phenol, N,N-Dimethylaniline, Ethyl Acetate, and 2,6-Dimethylphenol; Proposed Test Rule, Notice of Opportunity to Initiate Negotiations for TSCA Section 4 Testing Consent Agreements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing a test rule under section 4(a) of the Toxic Substances Control Act (TSCA) that would require manufacturers and processors of five chemicals (acetophenone, phenol, *N,N*-dimethylaniline, ethyl acetate, and 2,6-dimethylphenol) to conduct testing for certain chemical fate, health and environmental effects. This rule would require that testing be conducted to develop data with respect to chemical fate and health and environmental effects for which there is an insufficiency of data and experience and which are relevant to a determination that the manufacture, distribution in commerce, processing, use, or disposal of such chemicals, or that any combination of such activities, does or does not present an unreasonable risk of injury to health or the environment. In addition to the proposed test rule, EPA has negotiated a testing consent agreement development program under TSCA section 4 to allow the Agency to make greater use of enforceable consent agreements (ECAs). Therefore, EPA is soliciting interested parties for participation in or monitoring of consent agreement negotiations for the chemicals that are proposed for testing in this rulemaking. EPA is also inviting manufacturers and/or processors of chemical substances who wish to participate in consent agreement negotiations for the chemicals proposed for testing to develop and submit testing consent agreement proposals to EPA.

DATES: Written comments on the proposed rule must be received by EPA on or before January 21, 1994. If persons request an opportunity to submit oral comments by January 6, 1994, EPA will hold a public meeting on this proposed rule in Washington, DC. For further information on arranging to speak at the meeting see Unit VII of this preamble. Written ECA testing proposals must be received by January 21, 1994. Written notice of interest in being designated an "interested party" to the consent agreement negotiations for the chemicals proposed for testing in this rulemaking must be received by January 21, 1994. Those submitting written testing proposals will be considered "interested parties" and do not have to submit separate written notice of interest in being designated. EPA will contact all "interested parties" and advise them of meeting dates.

ADDRESSES: Submit written comments, identified by the document control number (OPPTS–42150) and the chemical-specific docket number, in triplicate to: TSCA Nonconfidential Information Center (7407), Office of Pollution Prevention and Toxics, Environmental Protection Agency, East Tower, Rm. G-99, 401 M St., SW., Washington, DC, 20460. A public version of the administrative record supporting this action, without confidential business information (CBI), is available for inspection at the above address in Room G-102, from 8 a.m. to 12 noon, and 1 p.m. to 4 p.m., Monday through Friday, except legal holidays.

FOR FURTHER INFORMATION CONTACT: Susan B. Hazen, Director, Environmental Assistance Division (7408), Office of Pollution Prevention and Toxics, Rm. E–543B, 401 M St., SW., Washington, DC 20460, (202) 554–1404, TDD (202) 554–0551.

SUPPLEMENTARY INFORMATION: This notice proposes a test rule under TSCA section 4(a)(1)(A) and (B) to require certain health, environmental, and chemical fate tests for acetophenone (CAS No. 98–86–2), phenol (CAS No. 108–95–2), *N,N*-dimethylaniline (CAS No. 121–69–7), ethyl acetate (CAS No. 141–78–6), and 2,6-dimethylphenol (CAS No. 576–26–1).

I. Introduction

A. ITC Recommendation

At the request of EPA, the ITC reviewed a subset of chemicals included on EPA's Integrated Risk Information System (IRIS) data base for which the Agency believed there is inadequate data. EPA brought these chemicals to the ITC to foster interagency coordination and cooperation on testing needs. The ITC designated six chemicals included in IRIS [acrylic acid (addressed in a separate rulemaking at 57 FR 7656, March 4, 1992), acetophenone, phenol, *N,N*-dimethylaniline, ethyl acetate, and 2,6-dimethylphenol] for priority consideration as candidates for chemical fate, health effects and environmental effects testing.

IRIS is an electronic database, prepared and maintained by EPA, containing both cancer and non-cancer chronic health hazard information on specific chemicals. IRIS provides hazard identification and dose-response assessment information. This information, when combined with specific exposure information, can be used to help characterize the public health risks posed by a chemical in a particular situation (Ref. 7).

In addition, as other agencies brought their testing needs and concerns for the chemicals to bear on the ITC deliberations, the ITC's testing recommendations expanded to include additional endpoints such as mutagenicity and neurotoxicity testing.

Besides health effects data, the ITC also recommended additional data to better characterize the environmental effects and chemical fate of two of these chemicals. The reasons for these particular testing recommendations by the ITC are further discussed in the **Federal Register** of March 6, 1991 (56 FR 9534), and in the chemical-specific sections of this notice.

B. Test Rule Development Under TSCA

Under section 4(a) of TSCA, EPA shall, by rule, require testing of a chemical to develop appropriate test data if the Administrator makes certain findings as described in TSCA section 4(a)(1)(A) or (B). Discussions of the statutory section 4 findings are provided in EPA's first and second proposed test rules, which were published in the **Federal Register** of July 18, 1980 (45 FR 48510) and June 5, 1981 (46 FR 30300). EPA also proposed its policy for making findings under TSCA section 4(a)(1)(B) in the **Federal Register** of July 15, 1991 (55 FR 32294) and finalized this policy in the **Federal Register** of May 14, 1993 (58 FR 28736). This is referred to in this test rule as the "B policy." For further discussion of EPA's interpretation of its authority under sections 4(a)(1)(A) and (B) of TSCA, see Unit III of this preamble.

In evaluating the ITC's testing recommendations for these chemicals, EPA considered the information provided by the ITC, the on-line IRIS data base, and supplemental information developed by EPA. In developing the testing requirements for this rule, EPA has also considered the status of acetophenone and phenol under the Clean Air Act Amendments of 1990 (Ref. 51). These considerations have influenced the proposed testing and routes of administration selected. From this evaluation, EPA is proposing health effects testing for five of these chemicals, and chemical fate and environmental effects testing for two of these chemicals under TSCA section 4(a)(1)(A) and/or (B). Either finding alone is sufficient to support a test rule. EPA has entered into an enforceable testing Consent Order for the sixth chemical--acrylic acid.

EPA did not require reporting for these chemicals under sections 8(a) or 8(d) of TSCA because production, use and exposure information and toxicity data for these chemical substances are available in the general literature and EPA expects that any unpublished studies will be submitted in response to the proposed rule. Where less is known about the toxicity and exposures to the chemical, section 8(a) and 8(d) information is needed and routinely required before EPA proposes a section 4 test rule.

This action constitutes EPA's response to the ITC as required by TSCA section 4(e)(1)(B).

II. Proposed Testing and Reporting Requirements

A. Test Standards and Reporting Requirements

EPA is proposing that health effects, environmental effects, and/or chemical fate testing be conducted on acetophenone, phenol, *N,N*-dimethylaniline, ethyl acetate, and 2,6-dimethylphenol according to the specific test guidelines set forth in § 799.4450.

Data developed under the final rule must be reported in accordance with TSCA Good Laboratory Practice (GLP) Standards, 40 CFR part 792.

As required by section 4(b)(1) of TSCA, EPA is proposing specific testing and reporting requirements for each of the proposed tests for the five IRIS chemicals as specified in the following Table 1:

TABLE 1.—TESTING AND REPORTING FOR FIVE IRIS CHEMICALS

Chemical Name (CAS No.)	Test (Route of Administration)	Guideline	Minimum Percent Purity	Deadline for Final Report[1] (months)	Docket No.
Acetophenone (98-86-2).	.....	.....	.....	.....	42150/42151
	Health effects testing:				
	Subchronic toxicity, Inhalation	§ 798.2450	99.0	18	
	Toxicokinetics[2], Oral	OECD 417	99.0	15	
	Toxicokinetics[2], Inhalation	OECD 417	99.0	15	
	Neurotoxicity, Acute and Subchronic, Inhalation.	§ 798.6050 and 798.6200	99.0	21	
	Neurotoxicity, Subchronic, Inhalation	§ 798.6400	99.0	21	
	Reproductive toxicity, Gavage	§ 798.4700	99.0	29	
	Developmental toxicity, Inhalation	§ 798.4900	99.0	12	
	Salmonella assay	§ 798.5265	99.0	9	
	In vitro gene mutation assay	§ 798.5300	99.0	10	
	In vivo cytogenetics assay	§ 798.5385 or 798.5395	99.0	14	
Phenol (108-95-2)	.....	.....	.....	.....	42150/42152
	Health effects testing:				
	Subchronic toxicity, Inhalation	§ 798.2450	99.0	18	
	Toxicokinetics[2], Oral	OECD 417	99.0	15	
	Toxicokinetics[2], Inhalation	OECD 417	99.0	15	
	Neurotoxicity, Acute and Subchronic, Inhalation.	§ 798.6050 and 798.6200	99.0	21	
	Neurotoxicity, Subchronic, Inhalation	§ 798.6400	99.0	21	
	Reproductive toxicity, Inhalation	§ 798.4700	99.0	29	
	Developmental neurotoxicity, Gavage	§ 795.250	99.0	21	
N,N-Dimethylaniline (121-69-7).	.....	.....	.....	.....	42150/42153
	Health effects testing:				
	Subchronic toxicity, Inhalation	§ 798.2450	99.0	18	
	Toxicokinetics[2], Oral	OECD 417	99.0	15	
	Toxicokinetics[2], Inhalation	OECD 417	99.0	15	
	Neurotoxicity, Acute and Subchronic, Inhalation.	§ 798.6050 and 798.6200	99.0	21	
	Neurotoxicity, Subchronic, Inhalation	§ 798.6400	99.0	21	
	Reproductive toxicity, Gavage	§ 798.4700	99.0	29	
	Developmental toxicity, Gavage	§ 798.4900	99.0	12	
	In vivo cytogenetics assay	§ 798.5385 or 798.5395	99.0	14	
	Environmental Effects Testing:.				
	Algal test	§ 797.1050	99.0	12	
	Daphnid acute test	§ 797.1300	99.0	12	
	Mysid shrimp acute test	§ 797.1930	99.0	12	
	Fathead minnow life stage test	§ 797.1600	99.0	12	
	Sheepshead minnow life stage test	§ 797.1600	99.0	12	
	Daphnid chronic test	§ 797.1330	99.0	18	
	Mysid shrimp chronic test	§ 797.1950	99.0	18	
	Chemical Fate Testing:.				
	Activated sludge testing	§ 796.3340	99.0	12	
	Anaerobic biodegradation testing	§ 796.3140	99.0	12	
Ethyl Acetate (141-78-6).	.....	.....	.....	.....	42150/42141A
	Health effects testing:				

TABLE 1.—TESTING AND REPORTING FOR FIVE IRIS CHEMICALS—Continued

Chemical Name (CAS No.)	Test (Route of Administration)	Guideline	Minimum Percent Purity	Deadline for Final Report[1] (months)	Docket No.
	Reproductive toxicity, Gavage	§ 798.4700	99.0	29	
	Developmental toxicity, Gavage	§ 798.4900	99.0	12	
	In vitro gene mutation assay	§ 798.5300	99.0	10	
2,6-Dimethylphenol (576-26-1).					42150/42154
	Health effects testing:				
	Toxicokinetics[2], Oral	OECD 417	99.0	15	
	Toxicokinetics[2], Inhalation	OECD 417	99.0	15	
	Neurotoxicity, Acute and Subchronic, Gavage.	§ 798.6050 and 798.6200	99.0	21	
	Neurotoxicity, Subchronic, Gavage	§ 798.6400	99.0	21	
	Reproductive toxicity, Gavage	§ 798.4700	99.0	29	
	Developmental toxicity, Gavage	§ 798.4900	99.0	12	
	In vitro gene mutation assay	§ 798.5300	99.0	10	
	In vivo cytogenetics assay	§ 798.5385 or 798.5395	99.0	14	
	Environmental Effects Testing:.				
	Algal test	§ 797.1050	99.0	12	
	Fathead minnow life stage test	§ 797.1600	99.0	12	
	Daphnid chronic test	§ 797.1330	99.0	18	
	Chemical Fate Testing:.				
	River die-away testing	(incorporated by reference) ????	99.0	12	
	Anaerobic biodegradation testing	§ 796.3140	99.0	12	
	Aqueous photolysis testing	§ 795.70	99.0	12	

[1] Figure indicates the reporting deadline in months calculated from the effective date of the final rule or from the date of test sponsor notification by certified letter to initiate test where such notification is specified.
[2] The toxicokinetics (pharmacokinetics and metabolism) guideline was developed by the European Organization for Economic Cooperation and Development (OECD) and is proposed to be incorporated by reference in this rule.

All of the guidelines referenced in Table 1 are intended to be used as currently published in Title 40 of the Code of Federal Regulations, except for the neurotoxicity test guidelines, which are modified in the codified section of this rule. The neurotoxicity guideline modifications specify the duration and frequency of exposure and specify that lower exposure levels shall show a graded neurotoxic response or no neurotoxicity. Exceptions also are the toxicokinetics and biodegradation in natural surface water guidelines, which are proposed to be incorporated by reference and are available in the docket for this rule.

B. Interim Mutagenicity Testing Policy

The proposed health effects testing in this rule reflects EPA's current thinking in the area of mutagenicity testing, both as an endpoint and as it leads to oncogenicity testing. The science of mutagenicity testing has undergone considerable change since EPA first required mutagenicity testing in a section 4 test rule (50 FR 20662, May 17, 1985). This new information, particularly data from EPA's Gene-tox Program related to the ability of short term tests to predict mutagenicity (Ref. 105), the National Toxicology Program's study of the ability of short term tests to predict carcinogenic potential (Ref. 90), and expert meetings, such as the 1987 Williamsburg conference, has led EPA to revise the TSCA section 4 mutagenicity testing scheme. This includes how EPA requires additional mutagenicity testing based on results from lower-tier mutagenicity tests and also how it requires oncogenicity testing based on mutagenicity test results. EPA believes the flexibility and opportunity to apply professional scientific judgment offered by the new approach afford considerable advantages over the prior scheme. EPA's rationale for these changes is discussed in the technical literature (Ref. 19) and will not be discussed here.

For purposes of this rule, in which only Tier I testing is being proposed, the changes are relatively minor. First, Tier I is redefined as a battery of two *in vitro* tests and one *in vivo* test. There is no longer a distinction as to gene mutations or chromosomal aberrations in Tier I, and the previously utilized *in vitro* cytogenetics test would be eliminated. The purpose of Tier I testing, however, continues to be to determine intrinsic mutagenic potential.

Subsequent mutagenicity testing, including Tier II testing, is not being proposed at this time. The test guidelines for several of the Tier II tests are still undergoing refinement. Thus, rather than delaying the Agency's response to the ITC until all of the details of the mutagenicity testing scheme have been completed, EPA has decided to propose only Tier I of the new mutagenicity testing scheme at this time. If appropriate, further mutagenicity testing, including triggers to oncogenicity testing, will be

addressed in a subsequent rulemaking after review of the Tier I results.

C. Persons Required to Test

Because of the findings in Unit III of this preamble, EPA is proposing that persons who manufacture (including import) or process, or who intend to manufacture or process, acetophenone, phenol, *N,N*-dimethylaniline, ethyl acetate, or 2,6-dimethylphenol, other than as an impurity, at any time from the effective date of the final test rule to the end of the reimbursement period, be subject to the testing requirements in this rule. Byproduct manufacturers and importers of acetophenone, phenol, *N,N*-dimethylaniline, ethyl acetate, and/or 2,6-dimethylphenol are considered manufacturers under this rule. As explained in 40 CFR 790.42, manufacturers of these substances would be required to submit letters of intent to conduct testing or exemption applications. However, small quantity manufacturers, research and development manufacturers and processors would not be required to submit letters of intent or exemption applications unless directed to do so in a subsequent notice as described in § 790.48(b).

EPA has specified relatively pure substances for testing (99 percent, or higher). EPA is not proposing to require submission of equivalence data as a condition for exemption from testing, since EPA is interested in evaluating the effects attributable to the substances themselves.

III. Findings

EPA interprets TSCA section 4(a) to mean that EPA's authority to require testing under TSCA section 4(a)(1)(A) and (B) is related to the "data insufficiency" and "testing is necessary" findings under TSCA section 4(a)(1)(A)(ii) and (iii) and (B)(ii) and (iii). Thus, once the Administrator has made a finding under TSCA section 4(a)(1)(A)(i) that a chemical may present an unreasonable risk, or under TSCA section 4(a)(1)(B)(i) that a chemical is or will be produced in substantial quantities and may either be released to the environment in substantial quantities or that there may be substantial or significant human exposure to the chemical, the Administrator may require any type of testing necessary to address unanswered questions about the effects of the chemical. EPA need not limit the scope of testing required to the factual bases for the section 4(a)(1)(A)(i) or (B)(i) findings. For a more detailed discussion of this interpretation, see EPA's final "B-policy" rule (58 FR 28736, May 14, 1993).

The proposed chemical fate, health and environmental effects testing is based on the authority of section 4(a)(1)(A) and (B) of TSCA. EPA finds that available data indicate that three of the chemicals may present an unreasonable risk of injury to human health or the environment; all five of these chemicals are produced in substantial quantities; there is or may be significant or substantial human exposure to all five of these chemicals; there is or may be substantial environmental release of one of these chemicals; there are insufficient data and experience to determine or predict the effects from manufacturing, distribution, processing, use, and disposal of all of these chemicals; and testing is necessary to develop these data.

As noted earlier, a general discussion of the statutory section 4 findings is provided in EPA's first and second proposed test rules, which were published in the **Federal Register** of July 18, 1980 (45 FR 48510) and June 5, 1981 (46 FR 30300), in EPA's final "B" policy, published in the **Federal Register** of May 4, 1993 (58 FR 28736), and in Unit II. C. of this preamble.

A. Acetophenone

EPA is proposing testing of acetophenone under the authority of section 4(a)(1)(B) of TSCA.

1. *Substantial quantities produced finding.* EPA believes that acetophenone is or will be produced in substantial quantities. According to records available to EPA, acetophenone production exceeds 1 million pounds per year; actual production volumes are CBI. EPA believes that production of 1 million pounds or greater constitutes substantial production under TSCA section 4(a)(1)(B)(i).

2. *Substantial human exposure finding.* EPA believes that there is or may be substantial human exposure to acetophenone. This assessment is based on a National Occupational Exposure Survey (NOES) which indicates that 39,880 workers were potentially exposed to acetophenone in various industrial applications (Refs. 70 and 109). Of these workers, 97 percent were potentially exposed during the use of trade name products containing acetophenone. As explained in EPA's "B" policy, EPA believes that the potential exposure of 39,880 workers to acetophenone constitutes substantial human exposure under section 4(a)(1)(B) of TSCA. Acetophenone is used as a perfume base in the fragrance industry, as a process solvent for gums, resins, and dyestuffs, as an intermediate for the synthesis of pharmaceuticals, in corrosion inhibitors, in rubber chemicals, in flavorings, as a polymerization catalyst, and as a photoinitiator (Refs. 14 and 81). The use of acetophenone as a fragrance in soaps and detergents also gives rise to widespread consumer exposure. EPA estimates an exposure of individual persons up to 3,783 mg/yr from use of hand soaps (Ref. 96).

EPA also believes that there is or may be general population exposure to acetophenone. Acetophenone has been detected in U.S. drinking water supplies. In a survey of 10 U.S. cities between 1969 and 1972, acetophenone was found in Philadelphia's drinking water, on 7 different occasions, at a concentration of approximately 1.0 μg/L (Refs. 54 and 89). This may result in the exposure of millions of people. For the reasons set forth in EPA's "B" policy, EPA believes that the potential exposure of 100,000 or more people in the general population to acetophenone constitutes substantial human exposure under TSCA section 4(a)(1)(B)(i).

3. *Insufficient data and experience finding.* EPA believes that there are insufficient data and experience to determine or predict the effects on human health or the environment from manufacturing, processing, distribution, use, and/or disposal of acetophenone. EPA believes that available studies are insufficient and other data are lacking to sufficiently evaluate the effects of acetophenone.

Inhalation data to assess the subchronic effects of exposure to acetophenone do not adequately address the concentration-response relationship for the portal-of-entry effects via the inhalation route. The primary study cited as providing the baseline RfC (for inhalation) indicated a no observed effect level (NOEL) of 0.007 mg/m^3 and a lowest observed effect level (LOEL) of 0.07 mg/m^3 based on congestion of cardiac vessels, liver dystrophy and changes in the ratios of blood proteins and muscle chronaxie (Ref. 49). This study exposed groups of 15 white male rats continuously to acetophenone vapor at 0, 0.007, or 0.07 mg/ m^3 for 70 days. While a NOEL and LOEL were reported, this study is inadequate because only one sex of animals was examined, only five animals per group were used to study cholinesterase activity, and serum protein levels and the number of animals which underwent histopathological examination were unreported (Ref. 51).

Another inhalation study reported a specific pattern of degeneration of the olfactory bulb in groups of four Wistar

rats continuously exposed to acetophenone vapors from 1 week to 3 months (Ref. 78). However, other parameters of toxicity were not evaluated in this study.

EPA is also aware of two oral subchronic studies. These studies failed to identify adverse effects in groups of five male and five female albino rats fed diets containing acetophenone at levels of 0.003, 0.05, 0.125, or 0.2 percent for 30 days (Ref. 85) or in groups of 10 male and 10 female Osborne-Mendel rats fed diets containing 1,000, 2,500, or 10,000 ppm acetophenone for 17 weeks (Ref. 40). These studies were judged adequate to predict oral toxicity, but only marginally so, because no LOAEL was established (Ref. 51).

Developmental toxicity data on acetophenone are limited to a study that reported no effects on length of gestation or postnatal development in the offspring of rats exposed dermally at 0.48 mg/kg on days 10 – 15 of gestation (Ref. 57). The data are insufficient because key study parameters were not reported, apparently only a single dose was administered, and the critical period of organogenesis may have been missed.

Available mutagenicity data in *Salmonella* (Ames testing) are insufficient because only three strains of the test organism were used, rather than the usual four or five that EPA considers necessary to establish a negative response in this assay. EPA's mutagenicity testing scheme (described in more detail in Unit II.B. of this preamble) also includes *in vitro* gene mutation and *in vivo* cytogenetics in the lowest tier. As neither study is available for acetophenone, additional mutagenicity testing is necessary to assess acetophenone's mutagenic potential.

Available *in vitro* and *in vivo* pharmacokinetics and metabolism studies are inadequate because quantitative data on acetophenone's rates of absorption, distribution, and excretion are lacking in these studies (Refs. 33, 58, 60, 91, 92, 84 and 55).

Finally, no data were found for reproductive effects or neurotoxicity.

4. *Testing is necessary to develop data finding.* EPA believes that testing of acetophenone is necessary to develop data for subchronic effects, neurotoxicity, pharmacokinetics and metabolism, reproductive effects, developmental effects and mutagenic effects. EPA believes that these testing data are needed to determine if the manufacturing, processing, distribution, use, or disposal of acetophenone or any combination of such activities does or does not present an unreasonable risk of injury to human health.

B. Phenol

EPA is proposing testing of phenol under the authority of section 4(a)(1)(A) and 4(a)(1)(B) of TSCA.

1. *Unreasonble risk of injury to human health or environment finding.* EPA believes that the manufacture, processing, distribution in commerce, use, or disposal, or any combination of such activities for phenol may present an unreasonable risk of injury to health or the environment. This finding is based on several studies that indicate that phenol is neurotoxic. After 20 exposures by inhalation to 100–200 mg/m^3, hind limb paralysis was reported for guinea pigs (Ref. 23). Continuous exposure to phenol vapors at 100 mg/m^3 for 15 days affected the performance of rats in a test assessing central nervous system (CNS) effects (Ref. 18). A developmental toxicity screening test with a single gavage dose of 100, 333, 667 or 1,000 mg/kg given to groups of 12–13 Sprague-Dawley rats on day 11 of gestation (Ref. 53), produced a syndrome of effects involving the limbs, tail, and urogenital system, which provides evidence of developmental neurotoxicity. The limb effects consisted of paralysis and/or palsy. Although the effect is not evident in newborns, limb function matures postnatally and requires a week to 10 days for effects to appear. This delayed effect was seen in 21.4 percent and 27.3 percent of the litters at 667 and 1,000 mg/kg, respectively.

As discussed further below, over 320,000 workers may be exposed to phenol in numerous industrial settings, and the wide variety of uses of phenol may result in more widespread worker and consumer exposure. Furthermore, phenol is produced and released into the environment in substantial quantities which may result in general population exposures. Because of these concerns, EPA believes that phenol may present an unreasonable risk of injury to health.

2. *Substantial quantities produced finding.* EPA believes that phenol is or will be produced in substantial quantities. EPA records indicate that phenol is produced in excess of 1 million pounds per year. In 1989, 13 facilities were listed as manufacturing this compound (Ref. 86). EPA estimates the annual production for 1989 to be 3,512,000,000 pounds for 10 manufacturers at 11 sites. As explained in the "B" policy, EPA believes that production of 1 million pounds or greater of phenol constitutes substantial production under section 4(a)(1)(B)(i) of TSCA.

3. *Substantial human exposure finding.* EPA believes that there is or will be substantial human exposure to phenol. This assessment is based on worker, general population and consumer exposure to phenol. The NOES conducted during 1981–1983 by NIOSH estimated that 320,914 workers were potentially exposed to phenol in 35 different industrial categories (Refs. 70 and 109). For the reasons set forth in the "B" policy, EPA believes that the potential exposure of 341,516 workers to phenol is sufficient to qualify as substantial human exposure under section 4(a)(1)(B)(i) of TSCA.

Phenol is used in a variety of commercial applications including phenolic resins - 38 percent; synthesis of bisphenol A - 23 percent; synthesis of caprolactam - 17 percent; synthesis of alkylphenols - 4 percent; synthesis of aniline - 3 percent; miscellaneous uses - 5 percent; exports - 6 percent (Ref. 16). The miscellaneous uses of phenol include: (1) The synthesis of adipic acid, salicylic acid, phenolphthalein, pentachlorophenol, acetophenetidine, picric acid, and pharmaceuticals; (2) as a selective solvent for refining lubricating oils, germicidal paints, laboratory reagent, dyes and indicators, slimicide, biocide, and (3) as a general disinfectant (Ref. 81). Many of these are uses that can lead to worker and consumer exposure.

In a compilation of air monitoring data collected between 1970 and 1987, the mean concentration of phenol in suburban and urban areas was reported as 0.015 and 6.883 ppb, respectively (Ref. 83). The concentration of phenol in the air of Portland, OR, during seven rain events in 1984 was 56 to 105 ppt, while the concentration of phenol in the rain ranged from 75 to 1,200 ppt (Ref. 61). It has also been detected in U.S. drinking water supplies (Refs. 29 and 69).

Phenol is used in numerous consumer products indicating a potential for exposure to consumers (Ref. 100).

4. *Release to environment in substantial quantities finding.* EPA believes that phenol is released to the environment in substantial quantities. Over 1 million pounds of phenol is released into the environment each year. The Toxics Release Inventory (TRI) for 1987, indicates that 8,100,731 pounds of phenol was released to the air, 402,579 pounds to water, and 1,098,624 pounds to land (Ref. 93). For 1988, the TRI indicates that 10,155,101 pounds was released to air, 262,127 pounds to water, and 2,162,250 pounds to land (Ref. 93). As explained in EPA's "B" policy, EPA

believes that 1 million pounds of release to the environment each year is a sufficiently large amount of release for making a finding of substantial environmental release under section 4(a)(1)(B) of TSCA.

Phenol was detected in 738 samples obtained from 33 industries and publicly owned treatment works (POTWs) at a maximum concentration range of 7.5 ppb to 530 ppm (Ref. 82). Data from the STORET database indicate that phenol was found in 42.1 percent of industrial effluent samples obtained from 1980–83, at a median concentration of 10 ppb (Ref. 87). The STORET database also indicates that phenol was found in 13 percent of ambient surface water samples, and 9 percent of sediment samples (Ref. 87), and also in groundwater samples (Ref. 88). Phenol was detected in 4 percent of 86 samples obtained during the National Urban Runoff Program of 1982, at concentrations ranging from 3 to 10 ppb (Ref. 17).

5. *Insufficient data and experience finding.* EPA believes that there are insufficient data and experience to determine or predict the effects on human health or the environment from manufacturing, processing, distribution, use, and/or disposal of phenol. EPA believes that there are insufficient data and experience to reasonably determine or predict the potential subchronic effects, neurotoxicity, pharmacokinetics and metabolism, reproductive toxicity, and developmental neurotoxicity from the manufacturing, processing, distribution, use, and/or disposal of phenol. Although a number of studies describe the metabolism and pharmacokinetics of phenol (Refs. 13, 20, 22, 52, 62, 65, and 66), the information is insufficient to make comparisons and assumptions that would allow full use of the existing database for regulatory purposes. The Chemical Manufacturers Association's Phenol Panel is conducting pharmacokinetic studies and has consulted EPA on study design (Refs. 113, 114, and 115).

A number of subchronic and chronic tests have been conducted with phenol by the oral and inhalation routes (Refs. 6, 21, 23, 27, 67, and 80). None of these studies are adequate to characterize portal-of-entry effects via the inhalation route. Several of the inhalation subchronic studies did not use controls and tested too few animals of unspecified sex (Ref. 23). A one-dose-level study determined a NOEL of 19 mg/m^3 (Ref. 80), but the design of this study did not include establishing an effect level for phenol. In addition, the information available shows phenol to be more toxic by inhalation exposure than by oral exposure, thereby precluding a high degree of reliance on conclusions based on route-to-route extrapolation. For these reasons, EPA is proposing to require testing to develop data on the effects of phenol by the inhalation route.

Anger and Johnson (1985), summarizing known neurotoxic effects of a number of chemicals, indicate motor and mental disturbances for phenol (Ref. 2). EPA has insufficient information to evaluate these effects. Deichmann et al. (1944) reported hind-limb paralysis in guinea pigs after 20 exposures by inhalation to 100–200 mg/m^3 phenol (Ref. 23). In addition, Dalin and Kristoffersson (1974) found that continuous exposure to phenol vapors at 100 mg/m^3 for 15 days adversely affected the performance of rats in a test assessing CNS effects (Ref. 18). Furthermore, Kavlock (1990) noted neurologically significant effects in the pups of dams exposed to phenol in a screening test for developmental effects (Ref. 53). However, these studies did not extend long enough to adequately characterize these effects. Furthermore, the Deichmann et al. study (Ref. 23) did not include control animals, and the Dalin and Kristoffersson study (Ref. 18) did not establish a NOAEL for the observed CNS effects.

The Kavlock study (Ref. 53) also supports concern for developmental neurotoxicity. When pregnant rats were given a single gavage dose of phenol, their offspring showed developmental toxicity affecting the limbs, tail, and urogenital systems. This study was a screening test, designed to help identify substances which may need additional developmental toxicity testing, and was not adequate to characterize these effects. In order to address the inadequacy of the data developed by these studies, EPA proposes to require both neurotoxicity and developmental neurotoxicity testing for phenol.

No additional testing for developmental effects is being proposed because NTP studies (Refs. 71 and 112) are adequate for this endpoint. Although these studies were conducted by the oral route, EPA expects that additional reproductive effects testing, which will be conducted by the inhalation route, will be an adequate complement to the existing database.

EPA believes a reproductive effects study on phenol by Heller and Pursell (1938) is inadequate for risk assessment purposes because the experimental methodology and test results reporting are inadequate and unreliable (Ref. 44). EPA is proposing to require reproductive effects testing. The inhalation route was selected because information indicates that animals are more sensitive to phenol when exposed by the inhalation route.

6. *Testing is necessary to develop data findings.* EPA believes that the testing of phenol is necessary to develop data for oral and inhalation pharmacokinetics and metabolism, inhalation subchronic effects, reproductive effects, developmental neurotoxicity, and neurotoxicity. EPA believes that these testing data are needed to determine if the manufacture, distribution in commerce, processing, use, or disposal of phenol, or any combination of such activities, does or does not present an unreasonable risk of injury to health or the environment.

C. N,N-Dimethylaniline

EPA is proposing testing of *N,N*-dimethylaniline under the authority of sections 4(a)(1)(A) and 4(a)(1)(B) of TSCA.

1. *Unreasonable risk of injury to health or the environment finding.* EPA believes that the manufacture, processing, distribution in commerce, use, or disposal, or any combination of such activities for *N,N*-dimethylaniline, may present an unreasonable risk of injury to health or the environment.

a. *Evidence of potential for adverse human health effects.* The health portion of this assessment is based on *N,N*-dimethylaniline's toxicity in subchronic (13–week), chronic, oncogenicity, and mutagenicity studies.

A 2–year chronic toxicity-oncogenicity gavage study in groups of 50 male and 50 female F344/N rats treated with 3 or 30 mg/kg 5 days per week and similarly sized groups of B6C3F1 mice treated with 15 or 30 mg/kg 5 days per week reported some evidence of carcinogenicity in male rats (sarcomas and osteosarcomas of the spleen) and equivocal evidence of carcinogenicity in female mice (squamous cell papillomas of the forestomach) (Ref. 72). Mutagenicity data were negative for reverse mutation in four strains of *Salmonella*, but were positive for forward mutation in mouse lymphoma L5178Y cells and for sister chromatid exchange and chromosomal aberrations in Chinese hamster ovary cells (Ref. 72).

A 13–week gavage study (that included comprehensive histopathological examination) in groups of 10 male and 10 female F344/N rats and B6C3F1 mice treated with 31.25, 62.5, 125, 250, or 500 mg/kg for 5 days per week identified the erythrocytes and the spleen as the most sensitive targets in both species (Refs. 1 and 72). Compound-related clinical

signs included lethargy in rats and mice and cyanosis in rats. The National Toxicology Program (NTP) study identified the rat as more sensitive than the mouse to the noncarcinogenic effects of *N,N*-dimethylaniline on erythrocytes and the spleen; these effects were seen in rats even at the lowest dose level tested, while an NOAEL of 31.25 mg/kg was seen for the mice (Ref. 72). An inhalation study reported altered muscle chronaxie and evidence of hemolytic anemia in the high dose group of rats continuously exposed for 100 days to 0.04 or 0.3 mg/m^3 (Ref. 64). Anger and Johnson (1985), summarizing known neurotoxic effects of *N,N*-dimethylaniline, indicate vision disturbances and central nervous system depression (Ref. 2).

As discussed further elsewhere in this preamble, over 28,000 workers may be exposed to *N,N*-dimethylaniline in various industrial settings and there is also evidence of general population exposure.

b. *Evidence of potential environmental toxicity.* This assessment is based on probabilistic dilution modelling indicating that *N,N*-dimethylaniline is present in the environment at levels within a factor of 100 of its known acute toxicity to environmental organisms. EPA believes that there may be an unreasonable risk of injury to the environment from chronic effects when acute toxicity is observed at levels within a factor of 100 of predicted stream concentrations. Specifically, EPA has determined a concentration of concern of 300 ppb (based on *N,N*-dimethylaniline's predicted chronic toxicity to daphnids) and has estimated that this concentration is exceeded 144 to 198 days of the year in receiving streams (Ref. 108).

Furthermore, *N,N*-dimethylaniline, which is produced in substantial quantities, has been detected in soil and water. According to the TRI, 147,692 pounds of *N,N*-dimethylaniline were released to the environment in 1987 (Ref. 93). For 1988, the TRI indicates that 119,122 pounds were released (Ref. 93). The TRI also indicates that some of these releases would be to the marine or estuarine environment (Ref. 116).

From these concerns, EPA believes that *N,N*-dimethylaniline may present an unreasonable risk of injury to health and the environment.

2. *Substantial quantities produced finding.* EPA believes that *N,N*-dimethylaniline is or will be produced in substantial quantities. EPA records indicate that domestic production of *N,N*-dimethylaniline in 1979 was 13.7 million pounds (Ref. 102). Information on current production volumes is CBI, but production is substantial (1 million pounds or greater). For the reasons set forth above, EPA believes that production of 1 million pounds or more per year of *N,N*-dimethylaniline is substantial production under section 4(a)(1)(B)(i) of TSCA.

3. *Substantial human exposure finding.* EPA believes that there is or may be substantial human exposure to *N,N*-dimethylaniline. This assessment is based on an NOES survey which estimated that 27,895 workers were potentially exposed to *N,N*-dimethylaniline in 9 different industrial classifications (Refs. 70 and 109). Of these workers, 39 percent were potentially exposed during the use of trade name products containing this compound. *N,N*-Dimethylaniline is used in dyes, as a synthetic intermediate for vanillin, pharmaceuticals, and other compounds, and as a solvent, stabilizer, and polymerization catalyst (Refs. 59, 81 and 99). For the reasons set forth in the "B" policy, EPA believes that the potential exposure of 28,048 workers to *N,N*-dimethylaniline constitutes substantial human exposure under TSCA section 4(a)(1)(B)(i).

Furthermore, there is or may be general population exposure to *N,N*-dimethylaniline. *N,N*-Dimethylaniline was detected in 8 samples obtained from three industries and POTWs at a maximum concentration of 3.1 ppm (Ref. 82). According to the TRI, 129,829 pounds of *N,N*-dimethylaniline was released to the air, 17,613 pounds to water, and 250 pounds to land in 1987 (Ref. 93). For 1988, the TRI indicates that 98,905 pounds was released to air, 19,967 pounds to water, and 250 pounds to land (Ref. 93). *N,N*-Dimethylaniline was detected in soil samples obtained near the bank of the Buffalo River, NY, at concentrations of 10 to 40 ppm (Ref. 68). *N,N*-Dimethylaniline was reported as being detected (no levels given) in water from Lake Ontario (Ref. 39).

4. *Insufficient data and experience finding.* EPA believes that there are insufficient data and experience to determine or predict the effects on human health or the environment from manufacturing, processing, distribution, use, and/or disposal of *N,N*-dimethylaniline. EPA believes that available studies are insufficient and other data are lacking to sufficiently evaluate the effects of *N,N*-dimethylaniline.

Data assessing the potential subchronic effects of inhalation exposure to *N,N*-dimethylaniline were not found in the literature. Available oral data are inadequate to estimate inhalation risk because the dose levels selected did not give a NOAEL (for rats) and there are no data on comparative pharmacokinetics or portal-of-entry effects (Refs. 1 and 72). The only inhalation study report available was a brief abstract that indicated altered muscle chronaxie and evidence of hemolytic anemia in the high dose group (0.3 mg/m^3 of rats continuously exposed for 100 days to 0.04 or 0.3 mg/m^3) (Ref. 64). This study cannot be used for risk assessment because it was reported in limited detail and histopathologic effects were not examined. Anger and Johnson (1985), summarizing known neurotoxic effects of a number of chemicals, cited visual disturbances and CNS depression for *N,N*-dimethylaniline (Ref. 2). EPA has insufficient information to evaluate these observations.

Developmental toxicity testing for *N,N*-dimethylaniline is limited to a screening study in 50 CD-1 albino mice treated with *N,N*-dimethylaniline in corn oil at 365 mg per kg per day on gestation days 7 to 14; maternal mortality, but no effects on body weight or viability of the neonatal offspring, was reported (Ref. 77). Although the test results are negative, EPA considers this test inadequate for risk assessment purposes because the exposure period did not cover the full period of major organogenesis (days 6 to 15 for the mouse), nor were sufficient dose groups used (only one versus the three required by EPA). EPA also specifies that two animal species be tested for a definitive developmental toxicity assessment. Therefore, developmental toxicity by gavage is proposed for two species, a rat and a non-rodent.

The available (negative) *Salmonella/* Ames data are adequate, as are the (positive) data in mouse lymphoma L51784 cells (Ref. 72). Available data also include positive results for sister chromatid exchange and chromosomal aberrations in Chinese hamster ovary cells (Ref. 72). Given these data, EPA believes that gene mutation data are adequate but that the chromosomal toxicity of *N,N*-dimethylaniline is insufficiently characterized.

Although numerous metabolism studies have been conducted for *N,N*-dimethylaniline, these are inadequate because quantitative pharmacokinetics data for absorption, distribution, or excretion are lacking (Refs. 5, 10, 11, 25, 26, 28, 37, 38, 41, 43, 45, 46, 47, 56, 73, 74, 75, 76, 79, 95 and 106).

No reproductive effects data were found for *N,N*-dimethylaniline.

Environmental effects data for *N,N*-dimethylaniline are limited. Algal toxicity data include a toxicity test in

bluegreen algae (Ref. 9) and a study on energy metabolism enzymes in marine algae (Ref. 4). The study by Batterton et al. (Ref. 9) is inadequate because the Agency needs data for a sensitive species of green algae such as *Selenastrum capricornutum*. Blue-green algae are not an acceptable substitute for green algae. The study by Armstrong et al. (Ref. 4) is inadequate because a rigorous measurement of growth inhibition such as a 96–hour EC50 value was not determined. The Agency believes that the 96–hour EC50 value for growth will be a more sensitive measure of effects on energy metabolism enzymes and will have more relevance in an environmental risk assessment. Acute aquatic toxicity studies are available for a ciliated protozoan and several species of fish (Ref. 3). While the acute toxicity studies for fish appear adequate, no chronic toxicity data for fish were found, nor were any relevant data found for the acute or chronic effects of *N,N*-dimethylaniline on aquatic invertebrates. The toxicity data for the ciliated protozoan are of unknown utility because little is known about how representative protozoa are as surrogate species for other aquatic invertebrates.

EPA found no data to determine anaerobic biodegradation or the biodegradation of *N,N*-dimethylaniline in systems which simulate *in situ* wastewater treatment.

5. *Testing is necessary to develop data finding.* EPA believes that testing of *N,N*-dimethylaniline is necessary to develop data for subchronic effects, neurotoxicity, pharmacokinetics and metabolism, reproductive effects, developmental effects, mutagenic effects, algal toxicity, daphnid acute and chronic toxicity, mysid shrimp acute and chronic toxicity, fathead minnow chronic toxicity, sheepshead minnow chronic toxicity, anaerobic biodegradation, and activated sludge biodegradation. EPA believes that this testing is needed to determine if the manufacturing, processing, distribution, use, or disposal of *N,N*-dimethylaniline or any combination of such activities does or does not present an unreasonable risk of injury to health or the environment.

D. Ethyl Acetate

EPA is proposing testing of ethyl acetate under the authority of sections 4(a)(1)(A) and 4(a)(1)(B) of TSCA.

1. *Unreasonable risk of injury to health or the environment.* EPA believes that the manufacture, processing, distribution in commerce, use, or disposal, or any combination of such activities for ethyl acetate may present an unreasonable risk of injury to health or the environment.

a. *Evidence of potential for adverse human health effects.* This finding is based on ethyl acetate's neurotoxic effects, as outlined and supported in previous rule-making for the testing of this chemical [cite *final multi-substance rule for the testing of neurotoxicity*].

1. *Substantial quanitities produced finding.*. EPA believes that ethyl acetate is or will be produced in substantial quantities. In 1988, 254.2 million pounds of ethyl acetate was produced in the United States (Ref. 103). EPA estimates the annual U.S. production for 1989 to be 292 million pounds for three manufacturers at five production sites (Ref.101). For the reasons set forth in the "B" policy, EPA believes that production of 1 million pounds or greater of ethyl acetate constitutes substantial production under section 4(a)(1)(B)(i) of TSCA.

2. *Substantial human exposure finding.* EPA believes that there is or will be substantial human exposure to ethyl acetate. The NOES survey estimated that 419,180 workers were potentially exposed to ethyl acetate (Refs. 70 and 109). Of these workers, 87 percent were potentially exposed during the use of trade name products containing this compound. Potential exposure to ethyl acetate was associated with 34 different industrial classifications (Ref. 70). Ethyl acetate has the following uses: coatings—41 percent; exports—36 percent; solvents—13 percent; plastics—8 percent; chemical synthesis—2 percent (Ref. 15). In addition, ethyl acetate is used as a solvent in numerous consumer applications. For the reasons explained in the "B" policy, EPA believes that the potential exposure of 419,180 workers to ethyl acetate is substantial human exposure under TSCA section 4(a)(1)(B)(i).

Ethyl acetate is found in numerous consumer products including lacquers, varnishes, coatings, detergents and soaps. EPA estimates the highest exposure levels occur by the dermal (4,680 mg/yr from use of latex paints) and inhalation (901 mg/yr from use of lacquer thinner) routes (Ref. 98).

There may also be widespread general population exposure. Ethyl acetate was detected in 66 samples obtained from 17 industries and POTWs at a maximum concentration of 7.7 ppm (Ref. 82). In a compilation of air monitoring data collected between 1970 and 1987, the median concentration of ethyl acetate in urban sites was 0.733 ppb (Ref. 83). Ethyl acetate was also detected in industrialized and urban sites in Virginia and West Virginia at concentrations ranging from <0.012 to 1.9 ppb (Ref. 30). The STORET database indicates that ethyl acetate has also been detected in groundwater (Ref. 88).

3. *Insufficient data and experience finding.* EPA believes that there are insufficient data and experience to determine or predict the effects on human health or the environment from manufacturing, processing, distribution, use, and/or disposal of ethyl acetate. Under section 4(a)(1)(B)(ii), EPA believes that there are insufficient data and experience to determine or predict the potential reproductive toxicity, developmental toxicity, and mutagenicity from the manufacturing, processing, distribution, use, and/or disposal of ethyl acetate.

EPA is proposing to test ethyl acetate for reproductive effects and developmental toxicity. EPA found no data for these effects.

EPA is also proposing mutagenicity testing for ethyl acetate. Ethyl acetate was negative for induction of reverse mutation in *Salmonella* when tested with and without metabolic activation (Refs. 24 and 50). Positive results were observed for mitotic aneuploidy but negative results were observed for point mutations and recombinations in yeast (Ref. 107).

In mammalian test systems, a positive response was reported for chromosomal aberrations in Chinese hamster fibroblasts *in vitro* (Ref. 50); however, these results do not support a concern or a finding for chromosomal effects under TSCA section 4 (a)(1)(A) because, in a more definitive *in vivo* test system, a negative response was reported for micronucleus formation in Chinese hamsters (Ref. 8).

EPA considers the existing *Salmonella* data (negative) on ethyl acetate to be acceptable. However, these data in bacteria alone are insufficient to adequately characterize the gene mutation effects of ethyl acetate, and EPA is proposing an *in vitro* gene mutation assay for ethyl acetate in mammalian cells in culture.

4. *Testing is necessary to develop data finding.* EPA believes that the testing of ethyl acetate is necessary to develop data for reproductive effects, developmental toxicity, and mutagenicity. EPA believes that this testing is needed to determine if the manufacture, distribution in commerce, processing, use, or disposal of ethyl acetate, or any combination of such activities, does or does not present an unreasonable risk of injury to health or the environment.

E. 2,6-Dimethylphenol

EPA is proposing to test 2,6-dimethylphenol under the authority of sections 4(a)(1)(A) and (B) of TSCA.

1. *Unreasonable risk of injury to human health and environment finding.* EPA believes that the manufacture, processing, distribution in commerce, use, or disposal, or any combination of such activities for 2,6-dimethylphenol may present an unreasonable risk of injury to health or the environment.

a. *Evidence of potential for adverse human health effects.* This assessment is based on 2,6-dimethylphenol's toxicity in an 8–month rat gavage study, that showed histopathological changes in the liver, spleen, and kidneys and changes in body weight, blood pressure and levels of protein sulfhydryl groups in blood serum and internal organs in 53 male rats treated with 6 mg/kg/day (Refs. 63 and 104). Effects were not seen in rats dosed with 0.06 mg/kg/day. In another study, increased relative liver and spleen weights, decreased body weight gain and marked atrophy and parenchymatous dystrophy of liver cells were observed in 10 male albino rats treated by gavage with 29.5 mg/kg/day for 10 weeks (Ref. 63).

b. *Evidence of potential for environmental toxicity.* This assessment is based on probabilistic dilution modelling indicating that 2,6-dimethylphenol is present in the environment at levels within a factor of 100 of its known acute toxicity to environmental organisms (Ref. 108). EPA believes that there may be an unreasonable risk of injury to the environment from chronic effects when acute toxicity is observed at levels within a factor of 100 of predicted stream concentrations. Specifically, EPA has preliminarily determined a concentration of concern of 100 ppb (based on 2,6-dimethylphenol's predicted chronic toxicity to daphnids) and has estimated that this concentration is exceeded 260 days of the year in receiving streams (Ref. 108).

As discussed further below, over 1,900 workers may be exposed to 2,6-dimethylphenol in a variety of commercial applications. Furthermore, 2,6-dimethylphenol, which is produced in substantial quantities, has been detected in air, rain, wastewater, and groundwater samples, which may indicate general population and environmental exposures (Refs. 34, 36, 42, 61, 81 and 83). Because of these concerns, EPA believes that 2,6-dimethylphenol may present an unreasonable risk of injury to health and the environment.

2. *Substantial quantities produced finding.* EPA believes that 2,6-dimethylphenol is or will be produced in substantial quantities. Information available to EPA indicates that in 1977, from 2 to 20 million pounds of 2,6-dimethylphenol was produced at six different facilities in the United States (Ref. 94). There were two facilities that manufactured 2,6-dimethylphenol in the United States in 1989 (Ref. 86). EPA estimates production in 1989 to have been 130 million pounds (Ref. 101). For the reasons set forth in the "B" policy, EPA believes that production of 1 million pounds or greater of 2,6-dimethylphenol constitutes substantial production under section 4(a)(1)(B)(i) of TSCA.

3. *Substantial human exposure finding.* EPA believes that there is or may be substantial human exposure to 2,6-dimethylphenol. EPA finds that 2,6-dimethylphenol is used in a variety of commercial applications, many of which can lead to worker exposure. The NOES survey estimated that 1,941 workers were potentially exposed to 2,6-dimethylphenol (Refs. 70 and 109). Of these workers, 95 percent were potentially exposed during the use of trade name products containing this chemical. 2,6-Dimethylphenol is used primarily in the production of poly(phenylene oxide) resins (Ref. 31). 2,6-Dimethylphenol is also used in the manufacture of tetramethylbisphenol A, 2,6-dimethylaniline, bis(4-hydroxy-2,5-dimethylphenyl)methane, dyes, pharmaceuticals and fragrances, and as a mixture with other xylenols, in disinfectants, solvents, pharmaceuticals, insecticides, fungicides, plasticizers, rubber chemicals, lubricant and gasoline additives, and wetting agents (Ref. 81). As explained in the "B" policy, EPA believes that the potential exposure of 1,941 workers to 2,6-dimethylphenol is substantial human exposure under section 4(a)(1)(B)(i) of TSCA.

Furthermore, general population exposure to 2,6-dimethylphenol is also indicated. 2,6-Dimethylphenol was detected in 64 samples obtained from 33 industries and POTWs at a maximum concentration of 2,895 ppm (Ref. 81). Monitoring data indicate trace quantities of 2,6-dimethylphenol in air and rain (Refs. 61 and 83). 2,6-Dimethylphenol was detected in shale oil wastewater in the range 0.75 to 1.7 µg/L (Ref. 42) and at 12 mg/L in the wastewater from the gasification of coal (Ref. 34). In addition, it was detected in groundwater samples from a wood preserving facility in Florida at a concentration of 0.90 mg/L, while the concentration of 2,6-dimethylphenol in groundwater 330 meters from the site was 0.29 mg/L (Ref. 36).

4. *Insufficient data and experience finding.* EPA believes that there are insufficient data and experience to determine or predict the effects on human health or the environment from manufacturing, processing, distribution, use, and/or disposal of 2,6-dimethylphenol. This assessment is based on the following information. EPA has adequate negative data evaluating the gene mutation effects of 2,6-dimethylphenol in *Salmonella* (Refs. 24 and 32). However, EPA has no data evaluating this chemical's potential as a gene toxicant in mammalian cells or as a chromosomal toxin. EPA found no data for neurotoxicity, pharmacokinetics and metabolism, reproductive effects, or developmental toxicity.

For environmental effects, acute aquatic toxicity studies are available for green algae, duckweed, daphnids, sea urchins, fathead minnows and Atlantic cod (Ref. 3). The study for green algae is inadequate because it lacks a rigorous measurement of growth inhibition as a 96–hour EC50 value. The effect measured was inhibition of chlorophyll synthesis and the lowest-observed-effect concentration (LOEC) was the only effective concentration reported. The Agency believes that the 96–hour EC50 value for growth will be a more sensitive effect than inhibition of chlorophyll synthesis and will be more relevant in an environmental risk assessment. While fish and invertebrate acute toxicity data are adequate, EPA found no available data for aquatic invertebrate chronic toxicity. An available 8–day study on fathead minnows for 2,6-dimethylphenol is of too short duration to be considered a chronic effects study, nor did it evaluate sensitive life stages, and, thus, this study is inadequate (Ref. 3).

Available chemical fate screening data for 2,6-dimethylphenol indicate that it may undergo substantial degradation under aerobic conditions; however, EPA found no available data to determine or reliably predict the half-life for the removal of 2,6-dimethylphenol by this process (Ref. 12). Data on the anaerobic degradation of 2,6-dimethylphenol are likewise limited. One screening study indicates that 2,6-dimethylphenol may not degrade under anaerobic conditions; another study indicated that this chemical undergoes anaerobic biodegradation in ground water and laboratory digestors (Refs. 12 and 35). These (contradictory) data are insufficient to adequately characterize this removal process. EPA also believes that the aqueous photolysis of 2,6-dimethylphenol is inadequately

characterized, with no data available which simulates this process under natural conditions (Ref. 12).

5. *Testing necessary to develp data finding.* EPA believes that testing of 2,6-dimethylphenol is necessary to develop data for neurotoxicity, pharmacokinetics and metabolism, reproductive effects, developmental effects, mutagenic effects, algal toxicity, fathead minnow chronic toxicity, daphnid chronic toxicity, aerobic biodegradation, anaerobic biodegradation, and aqueous photolysis. EPA believes that these testing data are needed to determine if the manufacturing, processing, distribution, use, or disposal of 2,6-dimethylphenol or any combination of such activities, does or does not present an unreasonable risk of injury to health or the environment.

IV. Issues for Comment

In addition to any relevant, general comments on the chemicals and proposed testing in this rulemaking, EPA would appreciate comments on the following specific issues:

1. EPA is proposing subchronic testing of acetophenone by the inhalation route of exposure. EPA is soliciting comment on the feasibility of inhalation testing given acetophenone's known irritant properties. If inhalation testing is not feasible, should EPA require subchronic testing by the oral route given the, at best, marginally acceptable nature of the existing oral studies?

2. In this rule, EPA is only proposing to require first tier mutagenicity testing at this time. For purposes of this rulemaking, EPA solicits comments on the appropriateness of these tests and its decision to defer higher tier mutagenicity testing and oncogenicity testing pending the receipt of first tier results.

3. EPA is also soliciting comments on the proposed toxicokinetics and biodegradation in natural surface water guidelines, which are proposed to be incorporated by reference.

V. Economic Analysis of the Proposed Rule

EPA has prepared an economic analysis that evaluates the potential for significant economic impacts as a result of the testing proposed in this notice (Ref. 101). Total costs of testing, including both laboratory costs and administrative costs, are as follows: acetophenone—$1.3 to 2.0 million; phenol—$1.5 to 2.4 million; *N,N*-dimethylaniline—$1.4 to 2.2 million; ethyl acetate—$0.8 to 1.2 million; and 2,6-dimethylphenol—$1.2 to 1.7 million.

Total costs of testing for each chemical have been annualized and compared with annual revenues as an indication of potential economic impact. Annualized costs, calculated over 15 years using a 7 percent discount rate, represent the equivalent constant costs which would have to be recouped each year of the payback period to finance the testing expenditure in the first year.

On the basis of these calculations, EPA believes that for phenol, ethyl acetate and 2,6-dimethylphenol there is no potential for adverse economic impact. Because these three chemicals have relatively large production volumes, the annualized costs of testing, expressed as a percentage of annual revenue, are very small—ranging from 0.2- to 0.13 percent. Costs of testing are therefore found to be insignificant relative to revenues for these three chemicals.

For the remaining two chemicals—acetophenone and *N,N*-dimethylaniline—there may be some potential for adverse economic impacts due to the proposed testing. Because these two chemicals are produced in smaller quantities than the other three chemicals subject to this proposed rule, costs of testing as a percentage of revenues are higher—ranging from approximately 2- to 4 percent. Costs of testing may therefore be significant relative to revenues for acetophenone and *N,N*-dimethylaniline.

VI. Availability of Test Facilities and Personnel

EPA believes that test facilities and personnel are available to perform the testing specified in this proposed rule. (Ref. 111).

VII. Public Meeting

If requested, EPA will hold a public meeting in Washington, DC after the close of the public comment period. Persons who wish to attend or to present comments at the meeting should contact Mary Louise Hewlett, Chemical Testing Branch (202) 260–8162 by January 6, 1994. The meeting will be open to the public, but active participation will be limited to those who requested to comment and EPA representatives. Participants are requested to submit copies of their statements by the meeting date. These statements and a transcript of the meeting will become part of EPA's rulemaking record.

VIII. Comments Containing Confidential Business Information

All comments will be placed in the public file unless they are clearly labeled as Confidential Business Information (CBI) when they are submitted. While a part of the record, CBI comments will be treated in accordance with 40 CFR part 2. A sanitized version of all CBI comments must be submitted to EPA for inclusion in the public file.

It is the responsibility of the commenter to comply with 40 CFR part 2 in order that all materials claimed as confidential may be properly protected. This includes, but is not limited to, clearly indicating on the face of the comment (as well as on any associated correspondence) that information claimed as CBI is included, and marking "CONFIDENTIAL", "TSCA CBI" or similar designation on the face of each document or attachment in the comment which contains information claimed as CBI. Should information be put into the public file because of failure to clearly designate its confidential status on the face of the comment, EPA will presume any such information which has been in the public file for more than 30 days to be in the public domain.

IX. Rulemaking Record

EPA has established a record for this rulemaking (docket number OPPTS–42150). This record contains the basic information considered by EPA in developing this proposal and appropriate **Federal Register** notices. EPA will supplement this record as necessary.

A public version of the record, from which all information claimed as CBI has been deleted, is available for inspection in the TSCA Nonconfidential Information Center, also known as the TSCA Public Docket Office, East Tower, Rm. G–102, 401 M St., SW., Washington, DC. 20460, from 8 a.m. to noon, and 1 p.m. to 4 p.m., Monday through Friday, except legal holidays.

The record includes the following information:

A. Supporting Documentation

(1) Notice containing the ITC designation.

(2) **Federal Register** notices pertaining to this rule consisting of:

(a) "Twenty-seventh Report of the Interagency Testing Committee to the Administrator; receipt of report and request for comments regarding priority list of chemicals." (March 6, 1991, 56 FR 9534).

(b) Notice of final rule on EPA's TSCA Good Laboratory Practice Standards (54 FR 34034, August 17, 1989).

(c) Notice of final rule on data reimbursement policy and procedures (48 FR 31786, July 11, 1983).

(d) Notice of proposed test rule on chloromethane and chlorinated benzenes (45 FR 48524, July 18, 1980).

(e) Notice of proposed test rule on dichloromethane, nitrobenzene and 1,1,1 trichloroethane (46 FR 30300, June 5, 1981).

(f) Notice of final test rule on the C9 aromatic hydrocarbon fraction (50 FR 20662, May 17, 1985).

(g) Notice of proposed TSCA section 4(a)(1)(B) statement of policy (56 FR 32294, July 15, 1991).

(h) Notice of final TSCA section 4(a)(1)(B) statement of policy (58 FR 28736, May 14, 1993).

(i) Notice of proposed test rule on glycidol and its derivatives category (56 FR 57144, November 7, 1991).

(j) Notice of testing consent order for acrylic acid (57 FR 7656, March 4, 1992).

(3) TSCA test guidelines cited as test standards for this rule.

(4) Communications consisting of:

(a) Written letters.

(b) Contact reports of telephone conversations

(c) Meeting summaries.

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X. Regulatory Assessment Requirements

A. Executive Order 12291

Under Executive Order 12291, EPA must judge whether a rule is "major" and therefore subject to the requirement of a Regulatory Impact Analysis. EPA has determined that this proposed test rule would not be major because it does not meet any of the criteria set forth in section 1(b) of the Order; i.e., it would not have an annual effect on the economy of at least $100 million, would not cause a major increase in prices, and would not have a significant adverse effect on competition or the ability of U. S. enterprises to compete with foreign enterprises.

This proposed rule was submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12291. Any written comments from OMB to EPA, and any EPA response to those comments, are included in the rulemaking record.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) EPA is certifying that this test rule, if promulgated, would not have a significant impact on a substantial number of small businesses because: (1) They would not be expected to perform testing themselves, or to participate in the organization of the testing effort; (2) they would experience only very minor costs, if any, in securing exemption from testing requirements; and (3) they are unlikely to be affected by reimbursement requirements.

C. Paperwork Reduction Act

OMB has approved the information collection requirements contained in this rule under the provisions of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq., and has assigned OMB Control number 2070–0033.

Public reporting burden for this collection of information is estimated to average 10,100 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The total public reporting burden is estimated to be 222,000 hours for all responses. Send comments regarding the burden estimate or any other aspect of this collection of information,

including suggestions for reducing this burden, to Chief, Information Policy Branch, 2131, U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; and to the Office of Management and Budget, Paperwork Reduction Project (2070–0033), Washington DC 20503. 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 799

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements, Testing, Incorporation by reference.

Dated: November 15, 1993.

Victor J. Kimm,

Acting Assistant Administrator for Prevention, Pesticides and Toxic Substances.

Therefore, it is proposed that 40 CFR, chapter I, subchapter R, part 799 be amended as follows:

PART 799—[AMENDED]

a. The authority citation for part 799 would continue to read as follows:

Authority: 15 U.S.C. 2601, 2603, 2611, 2625.

b. By adding § 799.4450 to subpart B to read as follows:

§ 799.4450 Designated IRIS chemicals.

(a) *Identification of test substances.* (1) The IRIS chemicals subject to this test guideline were designated in the Twenty-Seventh ITC report. These chemicals include acetophenone (CAS No. 98–86–2), phenol (CAS No. 108–95–2), *N,N*-dimethylaniline (CAS No. 121–69–7), ethyl acetate (CAS No. 141–78–6), and 2,6-dimethylphenol (CAS No. 576–26–1).

(2) Acetophenone, phenol, *N,N*-dimethylaniline, ethyl acetate, and 2,6-dimethylphenol of at least 99 percent purity shall be used as the test substance.

(b) *Persons required to submit study plans, conduct tests and submit data.* All persons who manufacture (including import) or process or intend to manufacture or process acetophenone, phenol, *N,N*-dimethylaniline, ethyl acetate, and 2,6-dimethylphenol other than as an impurity, after January 5, 1994, to the end of the reimbursement period shall submit letters of intent to conduct testing, submit study plans, conduct tests, and submit data, or submit exemption applications as specified in this section, subpart A of this part and parts 790 and 792 of this chapter for single-phase rulemaking, for the substances they manufacture subject to exclusions contained in § 790.42(a)(2), (a)(4) and (a)(5). These sections provide that processors, persons who manufacture less than 500 kg (1,100 lbs) annually, or persons who manufacture small quantities of the chemical solely for research and development as defined in § 790.42(a)(5) shall not be required to submit study plans, conduct tests and submit data, or submit exemption applications as specified in this section unless directed to do so in a subsequent notice as set forth in § 790.48(b).

(c) *Health effects*—(1) *Subchronic toxicity*—(i) *Required testing.* Subchronic toxicity testing shall be conducted by inhalation with acetophenone, phenol, and *N,N*-dimethylaniline in accordance with § 798.2450 of this chapter.

(ii) *Reporting requirements.* (A) The required subchronic toxicity test shall be completed and the final reports submitted to EPA within 18 months of the effective date in paragraph (f) of this section.

(B) Progress reports shall be submitted to EPA every 6 months beginning 6 months after the effective date in paragraph (f) of this section until the final report is submitted.

(2) *Pharmacokinetics and metabolism*—(i) *Required testing.* (A) Pharmacokinetics and metabolism studies shall be conducted with acetophenone, phenol, *N,N*-dimethylaniline, and 2,6-dimethylphenol by the oral route of administration in accordance with OECD test guideline 417 "Toxicokinetics", which is incorporated by reference. Copies of this guideline are available in the TSCA Nonconfidential Information Center, East Tower, Rm. G–102, 401 M St., SW., Washington, DC 20460. This guideline is also available for public inspection at the Office of the Federal Register, 800 North Capital St., Suite 700, Washington, DC. 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. This guideline is incorporated as it exists on the date of approval and a notice of any changes to the guideline will be published in the **Federal Register.**

(B) Pharmacokinetics and metabolism studies shall be conducted with acetophenone, phenol, *N,N*-dimethylaniline, and 2,6-dimethylphenol by the inhalation route of administration in accordance with OECD test guideline 417 "Toxicokinetics", which is incorporated by reference. Copies of this guideline are available in the TSCA Nonconfidential Information Center, East Tower, Rm. G–102, 401 M St., SW., Washington, DC 20460. This guideline is available for public inspection at the Office of the Federal Register, 800 North Capital St., Suite 700, Washington, DC. 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. This guideline is incorporated as it exists on the date of approval and a notice of any changes to the guideline will be published in the **Federal Register.**

(ii) *Reporting requirements.* (A) The required pharmacokinetics and metabolism studies shall be completed and the final reports submitted to EPA within 15 months after the effective date in paragraph (f) of this section.

(B) Progress reports shall be submitted to EPA every 6 months beginning 6 months after the effective date in paragraph (f) of this section until the final report is submitted.

(3) *Neurotoxicity (Inhalation)*—(i) *Required testing*—(A) *Functional observational battery.* (*1*) Functional observational battery tests shall be conducted with acetophenone, phenol, and *N,N*-dimethylaniline in accordance with § 798.6050 of this chapter except for the provisions in paragraphs (d)(4)(ii), (d)(5), and (d)(6) of § 798.6050.

(*2*) For the purpose of paragraph (c)(3)(i)(A) of this section, the following provisions also apply:

(*i*) *Lower doses.* Either the data from the lower doses shall show graded dose-dependent effects or there shall be no neurotoxic (behavioral) effects at any dose tested.

(*ii*) *Duration and frequency of exposure.* For the acute testing, animals shall be exposed for 6 hours per day for 1 day. For the subchronic testing, animals shall be exposed for 6 hours per day 5 consecutive days per week for a 90–day period.

(*iii*) *Route of exposure.* Animals shall be exposed to acetophenone, phenol, and *N,N*-dimethylaniline by inhalation administration.

(B) *Motor activity.* (*1*) Motor activity testing shall be conducted with acetophenone, phenol, and *N,N*-dimethylaniline in accordance with § 798.6200 of this chapter except for the provisions in paragraphs (d)(4)(ii), (d)(5), and (d)(6) of § 798.6200.

(*2*) For the purpose of paragraph (c)(3)(i)(B) of this section, the following provisions also apply:

(*i*) *Lower doses.* Either the data from the lower doses shall show graded dose-dependent effects or there shall be no neurotoxic (behavioral) effects at any dose tested.

(*ii*) *Duration and frequency of exposure.* For the acute testing, animals shall be treated for 6 hours per day for 1 day. For the subchronic testing, animals shall be exposed 6 hours per day 5 consecutive days per week for a 90–day period.

(*iii*) *Route of exposure.* Animals shall be exposed to acetophenone, phenol, and *N,N*-dimethylaniline by inhalation administration.

(C) *Neuropathology.* (*1*) Neuropathology testing shall be conducted with acetophenone, phenol, and *N,N*-dimethylaniline in accordance with § 798.6400 of this chapter except for the provisions in paragraphs (d)(4)(ii), (d)(5), (d)(6) and (d)(8)(iv)(C) of § 798.6400.

(*2*) For the purpose of paragraph (c)(3)(i)(C) of this section, the following provisions also apply:

(*i*) *Lower doses.* Either the data from the lower doses shall show graded dose-dependent effects or there shall be no neurotoxic (behavioral) effects at any dose tested.

(*ii*) *Duration and frequency of exposure.* For the acute testing, animals shall be exposed for 6 hours per day for 1 day. For the subchronic testing, animals shall be exposed for 6 hours per day 5 consecutive days per week for a 90–day period.

(*iii*) *Route of exposure.* Animals shall be exposed to acetophenone, phenol, and *N,N*-dimethylaniline by inhalation administration.

(*iv*) *Clearing and embedding.* After dehydration, tissue specimens shall be cleared with xylene and embedded in wax or plastic medium, except for the sural nerve, which should be embedded in plastic. Multiple tissue specimens (e.g. brain, cord, ganglia) may be embedded together in one single block for sectioning. All tissue blocks shall be labelled to provide unequivocal identification. Plastic embedding should follow the method described by Spencer, et al., in § 798.6400(f) of this chapter, or an equivalent method.

(ii) *Reporting requirements.* (A) The functional observational battery, motor activity, and neuropathology testing with acetophenone, phenol, and *N,N*-dimethylaniline shall be completed and the final reports submitted to EPA within 21 months of the effective date in paragraph (f) of this section.

(B) Progress reports shall be submitted every 6 months beginning 6 months after the effective date in paragraph (f) of this section until the final report is submitted.

(4) *Neurotoxicity (Gavage)*—(i) *Required testing*—(A) *Functional observational battery.* (*1*) A functional observational battery test shall be conducted with 2,6-dimethylphenol in accordance with § 798.6050 of this chapter except for the provisions in paragraphs (d)(4)(ii), (d)(5), and (d)(6) of § 798.6050.

(*2*) For the purpose of paragraph (c)(4)(i)(A) of this section the following provisions also apply:

(*i*) *Lower doses.* Either the data from the lower doses shall show graded dose-dependent effects or there shall be no neurotoxic (behavioral) effects at any dose tested.

(*ii*) *Duration and frequency of exposure.* For the acute testing, animals shall be treated once. For the subchronic testing, animals shall be treated 5 consecutive days per week for a 90–day period.

(*iii*) *Route of exposure.* Animals shall be exposed to 2,6-dimethylphenol by gavage administration.

(B) *Motor activity.* (*1*) Motor activity testing shall be conducted with 2,6-dimethylphenol in accordance with § 798.6200 of this chapter except for the provisions in paragraphs (d)(4)(ii), (d)(5), and (d)(6) of § 798.6200.

(*2*) For the purpose of paragraph (c)(4)(i)(B) of this section, the following provisions also apply:

(*i*) *Lower doses.* Either the data from the lower doses shall show graded dose-dependent effects or there shall be no neurotoxic (behavioral) effects at any dose tested.

(*ii*) *Duration and frequency of exposure.* For the acute testing, animals shall be treated once. For the subchronic testing, animals shall be treated 5 consecutive days per week for a 90–day period.

(*iii*) *Route of exposure.* Animals shall be exposed to 2,6-dimethylphenol by gavage administration.

(C) *Neuropathology.* (*1*) Neuropathology testing shall be conducted with 2,6-dimethylphenol in accordance with § 798.6400 of this chapter except for the provisions in paragraphs (d)(4)(ii), (d)(5), (d)(6) and (d)(8)(iv)(C) of § 798.6400.

(*2*) For the purpose of paragraph (c)(4)(i)(C) of this section, the following provisions also apply:

(*i*) *Lower doses.* Either the data from the lower doses shall show graded dose-dependent effects or there shall be no neurotoxic (behavioral) effects at any dose tested.

(*ii*) *Duration and frequency of exposure.* For the acute testing, animals shall be treated once. For the subchronic testing animals shall be treated 5 consecutive days per week for a 90–day period.

(*iii*) *Route of exposure.* Animals shall be exposed to 2,6-dimethylphenol by gavage administration.

(*iv*) *Clearing and embedding.* After dehydration, tissue specimens shall be cleared with xylene and embedded in wax or plastic medium, except for the sural nerve, which should be embedded in plastic. Multiple tissue specimens (e.g. brain, cord, ganglia) may be embedded together in one single block for sectioning. All tissue blocks shall be labelled to provide unequivocal identification. Plastic embedding should follow the method described by Spencer, et al., in paragraph (f) of § 798.6400 of this chapter, or an equivalent method.

(ii) *Reporting requirements.* (A) The functional observational battery, motor activity, and neuropathology testing with 2,6-dimethylphenol shall be completed and the final reports submitted to EPA within 21 months of the effective date in paragraph (f) of this section.

(B) Progress reports shall be submitted every 6 months beginning 6 months after the effective date in paragraph (f) of this section until the final report is submitted.

(5) *Reproductive toxicity*—(i) *Required testing.* Reproductive toxicity testing shall be conducted with acetophenone, *N,N*-dimethylaniline, ethyl acetate, and 2,6-dimethylphenol by gavage, and phenol by inhalation in accordance with § 798.4700 of this chapter.

(ii) *Reporting requirements.* (A) The reproductive toxicity tests shall be completed and the final reports submitted to EPA within 29 months of the effective date in paragraph (f) of this section.

(B) Progress reports shall be submitted to EPA every 6 months beginning 6 months after the effective date in paragraph (f) of this section.

(6) *Developmental toxicity*—(i) *Required testing.* Developmental toxicity testing in two species, a rat and a non-rodent, shall be conducted with acetophenone by inhalation, and *N,N*-dimethylaniline, ethyl acetate, and 2,6-dimethylphenol by gavage in accordance with § 798.4900 of this chapter.

(ii) *Reporting requirements.* (A) The developmental toxicity testing shall be completed and the final reports submitted to EPA within 12 months of the effective date in paragraph (f) of this section.

(B) Progress reports shall be submitted to EPA every 6 months beginning 6 months after the effective date in paragraph (f) of this section until the final report is submitted.

(7) *Developmental neurotoxicity*—(i) *Required testing.* Developmental neurotoxicity testing in the rat shall be

conducted with phenol by gavage administration in accordance with § 795.250 of this chapter.

(ii) *Reporting requirements.* (A) The developmental toxicity testing shall be completed and the final report submitted to EPA within 21 months of the effective date in paragraph (f) of this section.

(B) Progress reports shall be submitted to EPA every 6 months beginning 6 months after the effective date in paragraph (f) of this section until the final report is submitted.

(8) *Mutagenic effects—gene mutation*—(i) *Required testing.* (A) Gene mutation assays in the *Salmonella typhimurium* histidine reversion system shall be conducted with acetophenone in accordance with § 798.5265 of this chapter.

(B) Gene mutation assays in somatic cells in culture shall be conducted with acetophenone, ethyl acetate, and 2,6-dimethylphenol in accordance with § 798.5300 of this chapter.

(ii) *Reporting requirements.* Mutagenic effects—gene mutation tests shall be conducted and the final reports submitted to EPA as follows:

(A) Gene mutation in *Salmonella*, 9 months after the effective date in paragraph (f) of this section.

(B) Gene mutation in somatic cells in culture, 10 months after the effective date in paragraph (f) of this section.

(9) *Mutagenic effects—chromosomal aberrations* — (i) *Required testing. In vivo* cytogenetic assays shall be conducted by gavage with acetophenone, *N,N*-dimethylaniline, and 2,6-dimethylphenol in accordance with § § 798.5385 or 798.5395 of this chapter.

(ii) *Reporting requirements.* (A) Mutagenic effects - *In vivo* cytogenetics testing shall be completed and the final reports submitted to EPA within 14 months after the effective date in paragraph (f) of this section.

(B) Progress reports shall be submitted to EPA every 6 months beginning 6 months after the effective date in paragraph (f) of this section.

(d) *Environmental effects* —(1) *Algal toxicity testing* — (i) *Required testing.* Algal toxicity testing shall be conducted with *N,N*-dimethylaniline and 2,6-dimethylphenol in accordance with § 797.1050 of this chapter.

(ii) *Reporting requirements.* (A) The algal toxicity test for *N,N*-dimethylaniline and 2,6-dimethylphenol shall be completed and the final reports submitted to EPA within 12 months of the effective date in paragraph (f) of this section.

(B) Progress reports shall be submitted to EPA every 6 months beginning 6 months after the effective date in paragraph (f) of this section until the final report is submitted.

(2) *Invertebrate acute toxicity* — (i) *Required testing.* (A) Daphnid acute toxicity tests shall be conducted with *N,N*-dimethyaniline and 2,6-dimethylphenol in accordance with § 797.1300 of this chapter.

(B) Mysid shrimp acute toxicity tests shall be conducted with *N,N*-dimethylaniline in accordance with § 797.1930 of this chapter.

(ii) *Reporting requirements.* (A) Invertebrate acute toxicity testing shall be conducted and the final reports submitted to EPA within 12 months after the effective date in paragraph (f) of this section.

(B) Progress reports shall be submitted to EPA every 6 months beginning 6 months after the effective date in paragraph (f) of this section until the final report is submitted.

(3) *Invertebrate chronic toxicity testing* —(i) Required testing. (A) Daphnid chronic toxicity tests shall be conducted with *N,N*-dimethylaniline and 2,6-dimethylphenol in accordance with § 797.1330 of this chapter.

(B) Mysid shrimp chronic toxicity tests shall be conducted with *N,N*-dimethylaniline in accordance with § 797.1950 of this chapter.

(ii) *Reporting requirements.* (A) Invertebrate chronic toxicity testing shall be conducted and the final reports submitted to EPA within 24 months after the effective date in paragraph (f) of this section.

(B) Progress reports shall be submitted to EPA every 6 months beginning 6 months after the effective date in paragraph (f) of this section until the final report is submitted.

(4) *Fish chronic toxicity* —(i) *Required testing.* Fish early life stage toxicity tests shall be conducted with fathead minnows with *N,N*-dimethylaniline and 2,6-dimethylphenol, and sheepshead minnows with *N,N*-dimethylaniline, in accordance with § 797.1600 of this chapter.

(ii) *Reporting requirements.* (A) Fish early life stage toxicity tests shall be completed and the final reports submitted to EPA within 12 months of the effective date in paragraph (f) of this section.

(B) Progress reports shall be submitted to EPA every 6 months beginning 6 months after the effective date in paragraph (f) of this section until the final report is submitted.

(e) *Chemical fate*—(1) *Biodegradation in natural surface waters* —(i) *Required testing.* (A) Biodegradation testing in natural surface waters shall be conducted with 2,6-dimethylphenol.

(B) The testing shall be conducted in accordance with the test procedure specified in the American Society for Testing and Materials (ASTM) test method, entitled "Standard Test Method for Biodegradation By a Shake-Flask DieAway Method, Designation: E 1279–89," published in the Annual Book of ASTM Standards, March 1989, Philadelphia, Pa., which is incorporated by reference. Copies of this test method are available in the TSCA Nonconfidential Information Center, East Tower, Rm. G–102, 401 M St., SW., Washington, DC 20460. This test method is also available for inspection at the Office of the Federal Register, 800 North Capital St., Suite 700, Washington, DC. 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. This method is incorporated as it exists on the date of approval and a notice of any changes to the method will be published in the **Federal Register**.

(ii) *Reporting requirements.* (A) The biodegradation test in natural surface waters shall be completed and the final reports submitted to EPA within 12 months of the effective date in paragraph (f) of this section.

(B) Progress reports shall be submitted to EPA every 6 months beginning 6 months after the effective date in paragraph (f) of this section until the final report is submitted.

(2) *Biodegradation in activated sludge* — (i) *Required testing.* Biodegradation testing in activated sludge shall be conducted with *N,N*-dimethylaniline in accordance with § 796.3340 of this chapter.

(ii) *Reporting requirements.* (A) The biodegradation test in activated sludge shall be completed and the final report submitted to EPA within 12 months of the effective date in paragraph (f) of this section.

(B) Progress reports shall be submitted to EPA every 6 months beginning 6 months after the effective date in paragraph (f) of this section until the final report is submitted.

(3) *Anaerobic biodegradation* — (i) *Required testing.* Anaerobic biodegradation testing shall be conducted with *N,N*-dimethylaniline and 2,6-dimethylphenol in accordance with § 796.3140 of this chapter.

(ii) *Reporting requirements.* (A) The required anaerobic biodegradation testing shall be completed and the final report submitted to EPA within 12 months of the effective date in paragraph (f) of this section.

(B) Progress reports shall be submitted to EPA every 6 months beginning 6 months after the effective date in

paragraph (f) of this section until the final report is submitted.

(4) *Photolysis*—(i) *Required testing.* Aqueous photolysis testing shall be conducted on 2,6-dimethylphenol in accordance with § 795.70 of this chapter.

(ii) *Reporting requirements.* (A) The required aqueous photolysis testing shall be completed and the final report submitted to EPA within 12 months of the effective date in paragraph (f) of this section.

(B) Progress reports shall be submitted to EPA every 6 months beginning 6 months after the effective date in paragraph (f) of this section until the final report is submitted.

(f) *Effective date.* This test guideline is effective (44 days after publication of the final rule in the **Federal Register**).

[FR Doc. 93–28614 Filed 11–19–93; 8:45 am]

BILLING CODE 6560–50–F

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 93–279, RM–8368]

Radio Broadcasting Services; Cal-Nev-Ari, NV

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by Richard W. Myers seeking the allotment of Channel 285A to Cal-Nev-Ari, Nevada, as its first local aural transmission service. Channel 285A can be allotted to Cal-Nev-Ari in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.6 kilometers (1.6 miles) southeast, at coordinates North Latitude 35–17–12 and West Longitude 114–51–57, to avoid a short-spacing to Station KJUL, Channel 282C, North Las Vegas, Nevada. The petitioner is requested to provide further information to demonstrate that Cal-Nev-Ari is a community for allotment purposes. Concurrence by the Mexican Government is required because Cal-Nev-Ari is located within 320 kilometers (199 miles) of the U.S.-Mexican border.

DATES: Comments must be filed on or before January 3, 1994, and reply comments on or before January 18, 1994.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Peter Tannenwald, Esq., Kathleen L. Franco, Esq., Arent Fox Kintner Plotkin & Kahn, 1050 Connecticut Avenue NW., Washington, DC 20036–5339 (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. 93–279, adopted October 20, 1993, and released November 12, 1993. 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, DC. 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, DC 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.

Victoria M. McCauley,

Assistant Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 93–28546 Filed 11–19–93; 8:45 am]

BILLING CODE 6712–01–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 651

[Docket No. 931076–3276; I.D. 100193A]

RIN 0648–AD33

Northeast Multispecies Fishery; Correction

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

ACTION: Proposed rule; request for comments; correction.

SUMMARY: This document corrects a proposed rule published on October 27, 1993 (58 FR 57774), which is related to Amendment 5 to the Fishery Management Plan for the Northeast Multispecies Fishery (FMP). This document corrects Figure 2 of the proposed rule to depict Closed Areas properly.

EFFECTIVE DATES: November 22, 1993.

FOR FURTHER INFORMATION CONTACT: John G. Terrill, Fishery Policy Analyst, Northeast Regional Office, 508–281–9252.

The publication on October 27, 1993, of the proposed rule, which was the subject of FR Doc. 93–26251, is corrected as follows:

On page 57801, in Figure 2: Closed Areas, "Closed Area I" should read "Closed Area II", and "Closed Area II" should read "Closed Area I". A corrected Figure 2 appears below.

Dated: November 16, 1993.

Samuel W. McKeen,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

BILLING CODE 3510–22–M

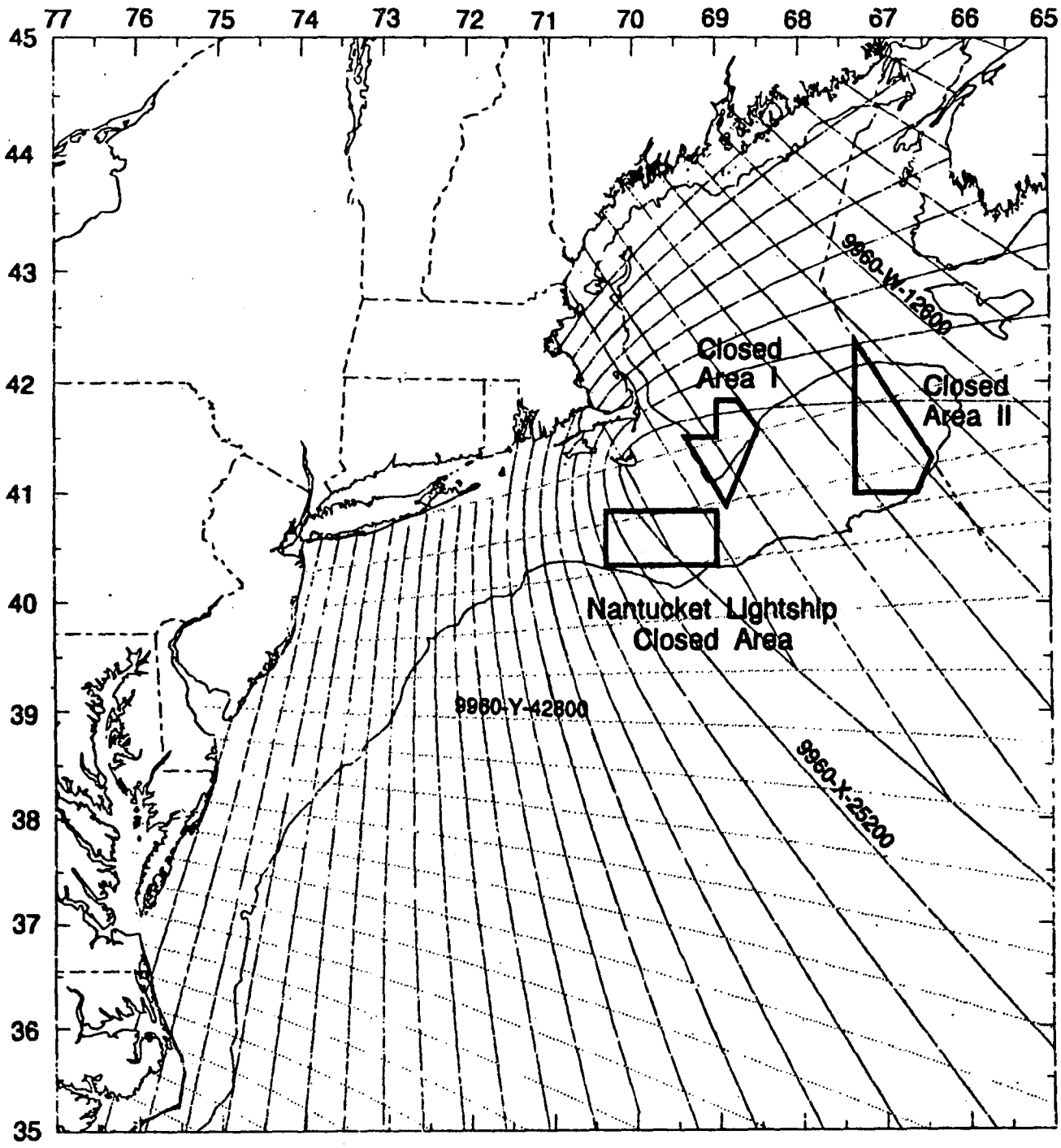

Figure 2: Closed Areas

[FR Doc. 93-28567 Filed 11-19-93; 8:45 am]
BILLING CODE 3510-22-C

Notices

Federal Register
Vol. 58, No. 223
Monday, November 22, 1993

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

Rural Telephone Bank

Determination of the 1993 Fiscal Year; Interest Rates on Rural Telephone Bank Loans; Correction

AGENCY: Rural Telephone Bank, USDA.

ACTION: Correction.

SUMMARY: In notice document 93-27189 beginning on page 58835 in the issue of Thursday, November 4, 1993, make the following correction:

On page 58837 in Table 1b.—Financing Account Rural Telephone Bank Cost of Money Rate—Continued, under Source of bank funds, the first line previously read "Excess of total advances over 1992 issuances". This should be changed to read "Excess of total advances over FY 1993 issuances".

Dated: November 17, 1993.

Robert Peters,

Acting Governor, Rural Telephone Bank.

[FR Doc 93-28625 Filed 11-19-93; 8:45 am]

BILLING CODE 3410-15-F

U.S. COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Arizona, California, New Mexico, and Texas Advisory Committees

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a meeting of the Chairpersons of the Arizona, California, New Mexico and Texas Advisory Committees to the Commission will convene at 9 a.m. and adjourn 2 p.m. on Saturday, December 18, 1993 at the Hyatt Regency Hotel, 330 Tierjas, Albuquerque, New Mexico 87102. The purpose of the meeting is to discuss the four-state immigration project with State Advisory Chairs.

Persons desiring additional information, or planning a presentation to the Committee, should contact Philip Montez, Director of the Western Regional Office, 213-894-3437 (TDD 213-894-0508). Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Regional Office at least five (5) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, November 12, 1993.

Carol-Lee Hurley

Chief, Regional Programs Coordination Unit

[FR Doc. 93-28574 Filed 11-19-93; 8:45 am]

BILLING CODE 6335-01-P

DEPARTMENT OF COMMERCE

Bureau of Export Administration

Sensors Technical Advisory Committee; Partially Closed Meeting

A meeting of the Sensors Technical Advisory Committee will be held December 10, 1993, 9 a.m., in the Herbert C. Hoover Building, room 1617M(2), 14th Street & Pennsylvania Avenue, NW., Washington, DC. The Committee advises the Office of Technology and Policy Analysis with respect to technical questions that affect the level of export controls applicable to sensors and related equipment and technology.

Agenda

General Session

1. Opening remarks by the Chairman.
2. Presentation of papers or comments by the public.
3. Discussion of export controls affecting sensors & lasers.

Executive Session

4. Discussion of matters properly classified under Executive Order 12356, dealing with the U.S. and COCOM control program and strategic criteria related thereto.

The General Session of the meeting will be open to the public and a limited number of seats will be available. To the extent that time permits, members of the public may present oral statements to the Committee. Written statements may be submitted at any time before or after the meeting. However, to facilitate distribution of public presentation materials to the Committee members, the Committee suggests that presenters forward the public presentation materials two weeks prior to the meeting date to the following address: Ms. Lee Ann Carpenter, EA/OAS—Room 3886C, Bureau of Export Administration, U.S. Department of Commerce, Washington, DC 20230.

The Assistant Secretary for Administration, with the concurrence of the General Counsel, formally determined on February 5, 1992, pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, that the series of meetings of the Committee and of any Subcommittees thereof, dealing with the classified materials listed in 5 U.S.C., 552b(c)(1) shall be exempt from the provisions relating to public meetings found in section 10(a)(1) and (a)(3), of the Federal Advisory Committee Act. The remaining series of meetings or portions thereof will be open to the public.

A copy of the Notice of Determination to close meetings or portions of meetings of the Committee is available for public inspection and copying in the Central Reference and Records Inspection Facility, room 6020, U.S. Department of Commerce, Washington, DC 20230. For further information or copies of the minutes, contact Lee Ann Carpenter on (202) 482-2583.

Dated: November 16, 1993.

Betty A. Ferrell,

Director, Technical Advisory Committee Unit.

[FR Doc. 93-28631 Filed 11-19-93; 8:45 am]

BILLING CODE 3510-DT-M

International Trade Administration

[C-508-064]

Roses From Israel; Determination not to Revoke Countervailing Duty Order

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of determination not to revoke countervailing duty order.

SUMMARY: The Department of Commerce is notifying the public of its determination not to revoke the countervailing duty order on roses from Israel.

EFFECTIVE DATE: November 22, 1993.

FOR FURTHER INFORMATION CONTACT: Brian Albright or Maria MacKay, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 482–4406 or 482–2786.

SUPPLEMENTARY INFORMATION:

Background

On September 2, 1993, the Department of Commerce (the Department) published in the **Federal Register** (58 FR 46629) its intent to revoke the countervailing duty order on roses from Israel (45 FR 58516; September 4, 1980). Under 19 CFR 355.25(d)(4)(iii), the Secretary of Commerce will conclude that an order is no longer of interest to interested parties and will revoke the order if no domestic interested party objects to revocation or no interested party requests an administrative review by the last day of the fifth anniversary month.

On September 28, 1993, The Floral Trade Council and Roses, Inc., petitioners in the original investigation, objected to our intent to revoke the order. Because the requirements of 19 CFR 355.25(d)(4)(iii) have not been met, we will not revoke the order.

This determination is in accordance with 19 CFR 355.25(d)(4).

Dated: November 16, 1993.

Roland L. MacDonald,

Acting Deputy Assistant Secretary for Compliance.

[FR Doc. 93–28632 Filed 11–19–93; 8:45 am]

BILLING CODE 3510–DS–P

[C–614–601]

Steel Wire From New Zealand; Determination Not To Revoke Countervailing Duty Order

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of determination not to revoke countervailing duty order.

SUMMARY: The Department of Commerce is notifying the public of its determination not to revoke the countervailing duty order on steel wire from New Zealand.

EFFECTIVE DATE: November 22, 1993.

FOR FURTHER INFORMATION CONTACT: Sarah Givens or Maria MacKay, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 482–4406 or 482–2786.

SUPPLEMENTARY INFORMATION:

Background

On September 2, 1993, the Department of Commerce (the Department) published in the **Federal Register** (58 FR 46629) its intent to revoke the countervailing duty order on steel wire from New Zealand (51 FR 31156; September 2, 1986). Under 19 CFR 355.25(d)(4)(iii), the Secretary of Commerce will conclude that an order is no longer of interest to interested parties and will revoke the order if no domestic interested party objects to revocation or no interested party requests an administrative review by the last day of the fifth anniversary month.

On October 1, 1993, Davis Wire Corporation and Leggett & Platt, Inc., domestic producers, objected to our intent to revoke the order. Because the requirements of 19 CFR 355.25(d)(4)(iii) have not been met, we will not revoke the order.

This determination is in accordance with 19 CFR 355.25(d)(4).

Dated: November 16, 1993.

Roland L. MacDonald,

Acting Deputy Assistant Secretary for Compliance.

[FR Doc. 93–28633 Filed 11–19–93; 8:45 am]

BILLING CODE 3510–DS–P

Export Trade Certificate of Review

AGENCY: International Trade Administration, Commerce.

ACTION: Notice of initiation of process to revoke export trade certificate of review No. 84–00011.

SUMMARY: The Secretary of Commerce issued an export trade certificate of review to Watsand International Ltd. Because this certificate holder has failed to file an annual report as required by law, the Department is initiating proceedings to revoke the certificate. This notice summarizes the notification letter sent to Watsand International Ltd.

FOR FURTHER INFORMATION CONTACT: Friedrich R. Crupe, Acting Director, Office of Export Trading Company Affairs, International Trade Administration, 202/482–5131. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 ("the Act") [15 U.S.C. 4011–21] authorized the Secretary of Commerce to issue export trade certificates of review. The regulations implementing Title III ["the Regulations"] are found at 15 CFR part 325. Pursuant to this authority, a certificate of review was issued on May 25, 1984 to Watsand International Ltd.

A certificate holder is required by law (Section 308 of the Act, 15 U.S.C. 4018) to submit to the Department of Commerce annual reports that update financial and other information relating to business activities covered by its certificate. The annual report is due within 45 days after the anniversary date of the issuance of the certificate of review [§§ 325.14 (a) and (b) of the Regulations]. Failure to submit a complete annual report may be the basis for revocation. [§§ 325.10(a) and 325.14(c) of the Regulations].

The Department of Commerce sent to Watsand International Ltd. on May 14, 1993, a letter containing annual report questions with a reminder that its annual report was due on July 9, 1993. Additional reminders were sent on July 13, 1993, and on August 13, 1993. The Department has received no written response to any of these letters.

On November 17, 1993, and in accordance with § 325.10 (c)(2) of the Regulations, a letter was sent by certified mail to notify Watsand International Ltd. that the Department was formally initiating the process to revoke its certificate. The letter stated that this action is being taken for the certificate holder's failure to file an annual report.

In accordance with § 325.10(c)(2) of the Regulations, each certificate holder has thirty days from the day after its receipt of the notification letter in which to respond. The certificate holder is deemed to have received this letter as of the date on which this notice is published in the **Federal Register**. For good cause shown, the Department of Commerce can, at its discretion, grant a thirty-day extension for a response.

If the certificate holder decides to respond, it must specifically address the Department's statement in the notification letter that it has failed to file an annual report. It should state in detail why the facts, conduct, or circumstances described in the notification letter are not true, or if they are, why they do not warrant revoking the certificate. If the certificate holder does not respond within the specified period, it will be considered an admission of the statements contained in the notification letter (§ 325.10(c)(2) of the Regulations).

If the answer demonstrates that the material facts are in dispute, the Department of Commerce and the Department of Justice shall, upon request, meet informally with the certificate holder. Either Department may require the certificate holder to provide the documents or information that are necessary to support its

contentions (§ 325.10(c)(3) of the Regulations).

The Department shall publish a notice in the **Federal Register** of the revocation or modification or a decision not to revoke or modify (§ 325.10(c)(4) of the Regulations). If there is a determination to revoke a certificate, any person aggrieved by such final decision may appeal to an appropriate U.S. district court within 30 days from the date on which the Department's final determination is published in the **Federal Register** (§§ 325.10(c)(4) and 325.11 of the Regulations).

Dated: November 17, 1993.

Friedrich R. Crupe,

Acting Director, Office of Export Trading Company Affairs.

[FR Doc. 93-28634 Filed 11-19-93; 8:45 am]

BILLING CODE 3510-DR-P

U.S. Department of Agriculture, et al.; Notice of Consolidated Decision on Applications for Duty-Free Entry of Electron Microscopes

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 a.m. and 5 p.m. in room 4211, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

Docket Number: 93-106. *Applicant:* U.S. Department of Agriculture, Delaware, OH 43015. *Instrument:* Electron Microscope, Model JEM-1010. *Manufacturer:* JEOL Ltd., Japan. *Intended Use:* See notice at 58 FR 49023, September 21, 1993. *Order Date:* June 29, 1993.

Docket Number: 93-110. *Applicant:* University of Pennsylvania, Philadelphia, PA 19104-4268. *Instrument:* Electron Microscope, Model CM 100. *Manufacturer:* Philips, The Netherlands. *Intended Use:* See notice at 58 FR 49024, September 21, 1993. *Order Date:* July 1, 1993.

Docket Number: 93-111. *Applicant:* Medical College of Georgia, Augusta, GA 30912. *Instrument:* Electron Microscope, Model CM 100. *Manufacturer:* Philips, The Netherlands. *Intended Use:* See notice at 58 FR 49024, September 21, 1993. *Order Date:* May 24, 1993.

Comments: None received. *Decision:* Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as these instruments are intended to be used, was being manufactured in the United States at the time the instruments were ordered. *Reasons:* Each foreign instrument is a conventional transmission electron microscope (CTEM) and is intended for research or scientific educational uses requiring a CTEM. We know of no CTEM, or any other instrument suited to these purposes, which was being manufactured in the United States either at the time of order of each instrument or at the time of receipt of application by the U.S. Customs Service.

Frank W. Creel

Director, Statutory Import Programs Staff

[FR Doc. 93-28635 Filed 11-19-93; 8:45 am]

BILLING CODE 3510-DS-F

Minority Business Development Agency

Business Development Center Applications: Cincinnati, Ohio—Kentucky—Indiana MSA (Service Area)

AGENCY: Minority Business Development Agency, DOC.

ACTION: Notice.

SUMMARY: In accordance with Executive Order 11625 and 15 U.S.C. 1512, the Minority Business Development Agency (MBDA) is soliciting competitive applications under its Minority Business Development Center (MBDC) program. The total cost of performance for the first budget period (12 months) from May 1, 1994 to April 30, 1995 is estimated at $198,971. The application must include a minimum cost-share of 15% of the total project cost through non-Federal contributions. Cost-sharing contributions may be in the form of cash contributions, client fees, in-kind contributions or combinations thereof. The MBDC will operate in the Cincinnati, Ohio—Kentucky—Indiana geographic service area. The award number of this MBDC will be 05-10-94005-01.

The funding instrument for this project will be a cooperative agreement. Competition is open to individuals, non-profit and for-profit organizations, state and local governments, American Indian tribes and educational institutions.

The MBDC program provides business development services to the minority business community to help establish and maintain viable minority businesses. To this end, MBDA funds organizations to identify and coordinate public and private sector resources on behalf of minority individuals and firms; to offer a full range of management and technical assistance to minority entrepreneurs; and to serve as a conduit of information and assistance regarding minority business.

Applications will be evaluated on the following criteria: the experience and capabilities of the firm and its staff in addressing the needs of the business community in general and, specifically, the special needs of minority businesses, individuals and organizations (50 points); the resources available to the firm in providing business development services (10 points); the firm's approach (techniques and methodologies) to performing the work requirements included in the application (20 points); and the firm's estimated cost for providing such assistance (20 points). An application must receive at least 70% of the points assigned to each evaluation criteria category to be considered programmatically acceptable and responsive. Those applications determined to be acceptable and responsive will then be evaluated by the Director of MBDA. Final award selections shall be based on the number of points received, the demonstrated responsibility of the applicant, and the determination of those most likely to further the purpose of the MBDA program. Negative audit findings and recommendations and unsatisfactory performance under prior Federal awards may result in an applicant not being considered for award. The applicant with the highest point score will not necessarily receive the award.

MBDCs shall be required to contribute at least 15% of the total project cost through non-Federal contributions. To assist in this effort, the MBDCs may charge client fees for management and technical assistance (M&TA) rendered. Based on a standard rate of $50 per hour, the MBDC will charge client fees at 20% of the total cost for firms with gross sales of $500,000 or less, and 35% of the total cost for firms with gross sales of over $500,000.

Quarterly reviews culminating in year-to-date evaluations will be conducted to determine if funding for the project should continue. Continued funding will be at the total discretion of MBDA based on such factors as the MBDC's performance, the availability of funds and Agency priorities.

DATES: The closing date for applications is January 3, 1994. Applications must be postmarked on or before January 3, 1994.

ADDRESSES: Chicago Regional Office, 55 E. Monroe Street, Suite 1440, Chicago, Illinois 60603, (312) 353-0182.

FOR FURTHER INFORMATION CONTACT: David Vega, Regional Director, Chicago

Regional Office, telephone (312) 353–0182.

SUPPLEMENTARY INFORMATION: Anticipated processing time of this award is 120 days. Executive order 12372, "Intergovernmental Review of Federal Programs," is not applicable to this program. The collection of information requirements for this project have been approved by the Office of Management and Budget (OMB) and assigned OMB control number 0640–0006. A pre-bid conference will be held on December 10, 1993, at 10 a.m. at the Chicago Regional Office. Questions concerning the preceding information can be answered by the contact person indicated above, and copies of application kits and applicable regulations can be obtained at the above address.

Pre-Award Costs

Applicants are hereby notified that if they incur any costs prior to an award being made, they do so solely at their own risk of not being reimbursed by the Government.

Notwithstanding any verbal assurance that an applicant may have received, there is no obligation on the part of the Department of Commerce to cover pre-award cost. Awards under this program shall be subject to all Federal laws, and Federal and Departmental regulations, policies, and procedures applicable to Federal financial assistance awards.

Outstanding Account Receivable

No award of Federal funds shall be made to an applicant who has an outstanding delinquent Federal debt until either the delinquent account is paid in full, repayment schedule is established and at least one payment is received, or other arrangements satisfactory to the Department of Commerce are made.

Name Check Policy

All non-profit and for-profit applicants are subject to a name check review process. Name checks are intended to reveal if any key individuals associated with the applicant have been convicted of or are presently facing charges such as fraud, theft, perjury or other matters which significantly reflect on the applicant's management honesty or financial integrity.

Award Termination

The Departmental Grants Officer may terminate any grant/cooperative agreement in whole or in part at any time before the date of completion whenever it is determined that the award recipient has failed to comply with the conditions of the grant/cooperative agreement. Examples of some of the conditions which may cause termination are failure to meet cost-sharing requirements; unsatisfactory performance of the MBDC work requirements; and reporting inaccurate or inflated claims of client assistance. Such inaccurate or inflated claims may be deemed illegal or punishable by law.

False Statements

A false statement on an application for Federal financial assistance is grounds for denial or termination of funds, and grounds for possible punishment by a fine or imprisonment as provided in 18 U.S.C. 1001.

Primary Applicant Certifications

All primary applicants must submit a completed Form CD–511, "Certifications Regarding Debarment, Suspension and Other Responsibility Matters; Drug-Free Workplace Requirements and Lobbying."

Nonprocurement Debarment and Suspension

Prospective participants (as defined at 15 CFR part 26, section 105) are subject to 15 CFR part 26, "Nonprocurement Debarment and Suspension" and the related section of the certification form prescribed above applies.

Drug Free Workplace

Grantees (as defined at 15 CFR part 26, section 605) are subject to 15 CFR part 26, subpart F, "Governmentwide Requirements for Drug-Free Workplace (Grants)" and the related section of the certification form prescribed above applies.

Anti-Lobbying

Persons (as defined at 15 CFR part 28, section 105) are subject to the lobbying provisions of 31 U.S.C. 1352, "Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions," and the lobbying section of the certification from prescribed above applies to applications/bids for grants, cooperative agreements, and contracts for more than $100,000.

Anti-Lobbying Disclosures

Any applicant that has paid or will pay for lobbying using any funds must submit an SF–LLL, "Disclosure of Lobbying Activities," as required under 15 CFR part 28, appendix B.

Lower Tier Certifications

Recipients shall require applications/bidders for subgrants, contracts, subcontracts, or other lower tier covered transactions at any tier under the award to submit, if applicable, a completed Form CD–512, "Certifications Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions and Lobbying" and disclosure form, SF–LLL, "Disclosure of Lobbying Activities." Form CD–512 is intended for the use of recipients and should not be transmitted to DOC. SF–LLL submitted by any tier recipient or subrecipient should be submitted to DOC in accordance with the instructions contained in the award document.

11.800 Minority Business Development

(Catalog of Federal Domestic Assistance)

Dated: November 16, 1993.

David Vega,

Regional Director, Chicago Regional Office.

[FR Doc. 93–28587 Filed 11–19–93; 8:45 am]

BILLING CODE 3510–21–M

National Oceanic and Atmospheric Administration

Marine Mammals

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Modification to permit No. 625 (P407).

SUMMARY: Notice is hereby given that Permit No. 625, issued to the Hyatt Regency Waikoloa Resort, Waikoloa, Hawaii, has been modified.

ADDRESSES: Documents submitted in connection with the above modification are available for review by appointment in the following offices:

Office of Protected Resources, NMFS, 1315 East-West Highway, room 13130, Silver Spring, MD 20910 (301/713–2289); and

Director, Southwest Region, NMFS, 501 West Ocean Boulevard, suite 4200, Long Beach, CA 90802–4213 (310/980–4015).

SUPPLEMENTARY INFORMATION: Notice is hereby given that pursuant to the provisions of § 216.33 (d) and (e) of the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216), public display permit No. 625, issued to the Hyatt Regency Waikoloa Resort, Waikoloa, Hawaii, is modified by deleting the first paragraph and substituting the following:

Subject to the provisions of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361–1407), the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216) and the conditions hereinafter set out, the Hyatt Regency Waikoloa Resort, Waikoloa, HI 96743, and Dolphin Quest,

Inc., 20 West 1st Street #208, Mesa, AZ 85201, are hereby authorized to maintain the indefinite care and custody for public display purposes of the marine mammals currently held in the facility operated by Dolphin Quest at the Hilton Waikoloa Village.

All general and special conditions currently contained in the permit remain in effect. This modification becomes effective upon publication in the Federal Register.

Dated: November 15, 1993.

William W. Fox, Jr.,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 93-28577 Filed 11-19-93; 8:45 am]

BILLING CODE 3510-22-M

Patent and Trademark Office

[Docket No. 931194-3294]

Request for Information Regarding Process Patent Amendments Made by the Omnibus Trade and Competitiveness Act of 1988

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Notice.

SUMMARY: The Patent and Trademark Office is requesting information from domestic industries regarding possible adverse effects of the process patent amendments made by the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100-418). This information will be useful in preparing a report to Congress as required by the Act.

DATES: Comments must be received on or before January 31, 1994.

FOR FURTHER INFORMATION CONTACT: Documents and questions should be submitted to H. Dieter Hoinkes, Office of Legislation and International Affairs, Box 4, Patent and Trademark Office, Washington, DC 20231. Telephone at (703) 305-9300.

SUPPLEMENTARY INFORMATION: The Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100-418) was enacted on August 23, 1988. Among other things, the Act amended title 35, United States Code, to extend the protection of a process patented in the United States also to products made by that process. As a consequence, whoever without authority imports into the United States, or sells or uses in this country, a product made by a patented process shall be liable as an infringer, if the importation, sale or use occurs during the term of the process patent. (Sections 9002 and 9003 of Pub. L. 100-418). The effective date of that amendment was February 23, 1989.

Section 9007 of the Act requires the Secretary of Commerce to report to the Congress, at the end of each one-year period from the effective date of the above amendments, on the effect of these amendments on those domestic industries that submitted complaints during such period, alleging that their legitimate sources of supply have been adversely affected. Such reports must be submitted for five successive years.

The fifth and last report from the Secretary of Commerce to the Congress will be submitted on February 23, 1994, covering the preceding one-year period. Accordingly, it is requested that domestic industries wishing their complaints reflected in the Secretary's report ensure that any submission on this subject is received by the Department of Commerce not later than January 31, 1994.

Dated: November 5, 1993.

Michael K. Kirk,

Acting Assistant Secretary of Commerce and Acting Commissioner of Patents and Trademarks.

[FR Doc. 93-28556 Filed 11-19-93; 8:45 am]

BILLING CODE 3510-16-M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjustment of Import Limits for Certain Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textiles and Textile Products Produced or Manufactured in China

November 16, 1993.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs adjusting limits.

EFFECTIVE DATE: November 17, 1993.

FOR FURTHER INFORMATION CONTACT: Janet Heinzen, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 927-6703. For information on embargoes and quota re-openings, call (202) 482-3715.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The current limits for certain categories are being adjusted for swing.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 57 FR 54976, published on November 23, 1992). Also see 57 FR 62304, published on December 30, 1992.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

November 16, 1993.

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on December 23, 1992, by the Acting Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, wool, man-made fiber, silk blend and other vegetable fiber textiles and textile products, produced or manufactured in China and exported during the twelve-month period which began on January 1, 1993 and extends through December 31, 1993.

Effective on November 17, 1993, you are directed to amend further the directive dated December 23, 1992 to adjust the limits for the following categories, as provided under the terms of the current bilateral agreement between the Governments of the United States and the People's Republic of China:

Category	Adjusted twelve-month limit [1]
Levels not in a group	
200	631,163 kilograms.
219	1,446,517 square meters.
300/301	2,873,910 kilograms.
317/326	19,465,235 square meters.
333	35,511 dozen.
345	136,691 dozen.
350	152,771 dozen.
359-C [2]	316,527 kilograms.
363	30,553,231 numbers.
369-D [3]	4,480,022 kilograms.
369-H [4]	3,091,941 kilograms.
410	1,758,533 square meters of which not more than 1,569,975 square meters shall be in Category 410-A [5] and not more than 1,569,975 square meters shall be in Category 410-B [6].

Category	Adjusted twelve-month limit [1]
434	13,392 dozen.
440	39,361 dozen of which not more than 22,491 dozen shall be in Category 440–M [7].
631	1,206,258 dozen pairs.
636	526,465 dozen.
638/639	2,434,499 dozen.
640	1,453,233 dozen.
641	1,044,944 dozen.
645/646	857,721 dozen.
647	1,111,437 dozen.
648	940,118 dozen.
651	722,902 dozen of which not more than 124,619 dozen shall be in Category 651–B [8].
652	1,796,529 dozen.
659–C [9]	309,733 kilograms.
669–P [10]	1,892,957 kilograms.
842	195,851 dozen.
846	86,956 dozen.
847	1,156,617 dozen.
Group III	
201, 220, 222–225, 227, 229, 362, 369–O [11], 400, 414, 464–469, 600, 603, 604–O [12], 606, 618–622, 624–627, 628, 629, 665, 666, 669–O [13], 670–O [14], as a group.	354,451,524 square meters equivalent.
Group IV	
832, 834, 836–839, 644/844, 850–852, 858 and 859, as a group.	28,196,961 square meters equivalent.

[1] The limits have not been adjusted to account for any imports exported after December 31, 1992.

[2] Category 359–C: only HTS numbers 6103.42.2025, 6103.49.3034, 6104.62.1020, 6104.69.3010, 6114.20.0048, 6114.20.0052, 6203.42.2010, 6203.42.2090, 6204.62.2010, 6211.32.0010, 6211.32.0025 and 6211.42.0010.

[3] Category 369–D: only HTS numbers 6302.60.0010, 6302.91.0005 and 6302.91.0045.

[4] Category 369–H: only HTS numbers 4202.22.4020, 4202.22.4500 and 4202.22.8030.

[5] Category 410–A: only HTS numbers 5111.11.3000, 5111.11.7030, 5111.11.7060, 5111.19.2000, 5111.19.6020, 5111.19.6040, 5111.19.6060, 5111.19.6080, 5111.20.9000, 5111.30.9000, 5111.90.3000, 5111.90.9000, 5212.11.1010, 5212.12.1010, 5212.13.1010, 5212.14.1010, 5212.15.1010, 5212.21.1010, 5212.22.1010, 5212.23.1010, 5212.24.1010, 5212.25.1010, 5311.00.2000, 5407.91.0510, 5407.92.0510, 5407.93.0510, 5407.94.0510, 5408.31.0510, 5408.32.0510, 5408.33.0510, 5408.34.0510, 5515.13.0510, 5515.22.0510, 5515.92.0510, 5516.31.0510, 5516.32.0510, 5516.33.0510, 5516.34.0510 and 6301.20.0020.

[6] Category 410–B: only HTS numbers 5007.10.6030, 5007.90.6030, 5112.11.2030, 5112.11.2060, 5112.19.9010, 5112.19.9020, 5112.19.9030, 5112.19.9040, 5112.19.9050, 5112.19.9060, 5112.20.3000, 5112.30.3000, 5112.90.3000, 5112.90.9010, 5112.90.9090, 5212.11.1020, 5212.12.1020, 5212.13.1020, 5212.14.1020, 5212.15.1020, 5212.21.1020, 5212.22.1020, 5212.23.1020, 5212.24.1020, 5212.25.1020, 5309.21.2000, 5309.29.2000, 5407.91.0520, 5407.92.0520, 5407.93.0520, 5407.94.0520, 5408.31.0520, 5408.32.0520, 5408.33.0520, 5408.34.0520, 5515.13.0520, 5515.22.0520, 5515.92.0520, 5516.31.0520, 5516.32.0520, 5516.33.0520 and 5516.34.0520.

[7] Category 440–M: HTS numbers 6203.21.0030, 6203.23.0030, 6205.10.1000, 6205.10.2010, 6205.10.2020, 6205.30.1510, 6205.30.1520, 6205.90.2020, 6295.90.4020 and 6211.31.0030.

[8] Category 651–B: only HTS numbers 6107.22.0015 and 6108.32.0015.

[9] Category 659–C: only HTS numbers 6103.23.0055, 6103.43.2020, 6103.43.2025, 6103.49.2000, 6103.49.3038, 6104.63.1020, 6104.63.1030, 6104.69.1000, 6104.69.3014, 6114.30.3044, 6114.30.3054, 6203.43.2010, 6203.43.2090, 6203.49.1010, 6203.49.1090, 6204.63.1510, 6204.69.1010, 6210.10.4015, 6211.33.0010, 6211.33.0017 and 6211.43.0010.

[10] Category 669–P: only HTS numbers 6305.31.0010, 6305.31.0020 and 6305.39.0000.

[11] Category 369–O: all HTS numbers except 6302.60.0010, 6302.91.0005 and 6302.91.0045 (Category 369–D); 4202.22.4020, 4202.22.4500, 4202.22.8030 (Category 369–H); 4202.12.4000, 4202.12.8020, 4202.12.8060, 4202.92.1500, 4202.92.3015, 4202.92.6090 (Category 369–L); and 6307.10.2005 (Category 369–S).

[12] Category 604–O: all HTS numbers except 5509.32.0000 (Category 604–A).

[13] Category 669–O: all HTS numbers except 6305.31.0010, 6305.31.0020 and 6305.39.0000 (Category 669–P).

[14] Category 670–O: only HTS numbers 4202.22.4030, 4202.22.8050 and 4202.32.9550.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 93–28626 Filed 11–19–93; 8:45 am]

BILLING CODE 3510–DR–F

Increase of Guaranteed Access Levels for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Guatemala

November 16, 1993.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs increasing guaranteed access levels.

EFFECTIVE DATE: November 23, 1993.

FOR FURTHER INFORMATION CONTACT: Nicole Bivens Collinson, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these levels, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 927–5850. For information on embargoes and quota re-openings, call (202) 482–3715.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The United States Government has agreed to increase the 1993 Guaranteed Access Levels (GALs) for Categories 340/640 and 347/348.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 57 FR 54976, published on November 23, 1992). Also see 57 FR 59334, published on December 15, 1992; and 57 FR 62306, published on December 30, 1992.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

November 16, 1993.

Commissioner of Customs,
Department of the Treasury, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directives issued to you on December 9, 1992 and December 23, 1992, by the Chairman, Committee for the Implementation of Textile Agreements. Those directives concern imports of certain cotton, wool and man-made fiber textile products, produced or manufactured in Guatemala and exported during the twelve-month period which began on January 1, 1993 and extends through December 31, 1993.

Effective on November 23, 1993, you are directed to increase the current Guaranteed Access Levels (GALs) for the following categories:

Category	Guaranteed access level
340/640	820,000 dozen.
347/348	1,500,000 dozen.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 93-28628 Filed 11-19-93; 8:45 am]

BILLING CODE 3510-DR-F

Announcement of Import Restraint Limits and Guaranteed Access Levels for Certain Cotton Textile Products Produced or Manufactured in Guatemala

November 12, 1993.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs establishing import limits and guaranteed access levels for the new agreement year.

EFFECTIVE DATE: January 1, 1994.

FOR FURTHER INFORMATION CONTACT: Nicole Bivens Collinson, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 927-5850. For information on embargoes and quota re-openings, call (202) 482-3715.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The Bilateral Textile Agreement of July 20, 1993, as amended, between the Governments of the United States and Guatemala establishes limits and guaranteed access levels for certain cotton, wool and man-made fiber textile products for the period beginning on January 1, 1994 and extending through December 31, 1994.

A copy of the current bilateral agreement is available from the Textiles Division, Bureau of Economic and Business Affairs, U.S. Department of State (202) 647-3889.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see Federal Register notice 57 FR 54976, published on November 23, 1992). Information regarding the 1994 CORRELATION will be published in the Federal Register at a later date.

Requirements for participation in the Special Access Program are available in Federal Register notice 51 FR 21208, published on June 11, 1986; 52 FR 26057, published on July 10, 1987; 54 FR 50425, published on December 6, 1989; and 55 FR 3079, published on January 30, 1990.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

November 12, 1993.

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229.

Dear Commissioner: Under the terms of section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854), and the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, as further extended on December 9, 1992; pursuant to the Bilateral Textile Agreement of July 20, 1993, as amended, between the Governments of the United States and Guatemala; and in accordance with the provisions of Executive Order 11651 of March 3, 1972, as amended, you are directed to prohibit, effective on January 1, 1994, entry into the United States for consumption and withdrawal from warehouse for consumption of cotton, wool and man-made fiber textile products in the following categories, produced or manufactured in Guatemala and exported during the period beginning on January 1, 1994 and extending through December 31, 1994, in excess of the following restraint limits:

Category	Twelve-month limit
340/640	1,000,004 dozen.
347/348	1,179,780 dozen.
351/651	212,000 dozen.
448	42,292 dozen.

Imports charged to the category limits for the periods May 28, 1993 through September 30, 1993 and October 1, 1993 through December 31, 1993 (Categories 351/651) and January 1, 1993 through December 31, 1993, shall be charged against those levels of restraint to the extent of any unfilled balances. In the event the limits established for those periods have been exhausted by previous entries, such goods shall be subject to the levels set forth in this directive.

The limits set forth above are subject to adjustment in the future pursuant to the provisions of the current bilateral agreement between the Governments of the United States and Guatemala.

Additionally, pursuant to the Bilateral Textile Agreement of July 20, 1993, as amended, between the Governments of the United States and Guatemala; and the terms of the Special Access Program, as set forth in 51 FR 21208 (June 11, 1986), 52 FR 26057 (July 10, 1987) and 54 FR 50425 (December 6, 1989), effective on January 1, 1994, guaranteed access levels are being established for properly certified textile products assembled in Guatemala from fabric formed and cut in the United States in the following categories which are re-exported to the United States from Guatemala during the period January 1, 1994 through December 31, 1994:

Category	Guaranteed Access Level
340/640	520,000 dozen.
347/348	1,000,000 dozen.
351/651	200,000 dozen.
448	42,000 dozen.

Any shipment for entry under the Special Access Program which is not accompanied by a valid and correct certification and Export Declaration in accordance with the provisions of the certification requirements established in the directive of January 24, 1990, as amended, shall be denied entry unless the Government of Guatemala authorizes the entry and any charges to the appropriate specific limit. Any shipment which is declared for entry under the Special Access Program but found not to qualify shall be denied entry into the United States.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception of the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 93-28627 Filed 11-19-93; 8:45 am]

BILLING CODE 3510-DR-F

Announcement of Import Restraint Limits for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Lesotho

November 16, 1993.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs establishing limits for the new agreement year.

EFFECTIVE DATE: December 1, 1993.

FOR FURTHER INFORMATION CONTACT: Janet Heinzen, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or

call (202) 927–5850. For information on embargoes and quota re-openings, call (202) 482–3715.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The Memorandum of Understanding (MOU) dated July 30, 1993 between the Governments of the United States and the Kingdom of Lesotho establishes limits for the period beginning on December 1, 1993 and extending through November 30, 1994.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 57 FR 54976, published on November 23, 1992). Information regarding the 1994 CORRELATION will be published in the **Federal Register** at a later date.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the MOU, but are designed to assist only in the implementation of certain of its provisions.

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

November 16, 1993.

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229.

Dear Commissioner: Under the terms of section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); and the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, as further extended on December 9, 1992; pursuant to the Memorandum of Understanding (MOU) dated July 30, 1993 between the Governments of the United States and the Kingdom of Lesotho; and in accordance with the provisions of Executive Order 11651 of March 3, 1972, as amended, you are directed to prohibit, effective on December 1, 1993, entry into the United States for consumption and withdrawal from warehouse for consumption of cotton and man-made fiber textile products in the following categories, produced or manufactured in Lesotho and exported during the twelve-month period beginning on December 1, 1993 and extending through November 30, 1994, in excess of the following levels of restraint:

Category	Twelve-month restraint limit
338–B/339–B/638–B/639–B [1].	805,600 dozen.
347/348	397,500 dozen.

[1] Category 338–B: only HTS numbers 6103.22.0050, 6105.10.0010, 6105.10.0030, 6105.90.3010, 6109.10.0027, 6110.20.1025, 6110.20.2065, 6110.90.0068 and 6114.20.0005; Category 339–B: only HTS numbers 6104.22.0060, 6104.29.2049, 6106.10.0010, 6106.10.0030, 6106.90.2010, 6106.90.3010, 6109.10.0070, 6110.20.1030, 6110.20.2075, 6110.90.0070, 6114.20.0010 and 6117.90.0022; Category 638–B: only HTS numbers 6103.23.0075, 6103.29.1050, 6105.20.2010, 6105.20.2030, 6105.90.3030, 6109.90.1049, 6110.30.1050, 6110.30.2050, 6110.30.3050, 6110.90.0076, and 6114.30.1010; Category 639–B: only HTS numbers 6104.23.0036, 6104.29.1050, 6104.29.2055, 6106.20.2010, 6106.20.2030, 6106.90.2030, 6106.90.3030, 6109.90.1090, 6110.30.1060, 6110.30.2060, 6110.30.3055, 6110.90.0078, 6114.30.1020 and 6117.90.0026.

Imports charged to these category limits for the period December 1, 1992 through November 30, 1993 shall be charged against those levels of restraint to the extent of any unfilled balances. In the event the limits established for that period have been exhausted by previous entries, such goods shall be subject to the levels set forth in this directive.

The limits set forth above are subject to adjustment in the future pursuant to the provisions of the MOU dated July 30, 1993 between the Governments of the United States and the Kingdom of Lesotho.

In carrying out the above directions, the Commissioner of Customs should construe entry into the United States for consumption to include entry for consumption into the Commonwealth of Puerto Rico.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception of the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 93–28629 Filed 11–19–93; 8:45 am]

BILLING CODE 3510–DR–F

Announcement of Import Restraint Limits for Certain Cotton, Wool and Man-Made Fiber Textile Products Produced or Manufactured in Poland

November 16, 1993.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs establishing limits for the new agreement year.

EFFECTIVE DATE: January 1, 1994.

FOR FURTHER INFORMATION CONTACT: Naomi Freeman, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 927–5850. For information on embargoes and quota re-openings, call (202) 482–3715.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

In a Memorandum of Understanding (MOU) dated October 5, 1993, the Governments of the United States and the Republic of Poland agreed to extend their current bilateral textile agreement for two consecutive one-year periods, beginning on January 1, 1994 and extending through December 31, 1995.

In the letter published below, the Chairman of CITA directs the Commissioner of Customs to establish limits for the 1994 agreement period. The limit for Category 443 has been reduced for carryforward used during the previous agreement period.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 57 FR 54976, published on November 23, 1992). Information regarding the 1994 CORRELATION will be published in the **Federal Register** at a later date.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the MOU, but are designed to assist only in the implementation of certain of its provisions.

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

November 16, 1993.

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229.

Dear Commissioner: Under the terms of section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854), and the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, as further extended on December 9, 1992; pursuant to the Memorandum of Understanding dated October 5, 1993, between the Governments of the United States and the Republic of Poland; and in accordance with the provisions of Executive Order 11651 of March 3, 1972, as amended, you are directed to prohibit, effective on January 1, 1994, entry into the United States for consumption and withdrawal from

warehouse for consumption of cotton, wool and man-made fiber textile products in the following categories, produced or manufactured in Poland and exported during the twelve-month period beginning on January 1, 1994 and extending through December 31, 1994, in excess of the following levels of restraint:

Category	Twelve-month restraint limit
335	146,068 dozen.
338/339	1,573,040 dozen.
410	2,550,250 square meters.
433	18,010 dozen.
434	9,823 dozen.
435	12,853 dozen.
443	201,495 numbers.
611	4,496,085 square meters.
645/646	230,338 dozen.

Imports charged to these category limits for the period January 1, 1993 through December 31, 1993 shall be charged against those levels of restraint to the extent of any unfilled balances. In the event the limits established for that period have been exhausted by previous entries, such goods shall be subject to the levels set forth in this directive.

In carrying out the above directions, the Commissioner of Customs should construe entry into the United States for consumption to include entry for consumption into the Commonwealth of Puerto Rico.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception of the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 93-28630 Filed 11-19-93; 8:45 am]

BILLING CODE 3510-DR-F

COPYRIGHT ROYALTY TRIBUNAL

[Docket No. 92-3-DART]

Digital Audio Recording Technology Act; Implementation

AGENCY: Copyright Royalty Tribunal.

ACTION: Notice.

SUMMARY: On November 3, 1993, The American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc., ("Performing Rights Organizations"), filed a petition to reopen for reconsideration the rulemaking proceeding which resulted in the Notice Adopting Final Regulations to implement the Audio Home Recording Act of 1992 (AHRA), issued by the Copyright Royalty Tribunal ("Tribunal") on October 18, 1993. 58 FR 53822. The Tribunal invites comments from the interested parties.

DATES: Comments are due by December 1, 1993.

FOR FURTHER INFORMATION CONTACT: Cindy Daub, Chairman, Copyright Royalty Tribunal, 1825 Connecticut Avenue NW., suite 918, Washington, DC 20009. (1993).

SUPPLEMENTARY INFORMATION: The Audio Home Recording Act of 1992 (AHRA), 17 U.S.C. 1001-1010 (Supp. IV 1992), became effective on October 28, 1992.

AHRA authorizes the Tribunal to prescribe the "form and manner" for filing claims. *Id.* The Tribunal, in an Advance Notice of Rule Making, invited comments concerning the filing of claims to royalties. 57 FR 54542 (1992). Thereafter, on January 29, 1993, the Tribunal, issued Interim Regulations, with a request for public comment. 58 FR 6441 (1993). The Interim Regulations also directed the parties to file a report, on or before June 1, 1993, commenting on the issue of whether performing rights societies need separate, specific, and written authorization to represent members and affiliates. 58 FR 6441, 6444 (1992). Having considered all the facts and comments before the Tribunal, final regulations were published October 18, 1993. 58 FR 53822.

In filing the petition to reopen for reconsideration of the final regulations on November 3, 1993, the Performing Rights Organizations objected to the provision in the Tribunal's final regulations requiring the performing rights societies to obtain separate, specific, and written authorizations, signed by their respective members and affiliates or their representatives in order to file claims on behalf of those members and affiliates under the Act. 58 FR at 53826; 37 CFR 311.2.

The Performing Rights Organizations contend that:

I. The Tribunal's final regulations as promulgated will disenfranchise many writers and publishers who are otherwise qualified to receive royalties under the Act; that due to the Tribunal October 18, 1993 publishing date of its regulation, and the filing of claims to 1993 royalties by February 28, 1994, the Tribunal's determination has left the performing rights organizations with little time to obtain the required authorizations for claims to 1993 royalties should the final regulation stand as adopted; and that the rights of claimants who want to file on their own behalf, or have others file for them, will not be impaired by adoption of a permanent rebuttable inference of an agency relationship between the performing rights societies and their respective members and affiliates. Moreover, because the Tribunal has adopted their proposal that lists of all individuals represented by joint claimants must be made available upon request to the other parties and the Tribunal, there can be no possibility of confusion about which organization is representing a particular writer or publisher in a given proceeding.

II. The Tribunal erred in concluding that the holding in *National Broadcasting Company, Inc.* v. *Copyright Royalty Tribunal,* 848 F.2d 1289 (D.C. Cir. 1988), precludes adoption of the rebuttable inference of agency for performing rights organization. They argue that the court in *NBC* v. *CRT,* held that the Tribunal's decision to award royalties to Worldvision, the syndicator, instead of NBC, the program owner, did not constitute a final adjudication of the rights of the parties under the syndication agreement. Similarly, they are not seeking a final judgment or interpretation of their membership and affiliation agreements. They are merely seeking a rebuttable inference for valid procedural, administrative and policy reasons. The rule that they are seeking will not be a binding judgment on any party in a DART distribution proceeding.

III. Even if the Tribunal rejects the concept of a permanent rebuttable inference, that the Tribunal's final ruling adopting a requirement that performing rights societies must obtain separate, specific and written authorizations signed by their respective members and affiliates should not be applied to the 1993 distribution proceeding because of the short turn around time before 1993 royalty claims have to be filed.

They further contend that the prejudice that will otherwise result to their members and affiliates is compounded by the fact that they have entered into a settlement with all joint claimant groups and all but one of the individual claimants (James Cannings) to the Musical Works Fund that links the distribution of 1992 DART royalties, for which they have the rebuttable inference of agency, to the outcome of the 1993 proceeding, for which they would not have the rebuttable inference if the Tribunal's final regulations stand.

Dated: November 16, 1993.

Cindy Daub,

Chairman.

[FR Doc. 93-28557 Filed 11-19-93; 8:45 am]

BILLING CODE 1410-09-M

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Notice of proposed information collection requests.

SUMMARY: The Director, Information Resources Management Service, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1980.

DATES: Interested persons are invited to submit comments on or before December 22, 1993.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Dan Chenok: Desk Officer, Department of Education, Office of Management and Budget, 726 Jackson Place, NW., room 3208, New Executive Office Building, Washington, DC 20503. Requests for copies of the proposed information collection requests should be addressed to Cary Green, Department of Education, 400 Maryland Avenue, SW., room 4682, Regional Office Building 3, Washington, DC 20202-4651.

FOR FURTHER INFORMATION CONTACT: Cary Green (202) 401-3200. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: Section 3517 of the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Director of the Information Resources Management Service, publishes this notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Frequency of collection; (4) The affected public; (5) Reporting burden; and/or (6) Recordkeeping burden; and (7) Abstract. OMB invites public comment at the address specified above. Copies of the requests are available from Cary Green at the address specified above.

Dated: November 17, 1993.

Cary Green,

Director, Information Resources Management Service.

Office of Elementary and Secondary Education

Type of Review: Revision
Title: Applications for New and Continuation Grants Under the Chapter 1 Migrant Education Coordination Program for State Educational Agencies
Frequency: Annually
Affected Public: State or local governments
Reporting Burden:
Responses: 10
Burden Hours: 400
Recordkeeping Burden:
Recordkeepers: 10
Burden Hours: 50
Abstract: The U.S. Department of Education will use the requested information to judge the merits of proposed and continuing projects under the Chapter 1 Migrant Education Coordination Program for State Educational Agencies.

Office of Elementary and Secondary Education

Type of Review: Revision
Title: Final Performance Report for the High School Equivalency Program and the College Assistance Migrant Program
Frequency: At the end of the five year grant cycle
Affected Public: Non-profit institutions
Reporting Burden:
Responses: 30
Burden Hours: 60
Recordkeeping Burden:
Recordkeepers: 30
Burden Hours: 90
Abstract: Grantees under the High School Equivalency Program and the College Assistance Migrant Program are required to file a final performance report 90 days after the termination of Federal financial support. This generally occurs at the end of the five year grant cycle.

Office of Educational Research and Improvement

Type of Review: New
Title: Dwight D. Eisenhower National Clearinghouse for Mathematics and Science Education
Frequency: On occasion
Affected Public: Individuals or households; State or local governments; Federal agencies or employees; Non-profit institutions
Reporting Burden:
Responses: 21,000
Burden Hours: 2,100
Recordkeeping Burden:
Recordkeepers: 1
Burden Hours: 1,040
Abstract: This submission contains a suite of eight instruments to be used in general data collection for the Eisenhower National Clearinghouse. All responses are voluntary. Subjects will be obtained as a sample of convenience at Clearinghouse workshops, demonstrations and presentations, and from recipients of Clearinghouse publications. Instruments are designed to provide general information for planning and evaluation purposes.

Office of Policy and Planning

Type of Review: New
Title: Study of Education for Homeless Children and Youth
Frequency: One time
Affected Public: State or local governments; non-profit institutions
Reporting Burden:
Responses: 166
Burden Hours: 166
Recordkeeping Burden:
Recordkeepers: 0
Burden Hours: 0
Abstract: This study is designed to (1) describe state plans to serve the educational needs of homeless children and youth, (2) assess the quality of state plans and measure state progress in overcoming barriers to enrollment, attendance, and school success for homeless children and youth, (3) identify innovative state level policies and programs that serve the educational needs of homeless children, and (4) identify lessons that will help the Department of Education and Congressional legislators design future legislation and education programs for homeless children and youth.

[FR Doc. 93-28610 Filed 11-19-93; 8:45 am]
BILLING CODE 4000-01-M

Office of Postsecondary Education

Federal Perkins Loan, Federal Work-Study, and Federal Supplemental Educational Opportunity Grant Programs

AGENCY: Department of Education.

ACTION: Notice of the closing date for institutions to file an "Application for Institutional Eligibility and Certification" (ED Form E-40-34P, OMB #1840-0098) to participate in the Federal Perkins Loan, Federal Work-Study, and Federal Supplemental

Educational Opportunity Grant programs for the 1994–95 award year.

SUMMARY: The Secretary invites currently ineligible institutions of higher education that filed a Fiscal Operations Report and Application to Participate (FISAP) (ED Form 646–1) in one or more of the "campus-based programs" for the 1994–95 award year to submit to the Secretary an "Application for Institutional Eligibility and Certification" and all documents required for an eligibility determination.

The campus-based programs are the Federal Perkins Loan Program, the Federal Work-Study Program, and the Federal Supplemental Educational Opportunity Grant Program and are authorized by Title IV of the Higher Education Act of 1965, as amended. The 1994–95 award year is July 1, 1994, through June 30, 1995.

DATES: *Closing Date for Filing Application and Required Documents.* To participate in the campus-based programs in the 1994–95 award year, a currently ineligible institution must mail or hand-deliver its "Application for Institutional Eligibility and Certification" on or before January 11, 1994. The application along with all documents required for an eligibility determination must be submitted to the Institutional Participation Division at one of the addresses indicated below.

ADDRESSES: Applications and Required Documents Delivered by Mail. An institutional eligibility application and required documents delivered by mail must be addressed to the U.S. Department of Education, Application Control Center, Attention: IPD/IPOS/OPE, room 3633, Regional Office Building 3, 400 Maryland Avenue, SW., Washington, DC 20202–4725.

An applicant must show proof of mailing consisting of one of the following: (1) A legibly dated U.S. Postal Service postmark; (2) a legible mail receipt with the date of mailing stamped by the U.S. Postal Service; (3) a dated shipping label, invoice or receipt from a commercial carrier; or (4) any other proof of mailing acceptable to the Secretary of Education.

If an application is sent through the U.S. Postal Service, the Secretary does not accept either of the following as proof of mailing: (1) A private metered postmark, or (2) a mail receipt that is not dated by the U.S. Postal Service.

An applicant should note that the U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an applicant should check with its local post office.

An applicant is encouraged to use registered or at least first class mail. Institutions that submit eligibility applications and required documents after the closing date will not be considered for funding under the campus-based programs for award year 1994–95.

Applications and Required Documents Delivered by Hand. An institutional eligibility application and required documents delivered by hand must be taken to the U.S. Department of Education, Application Control Center, room 3633, Regional Office Building 3, 7th and D Streets, SW., Washington, DC. The Application Control Center will accept hand-delivered applications between 8 a.m. and 4:30 p.m. (Eastern time) daily, except Saturdays, Sundays, and Federal holidays. An application for eligibility for the 1994–95 award year that is delivered by hand will not be accepted after 4:30 p.m. on the closing date.

SUPPLEMENTARY INFORMATION: Under the three campus-based programs, the Secretary allocates funds to eligible institutions of higher education. The Secretary will not allocate funds under the campus-based programs for award year 1994–95 to any currently ineligible institution unless the institution files its "Application for Institutional Eligibility and Certification" and other required documents by the closing date. If the institution submits its institutional eligibility and certification application or other required documents after the closing date, the Secretary will use this application in determining the institution's eligibility to participate in the campus-based programs beginning with the 1995–96 award year.

For purposes of this notice, ineligible institutions only include:

(1) An institution that has not been designated as an eligible institution by the Secretary but has previously filed a FISAP;

(2) An off-campus site of an eligible institution that is currently not included in the Department's eligibility certification for that eligible institution but has been included in the institution's 1994–95 FISAP; or

(3) A branch campus that is currently part of an eligible institution but has filed its own FISAP and is seeking eligibility as a separate institution of higher education.

The Secretary wishes to advise institutions that the institutional eligibility form, "Application for Institutional Eligibility and Certification," should not be confused with the FISAP form that institutions were required to submit electronically by October 1, 1993, in order to be considered for funds under the campus-based programs for the 1994–95 award year.

Applicable Regulations

The following regulations apply to the campus-based programs:

(1) Student Assistance General Provisions, 34 CFR Part 668.

(2) Federal Perkins Loan Program, 34 CFR Part 674.

(3) Federal Work-Study Program, 34 CFR Part 675.

(4) Federal Supplemental Educational Opportunity Grant Program, 34 CFR Part 676.

(5) Institutional Eligibility Under the Higher Education Act of 1965, as amended, 34 CFR Part 600.

(6) New Restrictions on Lobbying, 34 CFR Part 82.

(7) Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants), 34 CFR Part 85.

(8) Drug-Free Schools and Campuses, 34 CFR Part 86.

FOR FURTHER INFORMATION CONTACT: For information concerning designation of eligibility, contact: Robert Jamroz, Acting Director, Institutional Participation Division, Office of Postsecondary Education, U.S. Department of Education, room 3030, Regional Office Building 3, 400 Maryland Avenue, SW., Washington, DC 20202–5242. Telephone: (202) 708–4906.

For technical assistance concerning the FISAP or other operational procedures of the campus-based programs, contact: Robert R. Coates, Director, Campus-Based Programs Financial Management Division, room 4621, Regional Office Building 3, 400 Maryland Avenue, SW., Washington, DC 20202–5347. Telephone: (202) 708–9711. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

Program Authority: 20 U.S.C. 1087aa *et seq.*; 42 U.S.C. 2751 *et seq.*; and 20 U.S.C. 1070b *et seq.*

(Catalog of Federal Domestic Assistance Numbers: 84.007 Federal Supplemental Educational Opportunity Grant Program; 84.033 Federal Work-Study Program; 84.038 Federal Perkins Loan Program)

Dated: November 15, 1993.

David A. Longanecker,

Assistant Secretary for Postsecondary Education.

[FR Doc. 93–28609 Filed 11–19–93; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Pittsburgh Energy Technology Center; Grant Award

AGENCY: Bartlesville Project Office, Energy.

ACTION: Determination of noncompetitive financial assistance renewal with New Mexico Institute of Mining and Technology (NMIMT).

SUMMARY: The U.S. Department of Energy (DOE), Bartlesville Project Office (BPO) announces that pursuant to 10 CFR 600.7(b)(2)(i) criteria (A) and (D), it intends to award a Grant through the Pittsburgh Energy Technology Center (PETC) to the NMIMT for the continuation of it's effort entitled "Improved Efficiency of Miscible CO_2 Floods and Enhanced Prospects for CO_2 Flooding Heterogeneous Reservoirs".

ADDRESSES: Department of Energy, Pittsburgh Energy Technology Center, Acquisition and Assistance Division, P.O. Box 10940, MS 921-118, Pittsburgh, PA 15236.

FOR FURTHER INFORMATION CONTACT: Dona G. Sheehan, Contract Specialist, (412) 892-5918.

SUPPLEMENTARY INFORMATION:

Grant No.

DE-FG22-94BC14977

Title of Research Effort

"Improved Efficiency of Miscible CO_2 and Enhanced Prospects for CO_2 Flooding Heterogeneous Reservoirs"

Awardee

New Mexico Institute of Mining and Technology

Term of Assistance Effort

Thirty-six (36) months

Cost of Assistance Effort

The total estimated value is $1,956,718.

The DOE share of funding for this program study is $978,359.00.

Objective

The objective of this effort is to continue research in the area of recovery of oil by CO_2 flooding. This objective will be accomplished by extending the ongoing experimental research in three areas: (1) foams for selective mobility control in heterogeneous reservoirs, (2) reduction in the amount of CO_2 required in CO_2 floods, and, (3) miscible CO_2 flooding in fractured reservoirs.

This grant is a continuation of an activity presently being funded by DOE and for which competition for support would have a significant adverse effect on continuity or completion of the activity. The applicant has an exclusive domestic capability to perform the activity successfully, based upon unique technical expertise and equipment.

Carroll A. Lambton,

Director, Acquisition & Assistance Division.

[FR Doc. 93-28615 Filed 11-19-93; 8:45 am]

BILLING CODE 6450-01-M

Federal Energy Regulatory Commission

[Docket No. RM93-19-000]

Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Power Act; Extension of Time for Reply Comments

November 16, 1993.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of technical conference and request for comments; extension of time for reply comments.

SUMMARY: On June 30, 1993, the Commission issued a Notice of Technical Conference and Request for Comments regarding its pricing policy for transmission services provided by public utilities under the Federal Power Act (58 FR 36400, July 7, 1993). The date for filing reply comments is being extended at the request of various interested commenters.

DATES: The date for filing reply comments is extended to and including January 24, 1994.

ADDRESSES: Office of the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT: Lois D. Cashell, Secretary, (202) 208-0400.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28601 Filed 11-19-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP94-50-000]

Algonquin Gas Transmission Co.; Proposed Changes in FERC Gas Tariff

November 16, 1993.

Take notice that on November 10, 1993, Algonquin Gas Transmission Company (Algonquin), tendered for filing as part of its FERC Gas Tariff, Fourth Revised Volume No. 1, the following tariff sheets, with a proposed effective date of December 1, 1993:

Fourth Revised Sheet No. 20A
Original Sheet No. 99

Algonquin states that the purpose of this filing is to provide for the recovery of transition costs to be paid by Algonquin to CNG Transmission Corporation (CNG) pursuant to CNG's direct bill of Account Nos. 186 and 191 transition costs filed on October 29, 1993. Algonquin requests that the Commission waive § 154.22 of the Commission's regulations to the extent necessary in order to permit this application to take effect as requested.

Algonquin states that copies of this tariff filing were mailed to all customers of Algonquin 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 §§ 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before November 23, 1993. 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.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28600 Filed 11-19-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. ER93-953-000]

Allegheny Power Service Corp.; Filing

November 16, 1993.

Take notice that on November 5, 1993, Allegheny Power Service Corporation tendered for filing an amendment to its September 15, 1993, filing in the above-referenced docket.

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 18 CFR 385.214). All such motions or protests should be filed on or before December 1, 1993. 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.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28595 Filed 11-19-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CP94-66-000]

East Tennessee Natural Gas Co., Request Under Blanket Authorization

November 16, 1993.

Take notice that on November 8, 1993, East Tennessee Natural Gas Company (East Tennessee), P.O. Box 2511, Houston, Texas 77252, filed in Docket No. CP94-66-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to construct and operate a delivery point for deliveries of natural gas for the account of its firm transportation customer, Roanoke Gas Company (Roanoke), under East Tennessee's blanket certificate issued in Docket No. CP82-412-000 pursuant to section 7 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.

It is said that pursuant to Roanoke's request, East Tennessee has agreed to establish a temporary delivery point in Roanoke County, Virginia under the terms and provisions of its Rate Schedule FTA and a gas transportation agreement between East Tennessee and Roanoke. The new delivery point, it is said, would increase East Tennessee's flexibility and reduce the likelihood of having to curtail gas during the 1993-94 heating season.

East Tennessee states that there will be no increase or decrease in the total quantities it is authorized to deliver to Roanoke. East Tennessee states further that it has sufficient capacity to accomplish the deliveries at the new delivery point without detriment to any of East Tennessee's existing customers.

Any person on 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 § 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.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28589 Filed 11-19-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. ER93-950-000 and AC93-214-000]

Electric Energy Inc.; Filing

November 16, 1993.

Take notice that on November 10, 1993, Electric Energy, Inc. tendered for filing a Revised Appendix reflecting a change to the Appendix reflecting a change to the Appendix to its contract with the Department of Energy of the United States of America (the "Department of Energy") and the October 7, 1992, Letter Supplement to the Power Supply Agreement between (EEInc. on the one hand, and Kentucky Utilities Company, Union Electric Company, Illinois Power Company and Central Illinois Public Service Company (collectively, the "Sponsoring Companies") on the other, as modified. The Revised Appendix provides for an increase to the annual cap on total charges for Permanent Power and Excess Energy by EEInc. under its Agreements with the Department of Energy and the Sponsoring Companies to allow for the recovery of the transition obligation and accrual amounts required to comply with SFAS 106. The Revised Appendix reflects annual cap levels for the years 1993 through 1998 and thereafter.

Copies of the Revised Appendix were served on the Department of Energy of the United States of America, Kentucky Utilities Company, Union Electric Company, Illinois Power Company and Central Illinois Public Service Company.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before November 29, 1993. Protests will be considered by the Commission 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 must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28593 Filed 11-19-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CP94-63-000]

K N Interstate Gas Transmission Co.; Application

November 16, 1993.

Take notice that on November 5, 1993, K N Interstate Gas Transmission Co. (K N), P.O. 281304, Lakewood, Colorado 80228, filed in Docket No. CP94-63-000 an application pursuant to section 7(b) of the Natural Gas Act for permission and approval to abandon a sales and exchange service with Northern Natural Gas Company (Northern) which was authorized in Docket No. G-10588, all as more fully set forth in the application on file with the Commission and open to public inspection.

K N proposes to abandon a sales and exchange service with Northern which is provided pursuant to K N's Rate Schedule X-1. It is stated that K N and Northern have agreed to terminate their agreement for the service effective April 1, 1992.

Any person desiring to be heard or to make any protest with reference to said application should on or before December 7, 1993, file with the Federal Energy Regulatory Commission, Washington, DC 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 if filed within the time required herein, if the Commission on its own review of

the matter finds that 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 K N to appear or be represented at the hearing.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28588 Filed 11-19-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. ER94-126-000]

Montenay Montgomery Limited Partnership; Filing

November 16, 1993.

Take notice that on November 4, 1993, Montenay Montgomery Limited Partnership (MMLP) tendered for filing a Notice of Termination of MMLP's Rate Schedule FERC No. 1 and Supplement No. 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 18 CFR 385.214). All such motions or protests should be filed on or before December 1, 1993. Protests will be considered by the Commission in determing 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.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28596 Filed 11-19-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. ER93-951-000]

Montenay Montgomery Limited Partnership; Filing

November 16, 1993.

Take notice that on November 5, 1993, Montenay Montgomery Limited Partnership tendered for filing an amendment to its September 14, 1993, filing in the above-referenced docket.

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 18 CFR 385.214). All such motions or protests should be filed on or before December 1, 1993. 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.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28594 Filed 11-19-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CP94-73-000]

Northern Natural Gas Co.; Request Under Blanket Authorization

November 16, 1993.

Take notice that on November 12, 1993, Northern Natural Gas Company (Northern), 1111 South 103rd Street, Omaha, Nebraska 68124-1000 filed, in Docket No. CP94-73-000, a request pursuant to § 157.205(b) and 157.212 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205(b) and 157.212) for authorization to install and operate a delivery point to accommodate natural gas deliveries to Northern States Power Company (NSP), under Northern's blanket certificate granted September 1, 1982 at Docket No. CP82-401-000 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.

Northern states that it requests authority to install a delivery point to accommodate natural gas deliveries under Northern's existing service agreement(s). It is further stated that NSP has requested a new delivery point for Northern to service NSP Minnesota's Pathfinder Power Plant, a peaking power plant in Lincoln County, northeast of Sioux Falls, South Dakota. The estimated total volumes proposed to be delivered to NSP at the Pathfinder town border station is expected to result in an increase in Northern's peak day deliveries of 92,800 Mcf/day and 3,144,000 Mcf on an annual basis.

Northern states that the estimated cost to install the delivery point is $325,000.

Northern further states that a copy of this filing has been mailed to each of the affected state commissions.

Any person of the Commission's staff may, within 45 days after issuance of the instant notice by the Commission's file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28590 Filed 11-19-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP92-166-000]

Panhandle Eastern Pipe Line Co.; Informal Settlement Conference

November 16, 1993.

Take notice that an informal settlement conference will be convened in this proceeding on Wednesday, December 1, 1993, at 10 a.m., at the offices of the Federal Energy Regulatory Commission, 810 First Street, NE., Washington, DC, for the purpose of exploring the possible settlement of the above-referenced docket.

Any party, as defined by 18 CFR 385.102(c), or any participant, as defined by 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) (1993).

For additional information, contact Carmen Gastilo at (202) 208-2182 or Joanne Leveque at (202) 208-5705.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28599 Filed 11-19-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. OR94-2-000]

Trans Alaska Pipeline System; Petition for Declaratory Order

November 16, 1993.

The Federal Energy Regulatory Commission (Commission) gives notice that, on November 2, 1993, the Trans

Alaska Pipeline System carriers (Amerada Hess Pipeline Corporation; ARCO Transportation Alaska, Inc.; BP Pipelines (Alaska) Inc.; Exxon Pipeline Company; Mobil Alaska Pipeline Company; Phillips Alaska Pipeline Corporation, and Unocal Pipeline Company, collectively, TAPS Carriers) filed a petition seeking a declaratory order stating that the TAPS Carriers may accrue funds to pay for post-employment benefits other than pensions (PBOPs) in a manner consistent with the accounting treatment accorded such costs brought about by Statement 106 of the Financial Accounting Standards Board (SFAS 106) as implemented by the Commission's Statement of Policy on PBOPs, issued December 17, 1992. Post-Employment Benefits Other Than Pensions, 61 FERC ¶ 61,330 (1992). In particular, the TAPS Carriers seek permission to include the amount of such accruals in their rates under the TAPS Settlement Methodology (TSM), which was approved by the Commission as part of the TAPS Settlement Agreement [Trans Alaska Pipeline System, 33 FERC ¶ 61,425 (1968)], without adhering to the external fund or deferred income tax accounting requirements set forth in the Commission's Statement of Policy on PBOPs.

The Commission's Statement of Policy provided oil pipelines with an option either to continue to provide for PBOPs on a "pay-as-you-go" basis or to accrue funds under SFAS 106 subject to the conditions set forth in the Statement of Policy. Further, the Commission recognized that exceptions to its Policy Statement may be warranted in particular circumstances. The TAPS Carriers allege such particular circumstances and seek an exception to the Policy Statement, as more fully set forth in their petition.

A copy of The TAPS Carrier's petition for declaratory order is available for copying and public inspection in the Commission Office of Public Information, room 3203, 941 North Capitol Street NE., Washington, DC 20426. The Commission invites interested persons to submit comments on the TAPS Carriers' petition for declaratory order. The original and 14 copies of such comments should be submitted to the Office of the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426 and should refer to Docket No. OR94-2-000, not later than 30 days after publication in the **Federal Register**.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28598 Filed 11-19-93; 8.45 am]

BILLING CODE 6717-01-M

[Docket No. CP94-77-000]

Trunkline Gas Co., CNG Transmission Corp.; Application

November 16, 1993.

Take notice that on November 12, 1993, Trunkline Gas Company (Trunkline), P.O. Box 1642, Houston, Texas 77251-1642, and CNG Transmission Corporation (CNG), P.O. Box 2511, Houston, Texas 77252-2511, filed in Docket No. CP94-77-000 a joint application pursuant to section 7(b) of the Natural Gas Act for permission and approval to abandon an exchange and transportation service, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Trunkline and CNG state that they were authorized in Docket No. CP78-479-000 to transport and/or exchange up to 12,500 Mcf of natural gas per day on a firm basis. Trunkline and CNG have been providing the service under their Rate Schedules TE-4 and X-26, respectively. Trunkline and CNG have, by letter dated July 30, 1993, mutually agreed to terminate the exchange and transportation service, effective September 1, 1993, it is stated.

Trunkline and CNG further state that no facilities will be abandoned in conjunction with the abandonment of this service.

Any person desiring to be heard or to make any protest with reference to said application should on or before December 7, 1993, file with the Federal Energy Regulatory Commission, Washington, DC 20426 a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211) and 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 on review of the matter finds that 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 Trunkline and CNG to appear or be represented at the hearing.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28591 Filed 11-19-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. ER93-3-001]

United Illuminating Co., Filing

November 16, 1993.

Take notice that on November 5, 1993, United Illuminating Company (UI) tendered for filing revised copies of its compliance filing in the above-referenced docket.

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 18 CFR 385.214). All such motions or protests should be filed on or before December 1, 1993. 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.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28592 Filed 11-19-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RS92-88-005]

U-T Offshore System; Compliance Filing

November 16, 1993

Take notice that on November 8, 1993, U-T Offshore System ("U-TOS") filed, pursuant to section 4 of the Natural Gas Act, a compliance filing to implement the line pack gas settlement that was approved in the captioned proceeding by the Federal Energy Regulatory Commission by Letter Order dated October 12, 1993. Consistent with the approved settlement, the compliance filing is to be effective November 1, 1993. U-TOS' filing reflects a line pack surcharge amount of $0.0006 per Mcf to be applicable to all throughput until such time as the line pack costs have been recovered.

Any person desiring 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 Rule 211 and Rule 214 of the Commission's Rules of Practice and Procedure 18 CFR 385.211, 385.214. Any such protests and motions to intervened should be filed on or before November 30, 1993. 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.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28602 Filed 11-19-93; 8:45 am]

BILLING CODE 6717-01-M

ENVIRONMENTAL PROTECTION AGENCY

[FRL-4804-5]

Acid Rain Program: Notice of Final Retired Unit Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of final retired unit exemptions.

SUMMARY: The U.S. Environmental Protection Agency is issuing five-year retired unit exemptions, according to the Acid Rain Program regulations (40 CFR part 72), to the following 4 utility units in Iowa: Des Moines units 5, 10, and 11; and Maynard unit 1.

FOR FURTHER INFORMATION CONTACT: Jon Knodel at (913) 551-7622. Air and Toxics Division, EPA Region 7 (ARTX), 726 Minnesota Ave., Kansas City, KS 66101.

Dated: November 10, 1993.

Brian McLean,

Director, Acid Rain Division, Office of Atmospheric Programs, Office of Air and Radiation.

[FR Doc. 93-28617 Filed 11-19-93; 8:45 am]

BILLING CODE 6560-50-M

[FRL-4804-2]

Draft Guidance Document on Indirect Exposure Assessment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability of draft guidance document for review and comment.

SUMMARY: The U.S. Environmental Protection Agency (EPA or Agency) announces the availability of an external review draft of a guidance document entitled, Addendum to the Methodology for Assessing Health Risks Associated with Indirect Exposure to Combustor Emissions. This draft Addendum provides revisions and updates to the Agency's 1990 interim final document, Methodology for Assessing Health Risks Associated with Indirect Exposure to Combustor Emissions. The draft Addendum is being prepared in part to assist in appropriately applying the guidance found in the Agency's Draft Strategy on Hazardous Waste Minimization and Combustion, which was released on May 18, 1993. The Draft Strategy suggests that site-specific risk assessments, including risks from indirect exposures, be conducted, as appropriate, for all hazardous waste combustion facilities in the context of actions on their combustion permits.

DATES: The Agency will make the draft Addendum available for public review and comment on or about November 22, 1993. Comments must be in writing and postmarked by January 6, 1994.

ADDRESSES: To obtain a copy of the draft Addendum or the 1990 interim final Methodology, interested parties should contact the ORD Publications Center, CERI-FRN, U.S. Environmental Protection Agency, 26 West Martin Luther King Drive, Cincinnati, OH, 45268; telephone 513-569-7562; facsimile 513-569-7566. Please provide your name, mailing address, the document title, and the EPA number. The titles are as follows: external review draft of the Addendum to the Methodology for Assessing Health Risks Associated with Indirect Exposure to Combustor Emissions (EPA/600/AP-93/003); Methodology for Assessing Health Risks Associated with Indirect Exposure to Combuster Emissions: Interim Final (EPA/600/6-90/003).

The draft Addendum and the interim final Methodology document will also be available for inspection at the RCRA Docket, the ORD Public Information Shelf/EPA Headquarters Library, and all of the EPA Regional and Laboratory libraries. The EPA Headquarters Library is located in room M2904, 401 M Street, SW., Washington, DC 20460, and is open between the hours of 10 a.m. and 4 p.m., Monday through Friday, excluding Federal holidays.

Commenters must send an original and two copies of their comments to: Docket Clerk, Office of Solid Waste (5305), Docket Number F-93-AMCA-FFFFF, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. Comments should include the docket number F-93-AMCA-FFFFF. The RCRA docket is located in room M2616 at EPA Headquarters and is available for viewing from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays. Appointments may be made by calling 202-260-9327. Copies cost $0.15 per page; charges under $25.000 are waived.

FOR FURTHER INFORMATION CONTACT: For general information, contact the RCRA/Superfund Hotline, Office of Solid Waste, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460; telephone 800-424-9346; TDD 800-553-7672 hearing impaired); in the Washington, DC, metropolitan area, the number is 703-412-9810; TDD 703-412-3323. For technical information, the Hotline will provide a specific contact person, depending on the particular subject matter.

SUPPLEMENTARY INFORMATION: The draft Addendum is intended to be used in conjunction with the 1990 Methodology and provides revisions and updates to the 1990 Methodology in the following areas:

1. Human exposure scenarios
2. Air dispersion and deposition of emitted pollutants
3. Calculating soil concentrations
4. Determining exposure through the terrestrial food chain.
5. Determining exposure from soil ingestion
6. Determining exposure from dermal absorption via soil
7. Dust resuspension
8. Calculating water concentrations
9. Determining exposure from fish intake
10. Determining exposure from dermal absorption from water

11. Risk characterization.

The draft Addendum also contains recommendations for long-term improvement of multimedia risk modeling.

The Agency is soliciting comment on all aspects of the draft Addendum, including recommendations on topics that have not been addressed but which the reviewers believe should be addressed.

The EPA Science Advisory Board's Indoor Air Quality/Total Human Exposure Committee will review the draft Addendum at a meeting that will be announced in a separate **Federal Register** notice.

Dated: November 15, 1993.

Carl R. Gerber,

Acting Assistant Administrator for Research and Development.

[FR Doc. 93-28623 Filed 11-19-93; 8:45 am]

BILLING CODE 6560-50-M

[FRL-4805-5]

Science Advisory Board; Notification of Public Advisory Committee Meetings

Pursuant to the Federal Advisory Committee Act, Public Law 92-463, notice is hereby given that various committees of the Science Advisory Board (SAB) will meet on the dates and times described below. All meetings are open to the public. Due to limited space, seating at all meetings will be on a first-come basis. For further information concerning each meeting, please contact the individuals listed below. Documents that are the subject of SAB reviews are normally available from the originating EPA office and are not available from the SAB staff. Many of the meetings listed below include discussion of issues relevant to the SAB's Environmental Futures Project. The Environmental Futures effort is described in 58 FR 48063, dated September 14, 1993.

Environmental Engineering Committee

The Environmental Engineering Committee (EEC) will meet by conference call December 1, 1993; January 5, 1994; and February 2, 1994. All conference calls will be from 12 noon until 2 p.m. Eastern Time and are open to the public. The Committee will be discussing the Science Advisory Board's Environmental Futures project and the development of Environmental Engineering Committee input to that project. The Committee plans to prepare a draft report for discussion at an open meeting of the EEC tentatively scheduled for March 2-3, 1994 (this will be announced in a subsequent **Federal Register** notice).

For additional information concerning these teleconference meetings or to obtain an agenda, please contact Mrs. Dorothy Clark, Staff Secretary, Environmental Engineering Committee, Science Advisory Board (1400F), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. Phone: (202) 260-6552; Fax: (202) 260-7118. Anyone wishing to provide written public comment for the teleconferences should forward thirty-five copies to Mrs. Clark no later than 12 noon on Wednesday the week before the respective teleconference. Individuals wishing to participate in the meetings as audience or commenters should call the Designated Federal Official (DFO) for the EEC, Mrs. Kathleen Conway at 202/260-2558 as soon as possible as the number of available conference lines is limited.

Drinking Water Committee (DWC)

The Drinking Water Committee (DWC) will meet on Thursday, December 16, 1993, from 9 a.m. to 5 p.m. At this meeting, the Committee will continue its discussions concerning the Science Advisory Board's ongoing Environmental Futures Project. The meeting will be held at the Old Colony Inn, 625 First Street, Alexandria, Virginia 22314.

For additional information, including a draft agenda, please contact Mr. Manuel R. Gomez, Designated Federal Official, Science Advisory Board (Mail Code 1400F), US Environmental Protection Agency, Washington, DC 20460. Phone: (202) 260-2563; FAX: (202) 260-7118. Members of the public who wish to make a brief oral presentation to the Committee must contact Mr. Gomez no later than Wednesday, December 8, 1993 in order to be included on the Agenda.

Indoor Air Quality and Total Human Exposure Committee (IAQC)

The Indoor Air Quality/Total Human Exposure Committee (IAQC) will meet on Thursday and Friday, December 2-3, 1993 at the Quality Hotel Capitol Hill, 415 New Jersey Avenue, NW., Washington, DC 20001. The Committee will meet from 9 a.m. to 5 p.m. on December 2nd and from 9 a.m. until 4:30 p.m. on December 3rd. At this meeting, the Committee will: (a) continue its discussions concerning the Science Advisory Board's ongoing Environmental Futures Project; (b) conduct a review of the Agency's Indirect Exposure Documents (see below for titles); and (c) consider revisions to the Committees draft working paper on its September 1993 review of the Agency's Indoor Air Research Program. There are no publicly available materials for issues (a) and (c). For issue (b), copies of the "Methodology for Assessing Health Risks Associated with Indirect Exposure to Combustor Emissions" (EPA/600/6-90/003) and "Addendum to Methodology for Assessing Health Risks Associated with Indirect Exposure to Combustor Emissions" (EPA/600/11-93/003) are available from EPA's Center for Environmental Research Information (CERI). Phone (513) 569-7562. Please use the above titles and publication numbers when requesting copies.

For additional information, including a draft agenda, please contact Mr. Manuel R. Gomez, Designated Federal Official, Science Advisory Board (Mail Code 1400F), US Environmental Protection Agency, Washington, DC 20460. Telephone: 202-260-2563; FAX: 202-260-7118. Members of the public who wish to make a brief oral presentation to the Committee must contact Mr. Gomez no later than close of business on Wednesday, November 24, 1993, in order to be included on the Agenda.

Radiation Advisory Committee (RAC)

(a) The Radiation Advisory Committee will meet by conference call on Friday, December 17, 1993 from 11 a.m. to 1 p.m. Eastern Time. The topic will be the RAC's review of the Agency's draft scoping study on naturally occurring radioactive materials (NORM), entitled "Diffuse NORM—Waste Characterization and Preliminary Risk Assessment." The document is available from EPA's Air Docket at 401 M Street, SW., Washington, DC 20460 (202/260-7548). The Docket Number is R-82-01, and the Item Number is 11A-38 (by the time this notice is published, there may be a newer draft document with a different docket and item number). For technical information on the NORM Draft Document, please contact Mr. William E. Russo of EPA's Office of Radiation and Indoor Air (ORIA) at (202/233-9215). The Committee may also discuss scheduling of upcoming FY94 reviews, if time permits.

For additional information, including a draft agenda, please contact Dr. K. Jack Kooyoomjian, Designated Federal Official, or Mrs. Diana Pozun, Staff Secretary, Radiation Advisory Committee (RAC), Science Advisory Board (Mail Code 1400F), US Environmental Protection Agency, Washington, DC 20460. Phone: 202-260-6552 or FAX: 202-260-7118. Anyone wishing to provide written

public comment for the teleconference should forward thirty-five copies to Mrs. Pozun no later than 12 noon on Wednesday the week before the teleconference. Individuals wishing to participate in the meetings as audience or commenters should call the Designated Federal Official (DFO) for the RAC, Dr. Kooyoomjian at 202/260-2560 as soon as possible as the number of available conference lines is limited.

(b) The Environmental Futures Subcommittee of the Radiation Advisory Committee (RAC) will meet on Friday and Saturday, December 3-4, 1993. The meeting will be held at the Old Colony Inn, 625 First Street, Alexandria, Virginia 22314. At this meeting, the Subcommittee will discuss its contributions to the ongoing Environmental Futures Project of the SAB.

For additional information, including a draft agenda, please contact Dr. K. Jack Kooyoomjian, Designated Federal Official, or Mrs. Diana Pozun, Staff Secretary, Radiation Advisory Committee (RAC), Science Advisory Board (Mail Code 1400F), US Environmental Protection Agency, Washington, DC 20460. Phone: 202-260-6552 or FAX: 202-260-7118. Members of the public who wish to make a brief oral presentation must contact Dr. Kooyoomjian no later than Wednesday, November 24, 1993, in order to be included on the agenda.

Providing Oral or Written Comments at SAB Meetings

The Science Advisory Board expects that public statements presented at its meetings will not be repetitive of previously submitted oral or written statements. In general, each individual or group making an oral presentation will be limited to a total time of five minutes. For conference call meetings, opportunities for oral comment will be limited to no more than five minutes per speaker and no more than fifteen minutes total. Written comments (at least 35 copies) received in the SAB Staff Office sufficiently prior to a meeting date, may be mailed to the relevant SAB committee or subcommittee prior to its meeting; comments received too close to the meeting date will normally be provided to the committee at its meeting. Written comments may be provided to the relevant committee or subcommittee up until the time of the meeting.

Dated: November 9, 1993.

Donald G. Barnes,

Staff Director, Science Advisory Board.

[FR Doc. 93-28739 Filed 11-19-93; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL RESERVE SYSTEM

Jason Leon Collins, et al.; Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. Once the notices have been accepted for processing, they will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than December 13, 1993.

A. Federal Reserve Bank of Atlanta (Zane R. Kelley, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303:

1. Jason Leon Collins; Jeffery David Collins, Portland, Tennessee; Jonathan Ray Collins, Portland, Tennessee; Larry Joe Collins, Jr., and Jaska Ann Collins Sheucraft, Portland, Tennessee, as partners of C & C Construction Company, Portland, Tennessee, to retain 10.65 percent of the voting shares of Volunteer State Bancshares, Inc., Portland, Tennessee, and thereby indirectly acquire Volunteer State Bank, Portland, Tennessee.

Board of Governors of the Federal Reserve System, November 16, 1993.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 93-28581 Filed 11-19-93; 8:45 am]

BILLING CODE 6210-01-F

First Bank System, Inc., et al.; Formation of, Acquisition by, or Merger of Bank Holding Companies; and Acquisition of Nonbanking Company

The company listed in this notice has applied under § 225.14 of the Board's Regulation Y (12 CFR 225.14) for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) to become a bank holding company or to acquire voting securities of a bank or bank holding company. The listed company has also applied under § 225.23(a)(2) of Regulation Y (12 CFR 225.23(a)(2)) 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, or to engage in such an activity. Unless otherwise noted, these 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 December 16, 1993.

A. Federal Reserve Bank of Minneapolis (James M. Lyon, Vice President) 250 Marquette Avenue, Minneapolis, Minnesota 55480:

1. First Bank System, Inc., Minneapolis, Minnesota; to merge with American Bancshares of Mankato, Inc., Mankato, Minnesota, and thereby indirectly acquire American Bank Mankato, Mankato, Minnesota.

In connection with this application, Applicant also proposes to acquire Eagle Insurance Agency, Inc., Amboy, Minnesota, and thereby engage in general insurance agency activities (including the sale of annuities and property, casualty, life, health and accident, hail and multi-peril insurance) pursuant to § 225.25(b)(8)(vii) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, November 16, 1993.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 93-28582 Filed 11-19-93; 8:45 am]

BILLING CODE 6210-01-F

Mercantile Bancorporation Inc.; Acquisition of Company Engaged in Permissible Nonbanking Activities

The organization listed in this notice has applied under § 225.23(a)(2) or (f) of the Board's Regulation Y (12 CFR 225.23(a)(2) or (f)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to acquire or control voting securities or assets of a company engaged in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Comments regarding the application must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 16, 1993.

A. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166:

1. Mercantile Bancorporation, Inc., St. Louis, Missouri; to acquire United Postal Bancorp, Inc., St. Louis, Missouri, and thereby indirectly acquire United Postal Savings Association, St. Louis, Missouri, and thereby engage in operating a savings association pursuant to § 225.25(b)(9) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, November 16, 1993.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 93-28583 Filed 11-19-93; 8:45 am]

BILLING CODE 6210-01-F

Powhatan Point Community Bancshares, Inc., 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 16, 1993.

A. Federal Reserve Bank of Cleveland (John J. Wixted, Jr., Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101:

1. Powhatan Point Community Bancshares, Inc., Powhatan Point, Ohio; to become a bank holding company by acquiring 100 percent of the voting shares of The First National Bank of Powhatan Point, Powhatan Point, Ohio.

B. Federal Reserve Bank of Chicago (James A. Bluemle, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. Lincolnland Bancshares, Inc., Casey, Illinois; to acquire 100 percent of the voting shares of Westfield State Bank, Westfield, Illinois.

C. Federal Reserve Bank of Minneapolis (James M. Lyon, Vice President) 250 Marquette Avenue, Minneapolis, Minnesota 55480:

1. Norwest Corporation, Minneapolis, Minnesota; to acquire 100 percent of the voting shares of D. L. Bancshares, Inc., Detroit Lakes, Minnesota, and thereby indirectly acquire First National Bank of Detroit Lakes, Detroit Lakes, Minnesota.

2. Randall Holding Co. Inc., Randall, Minnesota; to become a bank holding company by acquiring 90 percent of the voting shares of Randall State Bank, Randall, Minnesota.

Board of Governors of the Federal Reserve System, November 16, 1993.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 93-28584 Filed 11-19-93; 8:45 am]

BILLING CODE 6210-01-F

Society Corporation, et al.; Formations of, Acquisitions by, and Mergers of Bank Holding Companies; and Acquisitions of Nonbanking Companies

The companies listed in this notice have applied under § 225.14 of the Board's Regulation Y (12 CFR 225.14) for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) to become a bank holding company or to acquire voting securities of a bank or bank holding company. The listed companies have also applied under § 225.23(a)(2) of Regulation Y (12 CFR 225.23(a)(2)) 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, or to engage in such an activity. Unless otherwise noted, these activities will be conducted throughout the United States.

The applications are available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition,

conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 16, 1993.

A. Federal Reserve Bank of Cleveland (John J. Wixted, Jr., Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101:

1. Society Corporation, Cleveland, Ohio; to merge with KeyCorp, Albany, New York, and Key Bancshares of New York, Inc., and thereby indirectly acquire Key Bank of New York, Albany, New York, and Key Bank, USA, N.A., Albany, New York; and Key Bancshares of Alaska, Inc., Anchorage, Alaska, and thereby indirectly acquire Key Bank of Alaska, Anchorage, Alaska, and Key Bank of Oregon, Portland, Oregon; and Key Bancshares of Idaho, Inc., Boise, Idaho, and thereby indirectly acquire Key Bank of Idaho, Boise, Idaho; and Key Bancshares of Maine, Inc., Portland, Maine, and thereby indirectly acquire Key Bank of Maine, Portland, Maine; and Key Bancshares of Washington, Inc., Tacoma, Washington, and thereby indirectly acquire Key Bank of Washington, Tacoma, Washington, and Key Savings Bank, Tacoma, Washington; and Key Bancshares of Utah, Inc., Salt Lake City, Utah, and thereby indirectly acquire Key Bank of Utah, Salt Lake City, Utah; and Key Bancshares, Inc., Cheyenne, Wyoming, and thereby indirectly acquire Key Bank of Wyoming, Cheyenne, Wyoming, and Key Bank of Colorado, Fort Collins, Colorado.

Society Corporation also proposes to acquire Key Life Insurance, Ltd., Phoenix, Arizona, and thereby engage in underwriting and sale of credit related insurance pursuant to § 225.25(b)(8)(i); Key Trust Company, Albany, New York, Key Trust of Florida, N.A., Orlando, Florida, Key Trust of Maine, Bangor, Maine, and Key Trust of Northwest, Seattle, Washington, and thereby engage in trust company activities pursuant to § 225.25(b)(3); Key Pacific Mortgage Company, Anchorage, Alaska, and thereby engage in mortgage servicing activities pursuant to § 225.25(b)(1)(iii); Key Trust Company of the West, Cheyenne, Wyoming, and thereby engage in trust company activities pursuant to § 225.25(b)(3); and The Tacoma Partnership, Federal Way, Washington, and thereby engage in community development activities pursuant to § 225.25(b)(6) of the Board's Regulation Y.

In connection with Society Corporation's proposed merger with KeyCorp, both Society Corporation and KeyCorp have each separately requested Board approval under §§ 3 and 4 of the Bank Holding Company Act to acquire an option to purchase up to 19.90 percent of the outstanding shares of the other company.

2. KeyCorp, Albany, New York; to acquire 19.19 percent of the voting shares of Society Corporation, Cleveland, Ohio, and thereby indirectly acquire Society National Bank, Cleveland, Ohio, and Society Bancorp of Michigan, Inc., Ann Arbor, Michigan, and thereby indirectly acquire Society Bank, Michigan, Ann Arbor, Michigan, and Society National Bank, Indiana, South Bend, Indiana.

In connection with this application, Applicant also proposes to acquire AmeriTrust Petroleum Corporation, Cleveland, Ohio, and thereby engage in investment advising activities pursuant to § 225.25(b)(4) and personal property appraisal activities pursuant to § 225.25(b)(13); Electronic Payment Services, Inc., Cleveland, Ohio; BUYPASS Corporation, Atlanta, Georgia; MAC New England, Manchester, New Hampshire; Metroteller Systems Incorporated, Buffalo, New York; MONEY ACCESS SERVICE CORP., New Holmsted, Ohio; Money Station, Inc., Cleveland, Ohio,; NetOps Corp., Philadelphia, Pennsylvania, and TRI-State Network Corporation, Pittsburgh, Pennsylvania, and thereby engage, as joint venture, in ATM and POS transactions pursuant to § 225.25(b)(7); St Joseph Insurance Agency, Inc., Elkhart, Indiana, and thereby engage in insurance activities pursuant to section 4(c)(8)(D) of the BHC Act; Seagate Community Development Corporation, Cleveland, Ohio, and Society Community Development Corporation, Cleveland, Ohio, and thereby engage in lending activities pursuant to § 225.25(b)(1) and community development activities pursuant to § 225.25(b)(6); Society Equipment Leasing Company, Cleveland, Ohio, and thereby engage in equipment leasing activities pursuant to § 225.25(b)(5); First Appraisal, Inc., Fort Myers, Florida, and thereby engage in real estate appraisal services pursuant to § 225.25(b)(13); Society First Federal Savings Bank, Fort Myers, Florida, and thereby engage in the operation of a savings and loan association pursuant to § 225.25(b)(9); Society Life Insurance Company, Cleveland, Ohio, and thereby engage in underwriting credit related insurance activities pursuant to § 225.25(b)(8); Society National Trust Company, Naples, Florida, and thereby engage in trust activities pursuant to § 225.25(b)(3) and investment advisory services pursuant to § 225.25(b)(4); and Society Trust Company of New York, New York, New York, and thereby engage in trust company activities pursuant to § 225.25(b)(3) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, November 16, 1993.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 93-28585 Filed 11-19-93; 8:45 am]

BILLING CODE 6210-01-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[MB-38-PN]

RIN 0938-AG10

Medicaid Program; Revised Medicaid Management Information Systems (MMIS) Functional Requirements

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Proposed notice.

SUMMARY: This proposed notice sets forth for public comment a restatement of existing functional requirements for Medicaid Management Information Systems (MMIS). The MMIS consists of software and hardware used to process Medicaid claims and to retrieve and produce utilization and management information about services that is required by the Medicaid agency or Federal Government for administrative and audit purposes. Section 1903(r) of the Social Security Act (the Act) requires initial approval and periodic reapproval of State systems, and reductions in Federal financial participation (FFP) for failure to meet deadlines for operating such a system or failure to meet requirements for reapproval. The proposed functional requirements contained in this notice would replace existing systems requirements that are found in the State Medicaid Manual, part 11. The proposed notice also incorporates system functions and objectives previously found in the MMIS-General Systems Design (GSD).

DATES: Written comments will be considered if we receive them at the appropriate address, as provided below, no later than 5 p.m. on January 21, 1994.

ADDRESSES: Mail written comments (1 original and 3 copies) to the following address: Health Care Financing Administration, Department of Health and Human Services, Attention: MB–38–PN, P.O. Box 7518, Baltimore, Maryland 21207–0518. If you prefer, you may deliver your written comments (1 original and 3 copies) to one of the following addresses:

Room 309–G, Hubert H. Humphrey Building, 200 Independence Avenue SW., Washington DC 20201, or

Room 132, East High Rise Building, 6325 Security Boulevard, Baltimore, Maryland 21207.

Because of staffing and resource limitations, we cannot accept comments by facsimile (FAX) transmission. In commenting, please refer to file code MB–038–PN. Comments received timely will be available for public inspection as they are received, beginning approximately three weeks after publication of this document, in room 309–G of the Department's offices at 200 Independence Avenue SW., Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5 p.m. (phone: 202–690–7890).

FOR FURTHER INFORMATION CONTACT: Richard Friedman, (410) 966–3292.

SUPPLEMENTARY INFORMATION:

I. Background

Section 1903(a)(3) of the Social Security Act (the Act) provides for the improvement of title XIX (Medicaid) programs by offering enhanced Federal funding for the design, development, installation and operation of mechanized claims processing and information retrieval systems. These systems are ones which the Secretary determines are likely to provide more efficient, economical and effective administration of Medicaid State plans and are compatible with the claims processing and information retrieval systems utilized in the administration of the Medicare program (title XVIII of the Act). Our regulations at 42 CFR 433.111 define a mechanized claims processing and information retrieval system as a system of software and hardware used to process Medicaid claims from providers of medical care and services furnished to recipients under the medical assistance program, and to retrieve and produce service utilization and management information required by the Medicaid single State agency and Federal Government for program administration and audit purposes. (See 54 FR 41973, October 13, 1989.) Section 1903(r) of the Act mandates the use of these systems for most States, establishes deadlines for their implementation and approval, and initiates a requirement for periodic reapproval of systems. The regulations governing the approval and reapproval of systems for which enhanced funding is available are found at 42 CFR part 433, subpart C.

We propose to use the requirements outlined in this document as the standard for evaluation of systems for which funding is requested under section 1903(a)(3) of the Act. They will be included in the State Medicaid Manual (SMM), part 11, chapter 3.

This version of the MMIS requirements maintains the intent of section 1903(a)(3) of the Act and at the same time allows States more flexibility to exercise variations in the expression and/or implementation of systems concepts without prescribing a particular systems design, implementation technique, or solution.

Previous versions of part 11, chapter 3, of the SMM, reflected the HCFA policy of utilizing the Medicaid Management Information System—General System Design (MMIS–GSD) as the standard for evaluation of systems for which funding was requested under section 1903(a)(3) of the Act. The MMIS–GSD was developed in the early 1970's to aid States in developing automated claims processing and information retrieval systems by providing a model GSD. The MMIS–GSD prescribed a systems design and general specifications for four front-end claims processing subsystems and two reporting subsystems; Recipient, Provider, Claims Processing, Reference File, Surveillance and Utilization Review, and Management and Administrative Reporting Systems respectively. The specifications included both functional specifications describing what the system should do, and implementation techniques describing how the system might actually be implemented. HCFA required that, among other things, to receive approval for funding under 42 CFR part 433, subpart C, an existing or proposed system must include or encompass all mandatory MMIS–GSD subsystems and conform in concept with each subsystem described. (State systems conforming to the MMIS–GSD are commonly referred to as MMIS.)

The MMIS–GSD proved to be a valuable resource to States during initial systems development particularly during the 1970's. The functional specifications were valid and implementation techniques appropriate for the time. However, the MMIS–GSD does not reflect many of the features, functions, capabilities and technologies found in today's systems. In June 1990, HCFA issued a revision to part 11, chapter 3, that eliminated all previous references to the MMIS–GSD.

II. Provisions of this Notice

With the above in mind, HCFA will no longer prescribe the MMIS–GSD as a model for new systems or as a measure of existing systems. Instead, HCFA is adopting the general functional requirements outlined in this document which do not incorporate, prescribe or recommend a particular systems design or implementation technique. HCFA will be further guided by the principles of: (1) Avoiding duplicate systems design and development costs whenever possible by requiring the transfer of existing approved systems in situations where feasibility of a successful transfer is assured; and (2) maximizing mechanization of these systems to the degree that it is cost effective to do so.

Therefore, to receive HCFA approval for funding under 42 CFR part 433, subpart C, an existing or proposed system will not be required to include or encompass MMIS–GSD subsystems but must meet the general functional requirements set forth in this document. These functional requirements are organized under General Requirements, Claims Processing Requirements, Information Retrieval Requirements and System File Requirements. Such systems will, however, continue to be referred to as MMIS.

The restated functional requirements contained in this proposed notice reflect existing operational guidelines, and therefore will continue in effect during the notice and comment process. The new requirements in this proposed notice have been distinguished from the restatement of existing requirements and are identified as follows: Proposed mandatory "PM" requirements. We intend that the effective date of these functional requirements be 60 days after publication of a final notice. A State with an approved MMIS would be required to implement the new MMIS functional requirements at the time of its first system replacement after the effective date of the final notice, or within 5 years of the effective date of the final notice, whichever is sooner.

A. General Requirements. To receive HCFA approval for funding under 42 CFR part 433, subpart C, at a minimum, an existing or proposed system must:

- Be a highly automated claims processing and information retrieval system, consisting of software and hardware, and related manual

procedures, that is used to process all Medicaid claims, including claims for home and community-based services under an approved waiver, claims for early and periodic screening, diagnosis, and treatment (EPSDT) services, and claims for services rendered under each demonstration project, and to retrieve and produce utilization and management information about services that are required by the Medicaid agency or Federal Government;

• Provide security from anticipated threats or hazards to its data (45 CFR 95.621);

• Maintain records for 3 years from the starting date of the retention period (45 CFR 74.20–74.24 and 42 CFR 431.17); and

• Meet the requirements outlined in this document.

1. Systems Standardization Requirements

An approved MMIS must accommodate standardization in the area of claims forms, electronic data sets and coding systems. It must:

• Accept and accommodate a unique identification number for all Medicaid recipients;

• Accept and accommodate a unique identification number for all Medicaid providers;

• Accept and use exclusively a common claim form for inpatient and outpatient hospital billing (The current form is Standard Form HCFA–1450);

• Accept the same provider electronic billing data set required by the Medicare program (applies only to hospital claims);

• Accept and use a uniform diagnostic coding system (The International Classification of Disease, 9th edition, clinical modification (ICD–9–CM and subsequent editions)), whenever diagnostic coding is used;

• Accept and use exclusively a uniform procedure coding system (HCFA Common Procedure Coding System—HCPCS) except that surgical procedures on inpatient billing may be coded with ICD–9–CM, volume III. Levels 1 and 2 codes of HCPCS are required; and

• Accept and use exclusively the common claim form for non-institutional providers (physicians, durable medical equipment suppliers, laboratories, chiropractors, and podiatrists). The current form is the Health Insurance Claim Form, HCFA–1500.

2. Data Requirements

An approved MMIS must include and retain sufficient data to insure support of both regulatory and State plan record maintenance requirements and other specific information requirements defined in the information retrieval section of this chapter. Other requirements include the following:

• Data entered into, maintained, or generated by an approved MMIS must be retained and accessible according to Federal requirements at 42 CFR 431.17 and 45 CFR 74.20–74.24;

• Substitution of microfilm or comparable media format may be made for original records if the format is legible, clearly reflects data and signatures, and copies are of sufficient quality to ensure admissability as legal evidence according to Federal requirements at 42 CFR 431.17(d); and

• The system must contain and utilize the data elements described in section D, System File Requirements, of these requirements.

3. Systems Documentation Requirements

An approved MMIS must be sufficiently documented to provide for its uninterrupted operation, to support system security requirements, and to validate that system software changes have been made according to management controls and priorities. Specific documentation requirements for an approved MMIS follow. Documentation must:

• Reflect actual operation;

• Include procedure requests and system change requests;

• Be internally consistent; i.e., the various types of documentation must agree with one another;

• Be current; i.e., updated on an ongoing basis, as changes are approved and made, and according to the system's documentation updating procedure; and

• Be complete and comprehensive, fully documenting the following components of the system, the details of which are described in Appendix I, Detail Systems Documentation Requirements:

+Systems Design Documentation
+Programming Documentation
+Computer Operations Documentation
+User Documentation
+Organizational Documentation.

B. Claims Processing Requirements

The overall objective of the MMIS claims processing function is to process and pay each enrolled provider for every valid claim for a covered service provided to any eligible recipient including claims for services as defined in sections 1905(a) and 1915(c) of the Act for home and community-based waivers. Toward this end, an approved MMIS must satisfy claims processing support information requirements, input validation and control requirements, edit and audit requirements, adjudication and payment requirements and audit trail requirements.

The timeliness of claims payment is addressed in our regulations at 42 CFR 447.45(d). In achieving these requirements, an approved MMIS must employ an efficient and controlled means to suspend claims and other transactions for manual review and corrective action, transmitting them to clerical and professional staff for subsequent reentry of data.

The claims processing requirements discussed in this section apply to all Medicaid provider claims, including claims for home and community-based waiver services, claims for EPSDT services, claims for services rendered under each demonstration project, and other transactions. A claim is any submission to the approved MMIS that has been processed to final disposition that results in either a payment or denial of payment.

(PM) For all claims not paid through an approved MMIS, for example home and community-based services claims, an individual claims record must be substituted for an actual claim. (section 1915(c) of the Act and 42 CFR 441.303). For purposes of the MMIS, a claims record is any submission to an approved MMIS that contains all the necessary data elements for a claim but does not result in a payment being made to an enrolled provider. This assumes that the enrolled provider has already been paid, or will be paid, and that payment is instead due to an intermediate Governmental agency through an enrolled provider's voluntary reassignment of its claim in accordance with 42 CFR 447.10. The claims record must be subject to the same edit and audit requirements as claims submitted for payment.

Transactions include adjustments, returned documents providing additional claim data for suspended claims, verifications of prior authorizations, claims inquiries, updates to claims processing support information and internally initiated transactions such as exception resolution actions and overrides.

1. Claims Processing Support Information Requirements

An approved MMIS must include appropriate manual and automated procedures necessary to accept and maintain all adjudicated claims, recipient, provider and reference related data and otherwise include information to: (1) insure the accuracy, reasonableness, and integrity of the claims processing function; and (2) meet

all operational, management and program analysis and monitoring requirements of the information retrieval function outlined in this document. (Data maintenance includes add, change and delete functions and data verification and correction of all data maintenance prior to updating the system).

At a minimum, an approved MMIS must: Accept, control, utilize and maintain current and historical reference data necessary to support all aspects of the claims processing function as well as the information retrieval functions outlined in this document. These reference data must include:

+ICD–9–CM diagnosis/procedure code data;
+Drug data;
+HCPCS procedure code data;
+Pricing data (pricing information used to update the files);
+Policy criteria data; e.g., setting limits on procedures or practices that are aberrant (Lock-In);
+Claims processing edit and audit criteria;

• Accept, control, input, and maintain current and historical data pertaining to all providers enrolled in the Medicaid program necessary to support all aspects of the claims processing function as well as the information retrieval requirements outlined in this document;

• Uniquely identify each provider; and where multiple identifiers are assigned to a single provider, cross-reference them; e.g., providers practicing out of several offices may have a different provider number for each office;

• Uniquely identify providers practicing in a group setting and have the capability to link the individual's number to a unique number assigned to any group(s) with which the individual may be practicing;

• Identify, control and maintain current and historical data concerning all recipients eligible for home- and community-based services, EPSDT services, and services rendered under each demonstration project.

• Reconcile provider data with State licensure and certification data and State renewal requirements on a continuing basis to ensure that providers continue to meet eligibility requirements; (Time frame for reconciliation is determined by State Licensure Board updates.)

• Identify, control and maintain current and historical data concerning all recipients eligible for Medicaid benefits from a variety of internal and external sources. These sources may include provider claims, separately maintained State eligibility systems, Medicare Buy-in, State Data Exchange, BEST File, BENDEX, third party payor information and any other source that supports all aspects of the claims processing function as well as the information retrieval requirements outlined in this document;

• Periodically reconcile recipient eligibility data with other sources of eligibility data;

• Uniquely identify providers who furnish services on a capitated basis, as well as providers who furnish services on both a capitated and FFS basis.

• Establish, maintain identification, and follow up on all individuals eligible for EPSDT services;

• Provide a mechanism for furnishing to providers appropriate recipient eligibility, coverage limitations, third party liability (TPL) and all other information the provider needs to ascertain the extent of Medicaid payment responsibility and all information needed to properly prepare a claim before furnishing services to the recipient. This requirement could be met via a traditional Medicaid ID card issued periodically, and/or by granting provider access to other media or data sources. However, if the latter option is followed, it must be proven to be cost beneficial before HCFA will provide Federal funding for this option;

• Store and retrieve TPL information (See 42 CFR part 433, subpart D and part 3, chapter 10, section 3900 of the SMM) such as Medicare entitlement, veterans' benefits, workers' compensation, court orders, Office of Civilian Health and Medical Program for the Uniformed Services, and casualty and private health insurances; and

• (PM) Provide a mechanism for the electronic receipt and transfer of medical support information as specified in part 3, chapter 10, section 3900 of the SMM. (section 1902(a)(25) of the Act and 42 CFR 433.138, 147, and 151.)

2. Input Validation and Control Requirements

An approved MMIS must capture, control, translate, uniquely identify, locate and track all claims, claims records, and other transactions. It must:

• Identify and locate all claims, claims records, and adjustments by its unique identification number that includes the date of receipt;

• (PM) Identify all eligibles enrolled in a managed care plan and the identity of the plan (Sections 1903(m)(1)(A) and 1902(a)(4) of the Act and 42 CFR 434.4 and 434.6);

• Accept and process claims, claims records, and other transactions submitted via hard copy and electronic media;

• Capture and/or translate all claims, claims records, and other transaction data into machine-readable form;

• Control all claims, claims records, and other transactions on the day of receipt to insure that they are processed to completion;

• (PM) Capture an image of all claims, claims records, attachments to claims, and adjustment claims (42 CFR 431.17);

• Control and track the status of all claims, claims records, and other transactions during their entire processing cycle and identify and account for suspensions; and

• Establish balancing routines that are fully documented to insure control within processing cycles from start to finish.

3. Edit and Audit Requirements

For purposes of the MMIS, an edit is the automated process of determining whether a transaction conforms to requirements, usually by: (a) Comparing data elements from that transaction with pre-defined criteria; and/or (b) validating data elements from that transaction with independent information maintained by the system; e.g., recipient eligibility validation. An audit is a similar process that involves the added dimension of combining like data elements from other current or past transactions to determine whether the transaction being processed, in combination with other transactions, constitutes a departure from agency requirements; e.g., exceeding service limitations.

An approved MMIS must include highly automated and comprehensive claims edit and audit capabilities to:

• Verify that the claims, claims records, and transactions include only valid data;

• Check recipient and provider eligibility;

• Verify that services delivered are logically consistent with the recipient's characteristics and circumstances in accordance with 42 CFR 447.45(f)(ii);

• Verify that the Medicaid program is the payer of last resort in accordance with 42 CFR part 433, subpart D; and

• Verify that the service does not duplicate or conflict with another claim previously or currently being adjudicated (42 CFR 447.45(f)(iii). In addition, an approved system must be structured in such a manner that edit and audit criteria can be readily changed in response to ongoing program and operational needs.

In addition, to the extent practical, PM—edits and audits must be sequenced to ensure that as many error conditions as possible are identified before the claim or transaction is accepted for manual review or returned to a provider (section 1902(a)(37) of the Act and 42 CFR 447.54).

At a minimum, an approved MMIS must include appropriate edits and audits to ensure that:

• All data elements and combinations of data elements, both current and historical, are checked to maximize accuracy, consistency, conformance to Federal and State regulations and policies, and to ensure proper claims processing;

• All dates are valid and reasonable (e.g., no future service dates are present);

• All data items that can be obtained by arithmetic manipulation of other data items must agree with the results of the manipulation (e.g., items cross foot and total);

• All coded data items consist of only valid codes;

• All data items containing self-checking digits (e.g., Recipient ID No.) pass appropriate check-digit tests;

• All numeric items with definitive upper and/or lower bounds are within the proper range; e.g., months of the year cannot exceed 12, dates of birth cannot exceed the current date, etc.;

• All mandatory data items are present including required attachments such as medical certifications, consent forms, evidence of third party billing, etc.;

• All providers submitting input are properly licensed, enrolled, and authorized to perform the service during the time the service was furnished according to accurate provider enrollment information maintained by the system;

• All recipients for whom a claim or claim record is submitted were eligible for and authorized to receive the billed service during the time the service was furnished according to accurate recipient eligibility information maintained by the system;

• All procedure codes are valid and represent a service covered by the State plan;

• All drug codes are valid and represent a service covered by the State plan;

• The procedure is consistent with the diagnosis, the recipient's age, sex, other relevant recipient data, place of service and the category of service;

• The procedure is compatible with other procedures within and across claim and provider type;

• The diagnosis code is valid and consistent with the recipient's age, sex and other relevant recipient data;

• The provider type and specialty is consistent with the diagnosis and procedures or service rendered;

• Services conform to service limitation restrictions, prior authorization requirements, medical policy, logical procedure specific limitations (e.g., once in a lifetime procedures), Federal regulations and State plan requirements;

• Every claim or claim record that indicates there is a potential liable third party is checked to identify whether cost avoidance or post-payment recovery should be employed;

• Every claim is checked against all current and previously processed claims for which duplicate payment could exist whether submitted by the same or different providers, or across and among different claim types. One of the most significant claims edit and audit requirement involves the examination of each claim prior to payment against all previously adjudicated and currently in-process claims. An approved system must support a comprehensive duplicate checking feature which employs accepted and effective techniques and criteria for hierarchical editing of all claim and claims record types to prevent payment of any duplicate bills. These criteria must support at a minimum, both exact duplicate and suspected duplicate checking. Exact duplicates would result in denial of the current claim; suspected duplicates would require the use of comprehensive claim investigation, resolution and reporting procedures. Pended claims that are reentered for processing must also be checked against the claims history.

4. Adjudication and Payment Requirements

At a minimum, an approved MMIS must adjudicate claims and adjustments to payment or denial, accommodating necessary recoupment actions and producing a variety of records to document the process. It must:

• Determine the approved amount of payment based on claim data and information maintained by the system;

• Ensure that claims for out-of-plan services, e.g., managed care plans are paid, and that claims for services covered by a managed care plan are not paid;

• Accommodate mechanisms employed by the State to ensure that amounts approved for payment are in accordance with State plan requirements;

• Process claims for payments in accordance with 42 CFR 447.45(d), Timely Processing of Claims;

• Accept and process both provider submitted and system generated (retroactive rate) debit and credit adjustments to previously adjudicated claims:

+Maintaining a record of each and every adjustment transaction;
+Maintaining the integrity of the original claim in its entirety;
+Maintaining a record of the result of each and every adjustment transaction in its entirety;
+Maintaining a record of the result of each and every crossover claim; and
+Readily linking each of the preceding four items to each other for information retrieval purposes;

• Create appropriate payment instruments and remittance statements to providers detailing claims and services paid or denied;

• Update provider financial information maintained by the system;

• Provide individual Explanation of Benefits notices to all or a sample group of recipients who received services in accordance with 42 CFR 433.116 (e) and (f);

• (PM) Establish dollar and/or frequency thresholds for key procedures or services and identify any recipient or provider whose activity exceeds the threshold during the history audit cycle and suspend the claim for medical or policy review prior to payment (section 1902(a)(37) of the Act and 42 CFR 447.54);

• Create and maintain provider recoupment accounts and apply approved claim payments to account balances;

• Suspend claims, withhold payments and offset monies from selected providers when appropriate;

• Create and maintain a historical record of each adjudicated claim reflecting all data elements necessary to fully document the transaction including the ability to link all institutional bills for the same stay. The period of time for which historical records are maintained must be sufficient to satisfy all claims processing edit and audit requirements as well as all information retrieval requirements;

• Check all claims against the existence of recipient TPL coverage data to determine if the service is covered by the third party policy (42 CFR part 433, subpart D) and if the date of service is within the coverage period, and cost avoid the claim whenever it is appropriate;

• Match any verified third party resource against a paid claims history and identify and offset receivable funds;

• Accumulate claims for purposes of seeking reimbursement from third parties in accordance with the threshold amount specified in the State plan; and

• Identify paid claims that contain specific diagnosis or trauma procedure codes for follow-up for purposes of identifying potentially liable third parties.

5. Audit Trail Requirements

At a minimum, an approved MMIS must include appropriate manual or automated procedures necessary to readily establish and maintain audit trails of all processing. The system must:

• Maintain a record of every query directed against an individual's (i.e., provider's and recipient's) payment and provider enrollment data record that results in an outside referral or update/change of data, including the identity of the person or organization requesting that query;

• Produce appropriate information to establish an audit trail to link all program management and financial reports, documents and information sources with adjudicated claims and transactions;

• Produce appropriate information to establish an audit trail of all systems edits and audits in force for any period of time.

This information must include, at a minimum, a description of the edit or audit, the computer logic employed, the transactions to which it applied, the disposition status as a result of the edit or audit and the effective date, transaction date and authorization date applicable to any changes to systems edits and audits;

• Provide an audit trail for every claim, claim record, and adjustment which identifies all edits and audits failed by the claim, claim record, and adjustment from the time of input into the system through the adjudication process as well as the resolution and disposition associated with each edit and audit failure;

• Produce appropriate information to establish an audit trail of instances where suspended claims with failed edit and/or audit conditions are automatically overridden (i.e., claims released for further processing or claims released for payment or denial status) based on management's authority to make such decisions; and

• Produce appropriate audit trails of data maintenance functions that are consistent with data security requirements and include for each data maintenance transaction:

+Transaction date;
+Effective date;
+Record of authorization; and
+Status of data prior to and subsequent to the data maintenance transaction.

C. Information Retrieval Requirements

The objective of the MMIS information retrieval function is improved Medicaid management through automated data consolidation, organization, and information presentation. (PM) Whenever a Medicaid financial payment is made, the data required to support that payment must be in the system (42 CFR 433.111, 433.112 (a) and (b) and 433.116(a) and 45 CFR 201.5). (PM) All claims processing and claims support functions must provide all data and information required for information retrieval processing in a single comprehensive reporting system unless specifically waived by HCFA (42 CFR 433.111, 433.112 (a) and (b) and 433.116(a) and 42 CFR 201.5). Integration must be done at least quarterly for Federal reporting, and more often at a frequency required for State reporting, if necessary to support claims processing functions. The information retrieval requirements discussed in this section are organized into three categories: Operational Information Requirements, Program Management Information Requirements and Surveillance and Utilization Review (SUR) Requirements. These three categories are for discussion purposes only and do not imply that these requirements need be broken down into these categories. These categories are described in the following sections.

Characteristics—The information retrieval requirements discussed in this section share the following general characteristics:

• Information may be presented in a variety of ways, including pre-designed or ad hoc paper reports, on-line reports for data, graphs and charts;

• Requirements need not necessarily be achieved exclusively through the use of traditional integrated hardware, software and related procedures. States may wish to augment their information retrieval capabilities via the flexible use of resources such as personal computers and related software;

• Many MMIS data sources may be accessed to meet a single requirement. Conversely, a single requirement may be met through a variety of reports and other information of the MMIS;

• The level of detail of the information produced may vary, depending on the user of the information and the specific requirement. An approved MMIS may provide multiple levels of information to meet the same requirement;

• The frequency with which the information is produced or accessed may vary, depending upon the requirement and the performance of the operation at any given time. However, States must also achieve applicable frequency requirements that may be called for as part of the MMIS reapproval process;

• The period(s) of time reflected in the information, or used for comparative purposes, may vary. The State should use whatever time frames it would find useful to determine trends, based on its knowledge of the factors affecting the operation, such as changes in fiscal agent or significant legislated program changes. In any case, sufficient data must be retained to accommodate the State's selected time frames; and

• Comparisons or trends and projections may be reflected through a variety of calculations or indicators, such as percents, medians, graphs, etc.

Information Base—At a minimum, an approved MMIS must include the capability of providing an information base which meets all operational, management, and SUR processing requirements.

The information base must meet the following requirements. It must:

• Contain all data elements and linkages between data elements capable of supporting data analysis and report output requirements of the Medicaid program, the overall administration of program policy, the analysis of actual program experience, and the monitoring of provider and recipient compliance with program rules and regulations, consistent with State and Federal laws;

• Include data contained within MMIS and the data sources required to support claims processing including recipient, provider, claims and reference information;

• Be structured to facilitate ease of access by the end user and to accommodate rapid and efficient processing of requests for information;

• Support the primary agency functions of claims processing, program operation, management, analysis and monitoring, utilization review, and Federal reporting requirements;

• Support requirements of the State plan for data analysis for: all provider types, all reimbursement methodologies, all types of benefits, and all categories of recipients;

• (PM) Support analysis of all alternative delivery systems and waiver programs contained in the State plan (Sections 1929 and 1930 of the Act); and

• Keep in step with changes to the Medicaid program. As new provider types are added (e.g., primary care physician case manager, midwives,

home and community-based services providers, community mental health providers, etc.), the information base must promptly be expanded to contain the new data values and/or data elements.

1. Operational Information Requirements

An approved MMIS must produce operational information needed to administer, operate, and improve the performance of claims and transaction processing functions. For purposes of these requirements, transactions include adjustments, returned documents providing additional claim data for suspended claims, verifications of prior authorization approval, updates to claims processing support information, internally initiated transactions such as suspended/pended resolution actions and overrides, and, if applicable, encounter data associated with non-fee-for-service providers and waiver program providers.

The system must provide information sufficient to enable State program managers and data processing personnel to effectively:

- Plan and control claims processing operations;
- Assess throughput efficiency;
- Identify potential processing problems, prevent and manage backlogs;
- Avoid and reduce excessive error rates;
- Identify the nature and source of problems; and
- Monitor trends and determine whether non-routine action is necessary to control processes.

At a minimum, an approved MMIS system must:

- Provide information to allow management to identify, control, balance and reconcile claims and transactions in the system, by type of claim and transaction;
- Provide information concerning the volume of claims and adjustments in suspense and provide information about error source, type and frequency;
- Provide information to determine whether claims and transactions are being processed within the timeframes specified in State and Federal regulations, and in fiscal agent contracts if applicable;
- Provide information to determine over time the volume of claims received, claims returned to providers, errors detected, payments approved and denials;
- Provide information to monitor trends over time in the volume of claims received, the volume of claims returned to providers, including returned documents providing additional data for suspended claims, errors detected, payments approved and denials;
- Provide information to monitor the actions taken to resolve errors on claims and transactions, the frequency with which various resolution methods are used and by whom;
- Provide information to analyze the flow of claims and transactions from receipt through final disposition;
- Provide information to monitor the application of edits and audits by claim category and processing cycle;
- Provide information to identify, rank and analyze the reasons for claim denials and returns to providers;
- Provide information to monitor trends over time in the volume of adjustments received and their disposition;
- Provide information to identify additions, deletions, and changes to edit and audit criteria;
- Provide information to monitor the volume of claim status inquiries received, the frequency with which various types of inquiries are received, and the manner in which they are responded to or resolved; and
- Provide information to monitor the occurrence and accuracy of claims processing support information updates.

2. Program Management Information Requirements

An approved MMIS must develop, maintain and provide information that supports major program management functions and activities such as fiscal planning and policy development, and provide information on both provider and recipient participation and service delivery. This information must be organized and structured into functional information areas and into levels specific to the user's needs. The functional information areas are: Administration, including financial management; Provider Relations; and Recipient Relations.

At a minimum, an approved MMIS must provide sufficient and timely Medicaid information to analyze the information functional areas, and to support internal and external reviews. It must:

- Provide claims processing related expenditure information to allow management to monitor and compare program expenditures and budgeted amounts periodically, including comparison of actual and budgeted funds, projections of expenditures, and calculation of budget variances. This information projects cost of program services for future periods from past experience. Information produced must be in a manner compatible with the State's budgetary process and be organized by appropriate budget elements such as category of service and aid category;
- Provide information to support financial planning and policy development, such as comparisons of past, current and future financial trends. Information must be presented by appropriate categorizations, such as aid category within category of service, and include trends of both current and anticipated expenditures in relation to use of services. Information must, at a minimum, include current payments to providers, average cost per eligible recipient and historical trends of payments and average costs to make projections of funds needed in future periods;
- Provide managed care-related expenditure information to allow management to generate financial reports on the per capita payments made to managed care entities;
- Provide periodic information on the extent of financial liability against the program, taking into consideration the value of in-process claims and the value of retroactive adjustments, including those involving TPL and cost-settlement activities;
- Provide Medicare participation information on the level of Medicaid expenditures for recipients who also have Medicare coverage. Recipient and payment information must describe the financial relationship between Medicare and Medicaid including: number of Medicaid eligibles bought-in for Medicare coverage; number of eligibles not yet accreted by the Social Security Administration; cost of part A and part B premiums paid by Medicaid; and Medicaid payments for Medicare claims deductibles and coinsurance. Related data on qualified Medicare beneficiaries (QMBs) also must be included;
- Provide information showing the extent that providers who are enrolled in the program are actually providing services. The information must allow analysis of the provider participation through the examination of payments, services furnished and recipients serviced by category of service, and must be presented by time periods to establish service distribution and participation trends for planning and control;
- Provide third party information for management to effectively plan, control and manage the operation of the TPL function, including information on dollars recovered and costs avoided;
- Provide claim filing information to assist financial management and provider relations staff in determining those areas of provider services which have delays between the dates of service

and the dates claims are received for processing;

• Provide prescription drug use information to assist in program planning and control by presenting a drug usage frequency analysis which reflects the most commonly used drugs and ranking of expenditures by drug classification codes, and by recipient aid category. Information must be organized in a manner to allow for analysis of both cost and potential abuse;

• Provide information showing recipient participation and utilization of services indicating both payments and number of recipients by aid category. Information must be presented by time periods and show trends of activity;

• Provide information showing the geographic distribution of expenditures and recipient participation at the county or other level to enable program management to monitor the Statewide availability, comparability and use of services;

• Provide information on the usage of services compared to any service limitations, showing the number of recipients and service units by aid category and category of service;

• Provide information to support Federal reporting requirements as contained in the SMM; and

• Provide information to support institutional and capitation fee setting.

3. Surveillance and Utilization Review (SUR) Information Processing Capabilities

The SUR information processing capability of an approved MMIS draws upon data from the information base and must utilize a variety of processing methodologies to identify potential fraud and abuse (42 CFR part 455), trends in utilization and payment, edit and audit failure, and patterns of payments and utilization inconsistent with program policy. Cases identified by the Surveillance and Utilization Review Section (SURS) that have a potential for provider fraud and abuse should be referred to the Medicaid Fraud Control Unit (MFCU) in those States which have such units. The referral should be in accordance with the memorandum of understanding in effect between the Units and the single State agency.

SUR information capabilities are organized according to the following processing methodologies and techniques: Statistical Analysis Requirements; Exception Processing Requirements; Retrospective Detection of Edit/Audit or Policy Failure Requirements; Sampling Requirements; General Access Features; General Processing Features; and Output Requirements.

a. Statistical Analysis Requirements. An approved MMIS must have the ability to support general overall analysis of the Medicaid program, both in pre-defined reports, and in ad hoc reports. Specifically, an approved MMIS, at a minimum, must be able to:

• Compute program-wide statistics by areas, such as benefit type, provider type, recipient category, and special program category;

• Focus on specific benefit, provider, or recipient categories at the request of program management.

b. Exception Processing Requirements. An approved MMIS must be capable of supporting user requests for exception reporting. Exception processing refers to the process of collecting data for a group of program participants (providers, recipients, contractors, group practices, case managers, etc.), defined by a common set of attributes (location, size, specialty, age, sex, amount paid, etc.), for the purpose of detecting exceptions or outliers to the group's statistical norms.

It should be emphasized that the exception reporting characteristics and requirements described in this section represent MMIS capabilities to support Utilization Control regulations at 42 CFR part 456, subpart B. The systems requirements set forth here are not intended to specify or mandate the frequency or scope of exception processing. Operational requirements of this nature must be in accordance with the State plan and MMIS reapproval requirements.

At a minimum, an approved MMIS must be able to:

• Perform exception processing for the purpose of detecting potential fraud and abuse (42 CFR part 455) for all provider types who are directly reimbursed for their services and for all recipients who receive directly reimbursed services;

• Associate individual participants (providers, recipients, case managers, etc.) with peer groups for comparative analysis, using provider, recipient, and other program participant data elements, as well as claims (and pseudo-claims or non-paid transactions where available) data elements, and combinations of participant demographics and claims data;

• Create class groups for all different types of entities authorized by the State program; e.g., recipients, servicing providers, group practice (billing ID) providers, case managers, health plans, and primary care providers;

• Calculate norms for participant groups using average and standard deviation (or other statistical calculations such as percentiles) to compute upper and lower limits. Users must be able to specify upper or lower limits;

• Calculate and produce frequency distribution reports on user requested report items;

• Compare individual participants to their group norms, averages, means, percentiles, and other constants;

• (PM) Apply weighting and ranking to the exception report items so that individuals with high potential for exception are identified and ranked accordingly (Section 1902(a)(30) of the Act and 42 CFR 433.116, 455.21, and 456.21);

• Identify individual participant exception to group norms and produce summary profiles displaying their activity and identifying the utilization and cost factors which exceed group norms;

• Retrieve from the information base all services associated with members of the user-defined groups, at the user's request, and according to data selection parameters established by the user; and

• Report both individual and class group summary statistics so that the individual exception case can be easily compared to the group norms;

Appendix II sets forth guidelines concerning the following components of the exception processing function:

• Categories of program users subject to exception processing;

• Criteria for establishing peer groupings within the various categories of program users;

• Utilization target areas on which exception processing must focus;

• Report item data sets for each category of Program User (organized by utilization target areas); and

• Service displays to be available on profiles and class group level reports.

c. Retrospective Detection of Edit/Audit or Policy Failure Requirements. An approved MMIS must be able to detect retrospectively cases where claims processing edits and audits, or provider, recipient, or reference file maintenance edits and audits may have failed, been improperly installed, or may not have been installed at all. The system must also be able to detect cases where program policies have been overridden or bypassed. This capability need not be achieved by means of special reports or processing but can be achieved as a by-product of the analysis of a variety of systems generated reports such as analysis of summary profile reports of exceptional providers or recipients.

At a minimum, an approved MMIS system must be able to use SUR information processing capabilities to:

• Detect individual cases or patterns in which Medicaid policy appears not to be correctly implemented in the claims processing function; and

• Identify front-end claims edit and audit, and provider, recipient, and reference maintenance failures and errors.

d. Sampling Requirements. An approved MMIS must be able to support sampling of data in the information base for a variety of purposes such as provider audits and recoupment of funds. PM—At a minimum, an approved MMIS must have the capability to randomly select and extract samples of adjudicated claims using each or a combination of the following selection parameters:

• Provider type;
• Provider ID number;
• Invoice type;
• Aid category;
• Recipient ID number;
• Procedure code;
• Date of service;
• Date of payment; and
• Geographic area (Section 1902(a)(30) of the Act and 42 CFR 455.13 and 455.17).

(PM) The output associated with this process must include appropriate totals, such as number and dollar value of claims in the universe from which the sample was selected, as well as totals applicable to the sample items selected (42 CFR 455.13 and 455.17).

(PM) In addition, an approved MMIS must have the capability to extrapolate sample results to the population from which it is drawn using generally accepted statistical techniques (Sections 1902(a)(30) and 1903(r)(5)(A) of the Act and 42 CFR 433.116, and part 456 subpart B). This capability must include the ability to extrapolate, at various levels of confidence; (1) instances of attributes or occurrences in the sample; e.g., number of claims with errors; and (2) value of variables in the sample; e.g., dollar overpayments.

e. General Access Features. Although each Medicaid agency's program differs from all others, all share a common set of "entity relationships"; i.e., every Medicaid program maintains associations between itself, providers, recipients, benefits, claims, etc. These associations can be specified as a series of business rules which translate agency policy into processes executed by the system. The information base must incorporate these relationships and provide access to them.

At a minimum, an approved MMIS must provide access to the information base by:

• Supporting analysis of State program cost and utilization, both in periodic reports, and in ad hoc, focused reports;

• Supporting user access to the information base such that user requests for information related to statistical analysis, exception processing, feedback to operations, and data sampling are met in a reasonable time frame and are efficiently executed;

• (PM) Providing end users (i.e., staff who use the data) with easy access to a parameter driven information base (Sections 1902(a)(30) and 1903(r)(5)(A) of the Act and 42 CFR 433.116, 455.21, and 456.21).

• (PM) Providing flexible methods of access (i.e., the user, using the syntax and vocabulary of the system access methodology, can specify what data are to be selected and how they are to be processed) (Sections 1902(a)(30) and 1903(r)(5)(A) of the Act and 42 CFR 433.116, 455.21, and 456.21).

• (PM) Allowing the user to specify which data elements and data element associations are to be extracted from the information base and what calculations and processes are to be applied to these selected data elements and what format is to be used for the output (screen, paper, electronic media) (Sections 1902(a)(30) and 1903(r)(5)(A) of the Act and 42 CFR 433.116, 455.21, and 456.21).

• Supporting efficient linkages or associations between key data elements by requiring at a minimum:

+Association of all referred services to the referring/admitting/prescribing provider;
+Association of diagnosis to procedure;
+Association of individual providers to their group practice;
+Association of periods of eligibility with recipient service activity (i.e., the system must be able to match the eligibility and enrollment status of the recipient at a point in time with the service rendered at that same time. The system must be able to connect eligibility and service data, as in reporting how many pregnant women, continuously eligible for Medicaid during the pregnancy, received prenatal care during the 9 to 10 month period);
—Linkage of all services to a single recipient ID regardless of the number of historical changes in ID;
—Cross-referencing all provider IDs to a single ID and to report separately and collectively on provider utilization;
—Association of services furnished in a clinic setting to both the clinic and the servicing provider; and
—Linkage of interim and final hospital bills into a single, merged record of the complete hospital stay;

f. General Processing Features. To support the above functions, an approved MMIS must include a range of processing features which the user can call upon to perform the basic SUR requirements of exception processing, program analysis, identification of failed policies and edits, and sampling of historical data. These processing features may be accessed through user commands as in a Control File, Parameter Data Base, or automated "encyclopedia of user instructions".

(PM) The range of processing features must demonstrate at a minimum the ability to:

• Unduplicate and count recipient IDs;
• Unduplicate and count Case IDs;
• Unduplicate provider IDs (of all types, e.g., referring provider, servicing provider, group practice, rendering provider);
• Count and unduplicate procedures and associated modifiers (section 1902(a)(30) of the Act);
• (PM) Compute unduplicated counts at the individual participant level and any designated group level, based on user parameter input; for example, if one individual goes to doctors *A* and *B* and another individual goes to doctors *B* and *C*, do not count as four doctors, but unduplicate and count as three doctors (Section 1902(a)(30) of the Act);
• Total units of service; e.g., days, quantity, days supply;
• Unduplicate and count drug codes; for example, certain prescriptions with the same specific National Drug Code may be prescribed in varying strengths (30mg, 50mg)—unduplicate and count the prescriptions separately. Although they are the same drug type, do not combine them;
• Total all dollar amounts;
• (PM) Associate provider and recipient characteristics with claim level data, e.g., provider specialty associated with procedure codes (Section 1902(a)(30) of the Act);
• (PM) Compute summary totals of information by major entity (provider, recipient, health plan, case manager, etc., and their associated attributes; e.g., type of provider, type of recipient) (section 1902(a)(30) of the Act);
• Perform association of summary totals; e.g., add, multiply, divide, and/or use Boolean logic; and
• Compute frequency distributions on user selected items.

g. Output Requirements. The system must produce output consistent with the type of request for information. There are no specified formats or media,

however, output must meet industry standards for legibility, timeliness, and appropriateness of the presentation to the purpose. State performance must achieve at least minimum output requirements in accordance with MMIS reapproval requirements. Where appropriate, English language descriptions must be printed in association with the value/information codes appearing in the report.

At a minimum, an approved MMIS must have the capability to produce the following outputs:

- Reports summarizing program-wide statistics on cost and utilization of services over user-specified time periods;
- Group profiles containing aggregation of data for groupings of program participants; e.g., servicing providers and recipients;
- Summary total reports displaying summary statistics for all requested data;
- Reports showing comparative statistics resulting from exception processing;
- Frequency distribution reports;
- (PM) Displays of report items by frequency, payment, ID of recipient or provider (section 1902(a)(30) of the Act);
- (PM) Individual summary profiles of providers, recipients (also contractors, case managers, etc.) are subject to exception processing (section 1902(a)(30) of the Act);
- Claims detail reports selected by a variety of data elements and sorted by user-selected options (selectable data elements must include servicing provider ID, referring provider ID, billing provider ID, recipient ID, case ID, as well as procedure and diagnosis codes, date of service ranges or date of payment;
- (PM) Exception logs listing individual participants in order of severity of exception (section 1902(a)(30) of the Act); and
- (PM) Lists of top designated number of diagnoses, procedure codes, drug codes for groups of participants and individuals (section 1902(a)(30) of the Act).

D. System File Requirements

The following data elements contained in the systems files are minimal and not exclusive requirements for source and use within an approved MMIS. These data elements are derived from State plan and Federal reporting requirements. Data elements related to services not covered in the State plan need not be included. The Uniform Hospital Discharge Data Set (UHDDS), developed through the National Committee on Vital and Health Statistics (NCVHS) and required by HHS departmental policy, effective January 1, 1975 revised July 31, 1985 (50 FR 31038), and which meets current Peer Review Organization requirements of section 11205 the State Medicaid Manual (SMM), contains, for hospital service only, discharge data as a file requirement and is identified in this section as:

*UHDDS as well as MMIS requirement

**UHDDS requirement only

At a minimum, an approved MMIS must include the following data elements:

1. Recipient Identification Number;

(A number that uniquely identifies an individual eligible for Medicaid benefits.)

2. *Recipient Social Security Number (SSN);

(The number used by the Social Security Administration (SSA) throughout a wage earner's lifetime to identify earnings under the Social Security Program.)

For newborns and children not having a SSN but covered under Medicaid, use No. 1 above to identify these eligible.

3. Recipient Social Security Claim Number;

(The number assigned to an individual by the SSA under which cash benefits (and Medicare benefits) are paid or eligibility is established.)

4. Recipient's Name;

(The name of the recipient.)

5. *Recipient's Residence Address;

(The resident address of the recipient, including zip code.)

6. *Recipient's Date of Birth;

(The date of birth of the recipient.)

7. **(a) The ethnic origin of the recipient;

(For example, White, Black, Hispanic, Asian/Pacific Islander, American Indian/Eskimo/Aleutian, and Other.)

8. *Recipient's Sex Code;

(The sex of the recipient.)

9. Recipient's Aid Category;

(A unique code indicating the Federal aid category(s) under which a recipient is eligible for Medicaid benefits and used for Federal reporting as specified in 42 CFR part 435 and covered under each State's Medicaid State plan.)

10. Gross Family Income;

(The monthly gross income for the family of which this recipient is a member.)

11. Family Size;

(The number of persons in the family of which this recipient is a member.)

12. Eligibility Beginning Date;

(A date that begins a period in which a recipient was certified as eligible to receive Medicaid benefits.)

13. Eligibility Ending Date;

(A date concluding a period in which a recipient is eligible to receive Medicaid benefits.)

14. (a) Third Party Liability Code;

(A code indicating the presence of third party resources.)

**(b) Expected Principal Source of Payment; (A code identifying the single major source that the patient expects will pay for his or her bill. Major sources are:

- Self-pay
- Workers' Compensation
- Medicare
- Medicaid
- Maternal and Child Health
- Other Government Payments
- Blue Cross
- Insurance Companies
- No charge (free, charity, special research or teaching)
- Other.)

15. Insurer Name;

(The name of the liable or potentially liable health insurance company.)

16. Insurer Address;

(The address of the liable or potentially liable health insurance company.)

17. Policyholder Name;

(The name of the policyholder or entity to whom the policy was issued.)

18. Policyholder/Recipient Relationship;

(The policyholder's relationship to the eligible recipient.)

19. Policy Number;

(The number assigned to the insurance contract.)

20. Insurance Coverage Begin Date;

(The date insurance coverage begins.)

21. Insurance Coverage End Date;

(The date insurance coverage ends.)

22. Insurance Resource Type;

(A code which identifies the type(s) of coverage, such as major medical, dental, vision or combinations thereof.)

23. SSN of an Absent Parent;

(See 42 CFR 433.138 for the conditions under which this piece of information must be captured.)

24. Health Maintenance Organization (HMO)/Capitated Plan Enrollment;

(A flag indicating whether a recipient is enrolled in an HMO or capitated plan which delivers services based on premium amounts.)

25. HMO/Capitated Plan Enrollment Date;

(A recipient's date of enrollment in an HMO/capitated plan.)

26. Recipient On-Review Indicator;

(A code indicating that all claims for a given recipient are to be manually reviewed prior to payment.)

27. Recipient Lock-In Indicator;

(An indicator which shows that a recipient is restricted to a specific provider for medical services.)

28. Lock-In Provider Number;

(The provider number associated with the capitated plan, lock-in, or other restricted service.)

29. Cash Grant Indicator;

(A code indicating whether or not the recipient is currently receiving cash assistance.)

30. Medicare Type Code;

(A code indicating whether the recipient is covered by Medicare, and, if so, whether s/he has Hospital Insurance Benefits (Part A) and/or Supplementary Medical Insurance Benefits (Part B).

31. Buy-In Status Code;

((a) The code indicating a recipient's status with respect to the State "buying in" and paying any Medicare Part A and Part B premiums.

(b) The code indicating a recipient's status respect to the State "buying in" and paying any Medicare Part A and Part B premiums for qualified Medicare beneficiaries (QMBs).)

32. Buy-In Eligibility Date;

(The beginning date from which the recipient is eligible for the Medicare Buy-In Program.)

33. Buy-In Premium Date;

(The date associated with Medicare Part A and Part B Buy-In premium amounts.)

34. Buy-In Premium Amount;

(The amount of money the State pays to HCFA each month per recipient for Medicare Part A and/or Part B Buy-In coverage.)

35. SSA-Information Exchange Code;

(A code scheme consisting of various numerical codes which describe situations that can occur at SSA or at the State level.)

36. Recipient's Eligibility Certification Date;

(The date the State certifies an individual meets all requirements of eligibility for public assistance, supplemental security income (SSI) or State supplemental benefits, or Medicaid benefits.)

37. Recipient's Location Code;

(The geographic or geopolitical subdivision of a State in which the recipient resides (such as, region, county, or district).)

38. Date of Death;

(The date of a recipient's death as indicated in the Social Services or SSI file after an official notice of death has been received.)

39. Provider Number (State);

(A unique number assigned by the State to each participating provider of services such as, capitated plans, primary care physicians, case managers, home- and community-based services providers, community mental health providers.)

40. Provider Name;

(The name of the provider of Medicaid services as used on official State records.)

41. Provider Address;

(The mailing address of the provider.)

42. Provider Pay to Address;

(The address to which Medicaid payments to a provider are sent.)

43. Pay to Provider Number;

(The provider number of the individual or group that is to receive payment if different from the number of the provider that provided the service.)

44. Provider Type;

(A code indicating the classification of the provider furnishing health and medical services as approved under the State Medicaid plan.)

45. Provider Beginning Date of Service;

(A date beginning a period in which the provider was authorized to receive Medicaid payments.)

46. Provider Ending Date of Service;

(A date concluding a period in which the provider is authorized Medicaid payments for services furnished.)

47. Provider Federal Identification Number;

(The number assigned to an employer for Federal reporting purposes; either the Employer Identification Number (EIN) or the SSN.)

48. *Medicare Provider Number;

(The identification number assigned by HCFA to a Medicare provider, any individual or entity furnishing Medicaid services under a provider agreement with the Medicaid agency (see 42 CFR 400.203).

49. Provider Year End Date;

(The calendar date on which the institutional provider's fiscal year ends.)

50. Provider Specialty Code;

(A code used to indicate the certified medical specialty(ies) of a physician, such as neurology and podiatry.)

51. Provider Credit Balance Amount;

(The amount of money the Medicaid program owes a provider.)

52. Provider Credit Balance Date;

(The processing date on which the last amount was entered in the Provider Credit Balance amount.)

53. Out-of-State Provider Code;

(A code indicating that the provider is located out of State.)

54. Per Diem Rate;

(The payment amount for each day of care in an institution reimbursed on a per diem basis.)

55. Percent-of-Charges Factor;

(The percent of a provider's charges that constitutes payment for certain categories of service.)

56. Rate Effective Date;

(The effective date of the accompanying per diem rate or percent-of-charges factor.)

57. Capitation Fee;

(The monthly payment made to a capitated plan for services provided to enrolled recipients by specified aid categories.)

58. Provider Location Code;

(The geographic or geopolitical subdivision in which the provider's place of business is located.)

59. Provider Enrolled Status Code;

(A code indicating a provider's certification status with respect to the Medicaid program.)

60. Provider Enrollment Status Date;

(The effective date of the accompanying provider enrollment status code.)

61. Provider Group Name and Address;

(The name and mailing address of the provider group.)

62. Provider Group Number;

(The number assigned to the group practice of which an individual provider is a member.)

63. Transaction Control Number;

(A unique number identifying each claim transaction received including the date the claim was received.)

64. Total Claim Charge;

(The sum of all charges associated with an individual claim.)

65. Medicaid Amount Paid;

(The amount paid by Medicaid to a provider on a claim or adjustment.)

66. Third Party Payment Amount;

(The amount of payment applied toward a claim by third party resources.)

67. Date of Adjudication;

(The date a claim is approved for partial or full payment or disapproved for payment.)

68. Claim Exception Code;

(A code indicating the nature of a failure of an edit/audit during claim adjudication processing.)

69. Payment Date;

(The date a payment instrument was generated for a claim transaction.)

70. Date Claim Entered Suspense;

(The date a claim transaction was initially suspended.)

71. Claim Category of Service;

(A code defining the category of service furnished (e.g., general inpatient, pharmacy, physician, home health).)

72. Laboratory, Medicare Certified Indicator;

(A code indicating that a laboratory is approved as meeting the requirements for participation in Medicare.)

73. Laboratory Service Authorized Code;

(A code indicating the services/procedures that a laboratory which meets the requirements for participation in Medicare is authorized to perform.)

74. *Physician Identification;

a. Attending Physician Number
(The provider number of the physician attending an inpatient in a hospital, nursing home, or other institution. This is the physician primarily responsible for the care of the patient from the beginning of this institutional episode.)

**b. Operating Physician
(This is the physician who performed the principal significant procedure. See Data Element No. 99 below, for definition of principal procedure.)

75. Referring Physician Number;

(The provider number of the physician referring a recipient to another practitioner or provider.)

76. Prescribing Physician Number;

(The unique identification number of the physician ordering a procedure or prescribing a drug.)

77. Diagnosis Name;

(The generally accepted nomenclature for a diagnosis consistent with the diagnosis code.)

78. Diagnosis Code;

(A table of codes identifying diagnosed medical conditions, as defined by the International Classification of Diseases, Version 9, Clinical Modification; i.e., ICD–9–CM and subsequent editions.)

79. *Principal Diagnosis Code;

(The diagnosis code for the principal condition requiring medical attention. **The condition established after study to be chiefly responsible for causing the patient's admission to the hospital for care for the current hospital stay. (HCFA requires the acceptance of ICD–9–CM coding.))

80. Other Diagnosis Code;

(The diagnosis code of any condition other than the principal condition which requires supplementary medical treatment. **Conditions other than the principal condition that coexisted at the time of admission, or developed subsequently, which affected the treatment received and/or the length of stay. Exclude diagnoses that relate to an earlier episode which have no bearing on the current hospital stay. (HCFA requires the acceptance of HCPCS coding.))

81. Diagnosis Related Group Code;

(A code identifying the diagnosis related group.)

82. Institutional Admission Date;

(The date a recipient was admitted to a medical institution.)

83. Beginning Date of Service;

(The date upon which the first service covered by a claim was furnished.)

84. Ending Date of Service;

(The date upon which the last service covered by a claim was furnished.)

85. *Discharge Date;

(The date an inpatient was discharged from an institution.)

86. Place of Service;

(A code indicating where a service was furnished by a provider.)

87. *Patient Number;

(Any number assigned by a provider to a recipient or claim for reference purposes, such as a medical record number.)

88. Patient Status;

(A code indicating the patient's status on the last date of service covered by an institutional claim.)

89. Units of Service;

(A quantitative measure of the services furnished to or for a recipient (e.g., day, visits, miles, injections).)

90. Medicare Cash Deductible Amount;

(The unmet Medicare deductible subject to payment by Medicaid.)

91. Medicare Coinsurance Charge;

(The Medicare coinsurance amount subject to payment by Medicaid.)

92. Medicare Reasonable Charge;

(Payment amount recognized as the reasonable charge for Medicare.)

93. Medicaid CoPayment Amount;

(The portion of the claim charge which the recipient must pay, called coinsurance when expressed as a percentage of the payment amount.)

94. Prior Authorization Control Number;

(A number that uniquely identifies the authorization for payment prior to the delivery of a service.)

95. Allowable Procedure Payment;

(The maximum allowed amount payable for a particular medical procedure, treatment, or service item.)

96. Prescription Dispensing Fee;

(The amount allowed to a dispenser of drugs as compensation for his/her professional services.)

97. Prescription Number;

(The number assigned by a pharmacist to a prescription at the time it is filled.)

98. Procedure Names;

(The generally accepted nomenclature for medical, surgical, dental, etc. procedure.)

99. Procedure Codes;

(Codes identifying medical procedures. In a physician or outpatient setting accept and use exclusively the HCPCS; for an inpatient setting, ICD-9-CM Volume 3 is recommended.)

**a. Significant procedures

(A significant procedure is one that is: surgical in nature; or carries a procedural risk; or carries an anesthetic risk; or requires specialized training.)

**b. Principal significant procedures (When more than one procedure is reported, designate the principal procedure applying the following criteria:

- The principal procedure is the one which was performed for definitive treatment rather than performed for diagnostic or exploratory purposes, or was necessary to take care of a complication.
- The principal procedure is that procedure most closely related to the principal diagnosis or the complications that arise during other treatments.)

100. Drug Code;

- (Codes identifying particular drugs; e.g.; National Drug Code, drug tables.)

101. Drug Name;

(The generally accepted nomenclature for a particular drug.)

102. Drug Therapeutic Classification;

(The therapeutic group in to which a drug is categorized.)

103. Maximum Days Supply of Drugs;

(The maximum units of a drug prescription eligible for a particular drug.)

104. Unit of Measure;

(The unit in which a drug is dispensed (e.g., cc, capsule, tablet.)

105. Drug Allowable Cost;

(The generally accepted wholesale acquisition cost of a drug.)

106. Drug Charge;

(The charge submitted by a provider for a given drug prescription.)

107. Drug Cancellation Date;

(The date after which a particular drug is no longer covered under the State Medicaid program.)

108. *Discharged Patient's Destination;

(A code indicating a recipient's destination upon discharge from a medical institution. Codes must identify:

- Discharged to home or self care (routine discharge)
- Left against medical advice
- Discharged/Transferred to another short term general hospital
- Discharged/Transferred to a long term care institution
- Discharged/Transferred to home under care or organized home health service organization
- Discharged/Transferred to a mental health center
- Died
- Other.)

109. Procedure Charge;

(The charge for an individual procedure, treatment, or service item as submitted by the provider.)

110. Adjustment Amount;

(The amount (plus or minus) by which a provider's account is to be changed.)

111. Date of Surgery;

(The date on which a surgical procedure(s) was performed on an inpatient.)

112. Valid Sex Indicator;

(A code which indicated when a procedure or diagnosis is limited to one sex only.)

113. Age Range Indicator;

(A code which specifies an age range when a procedure or diagnosis is limited to a particular age group.)

114. Screening Results Code;

(A code indicating the outcome of the various screening tests performed.)

115. Screening Referral Code;

(A code indicating the nature of any referrals made as a result of screening.)

116. Screening Related Treatment;

(A code identifying procedures or services received as result of screening.)

117. Family Planning Code;

(A code indicating whether any diagnosis, treatment, drugs, supplies, devices, counseling service, or other billed services or materials are for the purposes of family planning.)

118. Certification Review Indicator;

(Indicator showing that review was made by certification of a recipient who has been admitted to institutional care including approval status.)

119. Certification/Recertification Date;

(The date of certification/recertification of a recipient who has been admitted to institutional care.)

120. Certification Status;

(An indication of initial certification status of a patient in an institution.)

121. Number of Requests for Extension;

(The number of times an extension of certification of stay was requested for a patient in an institution.)

122. Days Certified Initially;

(The number of days of stay certified initially for a patient in an institution.)

123. Total Days Certified;

(The total number of days of stay certified for a patient in an institution.)

124. Date of Application;

(The date that a recipient applied for eligibility status in the Medicaid program.)

125. Budgeted Amount;

(The planned expenditures for various Medicaid services over a given period of time.)

126. Case Number;

(The number assigned by a State agency that links together family members.)

Appendix I—Detail Systems Documentation Requirements

Systems Design Documentation

The system design documentation is used to present an overview of system features, function and processes. It must include information sufficient to provide an understanding of how system components interact and how the system relates to user and computer operations. It must contain:

- Descriptions of inputs and outputs
- Data definitions
- File/data base descriptions
- System inventories
- Functional and system flow descriptions and/or representations
- System narratives.

Programming Documentation

Programming documentation must provide sufficient commentary and information to enable program problems resolution, maintenance activities, and enhancements. It must contain:

- Program codes
- Source code compilations
- Program definitions
- Report and screen layouts
- Program cross references and linkages
- A program change log
- A data element dictionary cross referenced to the data elements defined in section D of these requirements, System File Requirements.

Computer Operations Documentation

Computer operations documentation consists of written procedures needed to

operate the system, i.e., to run, control and balance jobs.

It must include:

- A production run book
- Job control language
- Hardware and system software configurations
- Data communications protocols
- Backup and recovery procedures
- Maintenance procedures and schedules for all applicable operating system software and equipment.

User Documentation

User documentation consists of written procedures and instructions needed by the end users (States, fiscal agents, providers to successfully interact with the system. It must include:

- Administrative procedures
- Work flow diagrams
- Control and balancing procedures
- Report and screen layouts
- Data entry/input instructions
- Medical and program policy
- A comprehensive claims processing and suspense resolution manual that complements the suspended claim system requirement in the Claims Adjudication and Payment Requirements section of these requirements
- Financial operations procedures for adjustments, recoupments, returned checks
- File/database maintenance and use procedures
- Reports interpretation and use descriptions
- Descriptions of system audit trails
- Provider billing manuals.

Organizational Documentation

Organizational documentation consists of information for management activities, such as planning and budgeting. It must include:

- Organization charts
- Job descriptions
- Systems resources and equipment necessary to operate the system.

Appendix II—Suggested Exception Processing Guidelines

The material described in this supplement represents the suggested scope of exception processing of an approved Medicaid Management Information System (MMIS). It is expected to appear in the SMM.

The following sections identify eleven categories of program users that should be accommodated in the exception processing function of an approved MMIS. States may expand and/or refine these categories to meet their unique exception processing objectives. For each category of program user, States also should:

- Organize program users into appropriate peer groupings;
- Define various utilization target areas (e.g., Physician prescribing patterns, referral practices, etc.);
- Develop appropriate report item data sets which focus on each target area; and
- Develop appropriate service displays to be available on individual profiles and class group level reports.

States may use the same, equivalent or expanded versions of the peer group criteria, utilization target areas, report item data sets and service displays identified in the eleven categories of program users. Where States elect to make substitutions based on equivalence, they should be able to demonstrate that substitutions achieve the same objective of the items or concept being substituted.

States that utilize MMIS to manage their capitation or other non-fee-for-service programs may employ the same exception processing guidelines as they logically apply to these programs. For example, individual health plans may encompass a wide range of program users whose services could be profiled by the same categories listed below. States may wish to modify or expand utilization target areas and upper and lower limits to accommodate the different practice patterns that occur in non-fee-for-service environments.

All exception items must be used in conjunction with volume thresholds to avoid exception on individuals who exceed a limit but whose volume of practice is small. This can be done by exception pattern linkage, denominator specification, master control logic or other State specific volume threshold mechanisms.

Minimum service (data element) displays must be available on profiles and on the class group level:

- Displays of procedure, diagnoses, drug and revenue codes must have English language descriptions.
- For each displayed value the ranking element, e.g., dollars, recipients, etc., should also reflect the percentage it represents of the total; i.e., if paid amount is shown it should have a corresponding percentage depicting those dollars as a percent of all dollars.
- The "N" (number) display should be at least 10, but States can expand the number of displayed values as they wish.
- All recipient, case, and provider counts should be unduplicated.

In addition to exception items, reports should include key information such as:

- Total dollars Medicaid Paid
- Total dollars Medicare Paid (where appropriate)
- Total Unduplicated Recipients
- Percent Recipients in Long Term Care
- *Percent of Services Rendered in Class Group
- *Percent of All Recipients Seen in Class Group
- *Percent of All Dollars Paid in Class Group
- *These may also be used as exception criteria in any report.

Category 1: Physician (Includes Medical Doctor, Osteopath, Physician Clinics)

Peer Grouping Criteria: Specialty, Type of Practice (Sole or Group Practice), Geographical Location.

Target Areas/Report Items: The exception report items for physician focus on the following target utilization areas: (A) Drug prescribing patterns; (B) referral practices; (C) direct services practices; and (D) recipient/case overutilization. Upper or lower exception indicators are noted. The items are identified in sets of items that should be linked together in evaluating an exception. Actual limits should be State/Program specific.

	Type of Limit
(A) Drug Prescribing Patterns	
Set 1:	
Percent of recipients receiving prescription only	Upper.
Ratio office visits for recipients with prescription drugs to recipients with prescription drugs	Lower.
Set 2:	
Percent of recipients receiving controlled drugs	Upper.
Average number controlled drugs per recipients with controlled drugs	Upper.
Number of different pharmacies dispensing	Lower.

	Type of Limit
(B) Referral Practices	
Set 1:	
Percent of recipients referred to other practitioners	Upper.
Average number referrals per recipient with referrals	Upper.
Number of different practitioners referring 'To'	Lower/Upper.
Set 2:	
Percent of services referrals 'from' other practitioners	Upper.
Number of different referring 'From' practitioners	Lower/Upper.
Percent of payments resulting 'From' other providers	Upper.
Set 3:	
Percent of recipients with referred laboratory/X-ray/diagnostic tests	Upper.
Average number referred laboratory/X-ray/diagnostic tests per recipient with referred tests	Upper.
Number of different laboratory X-ray/diagnostic test providers referring 'to'	Lower/Upper.
Total dollars generated by referred laboratory/X-ray/diagnostic tests providers	Upper.
Percent of all dollars paid to laboratory/X-ray diagnostic test providers resulting from providers' referrals	Upper.
Set 4:	
Percent referrals to own group member (The group(s) to which the physician being analyzed is also a member)	Upper.
Percent recipients referred to own group member	Upper.
Average number referrals to own group per recipient	Upper
Amount paid to own group for referrals to group	Upper
(C) Direct Services Practices Type of Limit	
Average number visits (all types) per Day (of Service)	Upper.
Percent of service days with over N visits	Upper.
Average number of visits per recipient	Upper.
Average number diagnostic services per recipient	Upper (also lower if pre-paid).
Average number direct referred diagnostic services per recipient	Upper (also lower if pre-paid).
Ratio all diagnostic services to visits	Upper (also lower if pre-paid).
Average number all services (direct and referred) billed per recipient	Upper.
Average paid (valued) per recipient	Upper.
Percent of services high cost services (Includes visits and diagnostics)	Upper.
(D) Recipient/Case Overutilization	
Average services per case ID	Upper.
Average services for case per service day	Upper.
Average number of recipients seen per case	Upper.

Service Displays (Profiles and Class Group)

Top N Diagnosis reported on direct billings by dollars, recipients and frequency.

Top N Procedures on direct billings by dollars, recipients and frequency.

Top N Drugs Prescribed by dollars, recipients and frequency. This should be based on first 9 digits of NDC or formulary code (e.g., without package size).

Top N Referred Laboratory/X-Ray/Diagnostic tests by dollars, recipients and frequency.

Top N Procedures Done by Referred 'to' Practitioners by dollars.

Top N Outpatient Surgical Procedures Reported by dollars, recipients, and frequency.

Top N Recipients Seen (Non Ambulatory/Surgery) by frequency and dollars.

Top N Revenue Codes billed by dollars, recipients and frequency.

Top N (Non-Ambulatory Surgical) Procedures reported by dollars, recipients and frequency.

Category 2: Inpatient Hospital (Includes all Acute Inpatient Services)

Peer Grouping Criteria: Teaching Facility, Tertiary Service Facility, Geographic Location and/or Bed Size.

Target Areas/Report Items: The exception items for hospitals focus on the following target utilization areas: (A) Diagnosis Related Group (DRG) cycling (for states that use DRGs); (B) length of stay/ancillary charges; and (C) critical care/tertiary services usage. Items are identified in sets.

	Type of limit
(A) DRG Cycling	
Percent recipients with readmissions	Upper.
Average number readmissions per recipient with admission	Upper.
Percent recipients readmitted within a range of days	Upper. (N–N is range).
Percent of days less, at, or below DRG average length of stay	Upper.
Percent of recipients with admissions for more than one DRG	Upper.
Number of recipients with DRG optimizing	Upper.
(B) Length of Stay/Ancillary Charges	
Set 1:	
Average length of stay per admission	Lower/upper.

	Type of limit
Room and board charge as percent of all charges	Lower/upper.
Average payment per day of stay	Lower/upper.
Set 2:	
Percent admissions—emergency (non-obstetric)	Upper.
Percent admissions through emergency/outpatient department (non-obstetric)	Upper.
Percent admissions—Weekends Admission/Discharge (non-obstetric)	Upper.
Set 3:	
Total admissions	Upper.
Average paid per admission	Upper.
Average number admissions per day	Upper.
Average discharges per day	Upper.
(C) Critical Care/Tertiary Services	
Percent admissions with critical care days (includes neonatal)	Upper.
Average critical care days per Admissions	Lower/upper.
Percent admissions with high level/revenue/procedures code e.g., cardiac catheterization charges	Upper.

Service Displays

Top N DRGs by dollars, recipients, admissions.
Top N diagnosis by dollars, recipients, admissions.
Top N Recipients by admissions, dollars.
Recipients with admissions for suspected DRG optimizing by admissions and dollars. Include DRGs for each admission.

Category 3: Outpatient (Includes Outpatient Facilities, Clinics Billing on UB–82, (HCFA 1450) Ambulatory Surgical Centers)

Peer Grouping Criteria: Hospital-based, Freestanding and Geographic Location.

Target Areas/Report Items: The items for outpatient focus on the following utilization target areas: (A) admissions to acute care; (B) ambulatory surgery; (C) service/recipient volume; and (D) recipient case overutilization. The items are identified in sets indicating linkage for exception analysis.

	Type of Limit
(A) Admissions to Acute Care	
Percent recipients admitted to acute care (includes obstetric admissions but not false labor. Any admission from outpatient date of service through three days after the outpatient date of service should be counted).	Upper.
Average laboratory/X-ray/diagnostic tests per recipient admitted	Upper.
Average outpatient paid for services to recipients admitted	Upper.
Average length of stay per admission for recipients admitted	Lower.
(B) Ambulatory Surgery (Note: Users may wish to exclude obstetric deliveries)	
Percent dollars paid for ambulatory surgery	Upper.
Average paid for ambulatory surgery case (include any follow-up services within N days of service)	Upper.
Average ancillary (diagnostic) charges per ambulatory case (include any follow-up services within N days of service)	Upper.
Percent all recipients receiving ambulatory surgery	Upper.
Percent ambulatory surgery billed on weekend	Upper.
Average number ambulatory surgeries billed per day	Upper.
(C) Recipient/Service Volume	
Set 1:	
Average number of services per recipient seen	Upper.
Percent recipients with multiple visits	Upper.
Average laboratory/X-ray/diagnostic test per recipient seen	Upper.
Set 2:	
Average pharmacy charges per recipient seen	Upper.
Percent of pharmacy charges of all ancillary charges	Upper.
Percent of recipients with pharmacy charges and medicaid visit only on a single day	Upper.
Set 3:	
Average number recipients seen per week-day (non-emergency room)	Upper.
Percent of services on weekend	Upper.
(D) Recipient/Case Overutilization	
Set 1:	
Average services per case ID	Upper.
Average services for case per service day	Upper.
Average number of recipients seen per case	Upper.

Service Displays

Top N Diagnoses reported by dollars, recipients, and frequency.
Top N Outpatient Surgical Procedures Reported by dollars, recipients, and frequency.
Top N Recipients Seen (Non-Ambulatory/Surgery) by frequency and dollars.
Top N Revenue Codes Billed by dollars, recipients and frequency.
Top N (Non-Ambulatory Surgical) Procedures Reported by dollars, recipients and frequency.

Category 4: Pharmacy.

Peer Grouping Criteria: Hospital Based, Chain, Community, Long Term Care.

Target Areas/Report Items: The exception items for pharmacy focus on the following utilization review target areas: (A) brand name drugs; (B) control drugs; (C) maintenance drugs; (D) prescribes, (E) long term care dispensing; and (F) recipient/case overutilization. They are depicted in sets indicating necessary linkage for exception analysis.

	Type of limit
(A) Brand Name Drugs	
Percent of drugs dispensed for brand names	Upper.
Average number brand name prescription drugs per recipient with brand name prescription drugs	Upper.
Average paid per brand name prescription drug	Upper.
Percent of dollars paid for brand name prescription drugs	Upper.
(B) Controlled Drugs	
Percent of prescription drugs for controlled drugs	Upper.
Percent recipients with controlled drugs	Upper.
Average control prescription drugs dispensed per recipient with controlled drugs	Upper.
Average days supply dispensed per controlled drug prescription	Upper.
Average days supply dispensed per recipient with controlled drugs	Upper.
(C) Maintenance Drugs	
Average days supply for maintenance prescription drugs	Lower.
Average number refills per maintenance prescription drug	Upper.
Dispensing fee as percent of payments for prescription drugs	Upper.
Total paid for maintenance prescription drugs	Upper.
(D) Prescribes	
Number different prescribes (non-long term lower care prescription drugs)	Lower.
Average drug payments generated per prescriber	Upper.
Average number prescription drugs per prescriber	Upper.
(E) Long Term Care	
Set 1:	
Percent prescription drugs for long term care recipients	Upper.
Average paid per long term care prescription drug	Upper.
Average days supply per long term care prescription drug	Upper.
Number of different long term care prescriber	Lower.
Set 2:	
Percent prescription drugs maintenance prescription drugs	Upper.
Average days supply for maintenance prescription drugs	Lower.
Set 3:	
Percent prescription drugs bulk purchase type prescription drugs (e.g., ASA, antacids)	Upper.
Average paid per bulk purchase type prescription drugs	Upper.
Set 4:	
Percent prescription drugs for sedatives and tranquilizers	Upper.
Average days supply per recipient sedatives and tranquilizers	Upper.
Set 5:	
Percent prescription drugs for supplies (e.g., syringes)	Upper.
Percent prescription drug dollars for supplies	Upper.
Average paid per supply prescription drug	Upper.
(F) Recipient/Case Overutilization	
Average services per case ID	Upper.
Average services for case per service day	Upper.
Average number of recipients seen per case	Upper.

Service Display

Top N Prescribes by dollars, frequency (number of Prescription Drugs) and recipients.
Top N Recipients for Controlled Drugs by days supply, Prescription Drugs, dollars.
Top N Non-Long Term Care Recipients for Prescription Drugs by dollars, Prescription Drugs.
Top N Long Term Care Recipients for Prescription Drugs by dollars, Prescription Drugs.
Top N Long Term Care Prescribes by dollars, frequency (Prescription Drugs) and recipients.
* Top N Prescription Drugs (Non-Long Term Care) by dollars, frequency and recipients.
* Top N LTC Prescription Drugs by dollars, frequency and recipients.

* Note: Users may opt to do this display by nine digit NDC code eliminating package size.

Category 5: Dentists.

Peer Grouping Criteria: Specialty, Type of Practice (Sole or Group Practice), Geographic Location.

Target Areas/Report Items: The exception items for Dentists focus on the following utilization review target areas: (A) Drugs prescribed; (B) referred services; (C) split billing; (D) service/recipient volume; and (E) recipient case overutilization. The items are depicted in sets relevant to exception analysis.

	Type of limit
(A) Prescribed Drugs (Includes all Dental Specialties and Clinics)	
Percent recipients with analgesics (and controlled prescription drugs)	Upper.
Average days supply for analgesics (per controlled prescription drugs)	Upper.

	Type of limit
Number different dispensing pharmacies	Lower.
(B) Referred Services	
Percent recipients with referrals to other practitioners	Upper.
Number different practitioners referring "To"	Lower/Upper.
Average number referrals per recipients with referrals	Upper.
Percent referrals to members of own group	Upper.
(C) Split Billings	
Ratio of Single Surface restorations to multi-surface restorations	Upper.
Ratio of single or unilateral X-rays to full mouth X-rays	Lower/Upper.
(D) Service/Recipient Volume	
Set 1:	
Average paid per recipient	Upper.
Average paid services per recipient	Upper.
Average services (non-diagnostic) billed per service day	Upper.
Average recipients seen per service day	Upper.
Average number diagnostic services per recipient	Upper.
Set 2:	
Average number restorations per recipient with restorations	Upper.
Average number extractions per recipient	Upper.
Percent endodontics on deciduous teeth	Upper.
Set 3:	
Percent services to long-term care recipients	Upper.
Percent payments for long-term care recipients	Upper.
(E) Recipient/Case Overutilization	
Average services per case ID	Upper.
Average services for case per service day	Upper.
Average number of recipients seen per case	Upper.

Service Display

Top N Procedures Billed by dollars, frequency and recipients.
Top N Recipients by dollars and frequency.
Top N Referred "to" Practitioners by dollars, frequency and recipients.
Top N Prescribed Prescription Drugs by dollars, frequency, and recipients.
Top N Pharmacies Dispensing Prescription Drugs by dollars, frequency and recipients.
Category 6: Independent Laboratories/Radiology.
Peer Grouping Criteria: Hospital-Based, Chain, Physician Owned, Geographic Location, Volume.
Target Areas/Report Items: The exception items for independent laboratories/radiology focus on the following utilization target areas: (A) Referring practitioners; (B) panel splitting; (C) high cost testing; and (D) service/recipient volume. They are depicted in sets reflecting linkage necessary to evaluate exceptions.

	Type of Limit:
(A) Referring Practitioners	
Number different referring practitioners including clinics	Lower.
Average paid to the independent laboratory per referring practitioner	Upper.
Number different referring practitioners for high cost tests	Lower/Upper.
(B) Panel Test Splitting	
Ratio single tests to panel tests (includes tests normally billable in panel)	Upper.
Percent of tests single tests	Upper.
Percent of recipients with panel test	Lower.
Percent of recipients with single tests only	Upper.
(C) High Cost Tests	
Percent of high cost tests (high cost test to be defined by State)	Upper.
Percent of payments for high cost tests	Upper.
Percent of recipients with high costs tests	Upper.
Average number high cost tests per recipient with high cost tests	Upper.
(D) Service/Recipient Volume	
Average payment per test	Upper.
Average payment per recipient	Upper.
Average number tests per recipient	Upper.

Service Displays

Top N Referring Practitioners by dollars, frequency, recipients.
Top N Recipients by dollars and frequency.
Top N Tests by dollars, frequency and recipients.
Category 7: Long Term Care Facilities (Includes Nursing Facilities, Intermediate Care Facilities for the Mentally Retarded).

Peer Grouping Criteria: Community Freestanding, Hospital-Based, Chain, Physician Owned, Bed Size, Geographic Location.

Target Areas/Report Items: The exception items focus on services provided to the recipient while in the facility: (A) drug and supply utilization; (B) physician services; and (C) inpatient admissions. The items are depicted in sets that are relevant to exception analysis.

	Type of limit
(A) Drugs and Supplies	
Set 1:	
Percent recipients on tranquilizers and sedatives	Upper.
Average daily dosage of tranquilizers and sedatives per recipient with tranquilizers and sedatives	Upper.
Average days supply of tranquilizers and sedatives per recipient with tranquilizers and sedatives	Lower/Upper.
Set 2:	
Average days supply of maintenance prescription drugs per recipient with prescription drugs	Lower.
Average number maintenance prescription drugs per recipient with prescription drugs	Upper.
Average days supply of bulk prescription drugs per recipient with prescription drugs	Lower/Upper.
Set 3:	
Average supplies (e.g., syringe) per recipient	Upper.
Average paid for supplies per recipient	Upper.
Set 4:	
Average paid for prescription drugs per recipient	Upper.
Percent of brand name prescription drugs	Upper.
Number different dispensing pharmacies	Lower.
(B) Physician Services and Testing	
Set 1:	
Average paid per physician seeing patients in facility	Lower/Upper.
Ratio medical doctor visits to long term care days	Lower.
Number different physicians seeing patients	Lower.
Set 2:	
Average diagnostic test per recipient	Lower/Upper.
Average rehabilitation/ancillary service per recipient	Lower/upper.
Average independent laboratory/X-ray service per recipient	Upper.
Average paid for independent laboratory/X-ray per recipient	Upper.
Number different independent laboratory/X-ray providers	Lower.
Average paid to independent laboratory/X-ray provider for recipients in long-term care facilities	Upper.
(C) Inpatient Admissions	
Percent of recipients with more than one hospital admission	Upper.
Average number hospital admissions per recipient admitted	Upper.
Average number inpatient bed hold days per month	Upper.
Percent admissions to inpatient for suspect quality of care diagnosis	Upper.
Ratio long-term care days billed (include bed hold) to recipients per month	Upper.

Service Display

Display Top N Recipients by length of stay, dollars.

Display Top N Diagnosis by length of stay, dollars, recipients.

Display Top N Physicians Drug Prescribed by dollars (paid to pharmacies), frequency and recipients.

Display Top N Physicians Seeing Recipients by visits, dollars (paid to physicians), recipients.

Display Top N Independent Laboratory/X-Ray Provider by dollars, frequency and recipients.

Category 8: Transportation (Ambulance, Taxi, Van, Etc.)

Peer Grouping Criteria: Ambulance, Van, Taxi, Chain, Hospital Based, Geographic Location.

Target Areas/Report Items: The exception items for transportation providers focus on service frequency. They should be reviewed with consideration as to the type of transportation the provider is authorized to render.

	Type of limit
(A) Recipient/Service Value	
Average payment per trip	Upper.
Average number of miles per trip	Upper.
Average paid per mile	Upper.
Average number trips per recipient	Upper.
Average additional charges per trip	Upper.
Percent trips with additional charges	Upper.
Percent of trips—emergency	Upper.
Percent of trips from home to doctor's office and office to home	Upper.
Ratio round trips to one way trips	Upper.

Service Display

Display Top N Recipients by trips, dollars. Include percents each ranked value represents.

Category 9: Durable medical equipment (DME) Supplies.

Peer Grouping Criteria: Chain, Hospital Based, Community, Pharmacy.

Target Areas/Report Items: The exception items for DME focus on the following utilization review target areas: (A) Rental/purchase; (B) prescribes; and (C) high cost DME.

	Type of limit
(A) Rental/Purchase	
Ratio rentals to purchase billing	Lower/Upper.
Average days rental per service rental	Upper.
Average days rental per purchasable item	Upper.
Average days rental per Recipient with rental equipment	Upper.
Percent recipients with multiple rentals Average paid per rental	Upper.
Average paid per recipient with rental	Upper.
Average Paid per purchasable item	Upper.
(B) Prescribes	
Number different prescribes of DME supplies	Lower.
Average dollar Amount Generated per prescriber	Upper.
(C) High Cost DME	
Percent of Services for Higher Cost Items (e.g., more expensive wheel chair)	Upper.
Percent of Recipients with Higher Cost Items	Upper.

Service Display

Top N Services by dollars, days rental, recipients. Each ranking value should include percent of total.

Top N Services by dollars, and days rental.

Top N Prescribes of DME by dollars, days rental and recipients.

Category 10: All Other Provider Types.

The items suggested are general and provide broad general service/volume indicators. States can develop Program specific items for these providers where appropriate.

	Type of limit
Average services per recipient	Upper.
Average paid per service	Upper.
Average paid per recipient	Upper.
Average services billed per service day	Upper.

Service Display

Top N services by dollars, frequency and recipient.

Top N Recipients by Dollars, and frequency.

Category 11: Recipient.

Peer Grouping Criteria: Age, Eligibility/Aid Category, Diagnosis, Long Term Care Status, Geographic Location.

Target Areas/Report Items: The exception items for recipients focus on the following utilization review target areas: (A) Drug utilization; and (B) ambulatory services utilization. They are described in sets appropriate for exception evaluation.

	Type of limit
(A) Drug Utilization	
Total prescription drugs	Upper.
Total payments to provider for prescription drugs	Upper.
Average number prescription drugs per month	Upper.
Total controlled and abused prescription drugs	Upper.
Total days supply of controlled drugs	Upper.
Average days supply of controlled drugs per month	Upper.
Number different prescribes for controlled drugs	Upper.
Number different pharmacies for controlled drugs	Upper.
(B) Ambulatory Services	
Number medical doctor/outpatient/clinic/emergency room visits	Upper
Number different outpatient/clinic/emergency room providers	Upper
Number medical doctor visits	Lower/Upper.
Number outpatient/clinic/emergency room visits with pharmacy charges	Upper.

Service Displays

Top N Prescriber ID's ranked by number of prescriptions and dollars paid to pharmacies for prescriptions.

Top N Physician ID's ranked by number of services and dollars paid to physicians for services.

Top N Emergency Room/Outpatient/Clinic ID's ranked by number of services and dollars paid to Emergency Room/Outpatient/Clinic providers.

Top N Prescriber ID's Ranked by Number of Prescriptions and dollars paid to pharmacies for prescriptions.

Top N Physician ID's Ranked by number of services and dollars paid to physicians for services.

Top N Emergency Room/Outpatient/Clinic ID's Ranked by number of services and dollars paid to emergency room/outpatient/clinic providers.

III. Response to Comments

Because of the large number of comments we receive on proposed notices, we cannot acknowledge or respond to them individually. However, in preparing the final notice, we will consider all comments and respond to them in that notice.

IV. Regulatory Impact Statement

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 proposed notice would not have a significant economic impact on a substantial number of small entities. For purposes of the RFA, States are not considered to be small entities.

Previous versions of the State Medicaid Manual, part 11, chapter 3, reflected HCFA's policy of utilizing the MMIS-GSD as the standard for evaluation of systems for which funding was requested under section 1903(a)(3) of the Act. Though the MMIS-GSD proved to be a valuable resource to States during initial systems development during the 1970's, the MMIS-GSD does not reflect many of the features, functions, capabilities and technologies found in today's systems. Therefore, HCFA would no longer prescribe the MMIS-GSD as a model for new systems or as a measure of existing systems. Instead, HCFA would adopt the general functional requirements outlined in this proposed notice for States to receive HCFA approval for funding.

As previously mentioned, these functional requirements are restatements of existing systems requirements. They have been restated to more accurately reflect the functional capabilities of state of the art technology States currently employ. Also, while developing the restatements, we have identified additional requirements that most States currently perform or have the systems capability to perform. However, these requirements have never been issued in part 11, chapter 3, of the SMM. We are taking this opportunity to publish these additional functional requirements in this proposed notice.

Each of these functional requirements stands on its own statutory or regulatory authority and implements program requirements resulting from existing legislation and recently enacted legislation, as is referenced in the notice, for which States would receive 50 percent FFP for administrative costs.

Except for minor enhancements that may result in negligible costs, the costs for these functional requirements have already been incurred by States: (1) To implement these requirements for which 90 percent Federal funding has already been paid, and (2) to operate them as part of MMIS for which 75 percent FFP is being paid.

For those States that may require minor enhancements, we estimate negligible additional costs for implementing and maintaining revisions to the MMIS.

Section 1902(a)(30) of the Act serves as the primary program authority to implement these additional requirements.

A State plan for medical assistance must provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan * * * as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care * * *.

These requirements will provide the following program benefits:

1. Facilitate the implementation of new statutory and regulatory program requirements;
2. Allow for more accurate and timely payment of claims;
3. Reduce the instances of returning claims to providers;
4. Allow for easier recovery of misspent program dollars;
5. Further refine program data to more efficiently and effectively detect potential fraud and abuse which will facilitate more referrals to Medicaid Fraud Control Units; and
6. Improve communications between the State and the Federal Government.

Since States are not considered small entities, we have determined and the Secretary certifies that this proposed notice would not have a significant effect on a substantial number of small entities. Thus, a regulatory flexibility analysis under the RFA is not required.

Section 1102(b) of the Act requires the Secretary to prepare a regulatory impact analysis if a proposed notice 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 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital which is located outside of a Metropolitan Statistical Area and has fewer than 50 beds.

We are not preparing a rural impact statement since we have determined, and the Secretary certifies, that this proposed notice would not have a significant economic impact on the operations of a substantial number of small rural hospitals.

V. Information Collection Requirements

This notice contains information collection requirements that are subject to Office of Management and Budget review under the Paperwork Reduction Act of 1980. The reporting and recordkeeping sections identified are currently approved under OMB approval number 0938–0247.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: July 30, 1993.

Bruce C. Vladeck,

Administrator, Health Care Financing Administration.

[FR Doc. 93–28379 Filed 11–19–93; 8:45 am]

BILLING CODE 4120–01–P

Food and Drug Administration

[Docket No. 93N–0425]

Animal Drug Export; Adequan® Canine (Polysulfated Glycosaminoglycan Sterile Injection)

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that Luitpold Pharmaceuticals, Inc., has filed an application requesting approval for export to Canada of the animal drug Adequan® Canine (polysulfated glycosaminoglycan sterile injection). The drug is administered intramuscularly to dogs for the treatment of arthritis.

ADDRESSES: Relevant information on this application may be directed to the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857, and to the contact person identified below. Any future inquiries concerning the export of nonfood animal drugs under the Drug Export Amendments of 1986 should also be directed to the contact person.

FOR FURTHER INFORMATION CONTACT: Gregory S. Gates, Center for Veterinary Medicine (HFV–110), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–594–1617.

SUPPLEMENTARY INFORMATION: The drug export provisions in section 802 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 382) provide that FDA may approve applications for the export of drugs that are not currently approved in the United States. Section 802(b)(3)(B) of the act sets forth the

requirements that must be met in an application for approval. Section 802(b)(3)(C) of the act requires that the agency review the application within 30 days of its filing to determine whether the requirements of section 802(b)(3)(B) have been satisfied. Section 802(b)(3)(A) of the act requires that the agency publish a notice in the Federal Register within 10 days of the filing of an application for export to facilitate public participation in its review of the application. To meet this requirement, the agency is providing notice that Luitpold Pharmaceuticals, Inc., Animal Health Division, Shirley, NY 11967, has filed an application requesting approval for the export of the animal drug Adequan® Canine (polysulfated glycosaminoglycan sterile injection) to Canada. The drug is administered intramuscularly for the treatment of noninfectious degenerative and/or traumatic arthritis and associated lameness of canine synovial joints. The application was received and filed in the Center for Veterinary Medicine on October 28, 1993, which shall be considered the filing date for purposes of the act.

Interested persons may submit relevant information on the application to the Dockets Management Branch (address above) in two copies (except that individuals may submit single copies) and identified with the docket number found in brackets in the heading of this document. These submissions may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

The agency encourages any person who submits relevant information on the application to do so by December 2, 1993, and to provide an additional copy of the submission directly to the contact person identified above, to facilitate consideration of the information during the 30-day period.

This notice is issued under the Federal Food, Drug, and Cosmetic Act (sec. 802 (21 U.S.C. 382)) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10) and redelegated to the Center for Veterinary Medicine (21 CFR 5.44).

Dated: November 4, 1993.

Robert C. Livingston,

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

[FR Doc. 93-28553 Filed 11-19-93; 8:45 am]

BILLING CODE 4160-01-F

[Docket No. 93N-0434]

Lyphomed, Division of Fujisawa USA, Inc.; Withdrawal of Approval of a New Drug Application

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is withdrawing approval of a new drug application (NDA) held by Lyphomed, Division of Fujisawa USA, Inc., 2045 North Cornell Ave., Melrose Park, IL 60160-1002 (Lyphomed). FDA is withdrawing approval of this application because of questions raised about the reliability of the data and information submitted to FDA in support of the application. Marketing of the drug has been discontinued, and Lyphomed has voluntarily requested withdrawal of approval of the application and waived its opportunity for a hearing.

EFFECTIVE DATE: November 22, 1993.

FOR FURTHER INFORMATION CONTACT: Tamar Nordenberg, Center for Drug Evaluation and Research (HFD-366), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301-594-2041.

SUPPLEMENTARY INFORMATION: Recently, FDA became aware of discrepancies concerning the data used to support approval of the following NDA held by Lyphomed:

NDA 19-539, M.V.C. 9+4 (Pediatric).

Lyphomed has identified discrepancies in data submitted to obtain approval of the application listed above, which have raised questions about the reliability of the data. Subsequently, in a letter dated August 12, 1992, Lyphomed requested withdrawal of this NDA.

Therefore, under section 505(e) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(e)) and under authority delegated to the Director, Center for Drug Evaluation and Research (21 CFR 5.82), approval of the NDA listed above, and all amendments and supplements thereto, is hereby withdrawn, effective November 22, 1993. Distribution of a new drug in interstate commerce without an approved application is unlawful.

Dated: November 8, 1993.

Murray M. Lumpkin,

Deputy Director for Review Management, Center for Drug Evaluation and Research.

[FR Doc. 93-28555 Filed 11-19-93; 8:45 am]

BILLING CODE 4160-01-F

National Institutes of Health

National Heart, Lung, and Blood Institute; Meeting of Board of Scientific Counselors

Pursuant to Public Law 92-463, notice is hereby given of the meeting of the Board of Scientific Counselors, National Heart, Lung, and Blood Institute on December 9 and 10, 1993, National Institutes of Health, 9000 Rockville Pike, Building 10, room 7N234, Bethesda, Maryland 20892.

This meeting will be open to the public from 9 a.m. to 5 p.m. on December 9 and from 9 a.m. to 1 p.m. on December 10 for discussion of the general trends in research relating to cardiovascular, pulmonary and certain hematologic diseases. Attendance by the public will be limited to space available.

In accordance with the provision set forth in section 552b(c)(6), title 5, U.S.C. and section 10(d) of Public Law 92-463, the meeting will be closed to the public from 1 p.m. to adjournment on December 10, 1993 for the review, discussion, and evaluation of individual programs and projects conducted by the National Institutes of Health, including consideration of personnel qualifications and performance, the competence of individual investigators, and similar items, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Ms. Terry Long, Chief, Communications and Public Information Branch, National Heart, Lung, and Blood Institute, Building 31, room 4A21, National Institutes of Health, Bethesda, Maryland 20892, phone (301) 496-4236, will provide a summary of the meeting and a roster of the Board members.

Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact the Executive Secretary in advance of the meeting.

Substantive program information may be obtained from Dr. Edward D. Korn, Executive Secretary and Director, Division of Intramural Research, NHLBI, NIH, Building 10, room 7N214, phone (301) 496-2116.

Dated: November 12, 1993.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 93-28559 Filed 11-19-93; 8:45 am]

BILLING CODE 4140-01-M

National Heart, Lung, and Blood Institute; Meeting

Pursuant to Public Law 92–463, notice is hereby given of the meeting of the following Heart, Lung, and Blood Special Emphasis Panel.

The meeting will be closed in accordance with the provisions set forth in section 552b(c)(4) and 552b(c)(6), title 5, U.S.C. and section 10(d) of Public Law 92–463, for the review, discussion and evaluation of individual grant applications, contract proposals, and/or cooperative agreements. These 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.

Name of Panel: NHLBI SEP of RFA for Monoenergetic X-ray Systems for Cardiovascular Imaging.

Dates of Meeting: December 7, 1993.

Time of Meeting: 8:30 a.m.

Place of Meeting: Holiday Inn, Bethesda, Maryland.

Agenda: To evaluate and review grant applications.

Contact Person: Dr. Andre Premen, 5333 Westbard Avenue, room 5A10, Bethesda, Maryland 20892, (301) 594–7480.

(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 12, 1993.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 93–28562 Filed 11–19–93; 8:45 am]

BILLING CODE 4140–01–M

National Heart, Lung, and Blood Institute; Meeting of Heart, Lung, and Blood Research Review Committee B

Pursuant to Public Law 92–463, notice is hereby given of the meeting of the Heart, Lung, and Blood Research Review Committee B, National Heart, Lung, and Blood Institute, National Institutes of Health, on December 2 and 3, 1993 at the Holiday Inn Chevy Chase, Maryland 20815.

This meeting will be open to the public on December 2, from 8 a.m. to approximately 9 a.m. to discuss administrative details and to hear reports concerning the current status of the National Heart, Lung, and Blood Institute. Attendance by the public will be limited to space available.

In accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5, United States Code, and section 10(d) of Public Law 92–463, the meeting will be closed to the public on December 2, from approximately 9 a.m. until recess, and from 9 a.m. until adjournment on December 3, for the review, discussion, and evaluation of individual grant applications. These applications and the discussions could reveal confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the applications, the disclosure of which could constitute a clearly unwarranted invasion of personal privacy.

Ms. Terry Long, Chief, Communications and Public Information Branch, National Heart, Lung, and Blood Institute, Building 31, room 4A21, National Institutes of Health, Bethesda, Maryland 20892, (301) 496–4236 will provide a summary of the meeting and a roster of the committee members.

Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact the Scientific Review Administrator in advance of the meeting.

Dr. Jeffrey H. Hurst, Scientific Review Administrator, Heart, Lung, and Blood Research Review Committee B, Westwood Building, room 555, National Institutes of Health, Bethesda, Maryland 20892, (301) 594–7418, will furnish substantive program information.

(Catalog of Federal Domestic Assistance Program Nos. 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research, National Institutes of Health)

Dated: November 12, 1993.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 93–28563 Filed 11–19–93; 8:45 am]

BILLING CODE 4140–01–M

National Heart, Lung, and Blood Institute; Meeting of Heart, Lung, and Blood Research Review Committee A

Pursuant to Public Law 92–463, notice is hereby given of the meeting of the Heart, Lung, and Blood Research Review Committee A, National Heart, Lung, and Blood Institute, National Institutes of Health, on December 2 and 3, 1993, at the Holiday Inn Chevy Chase, the Palladium Center Conference Room, 5520 Wisconsin Avenue, Chevy Chase, Maryland 20815.

This meeting will be open to the public on December 2, from 8 a.m. to approximately 9 a.m., to discuss administrative details and to hear reports concerning the current status of the National Heart, Lung, and Blood Institute. Attendance by the public will be limited to space available.

In accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5, United States Code, and section 10(d) of Public Law 92–463, the meeting will be closed to the public on December 2, from approximately 9 a.m. until recess, and from 9 a.m. until adjournment on December 3, for the review, discussion, and evaluation of individual grant applications. These applications and the discussions could reveal confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Ms. Terry Long, Chief, Communications and Public Information Branch, National Heart, Lung, and Blood Institute, Building 31, room 4A–21, National Institutes of Health, Bethesda, Maryland 20892, 301–496–4236, will provide a summary of the meeting and a roster of the committee members.

Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact the Scientific Review Administrator in advance of the meeting.

Dr. Deborah P. Beebe, Scientific Review Administrator (Acting), Heart, Lung, and Blood Research Review Committee A, Westwood Building, room 555, National Institutes of Health, Bethesda, Maryland 20892, 301–594–7418, will furnish substantive program information.

(Catalog of Federal Domestic Assistance Program Nos. 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; National Institutes of Health)

Dated: November 12, 1993.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 93–28564 Filed 11–19–93; 8:45 am]

BILLING CODE 4140–01–M

National Institute of Allergy and Infectious Diseases; Meeting: Board of Scientific Counselors

Pursuant to Public Law 92–463, notice is hereby given of the meeting of the Board of Scientific Counselors,

National Institute of Allergy and Infectious Diseases, on December 6–8, 1993. The meeting will be held in Building 4, room 233, National Institutes of Health, 9000 Rockville Pike, Bethesda, Maryland 20892.

The meeting will be open to the public on December 6 from 9 a.m. to 12 p.m. and from 1 p.m. to 2 p.m. On December 7 the meeting will be open from 8 a.m. until 10 a.m. During the open sessions, the permanent staff of the Laboratory of Molecular Microbiology and the Laboratory of Viral Diseases will present and discuss their immediate, past and present research activities.

In accordance with the provisions set forth in section 552b(c)(6), title 5, U.S.C. and section 10(d) of Public Law 92–463, the meeting will be closed to the public on December 6 from 8:30 a.m. until 9 a.m., from 12 p.m. until 1 p.m., and from 2 p.m. until recess; on December 7 from 10 a.m. until recess; and on December 8 from 8 a.m. until adjournment, for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Institute of Allergy and Infectious Diseases, including consideration of personal qualifications and performance, the competence of individual investigators, and similar items, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Ms. Claudia Goad, Committee Management Officer, National Institute of Allergy and Infectious Diseases, Solar Building, room 3C26, National Institutes of Health, Bethesda, Maryland 20892, 301–496–7601, will provide a summary of the meeting and a roster of committee members upon request. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact Ms. Goad in advance of the meeting.

Dr. John I. Gallin, Executive Secretary, Board of Scientific Counselors, NIAID, National Institutes of Health, Building 10, room 4A31, telephone 301–496–3006, will provide substantive program information.

(Catalog of Federal Domestic Assistance Program No. 93–301, National Institutes of Health)

Dated: November 12, 1993.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 93–28560 Filed 11–19–93; 8:45 am]

BILLING CODE 4140–01–M

National Institute of Child Health and Human Development; Meeting of the Board of Scientific Counselors, NICHD

Pursuant to Public Law 92–463, notice is hereby given of the meeting of the Board of Scientific Counselors, National Institute of Child Health and Human Development, December 3, 1993, in Building 31, room 2A52.

This meeting will be open to the public from 9 a.m. to 12 noon on December 3 for the review of the Intramural Research Program and scientific presentations. Attendance by the public will be limited to space available.

In accordance with the provisions set forth in section 552b(c)(6), title 5, U.S.C. and section 10(d) of Public Law 92–463, the meeting will be closed to the public on December 3 from 1 p.m. to adjournment for the review, discussion, and evaluation of individual programs and projects conducted by the National Institutes of Health, including consideration of personnel qualifications and performance, the competence of individual investigators, and similar items, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Ms. Mary Plummer, Committee Management Officer, NICHD, 6100 Executive Boulevard, room 5E03, National Institutes of Health, Bethesda, Maryland, Area Code 301, 496–1485, will provide a summary of the meeting and a roster of Board members, and substantive program information upon request. Individuals who plan to attend the open session and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact Ms. Plummer in advance of the meeting.

Dated: November 12, 1993.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 93–28561 Filed 11–19–93; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV–930–4210–04; N–57877, CACA32685]

Realty Action; Exchange of Public Lands in Clark County, Nevada, for Private Lands in Washoe, Lyon, and Storey Counties, Nevada and San Bernardino County, California; Correction

November 8, 1993.

AGENCY: Bureau of Land Management, Interior.

ACTION: Correction notice.

SUMMARY: This notice corrects errors in the legal description in the Notice of Realty Action published in the **Federal Register** on October 22, 1993, on pages 54600 and 54601.

1. Page 54600, column 3, line 61: Change T. 11 N., R. 3 E. to read T. 11 N., R. 3 W.
2. Page 54600, column 3, line 65: Change T. 12 N., R. 3 E. to read T. 12 N., R. 3 W.
3. Page 54601, column 1, line 50: Change Sec. 16: SE¼NE¼S½NW¼ to read Sec. 16, SE¼NE¼, S½NW¼.
4. Page 54601, column 2, line 18: Change Sec. 20: N½NW¼S½NW¼, E½SW¼ to read Sec. 20, NW¼, E½SW¼.

Billy R. Templeton,

State Director, Nevada.

[FR Doc. 93–28548 Filed 11–19–93; 8:45 am]

BILLING CODE 4310–HC–M

[NV–930–04–4210–05; N–57141]

Realty Action; Non-Competitive Sale of Public Lands in Clark County, NV

AGENCY: Bureau of Land Management, Interior.

ACTION: Amendment of NORA.

SUMMARY: The Notice of Realty Action (NORA) published in the **Federal Register** on April 16, 1993 (58 FR 19840; FR Doc. 93–8889), amended by a NORA published in the **Federal Register** on July 9, 1993 (58 FR 36986, FR Doc. 93–16276), is further amended to change the legal description of the proposed Indian Springs and Overton/Logandale solid waste transfer station sites to.

T. 16 S., R. 56 E. (Indian Springs), sec. 08: NE¼NE¼SE¼SW¼

T. 16 S., R. 68 E. (Overton/Logandale), sec. 06: E½SW¼NW¼SE¼

Upon publication of this notice in the **Federal Register**, the above described land will be segregated from all forms of appropriation under the public land

laws, including the general mining laws, except for recreation and public purposes, leasing under the mineral leasing laws and disposal of mineral materials.

For a period of 45 days from the date of publication of this notice in the **Federal Register**, interested parties may submit comments to the District Manager, Las Vegas District, P.O. Box 26569, Las Vegas, Nevada 89126. Any adverse comments will be reviewed by the State Director.

All of the other terms and conditions of the original NORA continue to apply.

Dated: November 9, 1993.

Colin P. Christensen,

(Acting District Manager, Las Vegas, NV).

[FR Doc. 93-28552 Filed 11-19-93; 8:45 am]

BILLING CODE 4310-HC-M

INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 32382]

Soo Line Railroad Company—Trackage Rights Exemption— Chicago and North Western Transportation Co.; Exemption

Chicago and North Western Transportation Company has agreed to grant overhead trackage rights to Soo Line Railroad Company (Soo) over 2.5 miles of its Hopkins-to-Cedar Lake, MN rail line. The trackage rights extend from the Soo connection at milepost 16.2, West St. Louis Park, to the Burlington Northern Railroad Company connection at milepost 13.7, in Minneapolis, MN. The trackage rights were to become effective November 12, 1993.

This notice is filed under 49 CFR 1180.2(d)(7). If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction. Pleadings must be filed with the Commission and served on: Wayne C. Serkland, 1000 Soo Line Building, 105 South Fifth Street, Minneapolis, MN 55402.

As a condition to the use of this exemption, any employees affected by the trackage rights will be protected under *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in Mendocino Coast Ry., *Inc.—Lease and Operate*, 360 I.C.C. 653 (1980).

Decided: November 15, 1993.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 93-28586 Filed 11-19-93; 8:45 am]

BILLING CODE 7035-01-P

DEPARTMENT OF JUSTICE

Information Collections Under Review

The Office of Management and Budget (OMB) has been sent the following collection(s) of information proposals for review under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35) and the Paperwork Reduction Reauthorization Act since the last list was published. Entries are grouped into submission categories, with each entry containing the following information:

(1) The title of the form/collection;
(2) The agency form number, if any, and the applicable component of the Department sponsoring the collection;
(3) How often the form must be filled out or the information is collected;
(4) Who will be asked or required to respond, as well as a brief abstract;
(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond;
(6) An estimate of the total public burden (in hours) associated with the collection; and,
(7) An indication as to whether section 3504(h) of Public Law 96-511 applies.

Comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the OMB reviewer, Mr. Jeff Hill on (202) 395-7340 and to the Department of Justice's Clearance Officer, Mr. Lewis Arnold, on (202) 514-4305. If you anticipate commenting on a form/collection, but find that time to prepare such comments will prevent you from prompt submission, you should notify the OMB reviewer and the DOJ Clearance Officer of your intent as soon as possible. Written comments regarding the burden estimate or any other aspect of the collection may be submitted to Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, and to Mr. Lewis Arnold, DOJ Clearance Officer, SPS/JMD/5031 CAB, Department of Justice, Washington, DC 20530.

Revision of a Currently Approved Collection

(1) INSPASS Application
(2) I-833. Immigration and Naturalization Service
(3) On occasion
(4) Individuals or households. This form is used to facilitate entry into the United States by frequent travelers from the United States, Canada, Bermuda, and Visa Waiver Pilot Program (VWPP) countries through an automated inspections processing. The system, called INSPASS, combines an enrollment process with biometrics technology (hand geometry) to be used for the accelerated inspections processing.
(5) 250,000 annual respondents at .166 hours per response
(6) 41,500 annual burden hours
(7) Not applicable under section 3504(h)

Extension of the Expiration Date of a Currently Approved Collection Without Any Change in the Substance or in the Method of Collection

(1) Petition for a Nonimmigrant Worker
(2) I-129. Immigration and Naturalization Service
(3) On occasion
(4) Individuals or households. This form is used to petition for temporary workers and for the admission of Treaty Traders and Investors. It is also used in the processes of an extension of stay or for a change of status to the nonimmigrant classes.
(5) 110,000 annual respondents at 1.41 hours per response
(6) 155,100 annual burden hours
(7) Not applicable under section 3504(h)

(1) Application of Waiver of Grounds of Excludability
(2) I-601. Immigration and Naturalization Service
(3) On occasion
(4) Individuals or households. The information provided on this form will be used to determine an applicant's eligibility for a waiver of excludability from the United States under Section 212 (g), (h), or (i) of the Act.
(5) 3,000 annual respondents at .50 hours per response
(6) 1,500 annual burden hours
(7) Not applicable under section 3504(h)

(1) Application for Advance Permission to Return to Unrelinquished Domicile
(2) I-191. Immigration and Naturalization Service
(3) On occasion
(4) Individuals or households. Information collected on this form will be used by the Service to determine whether an applicant is eligible for status under section 212(c) of the Act.
(5) 300 annual respondent at .25 hours per response

(6) 75 annual burden hours
(7) Not applicable under section 3504(h)
(1) Petition for Alien Fiance(e)
(2) I-129F. Immigration and Naturalization Service
(3) On occasion
(4) Individuals or households. Through the filing of this form, a United States citizen may facilitate the entry of his/her fiance(e) into the United States so that a marriage may be concluded within 90 days between the U.S. citizen and the beneficiary of the petition.
(5) 20,000 annual respondents at .50 hours per response
(6) 10,000 annual burden hours
(7) Not applicable under section 3504(h)
(1) Petition for Alien Relative
(2) I-130. Immigration and Naturalization Service
(3) On occasion
(4) Individuals and households. The information collected on this form will be used to determine eligibility for benefits sought for relatives of U.S. citizens and lawful permanent residents.
(5) 825,000 annual respondents at .50 hours per response
(6) 412,500 annual burden hours
(7) Not applicable under section 3504(h).

Public comment on these items is encouraged.

Dated: November 16, 1993.

Lewis Arnold,

Department Clearance Officer, Department of Justice.

[FR Doc. 93-28569 Filed 11-19-93; 8:45 am]

BILLING CODE 4410-01-M

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—The Frame Relay Forum

Notice is hereby given that, on September 28, 1993, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), The Frame Relay Forum ("FRF") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership.

The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, the identities of the additional members of FRF are: NETLINK, Ltd., Raleigh, NC; OKI America, Inc., New York, NY; and Premisys Communications, Palo Alto, CA.

KDD, Inc., a member of FRF, has changed its name to KDD America, Inc.

The following are no longer members of FRF: Advanced Computer Communications; Convex Computer Corporation; GN Navtel; Newport Systems Solutions; SynOptics Communications; and Transwitch Corporation.

No other changes have been made in either the membership or planned activities of the FRF. Membership remains open, and FRF intends to file additional written notifications disclosing all changes in membership.

On April 10, 1992, FRF filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the Federal Register pursuant to section 6(b) of the Act on July 2, 1992 (57 FR 29537).

The last notification was filed with the Department on July 1, 1993. A notice was published in the Federal Register pursuant to Section 6(b) of the Act on August 30, 1993 (58 Fed. Reg. 45532).

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 93-28549 Filed 11-19-93; 8:45 am]

BILLING CODE 4410-01-M

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Petroleum Environmental Research Forum Project No. 92-09

Notice is hereby given that, on October 21, 1993, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), the participants in the Petroleum Environmental Research Forum ("PERF") Project No. 92—09, titled "Evaluation of Toxicity of Hydrogen Fluoride at Short Exposure Times," filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing membership changes in the project. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Amoco Corporation, Chicago, IL and Elf Aquitaine, Inc., King of Prussia, PA have become members of the project.

No other changes have been made in either the membership or planned activity of the group research project. Membership in the venture remains open, and the parties intend to file additional written notification disclosing all changes in membership. Information regarding participation in the project may be obtained from: Dr. P.A. Naro, Environmental and Health Sciences Laboratory; Mobil Oil Corporation, P.O. Box 1029, Princetown, NJ 08543-1029.

On April 12, 1993, the participants in PERF Project No. 92-09 filed the original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the Federal Register pursuant to section 6(b) of the Act on June 2, 1993 (58 FR 31416).

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 93-28551 Filed 11-19-93; 8:45 am]

BILLING CODE 4410-01-M

Notice Pursuant to the National Cooperative Research and Production Act of 1993; Research Into Field Emission Display Technology

Notice is hereby given that, on September 28, 1993, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Pixel International S.A. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties and (2) the nature and objectives of a cooperative research venture entitled the FED Alliance (the "venture"). The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Pursuant to section 6(b) of the Act, the identities of the parties are Pixel International S.A., Rousset, FRANCE; and Texas Instruments Incorporated, Dallas, TX. The objective of the venture is to conduct research in the area of Field Emission Displays ("FED"), an enabling technology for flat panel displays, and specifically to investigate and promote advancements and improvements to the FED technology owned or controlled by Pixel and licensed to each of the members of the venture. It is anticipated that the members of the venture will develop multiple applications of FED technology including, without limitation, applications relating to computers, consumer electronic products, aviation and aerospace, telecommunications, automotive and industrial uses.

Additional members are expected to join the venture, and the parties intend

to file additional written notification disclosing all changes in membership.

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 93-28550 Filed 11-19-93; 8:45 am]

BILLING CODE 4410-01-M

NUCLEAR REGULATORY COMMISSION

[Docket No. 030-30082; License No. 49-26888-01; EA 93-033]

N.V. Enterprises, Evanston, Wyoming 82601; Issuance of Confirmatory Order

The Nuclear Regulatory Commission is publishing the attached Confirmatory Order that restricts N.V. Enterprises and Neal A. Cox from owning, managing or acting as Radiation Safety Officer of any entity engaged in NRC licensed activities for a period of three years. The purpose of this action is to provide public notice of a significant enforcement action.

Dated at Rockville, Maryland this 16th day of November 1993.

For The Nuclear Regulatory Commission.

James Lieberman,

Director, Office of Enforcement.

I

N.V. Enterprises (NV) formerly held NRC Byproduct Material License No. 49-26888-01 (License), issued on July 19, 1988 by the Nuclear Regulatory Commission. The License authorized the possession and use of sealed sources in industrial radiography. The license expired on July 31, 1993. An application for renewal of the License was not filed.

II

An inspection by the Nuclear Regulatory Commission (NRC) was conducted on October 22, 1991, at the Licensee's facility in Casper, Wyoming. This inspection and a subsequent investigation identified one violation of NRC requirements, a failure to wear alarm ratemeters during the performance of industrial radiography. The investigation determined this violation to have been willful on the part of the owner and president of NV, Mr. Neal A. Cox. On May 7, 1993, the NRC issued an Enforcement Action (EA 93-033) against NV consisting of a Notice of Violation and Proposed Imposition of Civil Penalty—$4,000 (Notice). On June 1, 1993, the Licensee filed an Answer and a Reply to the Notice and requested that the NRC permit NV to terminate its license in lieu of paying the civil penalty. In telephone conversations on June 14, 1993 and September 21, 1993, Neal A. Cox advised the NRC, Region IV office that he would not own, manage, or act as Radiation Safety Officer (RSO) of any entity engaged in NRC licensed activities for a period of three years if the NRC would withdraw the civil penalty. On July 27, 1993, the Licensee submitted a Certificate of Disposition of Materials and a request for termination of its License. Based on the information submitted by NV and NRC confirmation of receipt of the devices containing the licensed radioactive material by the transferee, the NRC is satisfied that NV has transferred all of its licensed materials.

III

The Notice proposed a $4,000 civil penalty and the Licensee filed an Answer and a Reply to the Notice. In telephone conversations on June 14, 1993 and September 21, 1993, with Charles Cain of the NRC, Region IV, Neal A. Cox agreed that he would not own, manage, or act as RSO of any entity engaged in NRC licensed activities for three years and would terminate his license, if the NRC would withdraw the civil penalty. As the parties desire to resolve all matters pending between them, Neal A. Cox agrees, for a period of three years from the date that he signs this Confirmatory Order, that he will not own, manage, or act as Radiation Safety Officer, of any entity engaged in licensed activities within the jurisdiction of the NRC for that same period of time.

IV

Accordingly, pursuant to section 81, 161b, 161i, 186, and 234 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202, 2.205, and 10 CFR Parts 30, 34, and 150, it is hereby ordered, stipulated and agreed between the NRC and Neal A. Cox as follows:

1. The NRC withdraws the civil penalty of $4,000 as proposed in the Notice dated May 7, 1993 (EA 93-033).

2. For a period of three years from the date Neal A. Cox signs this Confirmatory Order, Neal A. Cox, will not own, manage, or act as Radiation Safety Officer of any entity engaged in licensed activities within NRC jurisdiction, including an Agreement State licensee working under reciprocity, for that same period of time.

3. This Confirmatory Order constitutes settlement without payment of a civil penalty proposed in the Notice dated May 7, 1993 (EA 93-033). However, if Neal A. Cox violates paragraph 2 of this Section, then the civil penalty of $4,000 will be reinstated by an Order Imposing Civil Penalty and the civil penalty of $4,000 will be due in full within 30 days of the date of that Order Imposing Civil Penalty.

4. Neal A. Cox, NV, and their successors and assigns waive the right to contest this Order in any manner, including requesting a hearing on this Order or the Order Imposing Civil Penalty, should one be issued as provided in paragraph 3 of this Section.

5. NRC License No. 49-26888-01 is terminated by attached Amendment No. 2.

Dated: November 5, 1993.

For the Nuclear Regulatory Commission.

James Lieberman.

Dated: November 2, 1993.

For N.V. Enterprises.

Neal A. Cox.

[FR Doc. 93-28604 Filed 11-19-93; 8:45 am]

BILLING CODE 7590-01-M

POSTAL SERVICE

Privacy Act of 1974; System of Records

AGENCY: Postal Service.

ACTION: Notice of new routine use for existing system of records.

SUMMARY: The purpose of this notice is to provide information for public comment on the Postal Service's proposal to add a new routine use to USPS Privacy Act System 050.020—Finance Records—Payroll System. The new routine use will permit disclosure of certain employee payroll information, through computer matching efforts, regarding wages, expenses, compensation, reimbursement and taxes withheld to the Internal Revenue Service. This notice complies with subsection (e)(11) of the Privacy Act, which requires agencies to publish advance notice of any new use of information in a system of records.

DATES: Any interested party may submit written comments on the proposed new routine use. This proposal will become effective without further notice 30 days from the date of this publication (December 22, 1993), unless comments are received on or before that date which result in a contrary determination.

ADDRESSES: Comments may be mailed to Records Office, U.S. Postal Service, 475 L'Enfant Plaza SW., room 8831, Washington, DC 20260-5240 or delivered to room 8831 at the above address between 8:15 a.m. and 4:45 p.m., where they will be available for inspection during those hours.

FOR FURTHER INFORMATION CONTACT:

Sheila Allen, Records Office, (202) 268-4869.

SUPPLEMENTARY INFORMATION: The Postal Service (USPS) is proposing a new routine use for its Privacy Act System of Records, USPS 050.020, Finance Records—Payroll System. Routine Use No. 2 of this system of records provides for disclosure of name, address, social security number, wages and taxes withheld to federal, state, and local government agencies having taxing authority. Routine Use No. 27 of this system provides for disclosure of those data elements relevant to identifying individuals who owe delinquent federal taxes or returns to the IRS under computer matching efforts. The proposed Routine Use No. 30 will permit the USPS to provide information about specified categories of employees' wages, expenses, compensation, reimbursement, and taxes withheld to the IRS, also through computer matching. This information will enable the IRS to determine whether employees in specified categories properly reported information on their tax returns, and whether corrective action is warranted.

For example, the IRS has requested information to determine whether rural carriers who receive business expense reimbursement from the USPS are properly reporting this as income on their tax returns. The proposed routine use would enable the USPS to supply the requested information to the IRS.

Since information disclosed under this new routine use will assist in the administration of federal tax laws, the proposed routine use is clearly compatible with the purposes for which records are maintained in USPS 050.020. Accordingly, the Postal Service is adding Routine Use No. 30 to USPS 050.020, as shown below. A full description of this system of records last appeared at 57 FR 57515, dated December 4, 1992.

USPS 050.020

SYSTEM NAME:

Finance Records—Payroll System.

* * * * *

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES.

* * * * *

30. Disclosure of information about current or former postal employees may be made to the Internal Revenue Service under computer matching efforts, but limited only to those data elements relevant to making a determination as to the proper reporting for income tax purposes of an employee's wages, expenses, compensation, reimbursement, and taxes withheld, and to taking corrective action as warranted.

Stanley F. Mires,

Chief Counsel, Legislative Division.

[FR Doc. 93-28608 Filed 11-19-93; 8:45 am]

BILLING CODE 7710-12-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-33191; File No. SR-Amex-93-25]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by the American Stock Exchange, Inc. Relating to the Trading of Options on the North American Telecommunications Index and Long-Term Options on the Full-Value and Reduced-Value North American Telecommunications Index

November 12, 1993.

I. Introduction

On September 8, 1993, the American Stock Exchange ("Amex" or "Exchange") submitted to the Securities and Exchange Commission ("Commission" or "SEC"), pursuant to section 19(b)(1) of the Securities and Exchange Act of 1934 ("the Act")[1] and rule 19b-4 thereunder,[2] a proposal to list and trade index options on the North American Telecommunications Index ("Telecommunications Index" or "Index").

Notice of the proposed rule changes was published for comment and appeared in the Federal Register on October 18, 1993.[3] No comments were received on the proposed rule change. This order approves the proposal.

II. Description of the Proposal

A. Introduction

The Exchange is proposing to list and trade options on the Telecommunications Index. The Index is a new index developed by the Exchange and comprised of either stocks or American Depositary Receipts ("ADRs") traded on the New York Stock Exchange, Inc. ("NYSE"), Amex, or through the National Market System ("NMS") tier of the National Association of Securities Dealers, Inc. ("NASD") Automated Quotation ("NASDAQ") system.[4] The Amex also proposes to list and trade either long-term options on the full-value of the Index or long-term options on a reduced-value of the Index that will be computed at one-tenth of such value ("LEAPS" or "Index LEAPS").[5] Index LEAPS will trade independently of and in addition to the regular options on the Telecommunications Index.

B. Composition of the Index

The Index contains securities of highly-capitalized companies in the North American telecommunications industry.[6] The telecommunications industry in North America includes U.S., Canadian, and Mexican companies that provide telephone, long distance, cellular phone, paging, or other telecommunications related services; supply telecommunications equipment; or which otherwise are involved in the telecommunications industry. The Exchange will use an "equal" dollar-weighted method to calculate the Index.[7] As of August 9, 1993, the Index level was 321.88.

As of August 9, 1993, the market capitalizations of the individual stocks in the Index ranged from a high of $84.6 billion to a low of $5 billion, with the mean and median being $22.9 billion and $19.6 billion, respectively. The market capitalization of all the stocks in the Index was $344.3 billion. The total number of shares outstanding for the stocks in the Index ranged from a high of 1.3 billion shares to a low of 186.9 million shares. The average price per share of the stocks in the Index, for a six-month period between February and July 1993, ranged from a high of $88.13 to a low of $25.07. In addition, the average daily trading volume of the stocks in the Index, for the same six-month period, ranged from a high of 3.01 million shares per day to a low of 180,100 shares per day, with the mean and median being 812,270 and 539,046 shares, respectively. Lastly, as of August 9, 1993, no one stock comprised more

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] 17 CFR 240.19b-4 (1993).

[3] See Securities Exchange Act Release No. 33035 (October 8, 1993), 58 FR 53756 (October 18, 1993).

[4] Currently, the Index consists of 13 stocks and one ADR traded on the NYSE and one stock traded NASDAQ/NMS. In addition, should the index contain component securities listed on the Amex, none of the components will be Emerging Company Marketplace companies (as defined in the Amex Company Guide). Telephone conversation between Richard Zack, Branch Chief, Branch of Derivatives Regulation, SEC, and Nathan Most, Senior Vice President, New Products Planning, Amex, on November 10, 1993.

[5] LEAPS is an acronym for Long Term Equity Anticipation Securities.

[6] The current component securities of the Index are stocks or ADRs of Ameritech Corp., ALLTEL Corp., BCE Inc., Bell Atlantic Corp., BellSouth Corp., Spirit Corp., GTE Corp., MCI Communications Corp., Northern Telecom Ltd., NYNEX Corp., Pacific Telesis Group, Southwestern Bell Corp., American Telephone and Telegraph Corp., Telefonos De Mexico (ADR), and US West Inc.

[7] See infra section E entitled "Calculation of the Index" for a description of this calculation method.

than 7.05% of the Index's total value and the percentage weighting of the three largest issues in the Index accounted for 20.97% of the Index's value.

C. Maintenance

The Index will be maintained by the Amex. The Amex may change the composition of the Index at any time to reflect the conditions in the North American telecommunications sector and to ensure that the component securities continue to represent the telecommunications industry. At any time when it is necessary to replace a stock or stocks in the Index, the Exchange represents that it will make every effort to add new stocks that are representative of the telecommunications sector and will take into account a stock's capitalization, liquidity, volatility and name recognition. Further, stocks may be replaced in the event of certain corporate events, such as takeovers or mergers, that change the nature of the security. If, however, the Exchange determines to increase the number of Index component stocks to greater than twenty or reduce the number of component stocks to fewer than ten, the Amex will submit a rule filing with the Commission pursuant to section 19(b) of the Act.

D. Eligibility Standards for the Inclusion of Component Stocks in the Index

Exchange Rule 901C specifies criteria for the inclusion of stocks in an index on which options will be traded on the Exchange. Specifically, Rule 901C states that an index must have a minimum of five stocks, and any index with less than 25 component stocks may not include stocks traded on the Amex.[8] In addition, the Exchange will require, as reflected in amended Commentary .01 to Exchange Rule 901C, that at least 90% of the Index's numerical value, at the time the Index is listed and after the Index's quarterly rebalancing, be accounted for by stocks that meet the Exchange's options listing standards pursuant to Exchange Rule 915.[9]

In choosing among North American telecommunications industry stocks that meet the minimum criteria set forth in Rule 901C, the Exchange will focus only on stocks that are traded on either the NYSE, Amex (subject to the limitations of Rule 901C) or traded through NASDAQ/NMS. In addition, the proposal requires that the stocks included in the Index have an average monthly trading volume of not less than one million shares (or ADRs) in the U.S. market over the previous six-month period. Further, the Exchange intends, as an additional listing criteria standard, to include stocks that have a minimum market value (in U.S. dollars) of at least $75 million.[10]

E. Calculation of the Index

The Index will be calculated using an "equal-dollar weighting" methodology designed to ensure that each of the component securities are represented in approximately "equal" dollar amounts in the Index. The Exchange believes that this method of calculation is important since even among the largest companies in the telecommunications industry there is a great disparity in size. For example, although the stocks included in the Index represent many of the most highly capitalized companies in the retail industry, American Telephone and Telegraph (AT&T), currently represents over 24% of the aggregate market value of the Index. In addition, it has been the Exchange's experience that options on market value-weighted indexes dominated by one component stock are less useful to investors, since the index will tend to represent the one component and not the industry as a whole.

The following is a description of how the equal-dollar weighting calculation method works. As of the market close on January 18, 1993, the Amex selected a portfolio of telecommunications stocks representing an investment of $66,667 in the stock (rounded to the nearest whole share) of each of the companies in the Index. The value of the Telecommunications Index equals the current market value (based on the U.S. primary market share) of the sum of the assigned number of shares of each of the stocks in the Index portfolio divided by the Index divisor. The Index divisor was initially determined to yield the benchmark value of 300.00 at the close of trading on January 18, 1993. Each quarter thereafter, following the close of trading on the third Friday of January, April, July, and October, the Index portfolios will be adjusted by changing the number of whole shares of each component stock so that each company is again represented in "equal" dollar amounts. The Exchange has chosen to rebalance the Index following the close of trading on the quarterly expiration cycle because it allows an option contract to be held for up to three months without a change in the Index portfolio while at the same time, maintaining the equal-dollar weighting feature of the Index. If necessary, a divisor adjustment is made when rebalancing occurs to ensure continuity of the Index's value. The newly adjusted portfolio then becomes the basis for the Index's value on the first trading day following the quarterly adjustment.

The Amex has had experience making regular quarterly adjustments to a number of its indexes (such as the Biotechnology and Retail Indexes) and has not encountered investor confusion regarding the adjustments, since they are done on a regular and timely basis, with adequate notice. An information circular is distributed to all Exchange members notifying them of the quarterly changes. This circular is also sent by facsimile to the Exchange's contacts at the major options firms, mailed to recipients of the Exchange's options related information circulars, and made available to subscribers of the Options News Network. In addition, the Exchange will include in its promotional and marketing materials for the Telecommunications Index a description of the "equal-dollar" weighting methodology.

As noted above, the number of shares of each component stock in the Index portfolio remain fixed between quarterly reviews except in the event of certain types of corporate actions such as the payment of a dividend (other than an ordinary cash dividend), stock distribution, stock split, reverse stock split, rights offering, distribution, reorganization, recapitalization, or similar event with respect to the component stocks. In a merger or consolidation of an issuer of a component stock, if the stock remains in the Index, the number of shares of that security in the portfolio may be adjusted, to the nearest whole share, to maintain the component's relative weight in the Index at the level

[8] Accordingly, the North American Telecommunications Index as currently constituted does not include Amex-traded stocks. The Amex, however, has submitted a proposal, that, among other things, revises Amex Rule 901C to remove the limitation on the number of Amex stocks that can be included in an index which underlies a stock index option traded on the Exchange. Specifically, the proposal would allow, among other things, Amex-listed stocks to be included in Amex-traded index options that are comprised of less than 25 stocks. See Securities Exchange Act Release No. 30356 (February 10, 1992), 57 FR 5497 (February 14, 1992) (notice of File No. SR-Amex-91-35).

[9] The Amex's options listing standards, found in Rule 915, which are uniform among the options exchanges, provide that a security underlying an option must, among other things, meet the following requirements: (1) The public float must be at least 7,000,000; (2) there must be a minimum of 2,000 stockholders; (3) trading volume must have been at least 2.4 million over the preceding twelve months; and (4) the market price must have been at least $7.50 for a majority of the business days during the preceding three calendar months.

[10] Telephone conversations between Richard Zack, Branch Chief, Branch of Derivatives Regulation, SEC, and Nathan Most, Senior Vice President, New Products Planning, Amex, on November 10, 1993.

immediately prior to the merger or consolidation. In the event of a stock replacement, the average dollar value of the remaining portfolio components will be calculated and that amount invested in the stock of the new component, to the nearest whole share. In all cases, the divisor will be adjusted, if necessary, to ensure Index continuity.

Similar to other stock index values published by the Exchange, the value of the Index will be calculated continuously and disseminated every 15 seconds over the Consolidated Tape Association's Network B.

The Index value for purposes of settling outstanding Index options contracts upon expiration will be calculated based upon the regular way opening sale prices for each of the Index's component stocks in their primary market on the last trading day prior to expiration.[11] In the case of securities traded through the NASDAQ/NMS system, the first reported sale price will be used. Once all of the component stocks have opened, the value of the Index will be determined and that value will be used as the final settlement value for expiring Index options contracts. If any of the component stocks do not open for trading on the last trading day before expiration, then the prior trading day's (i.e., Thursday's) last sale price will be used in the Index calculation. In this regard, before deciding to use Thursday's closing value of a component stock for purposes of determining the settlement value of the Index, the Amex will wait until the end of the trading day on expiration Friday.[12]

F. Contract Specifications

The proposed options on the Index will be cashed-settled, European-style options.[13] Standard options trading hours (9:30 a.m. to 4:10 p.m. New York time) will apply to the contracts. Under Amex Rule 903C, the Exchange intends to list up to three near-term calendar months and two additional calendar months in three month intervals in the January cycle. The Exchange also intends to list long-term options series, having up to thirty-six months to expiration, on either the full-value Telecommunications Index or on a reduced-value Telecommunications Index. Strike price interval, bid/ask differential and price continuity rules will not apply to the trading of Telecommunication Leaps until their time to expiration is less than twelve months.[14]

The options on the Index will expire on the Saturday following the third Friday of the expiration month ("Expiration Friday"). Since options on the Index will settle based upon the opening prices of the component stocks on the last trading day before expiration (normally a Friday), the last trading day for an expiring Index option series will normally be the second to the last business day before expiration (normally a Thursday).

G. Listing of Long-Term Options on the Full-Value or Reduced-Value Retail Index

The proposal provides that the Exchange may list long-term index options that expire from 12 to 36 months from listing on the full-value Telecommunications Index, or a reduced-value Telecommunications Index that will be computed at one-tenth the value of the full-value Index. The current and closing Index value for reduced-value Telecommunications LEAPS will be computed by dividing the value of the full-value Index by 10 and rounding the resulting figure to the nearest one-hundredth. For example, an Index value of 185.46 would be 18.55 for the Index LEAPS and 185.43 would become 18.54. The reduced-value LEAPS will have a European-style exercise and will be subject to the same rules that govern the trading of all the Exchange's index options, including sales practice rules, margin requirements and floor trading procedures. The strike price interval for the reduced-value Index LEAPS will be no less than $2.50 instead of $5.00.

In addition, the proposal provides that full-value or reduced-value North American Telecommunication LEAPS will be issued at no less than six month intervals and that new strike prices will either be near or bracketing the current Index value.

H. Position and Exercise Limits, Margin Requirements, and Trading Halts

Because the Index is a Stock Index Option under Amex Rule 901C(a) and a Stock Index Industry Group under Rule 900C(b)(1), the proposal provides that Exchange rules that are applicable to the trading of narrow-based index options will apply to the trading of options on the Index. Specifically, Exchange rules governing margin requirements,[15] position and exercise limits,[16] and trading halt procedures[17] that are applicable to the trading of narrow-based index options will apply to options traded on the Index. The proposal further provides that positions in full-value and reduced-value Index options will be aggregated for position and exercise limit purposes. Specifically, under the proposal, ten reduced-value contracts will equal one full-value contract.

I. Surveillance.

Surveillance procedures currently used to monitor trading in each of the Exchange's other index options will also be used to monitor trading in full-value and reduced-value Index options. These procedures include complete access to trading activity in the underlying securities. Further, the Intermarket Surveillance Group Agreement, dated July 14, 1983, as amended on January 29, 1990, will be applicable to the trading of options on the Index.[18]

III. Findings and Conclusions

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, the requirements of section 6(b)(5).[19] Specifically, the Commission finds that the trading of North American Telecommunications options, including full-value and reduced-value North American Telecommunications LEAPS,

[11] See Securities Exchange Act Release No. 31330 (October 16, 1992), 57 FR 48408 (October 23, 1992).

[12] For purposes of the daily dissemination of the Index value, if a stock included in the Index has not opened for trading, the Amex will use the closing value of that stock on the prior trading day when calculating the value of the Index, until the stock opens for trading.

[13] A European-style option can be exercised only during a specified period before the option expires.

[14] See Securities Exchange Act Release No. 25041 (October 16, 1987), 52 FR 40008 (October 26, 1987) (order approving SR-Amex-87-22).

[15] Pursuant to Amex Rule 462(d)(2)(D)(iv), the margin requirements for the Index options will be: (1) For each short options positions, 100% of the current market value of the options contract plus 20% of the underlying aggregate Index value, less any out-of-the-money amount, with a minimum requirement of the options premium plus 10% of the underlying Index value; and (2) for long options positions, 100% of the options premium paid.

[16] Pursuant to Amex Rules 904C and 905C, respectively, the position and exercise limits for the Index options will be 8,000 contracts, unless the Exchange determines, pursuant to Rules 904C and 905C, that a lower limit is warranted.

[17] Pursuant to Amex Rule 918C, the trading of Index options will be halted or suspended whenever trading in underlying securities whose weighted value represents more than 20% of the Index value are halted or suspended.

[18] ISG was formed on July 14, 1983 to, among other things, coordinate more effectively surveillance and investigative information sharing arrangements in the stock and options markets. See Intermarket Surveillance Group Agreement, July 14, 1983. The most recent amendment to the ISG Agreement, which incorporates the original agreement and all amendments made thereafter, was signed by ISG members on January 29, 1990. See Second Amendment to the Intermarket Surveillance Group Agreement, January 29, 1990.

[19] 15 U.S.C. 78f(b)(5) (1988).

will serve to promote the public interest and help to remove impediments to a free and open securities market by providing investors with a means to hedge exposure to market risk associated with securities in the telecommunications industry.[20]

The trading of options on the Telecommunications Index and on a reduced-value Telecommunications Index, however, raises several concerns, namely issues related to index design, customer protection, surveillance, and market impact. The Commission believes, for the reasons discussed below, that the Amex adequately has addressed these concerns.

A. Index Design and Structure

The Commission finds that the Telecommunications Index and reduced-value Telecommunications Index are narrow-based indexes. The Index is comprised of only fifteen stocks, all of which are within one industry—the telecommunications industry. In addition, the basic character of the reduced-value Telecommunications Index, which is comprised of the same component securities as the Telecommunications Index and calculated by dividing the Index value by ten, is essentially identical to the full-value Telecommunications Index.[21]

Accordingly, the Commission believes it is appropriate for the Amex to apply its rules governing narrow-based index options to trading in the Index options.[22]

The Commission also finds that the large capitalizations, liquid markets, and relative weightings of the Index's component stocks significantly minimize the potential for manipulation of the Index. First, the overwhelming majority of the stocks that comprise the Index are actively traded, with a mean and median average daily trading volume on August 9, 1993, of 812,270 and 539,046 shares, respectively.[23] Second, the market capitalizations of the stocks in the Index are very large, ranging from a high of $84.6 billion to a low of $5 billion as of August 9, 1993, with the mean and median being $22.9 billion and $19.6 billion, respectively.[24] Third, although the Index is only comprised of fifteen stocks, no one particular stock or group of stocks dominates the Index. Specifically, as of August 9, 1993, no one stock comprised more than 7.05% of the Index's total value and the percentage weighting of the three largest issues in the Index accounted for 20.97% of the Index's value. Fourth, all of the component stocks in the Index currently are eligible for options trading and at no point after a quarterly rebalancing, will the Index contain less than 90% option eligible component stocks. Fifth, the Amex, prior to increasing the number of component stocks to more than twenty or decreasing that number to less than ten, will be required to seek Commission approval pursuant to section 19(b)(2) of the Act before effecting such change. This will help protect against material changes in the composition and design of the Index that might adversely affect the Amex's obligations to protect investors and to maintain fair and orderly markets in Telecommunications Index options.

In addition, the Commission does not believe that the fact that the Index is equal dollar-weighted instead of market-weighted or price-weighted results in the Index being readily susceptible to manipulation. Because the use of an equal dollar-weighting method, however, could give securities with relatively small floats or prices a greater weight in the Index than if the Index were capitalization weighted or price weighted, the Commission is concerned that this calculation method could make the Index more readily susceptible to manipulation. The Amex, however, has developed several composition and maintenance criteria for the Index that the Commission believes will minimize the possibility that the Index could be manipulated through trading in less actively traded securities or securities with smaller prices or floats. First, the Amex proposal requires that 90% of the weighting of the Index be accounted for by stocks that are eligible for standardized options trading. The Commission believes that this requirement will ensure that the Index will be almost entirely made up of stocks with large public floats that are actively traded, thus reducing the likelihood that the Index could be manipulated by abusive trading in the smaller stocks contained in the Index. Second, the proposal provides that only stocks with an average monthly trading volume of not less than one million shares over the previous six months will be eligible for inclusion in the Index. This trading volume requirement is considerably higher than the requirement contained in the options listing standards for individual equity options. Third, the Commission believes that the quarterly rebalancing of the Index will further serve to reduce the susceptibility of the Index to manipulation. Through the quarterly rebalancing, any "overweight stock"[25] will be brought back into line with the other stocks, thus ensuring that less capitalized stocks do not become excessively weighted. Fourth, because the Index is narrow-based, the applicable position and exercise limits and margin requirements will further reduce the susceptibility of the Index to manipulation. Lastly, the Amex represents that it will make every effort to add new stocks to the Index that are representative of the North American telecommunications sector and will take into account a stock's capitalization, liquidity, and volatility.[26]

[20] Pursuant to section 6(b)(5) of the Act, the Commission must predicate approval of any new option proposal upon a finding that the introduction of such new derivative instrument is in the public interest. Such a finding would be difficult for a derivative instrument that served no hedging or other economic function, because any benefits that might be derived by market participants likely would be outweighed by the potential for manipulation, diminished public confidence in the integrity of the markets, and other valid regulatory concerns. In this regard, the trading of listed options on the Telecommunications Index will provide investors with a hedging vehicle that should reflect the overall movement of the stocks comprising the telecommunications industry in the U.S., Canada, and Mexico stock markets. The Commission also believes that these Index options will provide investors with a means by which to make investment decisions in the telecommunications industry sector of the U.S., Canadian, and Mexican stock markets, allowing them to establish positions or increase existing positions in such markets in a cost effective manner. The Commission also believes that the trading of the Index options and Index LEAPS will allow investors holding positions in some or all of the underlying securities in the Index to hedge the risks associated with their portfolios more efficiently and effectively. Moreover, the Commission believes that the reduced-value Index LEAPS, that will be traded on an index computed at one-tenth the value of the Retail Index, will serve the needs of retail investors by providing them with the opportunity to use a long-term option to hedge their portfolios from long-term market moves at a reduced cost.

[21] See generally Securities Exchange Act Release No. 32875 (September 13, 1993), 58 FR 48906 (September 20, 1993) (order designating the Morgan Stanley Cyclical and Consumer Indexes as a broad-based index rather than a narrow-based index).

[22] See supra notes 15 through 17, and accompanying text.

[23] In addition, for the six-month period between February and July 1993, all of companies within the Index had an average daily trading volume greater than 180,000 shares per day.

[24] The Exchange, pursuant to its eligibility criteria for the Index, requires that component securities have a market capitalization (in U.S. dollars) of at least $75 million.

[25] A stock would be "overweight" if its weight in the Index were greater than the average weight of all of the stocks in the Index. This would occur, for example, if the price of a component stock significantly increased relative to the other stocks in the Index during a particular quarter and prior to the rebalancing.

[26] Components added to the Index are limited to those stocks or ADRs traded on the Amex (subject to the restrictions of Amex Rule 901C), NYSE, and through NASDAQ/NMS.

B. Customer Protection

The Commission believes that a regulatory system designed to protect public customers must be in place before the trading of sophisticated financial instruments, such as Telecommunications Index options (including full-value and reduced-value Index LEAPS), can commence on a national securities exchange. The Commission notes that the trading of standardized exchange-traded options occurs in an environment that is designed to ensure, among other things, that: (1) The special risks of options are disclosed to public customers; (2) only investors capable of evaluating and bearing the risks of options trading are engaged in such trading; and (3) special compliance procedures are applicable to options accounts. Accordingly, because the Index options and the Index LEAPS will be subject to the same regulatory regime as the other standardized options currently traded on the Amex, the Commission believes that adequate safeguards are in place to ensure the protection of investors in Telecommunications Index options and Index LEAPS.

The Commission also has some concern that the quarterly rebalancing of the Index could result in investor confusion because the number of shares of each issuer in the Index could fluctuate each quarter. Such fluctuation, among other things, could make it difficult for investors to maintain any corresponding cash positions in the stocks underlying the Index. The Commission does not believe that the quarterly rebalancing will result in dramatic changes in the weightings of the component securities. Moreover, the Commission believes the benefits to be derived from using a quarterly rebalancing will more than offset the potential confusion for investors. Specifically, the Commission believes the quarterly rebalancing will ensure that no stock or group of stocks will have a disproportionate impact on the Index.

Finally, the Amex has developed procedures to ensure that investors are adequately notified of any changes due to the quarterly rebalancing of the Index. In particular, the Amex represents that it will send informational circulars to its members notifying them of any changes to the Index as a result of the quarterly rebalancing.[27] In addition, the Amex has stated that it will include a description of the equal dollar weighting methodology in all its promotional and marketing materials for the Index. The Commission believes these procedures should help to avoid any investor confusion, while providing important information about the special characteristics of the Index.

C. Surveillance

The Commission believes that a surveillance sharing agreement between an exchange proposing to list a stock index derivative product and the exchange(s) trading the stocks underlying the derivative product is an important measure for surveillance of the derivative and underlying securities markets. Such agreements ensure the availability of information necessary to detect and deter potential manipulations and other trading abuses, thereby making the stock index product less readily susceptible to manipulation.[28] In this regard, the NYSE and NASDAQ/NMS, which are the primary markets for all of the Index's component stocks, are members of the Intermarket Surveillance Group ("ISG"), which provides for the exchange of all necessary surveillance information.[29]

D. Market Impact

The Commission believes that the listing and trading of Telecommunications Index options, including full-value and reduced-value LEAPS on the Amex will not adversely impact the underlying securities markets.[30] First, as described above, due to the "equal-dollar" weighting method, no one stock or group of socks dominates the Index. Second, because 90% of the numerical value of the Index must be accounted for by stocks that meet the options listing standards, the component securities generally will be actively-traded, highly-capitalized stocks. Third, the 8,000 contract position and exercise limits will serve to minimize potential manipulation and market impact concerns.[31] Fourth, the risk to investors of contra-party non-performance will be minimized because the Index options and Index LEAPS will be issued and guaranteed by the Options Clearing Corporation("OCC") just like any other standardized option traded in the United States.

Lastly, the Commission believes that settling expiring Telecommunications Index options (including full-value and reduced-value Index LEAPS) based on the opening prices of component securities is reasonable and consistent with the Act. As noted in other contexts, valuing options for exercise settlement on expiration based on opening prices rather than closing prices may help reduce adverse effects on markets for securities underlying options on the Index.[32]

IV. Conclusion

For the reasons discussed above, the Commission finds that the proposal is consistent with the Act and section 6(b)(5) of the Act, in particular.

It is therefore ordered, Pursuant to section 19(b)(2) of the Act,[33] that the proposed rule change (SR–Amex–93–25) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[34]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93–28565 Filed 11–19–93; 8:45 am]

BILLING CODE 8010–01–M

[27] See supra section II.E. entitled "Calculation of the Index" for the Exchange's notice provisions in connection with rebalancing of the Index.

[28] See Securities Exchange Act Release No. 32237 (April 29, 1993), 58 FR 26992 (May 6, 1993).

[29] See supra note 18.

[30] See supra note 9.

[31] See supra note 16.

[32] See supra note 11.

[33] 15 U.S.C. 78s(b)(2) (1988).

[34] 17 CFR 200.30–3(a)(12) (1993).

Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Application for Unlisted Trading Privileges in an Over-the-Counter Issue and To Withdraw Unlisted Privileges in an Over-the-Counter Issue

November 15, 1993.

On November 10, 1993, the Chicago Stock Exchange, Inc. ("CHX"), submitted an application for unlisted trading privileges ("UTP") pursuant to section 12(f)(1)(C) of the Securities Exchange Act of 1934 ("Act") in the following over-the-counter ("OTC") security, i.e., a security not registered under section 12(b) of the Act.

File No.	Symbol	Issuer
7–11494	BOST	Boston Chicken, Common Stock, No par value.

The above-referenced issue is being applied for as a replacement for the following security, which forms a portion of the Exchange's program in which OTC securities are being traded pursuant to the granting of UTP.

The CHX also applied to withdraw UTP pursuant to section 12(f)(4) of the Act for the following issue:

File No.	Symbol	Issuer
7-11495	GNSA	Gensia, Inc. Common Stock $.01 par value.

A replacement issue is being requested due to lack of trading activity.

Comments

Interested persons are invited to submit, on or before December 6, 1993, written comments, data, views and arguments concerning this application. Persons desiring to make written comments should file three copies with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

Commentators are asked to address whether they believe the requested grant of UTP as well as the withdrawal of UTP would be consistent with section 12(f)(2), which requires that, in considering an application for extension or withdrawal of UTP in an OTC security, the Commission consider, among other matters, the public trading activity in such security, the character of such trading, the impact of such extension on the existing markets for such security, and the desirability of removing impediments to and the progress that has been made toward the development of a national market system.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93-28566 Filed 11-19-93; 8:45 am]

BILLING CODE 8010-01-M

DEPARTMENT OF STATE

[Public Notice 1902]

Study Group 7 of the U.S. Organization for the International Radio Consultative Committee; Meeting

The Department of State announces that Study Group 7 of the U.S. Organization for the International Radio Consultative Committee (CCIR) will hold an open meeting December 2, 1993 in the suite 950 of the ARC Professional Services Group, 500 E Street, SW., Washington, DC commencing at 10 a.m.

Study Group 7 deals with matters relating to the space research systems and standard frequency and time systems. The purpose of the meeting is to receive status reports from the Working Parties and Task Groups, to review the Study Group's Questions and to review work plans for the technical preparations for the 1995 World Radiocommunication Conference. Members of the general public may attend the meeting and join in the discussions subject to instructions of the Chairman. Those planning to attend the meeting should contact Mr. Roger Andrews, (703) 834-5600 for further information.

Dated: November 4, 1993.

Warren G. Richards,

Chairman, U.S. CCIR National Committee.

[FR Doc. 93-28573 Filed 11-19-93; 8:45 am]

BILLING CODE 4710-45-M

[Public Notice 1901]

Shipping Coordinating Committee, Subcommittee on Safety of Life at Sea; Working Group on Carriage of Dangerous Goods; Meeting

The Working Group on Carriage of Dangerous Goods of the Subcommittee on Safety of Life at Sea (SOLAS) will conduct an open meeting at 9:30 a.m. on December 8, 1993, in room 4315, at U.S. Coast Guard Headquarters, 2100 2nd Street, SW., Washington, DC 20593-0001. The purpose of the meeting is to finalize preparations for the 45th Session of the Subcommittee on the Carriage of Dangerous Goods of the International Maritime Organization (IMO) which is scheduled for January 10-14, 1994, at the IMO Headquarters in London.

The agenda items of particular interest are:

a. Amendments to the International Maritime Dangerous Goods (IMDG) Code.

b. Amendments to the IMDG Code for harmonization with The United Nations Recommendations on the Transport of Dangerous Goods.

c. Amendments to section 13 of the General Introduction to the IMDG Code.

d. Implementation of the IMDG Code.

e. Development of criteria for the hermetic sealing of receptacles, packages and Intermediate Bulk Containers.

f. Development of new glossary and illustrations of packagings for Annex I to the IMDG Code.

g. Amendments to the Emergency Procedures for Ships Carrying Dangerous Goods (EmS) and the Medical First Aid Guide for Use in Accidents Involving Dangerous Goods (MFAG).

h. Implementation of Annex III of the Marine Pollution Convention (MARPOL 73/78), as amended, and amendments to the IMDG Code to cover pollution aspects.

i. Risk analysis of on-deck stowage of marine pollutants and recommendations for the revision of relevant stowage provisions in the IMDG Code.

j. Matters relating to SOLAS regulations II-2/53 and 54.

k. Ships' stores of a hazardous nature.

l. Guidelines for the development of shipboard emergency plans for marine pollutants.

m. Relations with other organizations.

n. Reports on incidents involving dangerous goods or marine pollutants in packaged form on board ships or in port areas.

o. Revision of the Recommendations on the Safe Transport, Handling and Storage of Dangerous Substances in Port Areas.

p. Review of existing ships' safety standards.

q. Role of the human element in maritime casualties.

r. Use of radio beacons on containers and packages.

s. Review of open-top containership provisional recommendations.

t. Review of the INF Code.

u. Criteria for immersion testing of packages containing marine pollutants for the purposes of Annex III of MARPOL 73/78.

Members of the public may attend this meeting up to the seating capacity of the room. Interested persons may seek information by writing: CDR K. J. Eldridge, U.S. Coast Guard (G-MTH-1), 2100 Second Street, SW., Washington, DC 20593-0001 or by calling (202) 267-1577.

Dated: November 8, 1993.

Marie Murray,

Executive Secretary, Shipping Coordinating Committee.

[FR Doc. 93-28571 Filed 11-19-93; 8:45 am]

BILLING CODE 4710-07-M

[Public Notice 1900]

Shipping Coordinating Committee Subcommittee on Safety of Life at Sea, Working Group on Lifesaving, Search and Rescue; Meeting

The Working Group on Lifesaving, Search and Rescue of the Subcommittee on Safety of Life at Sea (SOLAS) will conduct an open meeting at 9:30 a.m. on December 8, 1993 in room 5303 at Coast Guard Headquarters, 2100 Second Street SW., Washington, DC.

The purpose of the meeting is to prepare U.S. positions for the 25th Session of the International Maritime Organization (IMO) Sub-Committee on Lifesaving, Search and Rescue (LSR), scheduled for April 11-15, 1994, at the IMO Headquarters in London. Items of particular interest are:

—Complete work on review and amendment of SOLAS chapter III, to

clarify the intent of the chapter and to cover more specifically various lifesaving arrangements (such as free-fall lifeboats and marine evacuation systems) which are recently gaining wider application
—Application of SOLAS amendments to existing ships
—International approval of life-saving appliances
—Shipboard Safety Emergency Plans and emergency escape arrangements for passenger ships
—Role of the human element in maritime causalities (including on board communication problems)
—Harmonization of aeronautical and maritime Search and Rescue (SAR) plans and procedures
—Implementation of the IMO SAR Plan and the Global Marine Distress and Safety System (GMDSS)

The IMO LSR Sub-Committee works to develop international agreements, guidelines, and standards for Search and Rescue and for lifesaving equipment installed on commercial ships. In many cases, the work of the Sub-Committee forms the basis for national standards and regulations and classification society rules. The U.S. SOLAS Working Group supports the U.S. Representative to the LSR Sub-Committee in developing U.S. positions on issues raised at those meetings. Because of the potential impact of the Sub-Committee's work on U.S. regulations and standards, the U.S. SOLAS Working Group serves as an excellent forum for the U.S. maritime industry to express their ideas in the areas under the Sub-Committee's purview. Since these meeting are open to the public, anyone may attend up to the seating capacity of the room.

For further information contact Mr. Kurt J. Heniz at (202) 276–1444, U.S. Coast Guard Headquarters, (G–MVI–3/1404), 2100 Second Street SW., Washington, DC 20593–0001.

Dated: November 5, 1993.

Marie Murray,

Executive Secretary, Shipping Coordinating Committee.

[FR Doc. 93–28572 Filed 11–19–93; 8:45 am]

BILLING CODE 4710–07–M

THRIFT DEPOSITOR PROTECTION OVERSIGHT BOARD

National Advisory Board Meeting

AGENCY: Thrift Depositor Protection Oversight Board.

ACTION: Notice of meeting.

SUMMARY: In accordance with section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. app., announcement is hereby published for a meeting of the National Advisory Board. The meeting is open to the public. Please note that elsewhere in this issue of the **Federal Register** is a meeting notice for the National Housing Advisory Board, which will meet in the afternoon following the National Advisory Board meeting.

DATES: The National Advisory Board meeting is scheduled for Wednesday, December 15, 1993, 9 a.m. to 12 noon.

ADDRESSES: The meeting will be held at the Federal Deposit Insurance Corporation, Board room 6010, 550 17th Street NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Jill Nevius, Committee Management Officer, Thrift Depositor Protection Oversight Board, 1777 F Street NW., Washington, DC 20232, 202/786–9675.

SUPPLEMENTARY INFORMATION: Pursuant to section 21A (d) of the Federal Home Loan Bank Act, the Thrift Depositor Protection Oversight Board had established a National Advisory Board and six Regional Advisory Boards to advise the Oversight Board and the Resolution Trust Corporation (RTC) on the disposition of real property assets of the Corporation.

Agenda

A detailed agenda will be available at the meeting. The meeting will include briefings from the chairs of the six regional advisory boards on their respective meetings held throughout the country from November 2 to December 2. Discussion will focus on the key topics from the regional meetings: The impact of RTC activities on local real estate market conditions; an update on Secretary Bentsen's Management Reforms; and reviews of RTC's Small Investor Program, RTC's Environmentally Significant Property Program and RTC's overall asset sales strategies.

Statements

Interested persons may submit, in writing, data, information or views on the issues pending before the National Advisory Board prior to or at the meeting. Seating is available on a first come first served basis for this open meeting.

Dated: November 17, 1993.

Jill Nevius,

Committee Management Officer.

[FR Doc. 93–28606 Filed 11–19–93; 8:45 am]

BILLING CODE 2222–01–M

National Housing Advisory Board Meeting

AGENCY: Thrift Depositor Protection Oversight Board.

ACTION: Notice of meeting.

SUMMARY: In accordance with section 10(a)(2) of the Federal Advisory Committee Act 5 U.S.C. app., announcement is hereby published for a meeting of the National Housing Advisory Board. The meeting is open to the public. Please note that elsewhere in this issue of the **Federal Register** is a meeting notice for the National Advisory Board, which will meet in the morning prior to the National Housing Advisory Board meeting.

DATES: The National Housing Advisory Board meeting is scheduled for Wednesday, December 15, 1993, from 1 to 3 p.m.

ADDRESSES: The meeting will be held at the Federal Deposit Insurance Corporation, Board Room 6010, 550 17th Street NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Jill Nevius, Committee Management Officer, Thrift Depositor Protection Oversight Board, 1777 F Street NW., Washington, DC 20232, 202/786–9675.

SUPPLEMENTARY INFORMATION: In accordance with section 21A(d)(2) of the Federal Home Loan Bank Act, as amended by the Resolution Trust Corporation (RTC) Thrift Depositor Protection Reform Act of 1991, the Thrift Depositor Protection Oversight Board established a National Housing Advisory Board to advise the Oversight Board on policies and programs related to the provision of affordable housing. The National Housing Advisory Board consists of the Secretary of the Department of Housing and Urban Development and the chairs of the regional advisory boards established under section 21A (d)(3) of the Federal Home Loan Bank Act.

Agenda

A detailed agenda will be available at the meeting. The meeting will include briefings from the Board's chair and from the chairs of the six regional advisory boards on their respective meetings held throughout the country from November 2 to December 2, 1993. Discussions will focus on the RTC's single-and multi-family housing dispositions programs.

Statements

Interested persons may submit, in writing, data, information, or views on the issues pending before the National Housing Advisory Board prior to or at the meeting. Seating for the open meeting is available on a first come first served basis.

Dated: November 17, 1993.

Jill Nevius,

Committee Management Officer.

[FR Doc. 93-28607 Filed 11-19-93; 8:45 am]

BILLING CODE 2222-01-M

Sunshine Act Meetings

Federal Register
Vol. 58, No. 223
Monday, November 22, 1993

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).

U.S. NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE

Open Forum on Children and Youth Services: Redefining the Federal Role for Libraries

DATE AND TIME: December 3, 1993; 9 a.m.–3 p.m.

PLACE: Wallace Building Auditorium, 502 E. 9th Street, Des Moines, Iowa 50391.

STATUS: Open.

PURPOSE OF THE FORUM: Open forum on the changing role of the Federal government in support of library and information services and literacy programs for children and youth. The forum provides an opportunity for elected officials, representatives from community advocacy groups and organizations, school library media centers, public libraries, academic libraries, educational, literacy and information services organizations, companies, associations, and institutions to offer comments, observations, and suggestions related to Federal roles and responsibilities for library and information services, and literacy programs offered to children and youth.

Parties interested in presenting oral statements should notify Jan Irving, State Library of Iowa, East 9th and Grand, Des Moines, Iowa, 50391 (Telephone number 515–281–7572. written statements should be received at the NCLIS office by December 17, 1993.

To request further information or to make special arrangements for physically challenged persons, contact Kim Miller, NCLIS, no later than one week in advance of the forum.

Dated: November 15, 1993.

Peter R. Young,

NCLIS Executive Director.

[FR Doc. 93–28773 Filed 11–18–93; 3:08 pm]

BILLING CODE 7527-01-M

NUCLEAR REGULATORY COMMISSION

DATE: Weeks of November 22, 29, December 6, and 13, 1993.

PLACE: Commissioners' Conference Room 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of November 22

Wednesday, November 24

9:00 a.m.
Briefing by NUMARC on Thermo-Lag (Public Meeting)
(Contact: Bill Rasin, 202–872–1280)

10:30 a.m.
Affirmation/Discussion and Vote (Public Meeting)
a. Advanced Medical Systems, Inc.'s and NRC Staff's Petitions for Reconsideration of CLI–93–22 (Tentative)
(Contact: Margaret Doane, 301–504–2001)

Week of November 29—Tentative

Friday, December 3

10:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of December 6—Tentative

Tuesday, December 7

10:00 a.m.
Periodic Briefing on EEO Program (Public Meeting)
(Contact: Vandy Miller, 301–492–4665)

Thursday, December 9

10:00 a.m.
Briefing on Status of TVA Nuclear Programs (Public Meeting)
(Contact: Gus Lainas, 301–504–1435)

11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

2:00 p.m.
Briefing by Northeast Utilities (Public Meeting)
(Contact: Jose Calvo, 301–504–1404)

Friday, December 10

10: a.m.
Briefing by IG on Fee Audit (Public Meeting)
(Contact: Thomas Barchi, 301–492–7301)

Week of December 13—Tentative

Tuesday, December 14

10:00 a.m.
Briefing on Result of Operator Licensing Program Recentralization Study (Public Meeting)
(Contact: Robert Gallo, 301–504–1031)

11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

ADDITIONAL INFORMATION: Affirmation of "Final Rule, 10 CFR Parts 30, 40, 50, 70, and 72, 'Self-Guarantee as an Additional Financial Assurance Mechanism'" (Public Meeting) scheduled for November 17 was *postponed.*

Note: Affirmation sessions are initially scheduled and announced to the public on a time-reserved basis. Supplementary notice is provided in accordance with the Sunshine Act as specific items are identified and added to the meeting agenda. If there is no specific subject listed for affirmation, this means that no item has as yet been identified as requiring any Commission vote on this date.

The schedule for commission meetings is subject to change on short notice. To verify the status of meetings call (Recording)—(202 504–1292.

CONTACT PERSON FOR MORE INFORMATION: William Hill, (301) 504–1661.

Dated: November 17, 1993.

William M. Hill, Jr.,

SECY Tracking Officer, Office of the Secretary.

[FR Doc. 93–28722 Filed 11–18–93; 12:45 pm]

BILLING CODE 7590-01-M

SECURITIES AND EXCHANGE COMMISSION

Agency Meeting

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: [58 FR 60493 November 16, 1993]

STATUS: Closed meeting.

PLACE: 450 Fifth Street, NW., Washington, DC.

DATE PREVIOUSLY ANNOUNCED: Wednesday, November 10, 1993.

CHANGE IN THE MEETING: Additional meeting.

The following item will be considered at a closed meeting scheduled for Tuesday, November 23, 1993, at 10:00 a.m.:

Institution of administrative proceedings of an enforcement nature.
Institution of injunctive actions.
Settlement of injunctive actions.
Consideration of *amicus* participation.
Opinion.

Commissioner Beese, as duty officer, determined that Commission business required the above change and that no earlier notice thereof was possible.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Holly Smith at (202) 272–2000.

Dated: November 18, 1993.

Jonathan G. Katz,

Secretary.

[FR Doc. 93–28786 Filed 11–18–93; 3:47 pm]

BILLING CODE 8010–01–M

POSTAL RATE COMMISSION

TIME AND DATE: 2:30 p.m., November 30, 1993.

PLACE: Conference Room, 1333 H Street, NW., Suite 300, Washington, DC 20268.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Personnel Matters.

CONTACT PERSON FOR MORE INFORMATION: Charles L. Clapp, Secretary, Postal Rate Commission, Suite 300, 1333 H Street, NW., Washington, DC 20268–0001, Telephone (202) 789–6840.

Charles L. Clapp,

Secretary.

[FR Doc. 93–28668 Filed 11–17–93; 4:55 pm]

BILLING CODE 7710–FW–P

Corrections

Federal Register
Vol. 58, No. 223
Monday, November 22, 1993

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 ENERGY

Federal Energy Regulatory Commission

[Docket Nos. RP93-14-000, et al., RP93-126-000, et al., RP87-14-000, et al., RP86-41-000, et al.]

Algonquin Gas Transmission Co.; Informal Settlement Conference

Correction

In notice document 93-27214 appearing on page 59025 in the issue of Friday, November 5, 1993, the second docket number should appear as set forth above.

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 93-ANM-5]

Amendment of Class E Airspace; Denver, CO

Correction

In rule document 93-21976 beginning on page 47373 in the issue of Thursday, September 9, 1993, make the following correction:

§ 71.1 [Corrected]

On page 47374, in the 2d column, in § 71.1, under the heading **ANM CO E5 Denver, CO [Revised]**, in the paragraphed text, in the 11th line, "40°00′00″ N.," should read "40°30′00″ N.," and in the 12th line, "41°30′00″" should read "41°00′00″".

BILLING CODE 1505-01-D

UNITED STATES INFORMATION AGENCY

22 CFR Part 503

Freedom of Information Act Regulations

Correction

In proposed rule document 93-27950 beginning on page 60416 in the issue of Tuesday November 16, 1993 make the following correction:

On page 60416, in the second column, under **DATES:**, in the second line, "November 16, 1993." should read "December 16, 1993."

BILLING CODE 1505-01-D

federal register

Monday
November 22, 1993

Part II

Securities and Exchange Commission

17 CFR Part 201, et al.
Rules of Practice; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 201, 202, 229, and 240

[Release No. 34-33163; File No. S7-40-92]

RIN 3235-AF91

Rules of Practice

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rules and request for comment.

SUMMARY: The Securities and Exchange Commission is proposing to adopt revisions to its Rules of Practice. These rules govern Commission administrative proceedings including, among others, evidentiary hearings before administrative law judges, appeals of self-regulatory organization disciplinary actions and administrative law judge initial decisions and certain rulemaking proceedings. The Commission is also proposing revisions to conform rules 19d-2 and 19d-3 (concerning disciplinary sanctions imposed by self-regulatory organizations) under the Securities Exchange Act of 1934, 17 CFR 202.8 (procedures for summary suspensions pursuant to section 12(k) of the Act) and Regulation S-K (standard instructions for filling certain forms) to the proposed Rules of Practice.

The proposed rule changes are an outgrowth of the report of Commission's Task Force on Administrative Proceedings, "Fair and Efficient Administrative Proceedings," issued on March 15, 1993. Specifically, the proposal would implement two of the Report's recommendations: that the Commission make comprehensive revisions to the Rules of Practice to improve the efficiency of the administrative process, and that the Commission implement the authority granted to it by the Securities Enforcement Remedies and Penny Stock Reform Act including the authority to issue temporary cease-and-desist and disgorgement orders.

DATES: Comments must be submitted on or before January 6, 1994.

ADDRESSES: Comments should be addressed to File No. S7-40-92, Attention: Jonathan G. Katz, Secretary; U.S. Securities and Exchange Commission; 450 Fifth Street, NW.; Stop 6-9; Washington, DC 20549. All comments received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549.

FOR FURTHER INFORMATION CONTACT: Andrew Z. Glickman or Daniel O. Hirsch, Office of the General Counsel at (202) 272-2428; U.S. Securities and Exchange Commission; 450 Fifth Street, NW.; Stop 6-6; Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Overview of Proposals

The Securities and Exchange Commission ("Commission") is proposing for comment revisions to its Rules of Practice (17 CFR 201.1-201.29) and related procedural rules including rules 19d-2 and 19d-3 under the Securities Exchange Act of 1934 ("Exchange Act") (17 CFR 240.19d-2 and 240.19d-3) concerning disciplinary sanctions imposed by self-regulatory organizations. Included in this proposal are: (1) The proposed Rules of Practice; (2) a topical index including a timetable to the proposed rules; and (3) cross-reference tables indexing the location of existing rules to proposed rules and vice versa.

In order to implement these proposals, a number of conforming changes must also be made to other rules. The proposed Rules of Practice would exclude the provisions concerning "incorporation by reference" which related to the making of disclosure or regulatory filings. This provision would be moved to Regulation S-K (17 CFR 229.10 through 229.915). Conforming changes would also be made to the Commission procedures concerning summary suspensions under section 12(k) of the Exchange Act (17 CFR 202.8).

In order to number consecutively the Rules of Practice in the Code of Federal Regulations ("CFR"), the Commission's regulations pertaining to the Equal Access to Justice Act ("EAJA") (17 CFR 201.31-201.60) and the Commission's procedures pertaining to the payment of bounties pursuant to subsection 21A(e) of the Exchange Act (17 CFR 201.61-201.68) would be renumbered. No other changes are being proposed in relation to the EAJA rules or the bounty rules. In addition, adoption of this proposal would require existing cross-references to the Rules of Practice in all other rules and forms used by the Commission to be renumbered.

This proposal is the first comprehensive revision to the Rules of Practice in over 30 years. Certain provisions of the Rules are now out-of-date or, due to intervening amendments, inconsistent with other provisions. Similarly, practices of the administrative law judges and the Commission which have evolved over time are not reflected in the Rules. Further, there are opportunities to streamline the Rules to incorporate widely accepted changes in litigation practice and to reflect the availability of new services and technologies, such as next day air express for service of documents. Adoption of the proposed Rules will ensure greater consistency and efficiency in the administrative process by providing the Commission with a uniform and reliable set of administrative procedures and rules. In addition, the proposed rules and procedures implement the authority granted to the Commission by the Securities Enforcement Remedies and Penny Stock Reform Act ("Remedies Act") with respect to temporary cease-and-desist proceedings and delineate procedures to be used with respect to disgorgement in Commission initiated administrative enforcement proceedings.

A. Proposed Changes to Current Procedures

The proposed rules provide for:

1. An expanded role for prehearing conferences and more active case management by administrative law judges;
2. Production of documents, pursuant to subpoena, prior to the start of a hearing;
3. A streamlined discovery process codifying the existing unwritten practice, generally followed by the Division of Enforcement, of making available to respondents all non-privileged, relevant investigative files; and
4. Summary disposition of matters of law at any time after institution of proceedings, based on stipulated facts and the pleadings.

B. Proposed Additions to the Rules to Implement New Authority

1. Procedures would be adopted for the conduct of temporary cease-and-desist order proceedings and proceedings to suspend temporarily the registration of a broker, dealer, investment adviser or other Commission-registered entity.

Under the proposals with regard to temporary cease-and-desist orders:

a. The staff would file an application for a temporary cease-and-desist order simultaneously with or after the commencement of proceedings seeking a permanent order with respect to a registered entity or associated person. Prior to filing an application for temporary relief, the staff would, in all cases, have to obtain authority to seek a temporary order from the Commission. As with any other decision to initiate enforcement action prior to the institution of proceedings, Commission deliberations and discussions with the

staff concerning the decision whether to authorize an application for temporary relief would be nonpublic, privileged and not ordinarily reviewable by a court.

b. Upon institution of proceedings, the staff would file an application for a temporary cease-and-desist order including, unless specifically waived by the Commission, a supporting declaration of facts, a memorandum of law, a proposed order to show cause and a proposed temporary order.

c. Unless the statutorily specified conditions warranting issuance of an *ex parte* order were met, the respondent would be served with the application and supporting papers and a hearing on the application would be scheduled. If an order were issued *ex parte*, a hearing would normally be held within 48 hours upon request of the respondent. Hearings with regard to the grant, denial or modification of a temporary cease-and-desist order ordinarily would take place before the Commission and not an administrative law judge.

d. If a temporary cease-and-desist order were granted, or if an *ex parte* order were sustained, after a Commission hearing, the order could be appealed to a federal district court. If not modified by a court, it would remain in effect pending the hearing on the need for a permanent cease-and-desist order before an administrative law judge. After issuance of an initial decision by the administrative law judge on the need for a permanent order, however, the duration of the temporary cease- and-desist order pending Commission review would be limited.

2. Rules governing the collection and distribution of disgorgement funds and the payment of penalties required by Commission order would be adopted. Under the proposals:

a. Prejudgment interest would be assessed on all disgorgement ordered. Disgorgement would be due promptly upon entry of a final order.

b. Disgorgement funds would be distributed, where feasible, to injured investors; otherwise, funds would be paid to the U.S. Treasury. Where deemed appropriate by the Commission, disgorged funds could be turned over to a court for distribution in a private civil litigation based on the same operative facts underlying the Commission's administrative enforcement action.

c. Where necessary, a disgorgement fund administrator, selected from either the private sector or the Commission staff, would oversee processing of proofs of claims and distribution of monies from fund.

II. Discussion of Proposed Rules of Practice

Each of the proposed rules appears individually below. Commentary follows each rule or, where relevant, a paragraph of a rule. The proposal renumbers many of the Commissions rules to follow the chronological flow of events from service of papers to institution of a hearing before a hearing officer to Commission review. Rules pertaining to temporary sanctions, including temporary cease-and-desist orders, and disgorgement and penalty payments appear separately. In addition, rules relating to review of self-regulatory organization determinations also appear separately.

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Notes to the Rules of Practice

1. *Numbering*: Generally, the rules follow the chronological flow of events from institution, hearing before a hearing officer, and Commission review. Separate provisions with respect to temporary sanctions (including temporary cease-and-desist proceedings), disgorgement, and review of self-regulatory organization determinations follow the rest of the rules.

2. *Headings*: Each rule and each major paragraph within a rule have descriptive headings which are intended to guide a reader in searching for information on particular requirements.[1]

3. *Topical index including timetable*: A topical index has been provided to assist persons consulting the Rules of Practice. It is structured alphabetically by subject matter and contains cross-references to the rule numbers. The index is provided as a guide only. Its contents are not dispositive and do not form any portion of the rules.

Proposed Rules of Practice

(ER 1)

Rule 1. Scope, Rules of Construction and Definitions

(a) *Scope of the Rules of Practice.* These Rules of Practice govern proceedings before the Commission under the statutes which it administers. They shall be construed to secure the just, speedy, and inexpensive determination of every proceeding. These rules do not apply to investigations, except where made specifically applicable by the Rules Relating to Investigations, part 203 of this chapter (17 CFR part 203), or to rulemaking, except where made applicable by Commission order. In connection with any particular matter, reference should be made to any special requirements of procedure that may be contained in the particular statute involved or the rules and forms adopted by the Commission thereunder. Any such special requirements control to the extent that they conflict with the provisions herein.

Comment: By their terms, the existing Rules of Practice are generally applicable to "proceedings before the Commission under the statutes it administers." Investigations are excluded from the scope of the Rules except where made specifically applicable. A majority of both the existing and proposed rules address procedures in those matters where the Commission has ordered an evidentiary hearing pursuant to an order instituting proceedings. Where the Rules are silent as to the procedures to be used in a particular type of proceeding, such as notice and comment rulemaking, the Commission specifies procedures by order. In practice, only a small proportion of administrative proceedings involve hearings: Commission rulemaking is ordinarily conducted without hearings. Most adjudicatory matters involve regulatory decisions, such as whether to register an entity as a broker or dealer, which are resolved by exercise of delegated authority by the staff. Proceedings in which hearings are most often held by the Commission are enforcement proceedings. An even greater number of proceedings subject to the Rules arise from appeals to the Commission of decisions made after hearings by self-regulatory organizations.

The existing statement of the scope of the Rules sought to reflect these facts by distinguishing proceedings to which the Rules were "generally" or "particularly" applicable. The existing rule also emphasizes the distinction between proceedings with "hearings or opportunity for hearing" and other proceedings. The distinction between proceedings which are required to have "on the record" hearings, those that require a hearing, but not that the hearing be "on the record," and those in which no hearing is required, are very important. However, the Rules of Practice do not govern whether a hearing is or is not "on the record" or if a hearing is held at all. Reference to these different types of hearings and the special provisions of Rule 27 was unnecessary, and accordingly was deleted.

Individual rules have been modified to indicate whether they apply generally to all proceedings, or only to a proceeding in which an order instituting proceedings has been entered. Rules dealing with formalities, such as the hours the Commission is open for business, requirements for briefs or the requirements of Commission orders, apply to all proceedings. Other rules, such as those requiring service of filings, apply only if the Commission has issued an order instituting proceedings.

The language in the second sentence of Proposed Rule 1(a) is modeled on the language in Rule 1 of the Federal Rules of Civil Procedure.

The Task Force received comments indicating uncertainty with respect to the applicability of the Rules to proceedings pursuant to Exchange Act section 19(d)(2) to review disciplinary actions taken by self-regulatory organizations and proceedings pursuant to Exchange Act section 19(b)(2) to disapprove a self-regulatory organization rule. The Rules of Practice apply to both types of proceedings. The Task Force has recommended that the substantive requirements of Exchange Act Rules 19d–2 and 19d–3, which contain specific procedures governing certain aspects of proceedings under section 19(d)(2), be incorporated into the Rules of Practice, so that persons seeking review of self-regulatory organization disciplinary decisions can consult a single source with respect to all procedural requirements.

The specific reference to the rules' inapplicability to investigations has been retained. To codify what has been Commission practice, Proposed Rule 1(a) now states that the rules are not applicable to rulemaking proceedings, unless the Commission orders otherwise.

(b) *Rules of Construction.* For purposes of these rules:

(1) Any term in the singular includes the plural, and any term in the plural includes the singular, if such use would be appropriate;

(2) Any use of a masculine, feminine, or neuter gender encompasses all three, if such use would be appropriate; and

(3) Unless the context requires otherwise, counsel, if any, may take any action required or permitted to be taken by a party.

(c) *Definitions.* For purposes of these rules, unless explicitly stated to the contrary:

(1) "*Commission*" means the United States Securities and Exchange Commission, including a quorum of the Commission or the duty officer, as provided for at 17 CFR 200.42;

(2) "*Counsel*" means any lawyer representing a party, in accord with Rule 2(b) (§ 201.2(b), or a non-lawyer representative, to the extent permissible under Rule 2(a) (§ 201.2(a));

(3) "*Enforcement proceeding*" means a proceeding, initiated by an order instituting proceedings entered by the Commission, held for the purpose of determining whether or not a person has violated or caused a violation of the federal securities laws and the rules thereunder;

(4) "*Hearing officer*" means an administrative law judge, a panel of Commissioners constituting less than a quorum of the Commission, an individual Commissioner, or any other person duly authorized to preside at a hearing;

(5) "*Interested division*" means the division or office assigned responsibility by the Commission to participate in a particular proceeding;

(6) "*Party*" means the interested division, any person named as a

[1] The headings include at the far left margin the existing rule number, abbreviated "ER ____" and the proposed rule number, labeled "Rule ____."

respondent or party in the order instituting proceedings, persons entitled to notice as set forth in Rule 8(f) (§ 201.8(f)) or any person seeking Commission review of a decision;

(7) "*Registered entity*" means a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, or transfer agent;

(8) "*Secretary*" means the Secretary of the Commission; and

(9) "*Temporary sanction*" means a temporary cease-and-desist order or a temporary suspension of the registration of a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, or transfer agent.

Comment: Rules of construction and definitions have been included in order to clarify terms used throughout the rules. It was suggested that instead of using the term "hearing officer," the rules should refer to "administrative law judge." While administrative law judges do preside at most hearings at which the Commission itself does not preside, a duty officer or other persons may preside. *See* Securities Exchange Act section 4A; Administrative Procedure Act 5 U.S.C. 556(b). Accordingly, the proposed rules continue to use the term "hearing officer" throughout.

(ER 2)

Rule 2. Appearance and Practice Before the Commission.

A person shall not be represented at any hearing before the Commission or a hearing officer except as stated in paragraphs (a) and (b) of this rule or as otherwise permitted by the Commission or a hearing officer.

(a) *By non-lawyers.* In any proceeding, a person may appear on his or her own behalf; a member of a partnership may represent the partnership; a bona fide officer of a corporation, trust or association may represent the corporation, trust or association; and an officer or employee of a state commission or of a department or political subdivision of a state may represent the state commission or the department or political subdivision of the state.

(b) *By lawyers.* In any proceeding, a person may be represented by an attorney at law admitted to practice before the Supreme Court of the United States or the highest court of any State (as defined in section 3(a)(16) of the Exchange Act).

Comment: The proposed rule has been amended to conform with the definition of "State" contained in section 3(a)(16) of the Exchange Act. The phrase "or the Court of Appeals or the District Court of the United States for the District of Columbia" in the existing rule was unnecessary. The Court of Appeals for the District of Columbia is the District's highest court. Lawyers admitted to practice before the United States District Court for the District of Columbia or the Court of Appeals for the District of Columbia Circuit must be admitted before the court of a state or territory, so it was redundant to include admission before these two courts as separate criteria for practice before the Commission.

(c) *Former Commission employees.* Former employees of the Commission must comply with the restrictions on practice contained in the Commission's Conduct Regulation, subpart M, 17 CFR 220.735.

(d) *Notice of appearance; designation for service; power of attorney.* (1) When a person first appears on his or her own behalf before the Commission or a hearing officer in a proceeding in which an order instituting proceedings has been entered, or a notice of intention to file a petition for review pursuant to Rule 30 or an application pursuant to Rule 56 for review of a self-regulatory organization determination has been filed, he or she shall file with the Commission, or otherwise state on the record, an address at which any notice or other written communication required to be served upon him or her or furnished to him or her may be sent and a telephone number where he or she may be reached during business hours.

(2) When an attorney first appears in a representative capacity before the Commission or a hearing officer in a proceeding in which an order instituting proceedings has been entered, or a petition for review or an application pursuant to Rule 56 for review of a self-regulatory organization determination has been filed, he or she shall file a written notice of such appearance, which shall state the name of the proceeding in which he or she is appearing, his or her name, address and business telephone number and the name and address of the person or persons on whose behalf he or she appears.

(3) Any person appearing or practicing before the Commission in a representative capacity may be required to file a power of attorney with the Commission showing his or her authority to act in such capacity.

Comment: The provisions dealing with service have been moved to Proposed Rule 5 and made consistent with the norms of professional conduct, which require that when persons are represented by counsel, communications by opposing parties be made to counsel. *See, e.g.,* Rule 1.4 of the Rules of Conduct of the District of Columbia Bar (1992).

(e) *Suspension and disbarment.*—(1) *Generally.* The Commission may censure or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice and opportunity for hearing in the matter:

(i) Not to possess the requisite qualifications to represent others; or

(ii) To be lacking in character or integrity or to have engaged in unethical or improper professional conduct; or

(iii) To have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

Comment: The Commission has, in litigated as well as settled actions, sanctioned individuals by imposing a "censure" in proceedings brought under Rule 2(e)(1). *See, e.g., In re Ernst & Ernst,* ASR 248 (1937–1982 Transfer Binder) Fed. Sec. L. Rep. (CCH) ¶ 72,270 (May 31, 1978) (litigated proceeding; audit firm censured); *In re Epstein,* AAER 384, 51 SEC Docket 1044 (May 21, 1992) (settlement; individual censured and temporarily suspended). Existing Rule 2(e)(1), by its terms, only allows the Commission to "deny, temporarily or permanently," the privilege of appearing or practicing before the Commission. The proposed rule would reflect the Commission's established practice in appropriate cases of imposing only a "censure" as a sanction for violations of Rule 2(e)(1).

(2) *Certain professionals and convicted persons.* Any attorney who has been suspended or disbarred by a Court of the United States or in any State, or any person whose license to practice as an accountant, engineer, or other professional or other expert has been revoked or suspended in any State, or any person who has been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission. A disbarment, suspension, revocation, or conviction within the meaning of this rule shall be deemed to have occurred when the disbarring, suspending, revoking or convicting agency or tribunal enters its judgment or order, including a judgment or order on a plea of nolo contendere, regardless of whether appeal is pending or could be taken.

(3) *Temporary suspensions.* (i) The Commission, with due regard to the public interest and without preliminary hearing, may, by order, temporarily suspend from appearing or practicing before it any attorney, accountant, engineer, or other professional or expert who has been by name:

(A) Permanently enjoined by any court of competent jurisdiction, by

reason of his or her misconduct in an action brought by the Commission, from violation or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder; or

(B) Found by any court of competent jurisdiction in an action brought by the Commission to which he or she is a party or found by this Commission in any administrative proceeding to which he or she is a party to have violated (unless the violation was found not to have been willful) or aided and abetted the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

An order of temporary suspension shall become effective upon service upon the respondent. No order of temporary suspension shall be entered by the Commission pursuant to this paragraph (e)(3)(i) more than 90 days after the final judgment or order entered in a judicial or administrative proceeding described in paragraph (e)(3)(i)(A) or (e)(3)(i)(B) has become effective upon completion of review or appeal procedures or because further review or appeal procedures are no longer available.

(ii) Any person temporarily suspended from appearing and practicing before the Commission in accordance with paragraph (e)(3)(i) may, within 30 days after service upon him or her of the order of temporary suspension, petition the Commission to lift the temporary suspension. If no petition has been received by the Commission within 30 days after service of the order, the suspension shall become permanent.

(iii) Within 30 days after the filing of a petition in accordance with paragraph (e)(3)(ii), the Commission shall lift the temporary suspension or set the matter down for hearing at a time and place to be designated by the Commission or both, and, after opportunity for hearing, may censure the petitioner or disqualify the petitioner from appearing or practicing before the Commission for a period of time or permanently. In every case in which the temporary suspension has not been lifted, every hearing held and other action taken pursuant to this paragraph (e)(3) shall be expedited in accordance with the standards of Rule 38. If the hearing is held before a hearing officer, the time limits set forth in Rule 44 will govern review of the hearing officer's initial decision.

(iv) In any hearing held on a petition filed in accordance with paragraph (e)(3)(ii), the staff of the Commission shall show either that the petitioner has been enjoined as described in paragraph (e)(3)(i)(A) or that the petitioner has been found to have committed or aided and abetted violations as described in paragraph (e)(3)(i)(B) and that showing, without more, may be the basis for censure or disqualification. Once that showing has been made, the burden shall be upon the petitioner to show cause why he or she should not be censured or temporarily or permanently disqualified from appearing and practicing before the Commission. In any such hearing, the petitioner shall not be heard to contest any finding made against him or her or fact admitted by him or her in the judicial or administrative proceeding upon which the proceeding under this paragraph (e)(3) is predicated. A person who has consented to the entry of a permanent injunction as described in paragraph (e)(3)(i)(A) without admitting the facts set forth in the complaint shall be presumed for all purposes under this paragraph (e)(3) to have been enjoined by reason of the misconduct alleged in the complaint.

(4) *Filing of prior orders.* Any person appearing or practicing before the Commission who has been the subject of an order, judgment, decree, or finding as set forth above shall promptly file with the Secretary a copy thereof (together with any related opinion or statement of the agency or tribunal involved). Failure to file any such paper, order, judgment, decree, or finding shall not impair the operation of any other provision of this rule.

(5) *Reinstatement.* (i) An application for reinstatement of a person permanently suspended or disqualified under paragraph (e)(1) or (e)(3) of this rule may be made at any time, and the applicant may, in the Commission's discretion, be afforded a hearing; however, the suspension or disqualification shall continue unless and until the applicant has been reinstated by the Commission for good cause shown.

(ii) Any person suspended under paragraph (e)(2) of this rule shall be reinstated by the Commission, upon appropriate application, if all the grounds for application of the provisions of that paragraph are subsequently removed by a reversal of the conviction or termination of the suspension, disbarment, or revocation. An application for reinstatement on any other grounds by any person suspended under paragraph (e)(2) of this rule may be filed at any time and the applicant shall be accorded an opportunity for a hearing in the matter; however, such suspension shall continue unless and until the applicant has been reinstated by order of the Commission for good cause shown.

(6) Any proceeding brought under Rule 2(e) shall not preclude a proceeding under any other paragraph.

(7) All hearings held under Rule 2(e) shall be public unless otherwise ordered by the Commission on its own motion or after considering the motion of a party.

Comment: Paragraph (f) has been made a part of a rule on misconduct and sanctions, Proposed Rule 3.

(f) *Practice defined.* For the purposes of these rules, practicing before the Commission shall include, but shall not be limited to:

(1) Transacting any business with the Commission; and

(2) The preparation of any statement, opinion or other paper by any attorney, accountant, engineer or other expert, filed with the Commission in any registration statement, notification, application, report or other document with the consent of such attorney, accountant, engineer or other expert.

Comment: The existing rules contain provisions with respect to service in various rules. These provisions would be combined into one proposed rule on service, Proposed Rule 5, which governs service on attorneys as well as others. Rule 2(h) would therefore be deleted.

(ER 2(f))

Rule 3. Sanctions.

(a) *Conduct.* Dilatory, disruptive, contemptuous, or contumacious conduct by any person before the Commission or a hearing officer during a hearing or conference shall be grounds for the Commission or the hearing officer to exclude that person from such hearing or conference. Further, dilatory, disruptive, contemptuous, or contumacious conduct by any counsel at any time before the Commission or a hearing officer shall be grounds for summary suspension from practice for the duration or any portion of the proceeding in which such conduct occurred. Such conduct by counsel may also be grounds for the institution of proceedings under Rule 2(e) of these rules. Any person excluded from a hearing or conference, or counsel summarily suspended from practice for the duration or any portion of a proceeding, may seek review of the exclusion or suspension by filing with the Commission, within three days of the exclusion or suspension order, a petition to lift such order. The Commission shall consider the petition pursuant to Rule 2(e)(3)(iii).

Comment: Resort to sanctions for disruptive conduct during the course of a proceeding rarely has been necessary. However, anecdotal evidence presented to

the Task Force suggested a need to delineate more clearly a hearing officer's authority to impose such sanctions. The provisions for sanctions against persons engaging in dilatory, contemptuous, or contumacious conduct are based on Existing Rule 2(f). That rule applies only to attorneys. Under the proposed rule, any person, not just attorneys or representatives, could be excluded from a hearing or conference for misconduct. As before, summary suspensions could be directed only at attorneys or non-attorney representatives. The proposed rule expressly limits summary suspensions to appearances in connection with the proceeding in which the dilatory, contemptuous, or contumacious conduct took place. Any broader prohibition would be difficult to justify since the circumstances which triggered the misconduct would be unlikely to be present in an entirely different matter.

The proposed rule adds a mechanism for timely appeal of a summary suspension. The proposed rule does not include an explicit provision for appeal of an order excluding a person from all or a portion of the hearing or conference. A person subject to such an exclusion order by a hearing officer could seek interlocutory review of the order by the Commission, pursuant to Proposed Rule 18 (ER 12(a)). If interlocutory review was not allowed, the matter could be reviewed when, and if, the entire case was appealed. Exclusion by the Commission could ultimately be reviewed by a court on a similar basis.

(b) *Deficient filings and failure to file.* The Commission or the hearing officer may reject, in whole or in part, any filing that fails to comply with the requirements of these rules or any order. The Commission or hearing officer may prescribe new time limits, grant extensions of time limits pursuant to Rule 17 or direct that deficiencies of form or content be cured and the filing resubmitted within a certain time period. In the event a required filing is not made or is rejected, in whole or in part, without being cured within the time period authorized, the party failing to make the filing may be deemed in default and the proceedings may be dismissed or determined against such party on the basis of the record then existing, including the order instituting proceedings, the allegations of which may be deemed to be true.

Comment: This paragraph has been added to make clear that the Commission or a hearing officer has authority to reject a deficient filing. *See In the Matter of Fischbach*, Adm. Pro. File No. 3–7384 (June 18, 1991). A filing may be rejected if it fails to meet the requirements of any rule or order. For example, filings which are not served as required by Proposed Rule 5, which fail to cite to the record as required by Proposed Rule 27, which are longer than permitted by Proposed Rule 31, or which fail to comply with a prehearing order pursuant to proposed Rule 12 could be found to be deficient.

(ER 6(e))

(c) *Failure to appear: Default.* Any person who is named in an order instituting proceedings as a person against whom findings may be made or sanctions imposed and who fails to appear at a hearing or prehearing conference of which he or she has been duly notified, or fails to file a notice of appearance when ordered to do so, may be deemed in default and the proceedings may be determined against such person upon consideration of the record then existing, including the order instituting proceedings, the allegations of which may be deemed to be true. For the purpose of this paragraph, an answer shall constitute a notice of appearance.

Comment: This paragraph is based on Existing Rule 6(e), which provides that a respondent's failure to appear in response to, or file an answer to, an order instituting proceedings can be grounds for entry, by default, of an order making findings against the respondent. The proposed rule further provides for dismissal of the proceedings or entry of findings against the respondent for failure to appear at any hearing or prehearing conference.

(ER 11(c)–(d))

Rule 4. Authority of Hearing Officer.

The hearing officer shall conduct proceedings in a fair, impartial, and expeditious manner. The hearing officer shall have the authority to do all things necessary and appropriate to discharge his or her duties. No provision of these rules shall be construed to limit the powers of the hearing officer provided by the Administrative Procedure Act, 5 U.S.C. 556, 557. The powers of the hearing officer include, but are not limited to, the power:

(a) To regulate, through the date of issuance of an initial decision, the course of a proceeding and the conduct of the parties and their counsel;

(b) To hold prehearing conferences as set forth in Rule 12(a) ;

(c) To issue subpoenas authorized by law and to revoke, quash, or modify any such subpoena;

(d) To recuse himself or herself upon motion made by a party or upon his or her own motion;

(e) To administer oaths and affirmations;

(f) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(g) To order, in his or her discretion, the interested division, in a proceeding involving more than one respondent, to indicate, on the record, at least one day prior to the presentation of any evidence, each respondent against whom that evidence will be offered;

(h) Subject to any limitations set forth elsewhere in these rules, to consider and rule upon all procedural and other motions;

(i) To prepare and file with the Secretary an initial decision as provided in Rule 24; and

(j) Upon notice to all parties, to reopen any hearing prior to the filing of an initial decision therein, or, if no initial decision is to be filed, prior to the time fixed for the filing of final briefs with the Commission.

Comment: The existing rules list the powers of the hearing officer in a number of places. At times the powers enumerated are so specific and so detailed as to suggest that the hearing officer's inherent powers are limited. The proposed rule lists in one place the most prominent powers of the hearing officer, and clearly defines the broad inherent powers the hearing officer has to conduct the proceedings assigned to him or her. The list of powers is illustrative, not exhaustive. The hearing officer is permitted to take any action necessary and appropriate to discharge his or her duties as a presiding officer.

(ERs as to service: 2(d); 2(e)(3)(i)(*b*); 2(h); 6(b); 14(b)(3); 22(a); as to filing: ER 23)

Rule 5. Service and Filing of Papers.

(a) *Required.* In every proceeding in which an order instituting proceedings has been issued or an application pursuant to Rule 56 for review of a self-regulatory organization determination has been granted, every notice of appearance, written motion, brief, proposed conclusion of fact or law, and similar paper shall be served upon each of the parties and any other participants in the proceedings pursuant to Rule 5(b); provided, however, that absent an order to the contrary, no service on other parties or participants shall be required of motions which may be heard *ex parte*, requests for confidential treatment of information, or requests for the issuance of a subpoena.

Comment: References to the requirements for service are currently located in several places in the existing rules (*e.g.*, Existing Rules 2(d), 2(h) and 23(a)–(d)). To some degree, these requirements are inconsistent with each other and with professional standards governing contacts with a party represented by an attorney. The proposed rule establishes a separate rule on service which sets forth the general requirements for service and filing. Statutory provisions which dictate special service requirements in particular types of proceedings are incorporated in the rules dealing with those types of proceedings. The proposed rule is modeled on Rule 5 of the Federal Rules of Civil Procedure and Existing Rule 23.

Once an order instituting proceedings is issued, service of essentially all documents

filed in connection with the proceeding must be made on all other parties or other participants admitted to the proceeding pursuant to Proposed Rule 13 (ER 9). Under the existing rules, requests for issuance of subpoenas are not always made in writing and are not served on other parties. The proposed rules require subpoena requests to be in writing. *See* Proposed Rule 19(b) (ER 14(b)). As drafted, Proposed Rule 5 would not require service of a subpoena request on other parties. Comment is requested as to whether other parties should be served with a copy of a request for issuance of a subpoena.

As a general matter, Proposed Rule 5 would not require service on other parties or participants of a request pursuant to Proposed Rule 33 (ER 25) for confidential treatment, although notice of the request could be ordered by the Commission. Where confidential treatment is sought with respect to financial disclosure statements made by a respondent claiming an inability to pay fines or disgorgement, a copy of the disclosure statement must be served on the interested division, and notice that a financial disclosure statement was filed must be served on all other parties. *See* Proposed Rule 55. Comment is requested as to whether a party making a request for confidential treatment should always be required to serve the request, or notice that a request has been made, on other parties or participants.

(b) *To whom and how made.* Whenever service is required or permitted to be made upon a person represented by counsel who has filed a notice of appearance pursuant to Rule 2, service shall be made upon the counsel; provided, however, that a copy of any paper served may also be served directly upon the person represented. Service shall be made by delivering a copy to the counsel or the person represented. Delivery means:

(1) Personal service, by handing a copy to the counsel or person or leaving a copy at the counsel's or person's office with a clerk or other person in charge thereof; or if there is no one in charge, leaving it in a conspicuous place therein; or if the office is closed, or the person being served has no office, leaving it at the person's house or usual place of abode with someone of suitable age and discretion;

(2) Sending the papers through a commercial courier service or overnight delivery service that obtains a receipt or other proof of delivery; or

(3) Mailing the papers through the U.S. Postal Service by first class or registered or certified mail or by Express Mail delivery. Service by mail is complete upon mailing.

Comment: The proposed rule refers to "person" being served instead of "party" being served because there may be persons who are neither parties nor non-party participants entitled to service. *See* Proposed Rule 13 (ER 9).

The existing rules do not provide for service by private, commercial overnight delivery services. The proposed rule would permit use of such services. The Task Force considered also permitting service by facsimile machine if all parties to a proceeding agree, and if receipt of the fax is confirmed with fax return of a manually signed receipt. Comment is requested as to whether service by fax should be permitted under these conditions. The rule as proposed would not prohibit persons from serving papers by facsimile machine, electronic mail, etc. if allowed by specific order of the hearing officer or the Commission.

Consistent with the existing rules, *e.g.*, Rule 2(h), the proposed rule does not prohibit service directly on a party represented by counsel, provided that counsel is also served. Comment is requested as to whether service upon a represented party should only be allowed when specifically authorized by the Commission or a hearing officer.

(ER 23(c))

(c) *Proof of service.* Proof of service shall be made by filing, simultaneously with the filing of the required number of copies with the Commission, an affidavit of service or, in the case of any attorney, a certificate.

Comment: The proposed rule is taken from Existing Rule 23(c).

(d) *Filing with the Commission.* All papers required to be served by a party upon any person shall be filed with the Commission before service or promptly thereafter. Papers required to be filed with the Commission must be received within the time limit, if any, for such filing.

Comment: This paragraph is modeled on Existing Rule 22(a) and Rule 5(d) of the Federal Rules of Civil Procedure.

(ER 22(a))

(e) *Filing With the Commission or Hearing Officer.* Filing of papers with the Commission shall be made by filing them with the Secretary. When a case is assigned to a hearing officer, a person making a filing with the Secretary shall promptly provide to the hearing officer a copy of any such filing. The hearing officer may direct or permit filings to be made with the hearing officer, in which event the hearing officer shall promptly provide the Director of the Office of Filings, Information and Consumer Services with copies of such filings.

Comment: This paragraph is based on Existing Rule 22(a) and on Rule 5(e) of the Federal Rules of Civil Procedure. Responsibility for receipt of filings and maintenance of an official case docket for each proceeding is currently fragmented between several offices within the Commission; the result is that case dockets are not as well maintained as they might be. The Task Force has recommended the hiring of an administrative proceedings clerk to assist in maintenance of administrative proceedings records. The Office of Filings, Information and Consumer Services, ("OFICS") is the Commission's records custodian. 17 CFR 200.20c. Because hearing officers frequently preside at locations away from the Commission's Headquarters in Washington, D.C., where the Office of Filings, Information and Consumer Services is located, the Proposed Rules permit filings to be made with the hearing officer and forwarded by him or her to the Office of Filings, Information and Consumer Services. Rule 29(b) establishes additional procedures for the transmittal of items from the hearing officer to the Director of the Office of Filings, Information and Consumer Services.

(ER 22(c))

(f) *Number of copies.* An original and three copies of all papers filed with the Commission or hearing officer shall be filed.

Comment: This paragraph was taken from Existing Rule 22(c). The number of copies to be filed was reduced from seven to three based on the recommendation of the Secretary.

(ERs 22(j)–(k), 23(b))

Rule 6. Computation of Time.

(ER 22(j))

(a) *Computation.* In computing any period of time prescribed or allowed by these rules or by order of the Commission, the day of the act, event, or default from which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, a Sunday, or a legal holiday (as defined in Rule 7), in which event the period runs until the end of the next day that is neither a Saturday, a Sunday, nor a legal holiday. Intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation when the period of time prescribed or allowed is seven days or less, not including any additional time allowed for service by mail in Rule 6(b). If on the day a filing is to be made, weather or other conditions have made the Secretary's office or other designated filing location inaccessible, the filing deadline shall be extended to the end of the next day which is neither a Saturday, a Sunday, nor a legal holiday.

Comment: The new language at the end of this paragraph is taken from Rule 6(a) of the Federal Rules of Civil Procedure.

(b) *Additional time for service by mail.* Whenever a person has the right to or is required to do some act or make a filing within a prescribed period after the service of a notice or other paper upon that person and service of the notice or other paper is made by mail,

three days shall be added to the prescribed period.

Comment: This paragraph is based on Existing Rule 23(b) and Rule 6(e) of the Federal Rules of Civil Procedure. Pursuant to Proposed Rule 5(b)(3) service by mail is complete upon mailing. Accordingly, some additional time must be allowed for delivery when service is by regular mail. Existing Rule 23(b) allowed two days additional time. The proposed rule would allow three additional days. This change conforms to Rule 6(e) of the Federal Rules of Civil Procedure, and is a more realistic approximation of the time taken for delivery by regular mail. Service by overnight courier service is complete upon receipt, so no additional time is warranted for service by that method.

(ER 22(k))

(c) *Date of entry of orders.* In computing any period of time involving the date of the entry of an order by the Commission, the date of the entry shall be:

(1) The date of the adoption of the order by the Commission, as reflected in the caption of the order; or

(2) In the case of orders reflecting action taken pursuant to delegated authority, the date when such action is taken, as reflected in the caption of the order.

Comment: The deleted provisions of this paragraph which are located in Existing Rule 22(k) have been moved to Proposed Rule 32(c).

(ER 5)

Rule 7. Business Hours.

The Headquarters office of the Commission, at 450 Fifth St., NW., Washington, DC 20549, is open each day, except Saturdays, Sundays, and federal legal holidays, from 9 a.m. to 5:30 p.m., Eastern Standard Time or Eastern Daylight-savings Time, whichever is currently in effect in Washington, DC. Federal legal holidays consist of New Year's Day, Birthday of Martin Luther King, Jr., Presidents Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday in Washington, DC, by the President or the Congress of the United States.

(ER 6)

Rule 8. Notice of Proceedings and Hearings.

(a) *Notice of proceedings; order instituting proceedings.* Whenever an order instituting proceedings is issued by the Commission, appropriate notice thereof shall be given by the Secretary or other duly designated officer of the Commission to each party to the proceeding or to the person designated by any such party as being authorized to receive on his or her behalf notices issued by the Commission. The order shall state:

(1) The nature of any hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held; and

(3) A short and simple statement of the matters of fact and law to be considered and determined. In proceedings in which an answer is directed pursuant to Rule 9, the order instituting proceedings shall set forth the factual and legal basis alleged therefor in such detail as will permit a specific response thereto.

Comment: The phrase "persons entitled to notice" has been deleted because the term "party" is now defined at Proposed Rule 1(c) to include such persons.

(b) *Service of order instituting proceedings.* Service of an order instituting proceedings may be given pursuant to Rule 5(b)(1), 5(b)(2), or 5(b)(3); provided, however, that in proceedings pursuant to section 8 or 10 of the Securities Act of 1933 or section 305 or 307 of the Trust Indenture Act of 1939, service shall be by personal service or confirmed telegraphic notice; provided, further, that in proceedings pursuant to provisions of the Investment Company Act of 1940 and the Investment Advisers Act of 1940, service shall be given by personal service upon each party or by registered mail or certified mail or confirmed telegraphic notice to the party's last known business address.

Comment: Existing Rule 6(b) has been divided into Proposed Rules 8 (b) and (c). Service of an order instituting proceedings will generally be made pursuant to the provisions of Rule 5. The special provisions for service, including the references to service by "confirmed telegraphic notice," enumerated in the proposed rule are required by statute. *See,* Securities Act sections 8 (b), (d), and 10(b); Investment Company Act section 40(a); Investment Advisers Act section 211(c).

(c) *Time and place of hearing.* Each party shall be given notice of the hearing within a time reasonable in light of the circumstances, in advance of the hearing; provided, however, that in a proceeding in which a temporary *ex parte* sanction is sought, the Commission may direct that notice of the hearing shall be delayed. The time and place for any hearing in a proceeding shall be fixed with due regard for the public interest and the convenience and necessity of the parties, the participants, or their representatives. It is the policy of the Commission that in a proceeding under any provision of the Public Utility Holding Company Act of 1935, the Investment Company Act of 1940 (except section 9(b) thereof), section 206A of the Investment Advisers Act of 1940, section 8 of the Securities Act of 1933, sections 305 or 307 of the Trust Indenture Act of 1939, or any proceeding in which a temporary sanction is sought, the hearing should ordinarily be held in the District of Columbia.

Comment: The rule has been amended to provide for delayed notice when an *ex parte* sanction is sought. The requirement that notice be given at a time "reasonable in light of the circumstances" was added because in emergency cases, for example, where a temporary cease-and-desist order is not sought *ex parte,* the hearing may be scheduled with only very brief notice.

The Commission has had a long-standing practice of holding hearings outside of Washington, DC. In a substantial number of cases, hearings are held in multiple cities. This practice was begun prior to the advent of jet travel, when it was substantially more difficult and expensive for private parties or their witnesses to travel to a hearing. Data reviewed by the Task Force revealed that cases with hearings held in multiple cities take disproportionately more time to complete than do cases with hearings held in one location. Although other factors may contribute to the protracted nature of hearings held in multiple cities, it may still be more efficient, and no more costly for the Commission, to pay the parties' or witnesses' expenses for travel to Washington, DC, than to pay for a law judge and Commission staff to travel to hearing locations away from Washington. Comment is requested as to whether the practice of holding hearings in multiple cities should be discontinued, except in extraordinary cases. Comment is also requested as to whether, absent extraordinary circumstances, the Commission should adopt a policy either that all hearings be held in Washington, DC, or that hearings be held only in Washington and those cities where the Commission maintains Regional Offices.

(d) *Publication of notice of hearing.* Unless otherwise ordered by the Commission, notice of any public hearing shall be given general circulation by release to the public, by publication in the Securities and Exchange Commission News Digest and, where directed, by publication in the **Federal Register**.

Comment: The reference to the Commission's News Digest was added to conform this rule to the other rules which require publication of notices, Proposed Rule 24 (ER 16(f)) and Proposed Rule 25 (ER 17(f)). By publishing all notices in one source, information about pending proceedings is more readily available to the public. The SEC News Digest was chosen as a vehicle for publication because it is published daily and is available on electronic databases, assuring wide dissemination.

(e) *Amendment to order instituting proceedings.* In any proceeding, motions for amendments to the matters of fact and law to be considered may be granted by the hearing officer at any time prior to the filing of an initial decision therein, or, if no initial decision is to be filed, prior to the time fixed for the filing of final briefs with the Commission, upon a showing that the amendment is appropriate and within the scope of the order instituting proceedings. An amendment to the matters of fact and law to be considered may be granted by the Commission at any time.

Comment: Existing Rule 6(d) authorizes the hearing officer to make amendments to the matters of fact or law at any time prior to issuance of an initial decision. This rule has posed difficulties for the hearing officer because it is potentially at odds with the Commission's view that the Commission itself should determine the scope of charges that will be brought or the scope of regulatory issues that will be considered when hearings are to be held pursuant to an order instituting proceedings.

Typically, the issue of amending an order instituting proceedings arises in an enforcement proceeding when the evidence presented at hearing either does not conform to the violations alleged in the order instituting proceedings or establishes violations of statutory provisions or rules not enumerated in the order instituting proceedings. If no evidence or insufficient evidence is offered on an allegation, the charge of violations will not be sustained. In such a case, the hearing officer clearly is authorized to deny relief; an amendment of the order instituting proceedings could be made, but would usually be unnecessary.

However, if the evidence likely to be adduced or actually adduced at hearing establishes violations not specifically alleged in the order instituting proceedings, the issue is more difficult. In practice, hearing officers have allowed amendments to the order instituting proceedings to conform the order to the evidence to be presented where the amendments are within the scope of the order approved by the Commission. Amendments which would introduce entirely new allegations have generally not been allowed without Commission authorization.

The Task Force believes this approach is appropriate, and it has been codified in the rules. In any particular case, the question of whether a proposed amendment to the order instituting proceedings requires Commission approval must be decided on the particular facts of the case. Parties who disagree with a ruling on the amendment of an order instituting proceedings will have an opportunity for Commission review either through interlocutory review or after issuance of an initial decision.

(f) *Persons entitled to notice.* Any notice of a proceeding relating to the issuance of a stop order suspending the effectiveness of a registration statement pursuant to section 8(d) of the Securities Act of 1933 shall be sent to or served on the issuer; or, in case of a foreign government or political subdivision thereof, to or on the underwriter; or, in the case of a foreign or Territorial person, to or on its duly authorized representative in the United States named in the registration statement, properly directed in each case of telegraphic notice to the address given in such statement. In addition, if such proceeding is commenced within 90 days after the registration statement became effective, notice of the proceeding shall be given to the agent for service named on the facing sheet of the registration statement and to each other person designated on the facing sheet of the registration statement as a person to whom copies of communications to such agent are to be sent.

Comment: The existing rule references section 8(f) of the Securities Act, which contains a list of persons entitled to notice of a proceeding relating to the issuance of a stop order suspending the effectiveness of a registration statement pursuant to section 8(d) of the Securities Act. In general, the Task Force attempted to make the rules of practice self-contained. Therefore, the provisions of section 8(f) have been incorporated into the rule.

(ER 6(e), 7, 12(d))

Rule 9. Answers; Defaults.

(a) *When answer required.* In any order instituting proceedings issued by the Commission, the Commission may direct that any party shall file an answer to the allegations contained in the order instituting proceedings. Any party in any proceeding may elect to file an answer, if not so ordered.

(b) *Time to file answer.* Except where a different period is provided by rule or by order, a party directed to file an answer as provided in paragraph (a) shall do so within 20 days after service upon him or her of the order instituting proceedings. Any other person granted leave to participate on a limited basis in such proceedings pursuant to Rule 13(c) may be required to file an answer within a reasonable time, as determined by the Commission or the hearing officer. Where amendments to the matters of fact and law to be considered in such proceedings are authorized, the parties may be required by the Commission or the hearing officer to answer within a reasonable time the amended matters of fact and law to be considered.

Comment: The time allowed to file an answer was changed to 20 days. The 20-day period provides a more realistic amount of time to respond to allegations. This period conforms to the time for answers under Rule 12 of the Federal Rules of Civil Procedure. The new language with respect to a "person granted leave to participate* * *," reflects changes in Proposed Rule 13 (ER 9) with respect to the classification of non-party participants.

(c) *Contents of answer; effect of failure to deny.* Unless otherwise directed by the hearing officer or the Commission, an answer shall specifically admit, deny, or state that the party does not have and is unable to obtain sufficient information to admit or deny each allegation in the order instituting proceedings. Any allegation not denied shall be deemed to be admitted. When a party intends in good faith to deny only a part or a qualification of an allegation, the party shall specify so much of it as is true and shall deny only the remainder. A statement of a lack of information shall have the effect of a denial.

(d) *Motion for more definite statement.* A party may file with an answer, a motion for a more definite statement of specified matters of fact or law to be considered or determined. Such motion shall state the respects in which, and the reasons why, each such matter of fact or law should be required to be made more definite. If the motion is granted, the order granting such motion will set the periods in which such statement, and any answer thereto, shall be filed.

(e) *Effect of failure to file answer: Default.* If a party respondent fails to file an answer required by this rule within the time provided, such person shall be deemed in default, and the proceedings may be determined against such person by the hearing officer or the Commission upon consideration of the order instituting proceedings, the allegations of which may be deemed to be true.

(ER 6(e))

(f) *Effect of failure to appear: Default.* Any person who is named in an order instituting proceedings as a person against whom findings may be made or sanctions imposed in the proceedings and who fails to appear at a hearing or at a prehearing conference of which he or she has been duly notified, or fails to file a notice of appearance when specifically ordered to do so, may be sanctioned as provided in Rule 3.

Comment: Proposed Rule 9(f) is derived from Existing Rule 6(e). The existing rule addresses the possibility of a regulatory proceeding where persons are named in the order instituting proceedings but are not directed to file an answer. The existing rule requires such persons to file a notice of appearance within 15 days of being served with the order instituting proceedings.

Failure to do so can be grounds for a default. While a default pursuant to this provision has been rarely, if ever, ordered in recent years, the Task Force concluded that it was a potential source of unfairness. The requirement to file a notice of appearance in lieu of an answer is too obscure, particularly with respect to persons represented *pro se*, to warrant a default. The proposed rule permits the Commission in specific cases to order a named party to file a notice of appearance by way of response to an order instituting proceedings. However, the proposed rule eliminates the general requirement to file a notice of appearance in lieu of an answer in cases where no answer is required. Failure to appear and failure to file a notice of appearance specifically required by an order remain grounds for a default and for sanctions, as provided in Proposed Rule 3.

(ER 12(d))

(g) *Motions to set aside defaults.* In order to prevent injustice and on such conditions as may be appropriate, the hearing officer, at any time prior to the filing of his or her initial decision or the Commission at any time, may for good cause set aside a default. Any motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to file or appear, and specify the nature of the proposed defense in the proceedings.

Comment: The existing provision for motions to set aside defaults was moved to this rule so that it would be together with the other provisions governing defaults.

(ER 7(f))

Rule 10. Signature; Requirement and Effect Generally.

(a) *General requirements.* Every submission following the issuance of an order instituting proceedings of a party represented by counsel shall be signed by at least one counsel of record in his or her name and shall state that counsel's address and telephone number. A party or other participant who acts as his or her own counsel shall sign his or her individual name and state his or her address and telephone number on every submission.

(b) Effect of Signature. (1) The signature of a counsel, party, or other participant shall constitute a certification that: the person signing the submission has read the submission; to the best of his or her knowledge, information, and belief, formed after reasonable inquiry, the argument for the extension, modification, or reversal of existing law; and the submission are not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of adjudication.

(2) If a submission is not signed, the hearing officer or the Commission shall strike the submission, unless it is signed promptly after the omission is called to the attention of the person making the submission.

Comment: A signature requirement is contained in Existing Rule 7(f) but applies only to answers. The proposed signature requirement would be made a separate rule in order to emphasize its importance. The rule, which is modeled on Rule 11 of the Federal Rules of Civil Procedure, expands upon the existing rule to require a signature on every submission and to impose on the person signing a submission personal responsibility for the contents of the submission. If a submission is signed in violation of this rule, the party violating the rule could be subject to sanctions under Rule 3.

(ER 8(a))

Rule 11. Settlements.

(a) *Offers of settlement.* Persons who are notified that proceedings may or will be instituted against them or a party to a proceeding already instituted, may, at any time, propose in writing offers of settlement. Such offers must be signed by the person making the offer and submitted to the interested division of the Commission.

(b) *Consideration of offers of settlement.* (1) Offers of settlement shall be considered by the division to which the offer is made when time, the nature of the proceedings, and the public interest permit.

(2) Where a hearing officer is assigned to a matter, the hearing officer may, upon the agreement and request of the persons to be party to the proposed settlement, in his or her discretion, express views regarding the appropriateness of any offer of settlement. The request for the hearing officer to express his or her views constitutes a waiver by the persons making the request of any right to claim prejudgment by the hearing officer based on the views expressed. If an offer of settlement is to be presented to the Commission, the hearing officer may, at his or her discretion, determine whether to delay any portion of the proceedings pending a decision by the Commission.

(3) The interested division shall present the offer of settlement to the Commission with its recommendation, except that, if the division's recommendation is unfavorable, the offer shall not be presented to the Commission unless the proposed party or party making the offer so requests.

(4) In submitting any offer of settlement, a proposed party or party agrees that if the offer is accepted the proposed party or party waives:

(i) All hearings pursuant to the statutory provisions under which the proceeding is to be or has been instituted;

(ii) The filing of proposed findings of fact and conclusions of law;

(iii) Proceedings before and an initial decision by a hearing officer;

(iv) All posthearing procedures;

(v) Judicial review by any court;

(vi) Such provisions of these rules or other requirements of law as may be construed to prevent any member of the Commission's staff from participating in the preparation of, or advising the Commission as to, any order, opinion, finding of fact, or conclusion of law to be entered pursuant to the offer; and

(vii) Any right to claim bias or prejudgment by the Commission based on the consideration of or discussions concerning settlement of all or any part of the matter.

(5) If the Commission rejects the offer of settlement, the proposed party or party making the offer shall be notified of the Commission's action and the offer of settlement shall be deemed withdrawn and such offer and any documents relating thereto shall not constitute a part of the record in any proceeding against that proposed party or party, provided, however, that rejection of an offer of settlement does not affect the continuing validity of waivers pursuant to (b)(4)(vi) and (b)(4)(vii) of this rule with respect to any discussions concerning the rejected offer of settlement.

(6) Final acceptance by the Commission of any offer of settlement will be only by the issuance of findings and an order.

Comment: The Administrative Procedure Act, 5 U.S.C. 554(c), requires that in formal, "on the record" proceedings administrative agencies give persons the opportunity for the submission and consideration of offers of settlement when time, the nature of the proceeding, and the public interest permit. The Commission specifically authorizes the staff to enter into settlement negotiations prior to the institution of proceedings with proposed respondents in virtually all cases, whether or not the proceedings would be formal, "on the record" proceedings. If proceedings are not settled prior to institution, the staff is authorized to participate in settlement negotiations any time after institution without obtaining specific Commission authorization.

The existing rule deals only with settlement offers made after proceedings have been instituted. The proposed rule conforms to current practice by addressing offers of settlement made both prior to and after the institution of proceedings.

Under the existing rule, a request for the hearing officer to express his or her views on a settlement offer triggers an automatic waiver by the person making the request of future claims of prejudgment by the hearing officer. When the Commission itself

considers an offer of settlement it requires, in addition to a prejudgment waiver, that the person making the offer sign the offer of settlement and that the offer explicitly waive each right described in paragraphs (b)(4)(i) through (vii). The proposed rule includes a requirement that all offers be signed. In addition, by operation of the proposed rule, every offer of settlement will be deemed to incorporate these waivers. This eliminates the inconsistency of having one waiver, but not others, in the rules and assures uniformity in the form of offers of settlement. The Task Force recommends that offers of settlement still recite each waiver, particularly where a person is represented *pro se*.

Two of the waivers are of particular note. First, waiver (vi), which permits *ex parte* communications between the staff involved in a particular case and the Commission, reflects the Commission's position that it is necessary in all cases for the litigation staff to have an opportunity to talk to the Commission about an offer of settlement. *See In the Matter of The Stuart-James Co., Inc.*, Exchange Act Release No. 28810, 48 S.E.C. Docket 22 (January 23, 1991) (certain facts necessary for the Commission to make a reasoned judgment as to whether settlement offer is in the public interest are often available only to the staff that negotiated the proposed settlement).

Second, waiver (vii), involving a waiver of claims of bias or prejudgment arising from the Commission's consideration of an offer, is a logically necessary precondition to the making of an offer. If it were otherwise, rejection of an offer, no matter how unrealistic, would allow a respondent or proposed respondent to raise collateral challenges to the Commission's authority to later decide the case on the merits.

(ER 8(b)–(d))

Rule 12. Prehearing Conferences; Submissions; Specification of Procedures.

(a) *Prehearing Conferences.— (1) Procedures.* On his or her own motion or at the request of a party or other participant, the hearing officer may, in his or her discretion, direct counsel, any party, or any other participant to meet with him or her or to meet outside his or her presence for a prehearing conference or conferences. Such conferences may be held with one or more persons participating by telephone or other remote means. Where such a conference is held outside the presence of the hearing officer, the hearing officer shall be advised promptly by the parties of any agreements reached. The purposes of such conferences may include, but are not limited to:

(i) Expediting the disposition of the proceeding;

(ii) Establishing early and continuing control of the proceeding by the hearing officer; and

(iii) Improving the quality of the hearing through more thorough preparation.

(2) *Final prehearing conference.* Except where the emergency nature of a proceeding would make a prehearing conference clearly inappropriate, a final prehearing conference should be held. Any such conference shall be held as close to the start of the hearing as reasonable under the circumstances.

(3) *Subjects to be discussed at prehearing conferences.* At prehearing conferences consideration may be given and action taken with respect to any or all of the following:

(i) Simplification and clarification of the issues;

(ii) Exchange of witness and exhibit lists, and copies of exhibits;

(iii) Stipulations, admissions of fact, and stipulations concerning the contents, authenticity, or admissibility into evidence of documents;

(iv) Matters of which official notice may be taken;

(v) The need and schedule for exchanging prehearing briefs;

(vi) Summary disposition of any or all issues;

(vii) Settlement of any or all issues;

(viii) Determination of hearing dates;

(ix) Amendments to the order instituting proceedings or answers thereto;

(x) Production of documents as set forth in Rule 20, and prehearing production of documents in response to subpoenas duces tecum as set forth in Rule 19(b);

(xi) Specification of procedures as set forth in paragraph (d) of this rule; and

(xii) Such other matters as may aid in the orderly and expeditious disposition of the proceeding.

(b) *Prehearing submissions.* At a prehearing conference or otherwise, the hearing officer, on his or her own motion, or at the request of a party or other participant, may order any party, including the interested division, to furnish such information as deemed appropriate including any or all of the following:

(1) An outline or narrative summary of its case or defense;

(2) The legal theories upon which it will rely;

(3) Copies and a list of documents which it intends to introduce at the hearing; and

(4) A list of witnesses, who will testify on its behalf, including the witnesses' names, occupations, addresses and a brief summary of their expected testimony.

(c) *Prehearing orders.* At or following the conclusion of any conference held pursuant to this rule the hearing officer shall enter a ruling or order which recites the agreements reached and any procedural determinations made by the hearing officer.

Comment: Under the existing Rules, provisions concerning prehearing conferences are included in the same rule which deals with settlements. Because prehearing procedures are a logically distinct topic and because of the importance of prehearing conferences as a case management tool, under the proposed Rules the provisions with respect to prehearing conferences would be placed in a separate rule. The proposed rule is modeled on Rule 16 of the Federal Rules of Civil Procedure.

Anecdotal evidence presented to the Task Force indicated that when properly managed, prehearing conferences are an effective mechanism for eliminating unnecessary delay and improving the quality of justice by sharpening the preparation of cases, facilitating the prehearing exchange of documents, and promoting settlements. The rule is intended to give the hearing officer or the Commission discretion to order one or more prehearing conferences at any point prior to hearing, depending on the subject matter and circumstances of a case.

The list of topics to be discussed at a prehearing conference explicitly includes a number of matters addressed by other rules: exchange of exhibit copies and other documents (Proposed Rule 20); the summary disposition of any or all issues (Proposed Rule 16(b)); settlement of any issue (Proposed Rule 11); and amendments to the order instituting proceedings (Proposed Rule 8(e)).

An initial conference, while encouraged, is not mandatory. Unless the emergency nature of a hearing makes it clearly inappropriate to do so, a final conference should be held shortly before the hearing in all cases except those where exigent circumstances could make it clearly inappropriate to do so. The final prehearing conference should be held at a time close to the start of the hearing. In most cases this should be ten days to two weeks prior to the hearing. At that point the parties should have completed their hearing preparation and, with only a short period of time between the final conference and the start of the hearing, circumstances should not change such that any agreements reached with respect to scheduling, the admission of evidence or other matters would have to be amended. This schedule is consistent with the guidelines established in Rule 16(d) of the Federal Rules of Civil Procedure.

Comment is requested as to whether or not initial prehearing conferences should be mandatory in non-emergency cases. If there are to be initial conferences, should the rule state that an initial conference should be held within a certain time, for example, within 15 days of the filing of the answer?

The existing rule is too restrictive as to the permissible scope of prehearing submissions. The proposed rule would allow prehearing submissions as to any matter determined to be appropriate. If a party believes that any order by a hearing officer, whether with regard to a prehearing submission or otherwise, would be unduly inconvenient or inappropriate, an objection or request for

reconsideration can be filed. The specific provision in the existing rule that a hearing officer shall not order inappropriate procedures is deleted from the proposed rule.

This provision is taken from Existing Rule 8(d). Prehearing orders should be realistic and firm guides to the course of the proceeding. While flexibility is necessary in appropriate circumstances, prehearing orders should be amended only for good cause. Hearing officers must not permit prehearing case management procedures to become a source of collateral challenges or delay.

(d) *Specification of procedures.* (1) In any proceeding other than an enforcement proceeding, a party may, at any time up to 20 days prior to the start of a hearing, make a motion to specify the procedures necessary or appropriate for the proceeding, with particular reference to:

(i) Whether there should be an initial decision by a hearing officer;

(ii) Whether any interested division of the Commission may assist in the preparation of the Commission's decision; and

(iii) Whether there should be a 30-day waiting period between the issuance of the Commission's order and the date it is to become effective.

Any other party may object to the procedure so specified, and such party may specify such additional procedures as he or she considers necessary or appropriate; in the absence of such objection or specification of additional procedures, such party may be deemed to have waived objection to the specified procedures.

(2) Any proposal as to the procedural matters enumerated in paragraph (d)(1) of this rule, even if not objected to by any party, shall be subject to the approval of the hearing officer and be embodied in an appropriate stipulation. If the hearing officer agrees to a specification of procedures that would waive an initial decision, the hearing officer shall notify the Secretary and, unless the Commission directs otherwise within 14 days, no initial decision shall be issued.

Comment: Proposed paragraph (d) is based on Existing Rules 8(b) and (c). Specification of procedures by the parties, under the supervision of a hearing officer, has been an effective mechanism for managing certain hearings. Such flexibility is appropriate with respect to proceedings concerning regulatory matters, particularly where there may be numerous parties. The Task Force concluded, however, that because of the distinct issues raised by enforcement proceedings, in which the government is seeking to impose sanctions on named persons, the basic procedures used in enforcement proceedings should not be subject to negotiation by the parties. Accordingly, the proposed Rule excludes enforcement proceedings from the provisions of this rule. Consistent with the expectation that a final prehearing conference will be held ten days to two weeks prior to a hearing, the proposed Rule restricts motions to specify procedures to twenty days prior to the hearing. Any such motions can thereby be timely answered and resolved.

(ER 9)

Rule 13. Parties, Limited Participants and Amicus Curiae.

(a) *Parties in enforcement proceedings.* In enforcement proceedings, the interested division and the respondent or respondents named in the order instituting proceedings and any amendments thereto shall be the only parties to the proceeding, and no one else shall be granted leave to become a party or participate on a limited basis; provided, however, that by order, persons may be granted leave to file claims or state their views with respect to a proposed plan of disgorgement.

(b) *Intervention as a party.* (1) In any proceeding other than an enforcement proceeding, any person may seek leave to intervene as a party by filing a motion setting forth the person's interest in the proceeding. In regard to proceedings under the Public Utility Holding Company Act of 1935, any representative of interested consumers or security holders, or any other person whose participation in the proceedings may be in the public interest or for the protection of investors or consumers may be admitted as a party upon the filing of a written motion setting forth the person's interest in the proceeding. In regard to proceedings under the Investment Company Act of 1940, any representative of interested security holders, or any other person whose participation in the proceeding may be in the public interest or for the protection of investors may be admitted as a party upon the filing of a written motion setting forth the person's interest in the proceeding. No person shall be admitted as a party to a proceeding by intervention unless it is determined that leave to participate pursuant to paragraph (c) hereof would be inadequate for the protection of his or her interests.

(2) In proceedings under the Public Utility Holding Company Act of 1935, any interested representative, agency, authority or instrumentality of the United States or any interested state, state commission, municipality or other political subdivision of a state shall be admitted as a party to any proceeding upon the filing of a written motion requesting leave to be admitted.

(3) In proceedings under the Investment Company Act of 1940, any interested state or state agency shall be admitted as a party to any proceeding upon the filing of a written motion requesting leave to be admitted.

Comment: Section 19 of the Public Utility Holding Company Act of 1935 and section 40(c) of the Investment Company Act of 1940 mandate the provisions in paragraphs (b)(2) and (3). The last sentence of this section has been deleted because "party" is now defined at Proposed Rule 1(c) to include the interested division.

(c) *Leave to participate.* In proceedings other than enforcement proceedings, any person may move to be given leave to participate on a limited basis as a nonparty participant as to any matter affecting his or her interests.

(1) *Procedure.* Motions for leave to participate shall be in writing, shall set forth the nature and extent of the movant's interest in the proceeding, and, except where good cause for late filing is shown, shall be filed not later than 20 days prior to the date fixed for the commencement of the hearing. Leave to participate pursuant to this paragraph may include such rights of a party as the hearing officer may deem appropriate. Persons granted leave to participate shall be served in accordance with Rule 5(a); provided, however, that a party to the proceeding may move that the extent of notice of filings or other papers to be provided to persons granted leave to participate be limited, or may move that the person granted leave to participate bear the cost of being provided copies of any or all filings or other papers. Persons granted leave to participate shall be bound, except as may be otherwise determined by the hearing officer, by any stipulation between the parties to the proceeding with respect to procedure, including submission of evidence, substitution of exhibits, corrections of the record, the time within which briefs or exceptions may be filed or proposed findings and conclusions may be submitted, the filing of initial decisions, the procedure to be followed in the preparation of decisions and the effective date of the Commission's order in the case. Where the filing of briefs or exceptions or the submission of proposed findings and conclusions are waived by the parties to the proceedings, a person granted leave to participate pursuant to this paragraph shall not be permitted to file a brief or exceptions or submit proposed findings and conclusions except by leave of the Commission or of the hearing officer, if one is assigned.

(2) *Certain persons entitled to leave to participate.* The hearing officer is directed to grant leave to participate under this paragraph to any person to whom it is proposed to issue any

security in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the Commission is authorized to approve the terms and conditions of such issuance and exchange after a hearing upon the fairness of such terms and conditions.

Comment: Proposed paragraph (c) is based on Existing Rule 9(c), (d) and (g). The time limit for seeking leave to become a participant has been changed from two days to 20 days before the hearing. This change conforms with the expectation under Proposed Rule 12 that a final prehearing conference will be held prior to each hearing, at which all foreseeable procedural matters will be resolved. A request to participate in a hearing filed 48 hours before the hearing is to begin would disrupt the schedule established in prehearing conferences.

Because the cost of furnishing documents to non-party participants may be burdensome, the Rule contemplates that a party may seek to limit the distribution of documents or seek reimbursement for costs from the non-party participants.

(d) *Amicus participation.* A brief of an amicus curiae may be filed only:

(1) If accompanied by written consent of all parties;

(2) With leave, granted on motion; or

(3) At the request of the hearing officer, if one is assigned, and otherwise, the Commission; provided, however, that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth.

The brief may be filed conditionally with the motion for leave. A motion for leave shall identify the interest of the movant and shall state the reasons why a brief of an amicus curiae is desirable. Except as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support, unless the hearing officer for cause shown shall grant leave for later filing, in which event the hearing officer shall specify within what period an opposing party may reply. A motion of an amicus curiae to participate in oral argument will be granted only for extraordinary reasons.

Comment: Existing Rule 9 creates three categories of participants in Commission proceedings. Persons can participate as a party, they can seek leave to participate as a non-party, or can seek simply to state their views, without ongoing participation. While continuing to permit these different levels of participation, Proposed Rule 13 recognizes as a separate category, participation as an amicus.

The provisions for amicus participation are based on Rule 29 of the Federal Rules of Appellate Procedure. Amicus participation contemplates the limited action of filing a brief setting forth the filing person's views on particular legal or policy issues in the proceeding. By contrast, leave to participate contemplates participation that is concerned primarily with the facts of a particular case. Also, an amicus brief may be filed upon written consent of all parties. Leave to participate does not require written consent of all parties, nor will written consent of all parties alone be sufficient to obtain leave to participate.

Any person may seek leave to intervene as a party in non-enforcement proceedings. Persons granted leave to participate as a non-party participant would have an interest in the specific facts at issue in the proceeding. Such a person ordinarily would not be named directly in any final order and would have fewer rights at a hearing than a party. However, within this category, the degree of participation may vary greatly depending on the extent of that person's interest and the facts of each case. See In the Matter of Narragansett Capital Corporation, et al., Adm. Pro. File No. 3–6539 (Oct. 4, 1985) (person granted leave to participate on a limited basis may cross-examine witnesses). An amicus would participate in the traditional role of an amicus curiae, directing arguments to matters of law or policy, more than to the particular facts of a case.

The Public Utility Holding Company Act and Investment Company Act both provide for the admission of certain persons as parties to specified proceedings. In other proceedings of a regulatory nature it may also be appropriate to grant interested persons official status at a proceeding. The Task Force concluded, however, that because of the distinct issues raised by enforcement proceedings, in which the government seeks to impose sanctions upon named persons, the only parties should be those specified by the Commission in the order instituting proceedings, and no one else should be granted status as a limited or non-party participant. A person may seek to participate in enforcement proceedings as an amicus or, if they have knowledge of specific facts relevant to the proceeding, as a witness. In addition, in proceedings where findings of violation have been made, and a plan of disgorgement will be or has been proposed, persons will have an opportunity to comment on the proposed plan of disgorgement and, as appropriate under the plan, to file a claim against the disgorgement pool. See Proposed Rule 51.

In addition to these three methods of participation, the proposed rules take into account that from time to time persons, particularly individual security holders or members of the public, who do not otherwise wish to participate in a matter will seek to make written or oral statements of their views in a letter or by appearing at a hearing. As does the existing rule, the proposed rule allows such statements to be made.

(e) *Modification of participation provisions.* The Commission may, by order in any case, modify the provisions of this rule which would otherwise be applicable, and may impose such terms and conditions on the participation of any person in any proceeding as it may deem necessary or appropriate in the public interest.

Comment: The first sentence was deleted because its provisions were duplicative of Proposed Rule 18 (ER 12(a)), which states that the Commission may on its own motion review rulings by the hearing officer at any time.

(f) *Permission to state views.* Any person may seek leave to file a memorandum or make an oral statement of his or her views. Any such communication may be included in the record; provided, however, that unless offered and admitted as evidence of the truth of the statements therein made, the communications submitted pursuant to the provisions of this paragraph will be considered only to the extent that the statements therein made are otherwise supported by the record.

Comment: This paragraph allows for the submission of a statement of views with less formality than required for an amicus brief or to participate on an ongoing basis as a non-party. Comment is requested as to whether provisions allowing for both "amicus participation" and "permission to state views" are necessary, or whether a provision allowing for "permission to state views" is adequate.

Additionally, Rule 9(b) was deleted because it was intended to apply only to cases instituted prior to August 20, 1964. Proposed Rule 13(c) includes substantial portions of Existing Rule 9(c) and (d). Portions of Rule 9(e) have been included in Proposed Rule 13(b).

(ER 10)

Rule 14. Consolidation.

By order of the Commission, proceedings involving a common question of law or fact may be joined for hearing of any or all the matters in issue in such proceedings or such proceedings may be consolidated. The Commission may make such orders concerning the conduct of such proceedings as it deems appropriate.

Comment: Under the existing rule, the Commission may issue orders regarding the conduct of consolidated proceedings in order to avoid unnecessary cost or delay. Under the proposed rule, such orders could be issued any time the Commission deems it appropriate.

(ER 11)

Rule 15. Hearings.

(a) *Held on order of Commission.* Hearings shall be held only as ordered by the Commission. The hearings shall be conducted in a fair, impartial, and expeditious manner.

Comment: Proposed Rule 15 broadens the coverage of Rule 11 of the existing Rules of

Practice by including all Commission hearings, evidentiary or otherwise. The second sentence of the proposed rule is derived from Existing Rule 11(b).

(b) *Before whom held.* All hearings shall be held before the Commission or a hearing officer.

Comment: The deleted language in the first sentence is no longer necessary because "hearing officer" is now defined at Proposed Rule 1(c). The requirement that hearings shall be conducted in an impartial manner is now included in paragraph (a) of this rule.

(c) *Hearings to be public.* All hearings, except hearings on applications for confidential treatment filed pursuant to the provisions of Clause 30 of Schedule A of the Securities Act of 1933, section 24(b) of the Securities Exchange Act of 1934, section 22(b) of the Public Utility Holding Company Act of 1935, section 45(a) of the Investment Company Act of 1940, section 210(a) of the Investment Advisers Act of 1940, or the rules and regulations promulgated under such sections, shall be public unless otherwise ordered by the Commission on its own motion or the motion of a party. No hearing shall be nonpublic where all respondents request that the hearing be made public.

Comment: Under the Proposed Rules, Existing Rule 11(b) has been separated into paragraphs (b) and (c) of Proposed Rule 15. The added language in the penultimate sentence of Proposed Rule 15(c) conforms to the revised language in Proposed Rule 2(e)(7).

(d) *Disqualification of hearing officer.* At any time a hearing officer believes himself or herself to be disqualified from considering a matter, the hearing officer shall issue a notice stating that he or she is withdrawing from the matter and setting forth the reasons therefor. Any party or person granted leave to participate on a limited basis pursuant to Rule 13 who has a reasonable, good faith basis to believe that a hearing officer has a personal bias, or is otherwise disqualified from hearing a case, may make a motion to the hearing officer that the hearing officer withdraw. The motion shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification. If the hearing officer finds himself or herself not disqualified, he or she shall so rule and proceed with the hearing.

Comment: Under the proposed rule, the standard for making a motion to disqualify has been modified to require a "reasonable" good faith basis. Under the existing rule only a good faith basis is required. This change is intended to emphasize that there must be objective reasons to seek a disqualification, not just a subjective, though sincerely held, belief. The proposed rule also deletes the statements that a hearing officer "may file" a response to a motion to disqualify prior to ruling on the motion, and that the Commission may rule on the motion with or without oral argument. The normal procedure when a hearing officer is confronted with a motion to withdraw simply should be to rule on the motion. A "response" might be necessary only if the matter is argued before the Commission. The Commission already has the power to determine when oral argument will be held, *see* Proposed Rule 16; there is no need to restate it. The record of the case includes all motions and rulings; there is no need to specify that motions to disqualify are a part of the record. Consistent with the changes to Rule 18, the provisions for mandatory interlocutory review have been deleted from the proposed rule.

Additionally, the substance of Existing Rule 11(d) is now included at Proposed Rule 4, "Authority of a Hearing Officer." The substance of this Rule 11(e) is included at Proposed Rule 16(a)–(c).

(e) *Transcript of hearings.* Except as otherwise ordered by the hearing officer or the Commission, hearings shall be recorded or transcribed verbatim by shorthand, mechanical means, electronic sound recording, or any other method approved by the hearing officer. A transcript thereof shall be made unless the Commission, by order, determines otherwise.

Comment: The proposed rule incorporates revisions to account for technological changes in the recording of hearings. It is modeled upon 28 U.S.C. 753.

(ERs 11(e), 12(b)–(c))

Rule 16. Motions; Objections to Evidence; Exceptions to Rulings; Stays.

(ER 11 (e))

(a) *Procedures for motions.* Unless made during the hearing, a motion shall be in writing, shall state with particularity the grounds therefore, shall set forth the relief or order sought, and shall be accompanied by a written brief of the points and authorities relied upon in support of the same. The rules applicable to captions and other matters with respect to the form of papers filed with the Commission apply to all motions. All motions shall be signed in accordance with Rule 10. Briefs in opposition to a motion shall be filed within 10 days after service of the motion.

Reply briefs shall be filed within five days after service of the opposition. No oral argument will be heard unless the Commission or the assigned hearing officer otherwise directs.

Comment: Proposed Rule 16 is based on Existing Rules 11 and 12 and Rule 7(b) of the Federal Rules of Civil Procedure.

(ER 11(e))

(b) *Dispositive motions.* Any party may make a motion for an order that would dispose of the proceeding in whole or in part. Any such motion made prior to the start of the hearing shall be filed no later than 30 days prior to the commencement of the hearing, or at such earlier time in advance of the final prehearing conference as the hearing officer may order. For purposes of a motion for a dispositive ruling prior to the conclusion of the interested division's case, the facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations made by that party. The hearing officer shall promptly grant or deny the motion or shall defer decision on the motion until after the conclusion of the interested division's case.

Comment: By its terms, Existing Rule 11(e) appears to prohibit the making, as well as the consideration, of a dispositive motion prior to the completion of the case put on by the interested division. The apparent reason for these limitations on dispositive motions is that they are a necessary corollary of the principle that it is the Commission's sole prerogative to determine what matters will be subject to hearing. *See* Proposed Rule 15(a) (ER 11) (hearings to be held only as ordered by the Commission).

In this view, if a hearing officer grants a dispositive motion prior to hearing the interested division's case, he or she is, in effect, overruling the Commission's determination that allegations by the staff warrant a hearing. Moreover, as a practical matter, it would be inefficient to allow such motions prior to the conclusion of the staff's case since, if the Commission acted consistently with its original decision, it would presumably reverse the hearing officer's decision anyway.

The Task Force believes that the underlying premise of Existing Rule 11(e) is no longer entirely valid. Even prior to hearing, a hearing officer may have different information than the Commission did when it authorized an order instituting proceedings. At the authorization stage, a proposed respondent is not present before the Commission to argue his or her case. Not all respondents even submit a "Wells Statement" setting forth legal or policy reasons in opposition to a proposed recommendation to bring an enforcement action. As a result of prehearing procedures, including the filing of an answer, motions for more specific statements, document exchanges and prehearing conferences, matters of law may be clarified, new, undisputed facts may be discovered or prior disputes as to some facts may be resolved and facts stipulated to. Accordingly, a decision by a hearing officer to grant a dispositive motion prior to hearing does not necessarily reflect on the Commission's judgment to authorize proceedings, based on the information then available to the Commission.

As a result of prehearing procedures, in some cases there may be issues ripe for decision on undisputed facts prior to hearing. Under the present rule, respondents and the Commission may be forced to the time and expense of a hearing on issues where prehearing procedures permit agreement as to the facts, and where no hearing is necessary. In addition, the consideration of dispositive motions and supporting memoranda should assist in bringing into focus the remaining issues in dispute for the hearing.

The Task Force concluded that, on balance, the opportunity to dispose of portions of a case based on facts established by the pleadings, or stipulated by the parties prior to hearing, will improve the efficiency and the fairness of the administrative process. Under the proposed rule, therefore, parties may file motions to dispose of all or part of a proceeding prior to the commencement of the hearing as well as at later stages.

At the same time, the Task Force recognizes that, if not controlled by the hearing officer, the opportunity to make a dispositive motion prior to hearing can be used by the parties as a tactic for delay, or to increase the costs of prehearing preparation. The hearing officer must set firm schedules for the submission of dispositive motions. While prehearing procedures will help to focus issues, in many cases there will simply be basic disagreement as to the material facts. In these or similar circumstances, the hearing officer must promptly deny or defer ruling on dispositive motions until after the interested division has completed its case. The Task Force recommends that if this proposed change is adopted, the Commission monitor the effects of the change for a two-year period and determine the rule's effect on efficiency or the quality of justice.

The Task Force gave extended and careful consideration to suggestions that the rules should allow for a summary judgment procedure, similar to the procedure of Rule 56 of the Federal Rules of Civil Procedure. Summary judgment practice under the Federal Rules is premised on the right of each party to take pretrial discovery and to make summary judgment motions based on deposition transcripts, affidavits and other evidence. By contrast, the Proposed Rules of Practice do not permit discovery depositions and do not contemplate the submission of prehearing affidavits. The Task Force concluded that summary judgment practice under the Federal Rules should not be a model for prehearing practice in the wholly different context of administrative proceedings.

The existing Rules of Practice already allow dispositive motions prior to completion of the hearing. The proposed rule is intended only to make a modest change to that practice by allowing such motions to be made before and to be considered as early as, the time of a prehearing conference.

(ER 11(e))

(c) *Motions to be made to hearing officer.* Except as otherwise directed by the Commission, or where these rules specifically provide otherwise, all motions, objections, applications or other filings made during a proceeding prior to the filing of an initial decision therein, or, if no initial decision is to be filed, prior to the time fixed for the filing of briefs with the Commission, shall be directed to and decided by the hearing officer. Unless otherwise ordered by the Commission or the hearing officer, if a motion is properly made to the Commission concerning a proceeding to which a hearing officer is assigned, the proceeding before the hearing officer shall continue pending the determination of the motion by the Commission.

Comment: Proposed Rule 5(e) requires that filings shall be physically made with the Secretary or, if the hearing officer allows, directly with the hearing officer. Proposed Rule 16(c) requires that the person making a motion in a proceeding in which a hearing officer is presiding direct the content of his or her requests and arguments to the hearing officer, not the Commission, in every case in which a hearing officer is assigned. If a motion is directed to the Commission in a case in which a hearing officer is assigned, the Secretary must refer the motion to the hearing officer unless a motion directly to the Commission is authorized. In those unusual circumstances where a motion is properly directed to the Commission, the proceeding before the hearing officer should continue, unless otherwise ordered.

The provisions in this paragraph of the existing rule which deal with dispositive motions have been included in paragraph (b), above.

(ER 11(e))

(d) *Objections.* Objections to the admission or exclusion of evidence must be made on the record and shall be in short form, stating the grounds of objections relied upon. Exceptions to any ruling thereon by the hearing officer need not be noted at the time of the ruling in order to be preserved for appeal before the Commission. Such exceptions will be deemed waived, however, unless raised:

(1) In accordance with Rule 18;

(2) In the manner of a proposed finding in accordance with Rule 25; or

(3) In a petition for Commission review of an initial decision in accordance with Rule 26.

Comment: The deleted portions were inconsistent with or duplicative of proposed changes elsewhere in the Rules. The requirements for service are included in Proposed Rule 5; the complete hearing, including argument on objections should be transcribed, as required by Proposed Rule 15(e); finally, the contents of the record are described in Proposed Rule 29, and include all motions and rulings.

(ER 12(c))

(e) *Motions for stays.* A request for a stay shall be made by motion, filed pursuant to Rule 5(d) and (e), and served on all parties pursuant to Rule 5(b).

(1) *Time for filing motions for stays.* (i) A motion seeking a stay of the effectiveness of an order of the Commission pending review of the order by a court shall be made to the Commission prior to or at the same time as the filing of a petition for review in the appropriate court.

(ii) A motion seeking a stay of effectiveness of a final disciplinary sanction, summary suspension, prohibition or limitation of access by a self-regulatory organization in connection with an application pursuant to section 19(d)(2) of the Exchange Act, or any other motion for a stay, may be made to the Commission at any time.

(2) *Contents.* The motion for a stay shall state the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute, the motion shall be supported by affidavits or other sworn statements or copies thereof. Such parts of the record as are relevant to the relief sought shall be filed with the motion.

(3) *Opposition to a stay.* If the sanction or action complained of has already taken effect, or will, by its terms, take effect within four days, parties opposing a motion for a stay shall file a statement in opposition within two days of service of the motion. If the sanction or action complained of has not already taken effect, opposition to the motion shall be filed within five days.

(4) *Expedited consideration.* Where the sanction complained of has already taken effect, and the respondent promptly has sought relief upon notice of the sanction, the consideration and decision of a motion for a stay shall be expedited in every way, consistent with the Commission's other responsibilities. Normally, a decision in such a case as to whether or not to grant a stay should be issued within five days of the date set for filing of the opposition to a motion for a stay. If the sanction has not taken effect, the decision should be issued within 30 days.

(5) *Scope of relief.* The Commission may grant a stay in whole or in part, and may condition relief under this rule upon such terms or upon the implementation of procedures as it deems appropriate.

Comment: The proposed rule is based on Existing Rule 12(c), Exchange Act Rule 19d–2 and Rule 18 of the Federal Rules of Appellate Procedure. A motion for a stay would likely be made in three situations: to stay a Commission order pending review by a court of appeals; to stay a self-regulatory

organization's decision pending review by the Commission, *see, e.g.*, Exchange Act section 19(d)(2); or to stay a temporary cease-and-desist order pending review by a federal district court, *see, e.g.*, Exchange Act section 21C(d)(2).

The proposed rule requires that a motion for a stay of a Commission order pending review by a court be made prior to, or at the time of, the filing of a petition for review with the court. The Commission loses jurisdiction to grant a stay after the record is filed in the court of appeals. *See* Exchange Act section 25(c)(2) and Rule 18 of the Federal Rules of Appellate Procedure. Judicial economy requires a similar rule with respect to temporary cease-and-desist orders, even if arguably the Commission retains jurisdiction to stay its order pending district court review. Motions with respect to the stay of a determination by a self-regulatory organization or any other decisions may be filed at any time.

The reference to section 15A(b)(4) in the existing rule is obsolete as a result of amendments to the Exchange Act. The appropriate statutory reference, Exchange Act section 19(d)(2), has been substituted.

The first sentence, stating that requests for a stay must be by motion and cross-referencing Proposed Rule 5, is included particularly for the benefit of pro se respondents seeking a stay of a determination by a self-regulatory organization, who may not otherwise be familiar with the service requirements of the rules.

Section 19(d)(2) of the Exchange Act requires that the Commission establish an expedited procedure for consideration and determination of the question of a stay for "appropriate cases." The Commission has never published rules with respect to an expedited procedure. In practice, requests for stays are handled by staff in the Office of the General Counsel, which has been delegated the authority to decide whether a stay should be granted. *See* 17 CFR 200.30–14(g)(5), (6). In fiscal year 1991, the Commission received 13 requests for stays from determinations by self-regulatory organizations. None of the 13 requests for stays was granted. The median amount of time to decide whether to grant or deny a stay request was 48 days.

The proposed rule also includes a guideline that, in the ordinary case, if a sanction has already taken effect, a decision as to whether or not to grant a stay should be issued within five days of the date set for the filing of any opposition to the motion. Otherwise, the Commission should issue a decision within 30 days. This guideline imposes no affirmative obligations on the Commission and confers on respondents or other persons no right to a decision within a particular time.

Under Existing Rule 26, a decision by the General Counsel to grant a stay, pursuant to delegated authority, would itself automatically be stayed if the decision was appealed to the Commission. Under the proposed rule, the General Counsel's decision to grant a stay would remain in effect pending Commission determination of the matter.

Typically, self-regulatory organization suspensions and fines are not enforced by the self-regulatory organization pending Commission appeal. A permanent bar, however, ordinarily will be enforced. When an order is not enforced by the self-regulatory organization, the right to seek a stay from the Commission may be of little practical value if the motion is not briefed and adjudicated on an expedited basis. Under the proposed rule, in those cases where a sanction takes effect within four days of notice of the sanction, and a respondent promptly seeks a stay, the time for submission of an opposition brief by the self-regulatory organization would be reduced from five days to two. In exceptional circumstances the Commission may provide for longer or shorter periods for the filing of opposition briefs.

The proposed rule also provides that the grant of relief may be conditioned as the Commission deems appropriate. For example, the Commission may allow a firm to operate if it immediately implements certain procedures, makes certain disclosures to its customers concerning the self-regulatory organization finding, or agrees to account for and relinquish profits earned during the pendency of the stay if it does not prevail on the merits.

(ER 13)

Rule 17. Extensions of Time and Adjournments.

(a) *By Commission or hearing officer.* Except as otherwise provided by law, the Commission at any time, or the hearing officer at any time prior to the filing of his or her initial decision or, if no initial decision is to be filed, at any time prior to the closing of the record, for good cause shown, may extend or shorten any time limits prescribed by these rules for the filing of any papers and may, consistent with paragraph (b), postpone or adjourn any hearing.

(b) *Limitations on postponements and adjournments.* A hearing before a hearing officer shall begin at the time and place ordered by the hearing officer, provided that, within the limits provided by statute, the hearing officer may for good cause postpone the commencement of the hearing for a reasonable period of time or change the place of hearing. Any convened hearing may be adjourned to such time and place as may be ordered by the Commission or by the hearing officer. In considering a request for postponement of the start of a hearing, adjournment once a hearing has begun, or extensions of time for filing papers, the hearing officer or the Commission shall consider, in addition to those arguments advanced for a delay by the party requesting a postponement, adjournment or extension:

(1) The length of the proceeding to date;

(2) The number of postponements, adjournments or extensions already granted;

(3) The stage of the proceedings when the request is made; and

(4) Any other such matters as justice may require.

Postponements or adjournments should normally not exceed 21 days. If the hearing officer orders a postponement or an adjournment for a period exceeding 21 days, the reasons for so doing shall be stated on the record or set forth in a written order.

Comment: Research done by the Task Force suggested that there were a disproportionate number of postponements or adjournments in some cases. The proposed rule includes mandatory factors which a hearing officer must consider in determining whether to grant a request for postponement or adjournment. The Task Force recognizes that postponements or adjournments are often fully justified. However, the proposed rule would require the hearing officer to consider explicitly the efficient and timely administration of justice when determining whether to grant a request for an extension of time. The need for an extension of time must be balanced against the need to bring each case to a timely conclusion, consistent with the public interest. The factors listed in the proposed rule build on existing standards applied by the administrative law judges. For example, contrary to past practice in some proceedings, after a hearing date has been set, counsel should not assume that the Commission hearing will be postponed to accommodate matters that arise subsequently on behalf of other clients or before courts or other agencies.

The period during which a delay in the start or resumption of a hearing may be ordered without explanation would be decreased from 30 days to 21 days.

(ER 12(a))

Rule 18. Interlocutory Review.

(a) *Certification of hearing officer's rulings.* The Commission will not review a ruling of the hearing officer prior to its consideration of the entire proceeding in the absence of extraordinary circumstances. A hearing officer shall not certify a ruling for interlocutory review by the Commission unless a party so requests within five days of the hearing officer's ruling and:

(1) The hearing officer is of the opinion that:

(i) The ruling involves a controlling question of law as to which there is substantial ground for difference of opinion, and

(ii) An immediate review of the order may materially advance the ultimate termination of the proceeding; or

(2) His or her ruling would compel testimony of Commission members, officers or employees or the production of documentary evidence in their custody.

The certification by the hearing officer shall be in writing and shall specify the

material relevant to the ruling involved. The Commission may decline to consider the ruling that has been certified, if it determines that interlocutory review is not warranted or appropriate under the circumstances. The Commission may, at any time, on its own motion, direct that any matter be submitted to it for review. Unless otherwise ordered by the Commission or the hearing officer, the hearing shall continue pending interlocutory review.

Comment: The proposed rule is modeled on the procedures for interlocutory review in federal district courts under 28 U.S.C. 1292(b). In contrast to the federal court model, under the existing rules, the hearing officer's decision not to certify a question for interlocutory review can itself be subject to interlocutory review if the person seeking review files a motion with the Commission. This procedure undermines the authority of the hearing officer and is inconsistent with reasonable standards of judicial economy. The hearing officer's decision on the matter as to which certification is sought will ultimately be reviewable by the Commission after proceedings before the hearing officer are completed.

In federal court, a writ of mandamus may be used to obtain interlocutory review in some circumstances, even when a district court judge refuses to certify a matter for interlocutory review. Under the proposed rule, Commission procedure would not allow similar relief. However, the Commission may take up a matter on its own motion at any time, even if a hearing officer did not certify it for interlocutory review. Comment is requested, as to whether the hearing officer's decision not to certify a question should be subject to a less extraordinary review procedure, such as that included in the existing rule.

(b) *Priority of review.* The Commission's interlocutory review of a hearing officer's ruling shall be expedited in every way, consistent with the Commission's other responsibilities. Normally, review of interlocutory matters should be completed within 30 days of the date set for filing the final brief on the matter submitted for interlocutory review.

Comment: The existing rules did not contain a standard with respect to the priority to be accorded interlocutory appeals. The requirement that interlocutory review be "expedited in every way, consistent with the Commission's other responsibilities," conforms to the standard for review in Proposed Rules 2(e)(3)(iii) and 38. Interlocutory matters must be promptly resolved in order to allow for the timely completion of the entire case.

(ER 14)

Rule 19. Evidence; Subpoenas.[2]

(a) *Presentation and admission of evidence.* Any witness at a hearing shall testify under oath or affirmation, which shall be administered by the hearing officer. The hearing officer shall receive relevant and material evidence, and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious.

Comment: The second sentence in the existing rule is taken from section 556(d) of the Administrative Procedure Act ("APA"). That section contains other standards of equal importance that were not singled out for inclusion in the existing rule. Moreover, under the APA, the proposition that parties have the right to present evidence and cross-examine witnesses may be applied differently, depending, among other things, upon whether a proceeding is "on the record" and therefore subject to the requirements of section 556, or whether the proceeding involves "informal" adjudication, not directly subject to the requirements of section 556. The right to present evidence and to conduct cross-examination applies to Commission adjudicatory proceedings through the APA. Repetition of the APA requirement, out of context, is unnecessary, and is a source of potential confusion. Accordingly, it is deleted from the proposed rule.

The reference to offers of proof has been deleted because Proposed Rule 4 provides a hearing officer with the authority to rule upon offers of proof.

(b) *Official Notice.* In any proceeding, official notice may be taken of any material fact which might be judicially noticed by a district court of the United States, any matter in the public official records of the Commission, or any matter which is peculiarly within the knowledge of the Commission as an expert body. If official notice is requested or taken of a material fact not appearing in the evidence in the record, the parties, upon timely request, shall be afforded an opportunity to establish the contrary.

(ER 14(b)(1))

(c) *Subpoenas.—(1) Issuance of subpoenas.* In connection with any hearing ordered by the Commission, subpoenas requiring the attendance and testimony of witnesses at a designated time and place of the hearing, and subpoenas requiring the production of documentary or other tangible evidence returnable at any designated time or place may be sought from, and issued by, the hearing officer, if one is assigned to the proceeding, and otherwise sought from and issued by the Commission. Unless made on the record at a hearing, requests for issuance of a subpoena shall be made in writing. A person whose request for a subpoena has been denied or modified may not request any other person to issue the subpoena.

(2) *Unavailability of hearing officer.* In the event that the hearing officer assigned to a proceeding is unavailable, the party seeking issuance of the subpoena may seek its issuance, in order, from the first available of the following persons: the chief administrative law judge, the law judge most senior in service as a law judge, the duty officer, any other member of the Commission, or any other person designated by the Commission to issue subpoenas. Requests for issuance of a subpoena made to the Commission, or any member thereof, must be submitted to the Secretary, not to an individual Commissioner. A hearing officer may authorize issuance of a subpoena, and delegate the manual signing of the subpoena to any other person authorized to issue subpoenas.

Comment: The revised rule represents a significant departure from current policy. Under the existing rule, subpoenas are returnable only at the time and place of the hearing. While parties often agree to exchange documents in advance of the hearing, the practice is not universal. As a result, hearings may be delayed while each side reviews the other side's document production and arranges for suitable copies of documents to be introduced into evidence. The revised rule permits subpoenas *duces tecum* to be returnable in advance of the hearing. The Task Force spent considerable time debating whether subpoenas *ad testificandum* should also be returnable in advance of a hearing, as allowed in litigation under the Federal Rules of Civil Procedure. The current procedures appear to be adequate and fair, particularly in light of the provisions for prehearing return of subpoenas *duces tecum* and the document-turn-over provisions of Proposed Rule 20(a).

The proposed rule includes a requirement that, unless made on the record at a hearing, subpoena requests must be in writing. *Ex parte*, oral communication with the hearing officer concerning the need for issuance of a subpoena should be avoided because it creates the opportunity for unintended, and potentially improper, *ex parte* discussion of the merits of a case. Moreover, the requirement that subpoena requests be in writing provides the hearing officer with the best opportunity to review the basis for the

[2] The Task Force recommends deleting from the Rules of Practice the provisions relating to incorporation by reference (existing Rule 24) because they relate to the making of disclosure or regulatory filings with the Commission. See Securities Act Release No. 3867 (Dec. 2, 1957); Securities Act Release No. 4665 (Feb. 7, 1964). Few practitioners are aware that these provisions are to be found in the Rules of Practice. If the proposed rules are adopted, the substantive requirements of this rule would be moved to an item in Regulation S-K which includes the rules directly related to the making of disclosure or regulatory filings. See Proposed 17 CFR § 229.703.

request. Since requests for subpoenas may be submitted by fax with the permission of the hearing officer, the requirement for a written request need not cause delay in transmitting a subpoena request.

Currently, the chief administrative law judge is authorized to issue subpoenas if the administrative law judge assigned to a matter is unavailable. *See* 17 CFR 200.30–10(a)(7). The revised rule provides additional alternatives for issuance of a subpoena in the event the chief administrative law judge is also unavailable. The revised rule also addresses a recurring situation in which an administrative law judge is at a hearing away from the Commission's offices in Washington, DC. While the administrative law judge is able to review a fax of a subpoena and authorize its issuance, he or she is physically unavailable to sign the actual subpoena. Following current practice, the proposed rule authorizes another administrative law judge or other authorized person in such a case to sign the subpoena in the name of the authorizing official.

(ER 14(b)(1))

(3) *Criteria for issuance.* Where it appears to the person requested to issue the subpoena that the subpoena sought may be unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may, in his or her discretion, as a condition precedent to the issuance of the subpoena, require the person seeking the subpoena to show the general relevance and reasonable scope of the testimony or other evidence sought. If the person requested to issue the subpoena, after consideration of all the circumstances, determines that the subpoena or any of its terms is unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena, or issue it only upon such conditions as fairness requires. In making the foregoing determination, the person issuing the subpoena may, if possible without causing undue inconvenience to the participants in the proceeding, inquire of the other participants whether they will concede the facts sought to be proved, provided, however, that, except with permission of the person seeking the subpoena, the identity of the person sought to be subpoenaed shall not be disclosed.

Comment: Under the current rules, the fact that a subpoena is sought, as well as the identity of the person subpoenaed, is not disclosed. Under Proposed Rule 5(a), which governs when service of filings is required, requests for subpoenas do not have to be served on opposing parties. Comment is requested as to whether the identity of the persons subpoenaed should be disclosed to other parties. If disclosure is appropriate, should it take place at the time a subpoena is requested, or at some other time? If issuance of a subpoena is not disclosed to all parties and the recipient of a subpoena applies to quash, should notice of the application to quash be given to all parties, or only the party requesting the subpoena?

The current rules appear to allow an appeal of a hearing officer's decision to deny or modify a subpoena, without requiring that the procedures for interlocutory review, Proposed Rule 18 (ER 12(a)), be followed. The question of whether issuance or modification of a subpoena is warranted is usually a highly fact-intensive inquiry. Consistent with the view reflected in Proposed Rule 18 that interlocutory review should be limited, the provision allowing automatic appeal to the Commission of the denial or modification of a subpoena to persons not members of or employed by the Commission would be deleted.

By contrast, under the standards of Proposed Rule 18, a subpoena requiring a Commission member, officer or employee to testify or turn over documents would have to be certified for interlocutory review if there was an objection to the testimony or document production. These provisions reflect a judgment that, in order to fulfill its statutory responsibilities, the Commission should not delegate to a hearing officer the power to compel the production of Commission information that, however related to the hearing of a particular case, may adversely affect unrelated Commission programs. In addition, particular scrutiny of subpoenas to Commission members, officers and employees is necessary to prevent a respondent from unduly interrupting the Commission's ordinary business. In the event of an irreconcilable conflict between a respondent's need to pursue particular testimony or documents from the Commission and the Commission's desire to protect that testimony or documents, the Commission itself should decide whether, or on what terms, the proceedings should continue.

(ER 14(b)(3) (i)–(iii))

(4) *Service.* Service shall be made pursuant to Rule 5. When a subpoena is issued at the instance of anyone other than an officer or agency of the United States, service is valid only if the subpoena is accompanied by a tender to the subpoenaed person of the fees for one day's attendance and the mileage as specified by paragraph (e) of this rule. The provisions of this paragraph shall apply to the issuance of subpoenas for purposes of investigations as well as hearings.

Comment: The deleted first sentence of Rule 14(b)(3) concerning service of subpoenas is now covered by Proposed Rule 5.

(ER 14(b)(2))

(d) *Applications to quash.* Any person to whom a subpoena is directed may, prior to the time specified therein for compliance, but in no event more than 10 days after the date of service of such subpoena, request that the subpoena be quashed or modified. Such request shall be made by application, filed with the Secretary, and shall be served only upon the person on whose behalf the subpoena was issued. The person on whose behalf the subpoena was issued may, within five days of service of the application, file a brief in opposition to the application. If a hearing officer has been assigned to the proceeding, the application to quash shall be directed to that hearing officer, even if the subpoena was issued by another person. If compliance with the subpoena would be unreasonable, oppressive or unduly burdensome, the hearing officer or the Commission shall quash or modify the subpoena, or may order return of the subpoena only upon specified conditions. These conditions may include a requirement that a person on whose behalf the subpoena was issued shall make reasonable compensation to the person to whom the subpoena was addressed for the costs of copying or transporting evidence to the place for return of the subpoena.

Comment: This paragraph is based on Existing Rule 14(b)(2). Under the existing rule, requests for subpoenas are made *ex parte*. Consistent with this requirement, only the party requesting a subpoena would receive notice of an application to quash. Comment is requested as to whether notice that a subpoena has been sought or challenged should be given to all parties. *See* Comment to Proposed Rule 19(c), *supra*.

A request to have a subpoena quashed or modified is made by application, instead of motion, to emphasize that the normal requirements of service and replies to motions do not apply. Under the proposed rule, the recipient of a subpoena could seek to quash within ten days of service, or up to the time for compliance, whichever was shorter. Under the existing rule, only five days is allowed. This is too short a period for third parties, who may be subpoenaed without prior notice, to obtain assistance of counsel and to respond. Under Rule 45(c) of the Federal Rules of Civil Procedure, a person receiving a subpoena *duces tecum* has up to 14 days to seek to quash. The Task Force viewed such a period as longer than necessary in the context of an administrative proceeding where subpoenas are issued only upon the approval of a hearing officer.

The rule has been revised to provide that an application to quash will be decided by the hearing officer assigned to a proceeding, if any, even if that hearing officer did not issue the subpoena. The last clause of the existing paragraph has been modified to conform to paragraph (b), which allows subpoenas for the production of documents or other evidence to be returnable at any designated time or place.

(e) *Witness fees and mileage.* Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States, and

witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States. Witness fees and mileage shall be paid by the party at whose instance the witnesses appear.

(ER None)

Rule 20. Production of Relevant Investigative Documents in Enforcement Proceedings.

(a) *Production.* At a time agreed upon by the parties or ordered by the hearing officer, the interested division shall make available to the other parties for inspection and copying all documents, including transcripts of testimony, relevant to any allegation in the order instituting proceedings, and not subject to a valid claim of privilege or work product. The interested division, however, may withhold documents if:

(1) Disclosure would result in an unwarranted invasion of personal privacy given the level of relevance of the documents in question;

(2) Disclosure would tend to reveal the identity of a confidential informant;

(3) The documents were obtained during the course of a pending nonpublic investigation, unless the documents will be relied upon by the interested division during the course of the hearing; or

(4) The interests of justice otherwise require that particular documents be withheld. The interested division shall state whether any material being withheld under this subparagraph is directly relevant to the culpability of any respondent. The hearing officer, upon his or her own motion or that of a respondent, shall review the withheld material and determine whether it should be produced.

(b) *Failure to produce—harmless error.* In the event that a document required to be turned over to a respondent is not turned over by the interested division, no rehearing or redecision of a matter already heard or decided shall be required, unless the respondent shall establish that the failure to turn over the document was not harmless error.

(c) *Privileged/work product document list.* The interested division shall maintain a list of documents withheld under a claim of privilege or work product and the specific privilege or work product being claimed and shall submit the list to the hearing officer, if directed by the hearing officer.

(d) *Copying costs.* The respondents shall be responsible for the costs of copying documents turned over by the interested division. Unless otherwise ordered, charges for copies will be at the rate charged for copies in the Commission's public reference room.

Comment: Although not required to do so by rule, in most enforcement proceedings, the staff voluntarily turns over to the respondents relevant investigative documents prior to the commencement of the hearing. The reasons for doing so vary. Some staff members believe that such a practice is the simplest way to discharge obligations under the Commission's "Jencks Rule," Existing Rule 11–1, while others believe that the practice promotes a fairer, more efficient hearing. While some document production occurs in all cases, the policy as to the scope of voluntary production varies significantly in different offices. This proposed rule is intended to codify the practice of the majority of the offices.

Requiring parties to turn over documents is a concept which has received growing interest from scholars and judges. *See, e.g.,* Pelham, *Panel Flips, OKs Discovery Reform, Legal Times,* Apr. 20, 1992, at 6 (discussing the July 1992 Proposed Amendments to Fed. R. Civ. P. 26 by the Advisory Comm. on Civil Rules requiring significant *voluntary* disclosure of information). Comment is requested as to whether the concept should be codified in the Rules of Practice and, if so, whether the proposed formulation is appropriate. While we are interested in alternative formulations, as discussed in the Task Force report, the Task Force has concluded after lengthy consideration that discovery rules comparable to those in the current Federal Rules of Civil Procedure are not appropriate in administrative proceedings where the government has already undertaken a detailed investigation of the conduct which is the subject of the proceeding. In particular, the Task Force does not recommend allowing parties to issue their own discovery subpoenas or to compel depositions for the purpose of discovery. *Cf.* Rule 45(a) of the Federal Rules of Civil Procedure (allowing issuance by the court clerk of blank subpoenas to a party requesting them).

Specific rule provisions. The opening text of the rule ("At a time agreed upon by the parties or ordered by the hearing officer * * *") signifies that production of documents under this rule is mandatory. Production will occur, regardless of whether respondent asks for production.

In codifying the current practice of voluntarily turning over most documents, it is essential to reflect a balance between the needs of respondents, the rights of those who have submitted documents, and the Commission's legitimate interests in maintaining effective law enforcement. Consequently, the proposed rule provides exceptions to disclosure of certain classes of documents. The rule assumes that production of relevant investigative documents will be made; the staff has the burden of justifying the exceptions.

Proposed exception (1) shields production of confidential questionnaires, credit card statements of individuals, personal telephone records and the like. The term "unwarranted" and the reference to relevance are intended to make clear that a balancing of interests must take place. Proposed exception (2) protects the identity of confidential informants or information that would tend to reveal the identity of a confidential informant. *See* 5 U.S.C. 552(b)(7)(C) and (D).

Proposed exception (3) addresses concerns that disclosure of documents when an investigation is still pending could jeopardize further law enforcement efforts. The reference to "pending nonpublic investigation" refers to an investigation in which there is a staff inquiry under way and that inquiry is not the subject of public proceedings. Of course, where particular documents will be used by the staff during the hearing, production is appropriate regardless of whether there is a pending investigation.

Proposed exception (4) provides flexibility to allow for exceptions that are not specifically enumerated. For example, the staff may believe that physical harm will befall an individual if particular documents are produced. Since these situations will presumably be quite varied and not frequent, the exception is worded broadly.

The hearing officer may, in his or her discretion, override any exception claimed by the staff and order the staff to produce disputed items.

Work product of the staff is not encompassed within the description of the documents that must be turned over. A respondent's claim that work product should be turned over would have to be evaluated on a case-by-case basis. *See* S. Rep. No. 1277, 93d Cong., 2d Sess. (1974), U.S. Code Cong. & Admin. News 1974, p. 7051. The principals enunciated in *Brady* v. *Maryland,* 373 U.S. 83 (1963), are not directly applicable to Commission administrative proceedings. Nonetheless, if the interested division discloses under Proposed Rule 20(a) that it has withheld material directly relevant to the culpability of any respondent, the hearing officer shall, upon his or her own motion or that of a respondent, review the material and determine whether, after balancing the concerns addressed in this rule, the material should be produced to the respondents.

(ER 11–1)

Rule 21. Production of Witnesses' Statements in Enforcement Proceedings.

(a) *Production.* Any respondent in an enforcement proceeding may move that the interested division produce for inspection and copying any statement of any person called or to be called as a witness by the division which pertains or is expected to pertain to his or her direct testimony that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. 3500. Such production shall be made at a time and place fixed by the hearing officer and shall be made available to any party, provided, however, that the production shall be made under conditions intended to preserve the items to be inspected or copied.

(b) *Failure to produce—harmless error.* In the event that a statement required to be turned over to a respondent is not turned over by the interested division, no rehearing or redecision of a matter already heard or decided shall be required unless the respondent shall establish that the failure to turn over the statement was not harmless error.

Comment: Although the Commission, as an administrative agency, is not directly subject to the Jencks Act, which by its terms applies only to criminal judicial proceedings, the Commission requires its staff to turn over prior witness statements to respondents. Consistent with the Jencks Act itself, the existing rule required that witness statements were to be turned over to the respondent only after the witness had been called to testify. In practice, however, Enforcement staff in most cases turns over "Jencks Rule" statements prior to the commencement of a hearing.

The Proposed Rule conforms to current practice so that Jencks statements will be turned over either before or during a hearing, as directed by the hearing officer. This change is consistent with, and in some instances will be duplicative of, the production required under Proposed Rule 19 allowing for the return of subpoenas prior to the start of a hearing, and Proposed Rule 20 placing an affirmative obligation on the interested division to turn over relevant documents to respondents.

Prior statements by witnesses taken in the form of transcripts during the investigative phase of a case, before the institution of proceedings, appear to fall squarely within the scope of the existing and proposed rule, and would probably be turned over as a result of the document production requirements of Proposed Rule 20, or, in rare cases, a subpoena. More difficult are staff notes of witness interviews, particularly those conducted after institution of the proceedings, or even the hearing itself. Where the staff believes a statement falls outside the purview of the rule, the hearing officer may require that the documents in question be turned over for *in camera* inspection. *See, e.g., In the Matter of Thomas J. Fittin, Jr.*, 48 S.E.C. Docket 1474, 1483 (1991); *In the Matter of Robert Iles, Sr.*, Adm. Pro. File No. 3–7261 (Apr. 19, 1990) (order on *Brady* and Jencks Act issues). The revised rule should not change that practice.

It was suggested to the Task Force that the early submission of prior witness statements could provide a motive for intimidation of witnesses or improper contact by respondents with witnesses. These risks appear remote in most cases. The proposed rule provides that the time for delivery of witness statements is to be determined by the hearing officer, so a case-by-case determination of such risks can be made. Upon a proper showing that there is substantial risk of improper use of a witness' prior statement, the hearing officer may order that the turning over of a witness statement be delayed. Parties could also be prohibited from communicating with particular witnesses or, if warranted, other protective measures could be devised.

Paragraph (b) reflects the Task Force's belief that an inadvertent or harmless error in failing to discover or turn over a prior statement should not invalidate an otherwise proper hearing and decision. The obligation to turn over prior statements requires the staff of the interested division to make a good faith effort to conduct a reasonable search of the files reasonably accessible to them, or, to turn over all prior statements within the scope of the rule. For example, ordinarily, the staff should check the Commission's computerized database of witness transcripts to determine if a witness has testified in other proceedings or investigations. Because of limitations in the database, all such prior testimony will not necessarily be found in a properly conducted database search. Further, there is no general obligation for the staff to search or request searches of all Commission files in all Commission offices.

Even where a statement might be known to exist, or might have been discovered with greater effort, the failure to turn over a statement which would not likely have affected the results of the hearing, should not be a basis to require a new hearing or a new decision.

(ER 15)

Rule 22. Depositions Upon Oral Examination.

(a) *Persons before whom depositions may be taken.* Depositions shall be taken before a deposition officer, designated by the hearing officer or, if no hearing officer is assigned, by the Commission. A deposition officer so designated may be any person authorized to administer oaths by the laws of the United States or of the place where the examination is held. The hearing officer may designate himself or herself as the deposition officer.

Comment: Existing Rule 15 concerns both "depositions" and "interrogatories." As used in Rule 15, the term "deposition" corresponds to what is termed a "deposition upon oral examination" in Rule 30 of the Federal Rules of Civil Procedure. In this most familiar form of deposition, questions are formulated and asked by a party or counsel directly to a witness, who provides an immediate oral answer. The term "interrogatories," in Rule 15 is used to correspond to what is termed "a deposition upon written questions" in Rule 31 of the Federal Rules of Civil Procedure. In this form of deposition, questions are read from a script by a deposition officer, and oral answers given by the witness. Existing Rule 15 has no procedure to allow for "interrogatories" as that term is most commonly used, meaning that written questions are submitted by one party, with written answers provided in reply. The revised rule adopts the more commonly used and widely known terminology of the Federal Rules of Civil Procedure. References to interrogatories are therefore deleted from the proposed rule. As in the Federal Rules, the proposed Rules of Practice have one rule for depositions upon oral examination, and a separate rule for depositions upon written questions.

Existing Rule 15 specifies only that depositions are to take place before a designated officer, but does not define who such a person could be. The proposed rule specifies the criteria for a deposition officer, based on the criteria provided in Rule 28 of the Federal Rules of Civil Procedure.

(ER 15(a))

(b) *Motions for depositions.* Any party desiring to take a deposition shall make a written motion therefor, setting forth the reasons why such deposition should be taken, the name and residence of the witness, the matters concerning which the witness is expected to be questioned, and the time and place proposed for the taking of the deposition. The Commission may, in its discretion, or if a hearing officer is assigned, the hearing officer may, in his or her discretion, issue an order that a deposition be taken upon a finding that a prospective witness will likely give testimony material to the proceeding, that it is likely that such witness will be unable to attend a hearing, and that the taking of a deposition will serve the interests of justice.

Comment: Depositions under the existing Rules of Practice are used only to preserve testimony of a witness who would be unlikely to be able to attend the hearing. They are not allowed for purposes of discovery. *L.M. Rosenthal & Co., Inc.*, Adm. Pro. File No. 3–4330 (Jan. 30, 1974). The revised rules do not change this approach. As discussed in the Task Force Report, the Task Force spent an extensive amount of time considering proposals to allow depositions for purposes of discovery, and concluded that such a change was unwarranted at this time.

Provisions with respect to the content of the order for a deposition have been moved to Proposed Rule 22(c). Provisions with respect to service of the order on the parties are part of Proposed Rule 32.

(ER 15(a))

(c) *Order for deposition.* An order for deposition shall state:

(1) The name of the witness whose deposition is to be taken;

(2) The scope of the testimony to be taken;

(3) The time and place of the deposition;

(4) The identity of the deposition officer;

(5) The manner of recording, preserving and filing the deposition; and

(6) The number of copies, if any, of the deposition and exhibits to be filed upon completion of the deposition.

Comment: Proposed paragraph (c) is based on the requirements for a deposition order

included in Existing Rule 15(a). The existing rule states that depositions were to be "recorded." The revised rule provides that the order for deposition shall state the manner of recording and preserving the deposition in order to make clear that the means of recording and preserving a deposition may vary: Videotape or other new technologies may be used.

(d) *Testimony on depositions.* A witness whose testimony is taken by deposition shall be sworn or shall affirm before any questions are put to him or her. Examination and cross-examination of deponents may proceed as permitted at a hearing.

(e) *Objections to questions or evidence.* Objections to questions or evidence shall be in short form, stating the grounds of objection relied upon. Objections to questions or evidence shall be noted by the deposition officer upon the deposition, but a deposition officer other than the hearing officer shall not have the power to decide on the competency, materiality or relevance of evidence. Failure to object to questions or evidence before the deposition officer shall not be deemed a waiver unless the ground of the objection is one that might have been obviated or removed if presented at that time.

Comment: The proposed rule deletes the existing provision that deposition transcripts are to exclude argument or debate. The requirement to exclude argument appears to have not been followed in practice. It is inappropriate for the participants to a deposition to agree to redact portions of the proceedings deemed by them, or a deposition officer, to be argumentative. The hearing officer should have the opportunity to review the entire deposition as it occurred. Moreover, where the deposition officer is the hearing officer, the hearing officer can hear argument and rule on the objections.

(f) *Filing of depositions.* The testimony shall be reduced to writing by the deposition officer, or under his or her direction, after which the deposition shall be subscribed by the witness and certified by the deposition officer. The original deposition and exhibits shall be forwarded under seal to the hearing officer, if one is assigned, and otherwise to the Secretary with such number of copies as may be requested by the Secretary. Copies of the deposition and exhibits shall be forwarded to each party.

(g) *Form of depositions.* Such depositions shall conform to the specifications of Rule 31, but deficiencies of form shall not invalidate the deposition if properly executed.

(h) *Depositions as part of the record.* At a hearing, anyone wishing to introduce a part or all of a deposition, so far as otherwise admissible in the proceeding, may make a motion setting forth the reasons therefor. Such motion shall be granted if it appears that:

(1) The witness is dead;

(2) The witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition;

(3) The witness is unable to attend or testify because of age, sickness, infirmity, imprisonment or other disability;

(4) The party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(5) Such circumstances exist to make it desirable, in the interests of justice, and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used.

If only part of a deposition is offered in evidence by a party, the hearing officer may, in his or her discretion, require that all relevant portions of the deposition be introduced.

Comment: Comment is requested as to whether the stipulation of the parties to accept a deposition in lieu of live testimony should be included in the proposed rule as a factor in determining whether a deposition already taken should be admitted.

(ER 15(g))

Rule 23. Depositions Upon Written Questions.

Depositions may be taken and submitted on written questions upon motion of any party as provided in Rule 22(b). The written questions shall be filed with the motion. Within 10 days after the motion and written questions are served, a party may file objections, if any, to such written questions and may serve cross-questions upon any or all other parties. When a deposition is taken pursuant to the provisions of this rule, no party shall be present or represented unless otherwise permitted by order. No persons other than the witness, counsel to the witness, the deposition officer, and, if the deposition officer does not act as reporter, a reporter, shall be present at the examination of the witness. The deposition officer shall propound the questions and cross-questions to the witness in their order. The order for deposition, filing of the deposition, form of the deposition and use of the deposition in the record shall be governed by the applicable provisions of Rule 22.

Comment: In the proposed rule the term "interrogatories" was replaced by the term "written questions" to conform the proposed rule to the more widely used terminology of Rules 31 and 33 of the Federal Rules of Civil Procedure.

(ERs 16(a)–(b), 17(f))

Rule 24. Content, Effect and Finality of Initial Decision.

(ER 16(b))

(a) *When initial decision required.* Unless the Commission directs otherwise, the hearing officer shall make an initial decision in any proceeding in which the Commission directs a hearing officer to preside at a hearing, provided, however, that an initial decision may be waived by the parties with the consent of the hearing officer pursuant to Rule 12(d)(2).

Comment: The existing rule requires a hearing officer to make an initial decision in two situations: (1) "In any proceeding in which a hearing is required to be conducted in conformity with section 7 of the Administrative Procedure Act, unless an initial decision is waived by all parties who appear at the hearing and the Commission does not subsequently order that an initial decision nevertheless be made by the hearing officer"; and (2) "in any other proceeding in which the Commission directs him to make such a decision."

Section 7 of the Administrative Procedure Act was repealed in 1966, and reenacted as 5 U.S.C. 556. It applies only in cases of formal, "on the record" adjudication. The proposed rule has been modified to conform to existing practice, which is that an initial decision is prepared in all matters submitted to a hearing officer for hearing, unless the Commission orders otherwise, or the parties waive an initial decision in accord with Proposed Rule 12(d) [ER 8(c)].

(ER 16(a))

(b) *Content of initial decisions.* An initial decision shall include: Findings and conclusions, and the reasons or bases therefor, upon all the material issues of fact, law or discretion presented on the record; and the appropriate order, sanction, relief, or denial thereof. An initial decision shall also include a statement of the time within which a petition for review of the initial decision may be filed. The time allowed to file a petition for review shall not exceed 21 days after service of the initial decision except for good cause shown. An initial decision shall also include a statement that:

(1) The initial decision shall become the final decision of the Commission as to each party unless a party files a petition for review of the initial decision or the Commission determines on its own initiative to review the initial decision as to a party; and

(2) If a party timely files a petition for review or the Commission takes action to review as to a party, the initial

decision shall not become final with respect to that party.

Comment: Existing Rule 16(a) is based on the requirements of section 557(c)(3) of the Administrative Procedure Act. The proposed language added to the first sentence reflects more closely the actual text of that section as it applies to adjudicatory decisions.

Existing Rule 16(a) states that an initial decision is to contain, inter alia, "a statement of the time within which a petition for review of the initial decision may be filed." There is no cross-reference to the requirement of Existing Rule 17(b), that a petition for review of an initial decision "shall be filed within 15 days after service of the initial decision." A 15-day period does not allow as much time as warranted for review of an initial decision and preparation of a petition for review.

By contrast, Exchange Act section 19(d)(2) provides a 30-day period for the filing of an application for review of a determination by a self-regulatory organization, a shorter and simpler document than a petition for review. Because parties in Commission proceedings will already have prepared proposed findings of fact and proposed conclusions of law which will form the basis for any petition for review, the Task Force did not believe 30 days would ordinarily be needed for preparation of a petition for review. Accordingly, the proposed rule includes a guideline of 21 days time for the filing of petitions for review.

The proposed rule retains the requirement that the initial decision recite certain information about the procedural effect of an initial decision. This information is of particular benefit to pro se respondents.

(ER 17(f))

(c) *Effect of initial decisions; when final.* (1) Unless a party or other person entitled to seek review of an initial decision timely files a petition for review, or unless the Commission on its own initiative orders review pursuant to Rule 26, an initial decision shall become the final decision of the Commission.

(2) If a petition for review is timely filed by a party or any other person aggrieved by the decision and entitled to review, or if the Commission upon its own initiative has ordered review of a decision with respect to a party or a person aggrieved who would be entitled to review, the initial decision shall not become final as to that party or person.

Comment: Proposed Rule 24 is written to be consistent with Proposed Rule 26 (ER 17), which recognizes that a non-party may, in certain limited circumstances, be aggrieved by a decision and entitled to seek review. *See, e.g.,* Exchange Act section 25(a)(1).

(ER 17(f))

(d) *Order of finality.* In the event that the initial decision becomes the final decision of the Commission with respect to a party, the Commission shall issue an order that the decision has become final as to that party. The order shall state that the time for filing of a petition for review of the initial decision by the party has expired and that the Commission has determined not to order review of the initial decision on its own initiative. Unless otherwise provided, any sanctions ordered in an initial decision shall take effect on the first day following service of the order of finality. Notice of the order shall be published in the Securities and Exchange Commission News Digest and the SEC Docket.

Comment: The existing rule requires only a "notice" of finality to be issued and published. However, the "notice," published by the Secretary actually operates as a Commission order in that it sets the date on which an initial decision, and any sanctions specified therein, become effective. The revised rule provides instead that the Commission issue an "order." An initial decision automatically becomes final with the passage of time even if the order of finality is not issued. However, unless otherwise provided, the sanctions specified in an initial decision do not take effect until the first day after service of the order of finality.

(ER 16(c)–(g))

Rule 25. Proposed Findings, Conclusions and Supporting Briefs Filed With the Hearing Officer.

(a) *Proposed findings and conclusions; briefs.* Before an initial decision is made, the parties will be granted a reasonable opportunity to file in writing proposed findings and conclusions together with, or as a part of, their briefs. Proposed findings of fact must be supported by citations to specific portions of the record.

Comment: Existing Rule 16(d) provides that parties "may file" proposed findings and conclusions in any proceeding involving "a hearing or opportunity for hearing." The proposed rule would track more closely the language of section 557(c) of the Administrative Procedure Act, pursuant to which parties are entitled "to a reasonable opportunity to submit" proposed findings and conclusions prior to an initial decision. The limitation in the proposed rule that the opportunity to submit proposed findings and conclusions be "reasonable" would permit the hearing officer to restrict the time or length for filing any submission as appropriate, given the circumstances of the case.

By its terms, section 557(c) applies only to hearings "on the record," after notice and opportunity for hearing. By contrast, the language of the proposed rule mandates the opportunity for submission of findings and conclusions in any case in which an initial decision is to be prepared whether or not the proceeding is "on the record." The proposed standard conforms to current Commission practice, which is to permit proposed findings and conclusions in all cases in which an initial decision is to be issued.

Neither the existing rule nor the proposed rule applies to proceedings in which the Commission itself presides at the taking of evidence, and no initial decision is to be issued. In such a case—for example in a proceeding where a temporary cease-and-desist order is sought—the Commission has complete discretion whether to allow for posthearing submissions.

The requirement that each proposed finding of fact or conclusion of law be briefed would be eliminated because it was unnecessary and not followed in practice. Proposed findings of fact or conclusions of law may be uncontested or so obvious that they do not warrant briefing. Instead, the proposed rule requires that each finding must be supported by appropriate citations to the record. A respondent can choose whether or not to brief proposed conclusions of law. Those which are contested and which are not supported will not be deemed to be waived, but may not be persuasive.

(b) *Time for filing proposed findings and briefs prescribed by hearing officer.* At the end of each hearing, the hearing officer shall, by order, after consultation with the parties, prescribe the period within which proposed findings and conclusions and supporting briefs are to be filed provided, however, that the period within which the first filing is to be made normally should be no more than 30 days after the close of the hearing. If the hearing officer directs that the first filing be made at a date later than 30 days after the close of the hearing, the reasons for so doing shall be stated in the order.

Comment: Simultaneous filings of proposed findings and conclusions of law may have been used in some proceedings in the past. Currently, the practice of the administrative law judges is to require successive filings. Successive filings are of greater benefit to the hearing officers. They are more likely to lead to proposed findings and conclusions which highlight those areas not in dispute as well as to articulate the competing arguments for points which are contested. A hearing officer would always have the authority to order simultaneous filings of proposed findings and conclusions if warranted in a particular case. Comment is requested as to whether, in light of current practice, the separate provisions relating to simultaneous filings should be eliminated from the proposed rule.

It is important that posthearing submissions be completed without delay, while the evidence is fresh in the minds of the hearing officer and the parties. The existing rule contains a suggested time limit of 30 days for the filing of the first posthearing submissions, but no time limit for the entire posthearing briefing schedule. Based on an assessment of the time necessary to file briefs, and the recommendation that the entire hearing process should take approximately 10 months, the Task Force concluded that a 90-day period for briefing was appropriate under normal

circumstances. The hearing officer may order a longer or shorter period for the filing of briefs. The reasons for allowing more than a 90-day period must be stated in the order. A 90-day period is comparable to the 84-day period allowed for briefs under Rule 31 of the Federal Rules of Appellate Procedure. The proposed rule retains the requirement that the first brief should be filed within 30 days of the close of the hearing.

If successive filings are directed, the proposed findings and conclusions of the party assigned to file first shall be set forth in serially numbered paragraphs and any counter-statement of proposed findings and conclusions must, in addition to any other matter, indicate as to which paragraphs of the proposals already filed there is no dispute. A reply brief may be filed by the party assigned to file first, or, where simultaneous filings are directed, reply briefs may be filed by each party, within the period prescribed therefor by the hearing officer. No further briefs may be filed except with leave of the hearing officer.

Normally, the total period within which all such proposed findings and conclusions and supporting briefs and any counter-statements of proposed findings and conclusions and reply briefs are to be filed should be no more than 90 days after the close of the hearing. If the hearing officer directs that such total period be extended beyond 90 days, the reasons for so doing shall be stated in the order.

(ER 16(f))

(c) *Service of record.* In proceedings in which an initial decision by a hearing officer is to be made, the Director of the Office of Filings, Information and Consumer Services shall serve the record in the proceeding and an index thereto upon the hearing officer when the hearing officer so directs. The hearing officer shall transmit any corrections to the index to the Director who shall promptly issue a corrected index. The initial decision shall include a certification by the hearing officer that the record consists of those items that are set forth in the index.

Comment: Under current procedures responsibility for receipt and custody of filings and exhibits is fragmented among several offices over the course of a proceeding. The Task Force recommended that new procedures be developed for the filing and safekeeping of administrative proceedings case records.

Existing Rule 20(a)(2) seeks to address issues concerning the transfer of items in the record to and from the hearing officer by requiring that at the beginning of a hearing the hearing officer read into the record all items then constituting the record. Other items added to the record would presumably be noted in the transcript. The requirement that the items constituting the record be read aloud has not been followed in practice. It would therefore be deleted from the proposed rule. Instead, the revised rule includes a requirement that the hearing officer review the record and certify in the initial decision that it is complete.

Under the proposed rule, the Director of the Office of Filings, Information and Consumer Services is required to submit an index or listing of the contents of the record showing the items that the Director has in his or her custody. Staff in the Office of Filings, Information and Consumer Services, who are responsible for the physical custody of administrative proceedings files at the conclusion of a hearing, would not have personal knowledge of whether all documents filed with the Secretary or relied upon at hearing were forwarded to them. Accordingly, they cannot certify that a record is complete. Under the proposed rule, the hearing officer who presides at a hearing and who will have personal knowledge of the contents of the record is responsible for certifying that the record is complete. The hearing officer's certification in the initial decision that the record is complete affords the parties a clear opportunity to object if they believe that the certified record is incomplete.

(ER 16(f))

(d) *Filing of initial decision.* Normally, the hearing officer should file the initial decision with the Secretary within 75 days of the filing of the last brief called for by the posthearing briefing schedule, or, if no briefs are filed, within 75 days of the close of the hearing. The Secretary shall promptly serve the initial decision upon the parties and shall promptly publish notice of the filing thereof in the Securities and Exchange Commission News Digest. Thereafter, the Secretary shall publish the initial decision in the SEC Docket; provided, however, that in nonpublic proceedings no notice shall be published unless the Commission otherwise directs.

Comment: The existing rule states that initial decisions are to be filed within 30 days after the record has been served on the hearing officer. There is no guideline as to how much time the hearing officer should take before he or she requests that the record be served. Because of the availability of photocopies, the hearing officer does not need the official record to prepare an initial decision. In many cases, the initial decision is issued within a few days after service of the record. However, this interval is not an accurate reflection of actual time spent preparing the initial decision because it does not take into account the amount of time spent after the end of the briefing but before the record is served. The proposed rule provides that the hearing officer should ordinarily take no more than 75 days from the filing of the last brief called for by the briefing schedule to prepare the initial decision. This period is consistent with the amount of time actually taken to prepare initial decisions in a majority of cases.

Additionally, Rule 16(g) is deleted from the proposed rule because the authority to hear oral argument on any pending matter is inherent in the powers of a hearing officer (set forth in Proposed Rule 4) and does not need to be restated.

(ER 17(a)–(d),(g)–(h))

Rule 26. Review by the Commission of Initial Decisions by Hearing Officers.

(a) *Petition for review; when available.* In any proceeding in which an initial decision is made by a hearing officer, any party to the proceeding, and any person who would have been entitled to judicial review of the final order entered in the proceeding if the Commission itself had made the initial decision, may file a petition for Commission review of the initial decision.

Comment: In the federal court system, an appeal from a decision of a district court is initiated with a notice of appeal which, in the absence of a local rule to the contrary, does not generally require any statement or analysis of the alleged errors in the district court's decision. *See* Rule 3 of the Federal Rules of Appellate Procedure. The Task Force considered suggestions that appeals from the decision of a hearing officer be initiated with an analogous summary notice, instead of a more extensive petition. The procedure for a petition for review is retained because, unlike a federal court of appeals, the Commission, with certain exceptions, may determine not to hear an appeal or may limit the issues on appeal. The petition, while not as extensive as a brief, must include enough information to permit this preliminary jurisdictional decision to be made. Moreover, preparing a petition should sharpen the presentation of the matters at issue, and should assist in preparation of the appellant's brief on the merits. Finally, pursuant to Administrative Procedure Act section 557(c), on appeal of an initial decision a party must have the opportunity to file proposed conclusions of law and fact. This requirement is satisfied by the filing of a petition for review setting forth exceptions to findings and conclusions of law of the hearing officer. Accordingly, for the Commission to retain its power to order a summary affirmance (*see* Proposed Rule 26(g); Existing Rule 17(d)), the petition for review must provide an opportunity to note exceptions.

By contrast, when a respondent applies for review of a determination by a self-regulatory organization pursuant to Proposed Rule 56, the Commission is required by statute to consider *de novo* the appeal in every case. Accordingly, under the existing rules only a summary application for review, similar to a notice of appeal under the Federal Rules, is required.

Comment is requested as to whether, notwithstanding the potential benefits of preparing a petition for review, the requirement for a petition should be eliminated where an appeal is provided as of right by section 4A(b) of the Exchange Act. *See* Proposed Rule 26(f). Comment is also requested as to whether, in light of the Commission's longstanding practice of accepting virtually all petitions for review, and rarely granting a summary affirmance, the requirement of filing a petition for review (and the possibility of a summary affirmance) should be eliminated in all cases. Comment

is also requested as to whether, in light of the potential benefits of a summary statement of the contested issues very early in the appellate process, respondents in appealing the determination of a self-regulatory organization should be required to file a petition for review which includes a statement of the issues on review and the alleged errors by the self-regulatory organization.

(b) *Petition for review a prerequisite to judicial review.* Pursuant to the provisions of 5 U.S.C. 704, a petition to the Commission for review of an initial decision in any proceeding is a prerequisite to the seeking of judicial review of a final order entered pursuant to the initial decision.

(c) *Petition for review; procedure.* Any person who seeks Commission review of an initial decision by a hearing officer shall, within such time after service of the decision as prescribed by the hearing officer pursuant to Rule 24(b) file a petition for Commission review indicating specifically the findings and conclusions as to which exceptions are taken together with supporting reasons for such exceptions based on appropriate citations to the record. These reasons may be stated in summary form. Any objection to an initial decision not saved by written exception filed pursuant to this rule will be deemed to have been waived. A brief in opposition to a petition for review may be filed within five days of service of the petition. Any party may petition for summary affirmance in opposition to a petition for review and identify those issues which the party contends do not warrant consideration by the Commission, stating briefly the reasons for such a contention with appropriate citations to the record.

Comment: Proposed Rule 26(c) would modify the existing rule by explicitly providing a five day period after service of a petition for review for the filing of a brief in opposition to grant of review and/or a petition for summary affirmance. Under Proposed Rule 24(b), the hearing officer would include in the initial decision a statement as to the period allowed for filing a petition for review. Pursuant to that rule, the period allowed for a respondent to file a petition for review normally would be 21 days after service of the initial decision on that respondent. Under Proposed Rule 27(a), the Commission would have 15 days after the filing of a statement in opposition to review or a petition for summary affirmance to determine whether to grant review, and to issue an order establishing a briefing schedule. If additional time is allowed for filing of an opposition, there would be a corresponding increase in the time that would elapse before the Commission would determine whether to order review. Comment is requested as to whether 10 days or 15 days would be a more realistic period for filing a brief in opposition to a petition for review or a petition for summary affirmance.

(ER None)

(d) *Requirement to include financial disclosure statement.* Any person who files a petition for review of an initial decision which asserts that person's inability to pay either disgorgement or a penalty shall file with the opening brief a financial disclosure statement containing the information specified in Rule 55(b).

Comment: The Commission is authorized to bring proceedings seeking disgorgement and penalties either in court or administrative proceedings. In each forum, a defendant's or respondent's ability to pay sums that may be owed often becomes a significant issue. Even when there is undisputed evidence of a defendant's or a respondent's inability to pay, the Commission will generally insist upon an order assessing disgorgement and/or penalties as a term of any settlement that might be reached. In connection with such settlements, however, the Commission often agrees to a waiver of disgorgement and/or penalties to the extent there is a verified inability to pay.

In order to make a determination with respect to whether a proposed disgorgement or penalty is appropriate, and whether it should be waived due to inability to pay, the Commission must have access to complete and current financial information about respondents who raise inability to pay as an issue. Even if financial disclosure has been made during the course of a hearing before a hearing officer pursuant to Rule 55, or otherwise, by the time an initial decision and petition for review have been filed that information may no longer be current.

Pursuant to Proposed Rules 26 (petitions for review), and 28(e) (adducing evidence), the Commission could, at the time that it grants a petition for review, or orders review on its own motion, issue an order that additional evidence on ability to pay be adduced and that the issue be briefed. However, because of the importance of the information, and the advantages of receiving the information in a standardized form, the proposed rule would provide that a financial statement be required with the opening brief on the merits whenever a petition for review raises inability to pay as an issue. The information would have to be kept current pending a final decision. A model financial disclosure statement form can be obtained from the Commission. See Rule 55f. The Commission would specify when it issues the briefing schedule order required by Rule 27(a) whether the form should be used, or whether the information should be submitted by other in another format.

The requirement to include a financial disclosure statement if a respondent makes a claim of inability to pay does not apply to cases on appeal of determinations by self-regulatory organizations. Comment is requested as to whether a similar requirement should be extended, through the Rules of Practice, or otherwise, to self-regulatory organization cases.

(e) *Review by the Commission on its own initiative.* The Commission may, on its own initiative, order review of any initial decision (or a portion of any initial decision) by a hearing officer within 15 days after the end of the period established pursuant to Rule 26(c) for filing a brief in opposition to a petition for review. The vote of one member of the Commission, conveyed to the Secretary, shall be sufficient to bring a matter before the Commission for review. A party who does not intend to file a petition for review and who desires the Commission's determination to be made in a shorter time, may make a motion for an expedited decision, accompanied by a written statement that the party waives its right to file a petition for review.

Comment: The proposed rule would use a different formula than that in the existing rule to establish the time allowed the Commission to order review on its own initiative. However, the amount of time allowed for the Commission to decide whether to order review after the filing of petitions for review and any replies would remain the same, 15 days. (Existing Rule 17(c) allows the Commission up to 30 days from service of the initial decision to order review on its own initiative; Existing Rule 17(b) allows a respondent 15 days after service of the initial decision to file a petition for review. Thus, the Commission has 15 days after any petitions for review are due to determine whether to order review on its own initiative.)

Whether or not the Commission may order review on its own initiative is not necessarily linked to whether or not a petition for review is filed. Even if a respondent files a petition for review, that respondent may not seek review as to all issues or other respondents in the same proceeding may not file petitions for review. Before the Commission determines whether to order review of an issue on its own motion, all of the parties' petitions, cross-petitions and replies should be filed.

Under Proposed Rule 24(b) the time allowed for filing a petition for review, which would be set by the hearing officer, would normally be 21 days. Further, Proposed Rule 26(c) would allow five days after service of the petition for review for filing of petitions in opposition to review or for summary affirmance. Accordingly, Proposed Rule 26(e) would provide that the Commission could order review on its own initiative up to 15 days after the last day of the period allowed for filing a brief in opposition to a petition for review. This period corresponds to the time allowed under Proposed Rule 27(a) for the Commission to establish a briefing schedule. The Commission rarely exercises its authority to order review on its own initiative; based on existing practice a 15-day period is sufficient to make this determination.

Existing Rule 17(c) would also be revised to incorporate the requirement of section 4A(b) of the Exchange Act that the vote of one member of the Commission is sufficient

to bring a matter before the Commission for review.

(f) *Standards for granting review by the commission pursuant to petition for review.* After a petition for review has been filed:

(1) The Commission shall review any initial decision which:

(i) Denies any request for action pursuant to section 8(a) or section 8(c) of the Securities Act of 1933 or the first sentence of section 12(d) of the Securities Exchange Act of 1934;

(ii) Suspends trading in a security pursuant to section 12(k) of the Securities Exchange Act of 1934; or

(iii) Is in a case of adjudication (as defined in 5 U.S.C. 551) not required to be determined on the record after notice and opportunity for hearing (except to the extent there is involved a matter described in 5 U.S.C. 554(a)(1) through (6)).

Comment: This paragraph would be amended to conform to the requirements of section 4A(b) of the Exchange Act, which mandates review of certain decisions made pursuant to delegated authority. The standards of this proposed rule would also apply to review of decisions pursuant to delegated authority by persons other than a hearing officer. *See* Proposed Rule 30 (ER 26). Although it is unlikely under current procedures that a case assigned to a hearing officer and resulting in an initial decision would involve the matters set forth in subparagraph (f)(1)(i) or (ii), decisions on those matters are specified in the Exchange Act as ones as to which there is a right to review, and were therefore included here. Paragraph (f)(1)(iii) incorporates statutory language from section 4A. The phrase "on the record after notice and opportunity for hearing" in that section is a term of art. If that phrase does not appear in the statute authorizing a particular proceeding, the proceeding is considered to be "informal" adjudication under the Administrative Procedure Act. The Exchange Act provides an automatic right of appeal in such cases, notwithstanding that a hearing may, in fact, be held. Cease-and-desist proceedings are an example of proceedings not required to be "on the record."

(2) The Commission may decline to review any other decision. In determining whether to grant review, the Commission shall consider whether the petition for review makes a reasonable showing that:

(i) A prejudicial error was committed in the conduct of the proceeding; or

(ii) The initial decision embodies:

(A) A finding or conclusion of material fact that is clearly erroneous; or

(B) A conclusion of law that is clearly erroneous; or

(C) An exercise of discretion or decision of law or policy that is important and that the Commission should review.

Comment: Existing Rule 17(d) intertwines statutory provisions mandating review of certain decisions with provisions adopted by the Commission by rule which set standards for discretionary review. The rule would be modified to delineate those cases in which there is a statutory requirement for Commission review (subparagraph (1)), and those cases in which review is discretionary, with the decision whether to grant review guided by criteria provided in the rule (subparagraph (2)). The provisions relating to summary affirmance have been deleted and replaced by a separate paragraph, below.

The Task Force is unaware of any case in which the Commission has declined to grant a petition for review. This practice represents a Commission determination, the product of a consensus over many years, that there is a benefit to joint deliberation by the Commission itself before a decision becomes final and binding. Although Commission review in a particular case can be time consuming, it establishes authoritative precedent applicable to other cases and promotes confidence in the entire adjudicatory process. Both of these factors may encourage settlements or acceptance of hearing officers' decisions in other matters and accordingly reduce the number of cases appealed to the Commission. Reducing the Commission's role in reviewing cases therefore might not be efficient in the long-term.

The Task Force agreed that the rationale for accepting virtually all petitions for review remains compelling, particularly if the volume of the Commission's adjudicatory docket does not expand beyond the levels of the past eleven years. However, the Commission should also recognize that decisions which do not warrant full consideration by the Commission may arise on appeal. In such cases the Commission should not be unwilling to exercise its authority to deny a petition for review or summarily affirm the decision of the hearing officer. Exercise of that authority makes the hearing officer's decision the final decision of the Commission. A respondent is able to immediately appeal that final decision to federal court. *See* Comments to Rules 26(a) and 26(g).

(g) *Summary Affirmance.* The Commission may summarily affirm an initial decision based upon the petition for review and any response thereto, without further briefing, if it finds that no issue raised in the petition for review warrants further consideration by the Commission.

Comment: This paragraph is derived from Existing Rule 17(d), which provided for summary affirmance. Proposed Rule 26(c) establishes a specific opportunity for a party to argue for summary affirmance in response to a petition for review.

Provision in the existing rule for both the denial of a petition for review and summary affirmance arises from a recommendation of the Administrative Conference of the United States (ACUS) 1 CFR 305.68–6, (2)(b) (1992). However, the availability of either mechanism would satisfy the policy concerns addressed by the ACUS recommendation. Comment is requested as to whether both procedures are necessary or whether denial of a petition for review should be eliminated from the Rules of Practice. *See* also Comment to Rule 26(a).

The existing rule includes a provision prohibiting summary affirmance in cases in which the petition for review made "a reasonable showing" of prejudicial procedural error, clearly erroneous factual error, an erroneous conclusion, or an exercise of discretion which is "important" and which the Commission "should" review. Under the proposed rule those factors would be considered by the Commission in determining whether or not to grant review in the first place. Relating these standards to the decision whether to grant review is more logical and should focus the petition on the relevant issues. If the Commission finds any of those factors is present and grants review, a summary affirmance would not be warranted. Focusing the application of these standards on the petition for review is also more consistent with the provisions of Proposed Rule 26 (ER 17), which permits the Commission to select particular issues for review.

Summary affirmance has rarely been granted. The last summary affirmance of an initial decision was in 1988 in a case in which the petitioners failed to file required briefs. *In the Matter of Joseph Lugo,* Adm. Pro. File No. 3–6740 (Aug. 8, 1988), Exchange Act Release No. 25982, 41 SEC Docket 946 (1988). The Task Force considered suggestions that the Commission should use summary affirmance in appropriate cases as a mechanism to resolve cases which were correctly decided by a hearing officer. After a summary affirmance a respondent can immediately seek appellate court review.

Virtually all cases appealed to the Commission turn on specific facts, particularly those facts regarding whether a proposed sanction is in the public interest. The Task Force concluded that the Commission should consider more closely whether to use its power to affirm summarily particular initial decisions. At the same time, the Task Force believes that the Commission should continue to set a high threshold for any such affirmance.

(h) *Scope of review.* (1) Review by the Commission of an initial decision by a hearing officer shall be limited to the matters specified in the order for review. On notice to all parties, however, the Commission may at any time prior to issuance of its decision raise and determine any other matters which it deems material, with opportunity for oral or written argument thereon by the parties.

(2) The Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial decision by the hearing officer and make any findings or conclusions which in its judgment are proper and on the record.

(3) In the event a majority of participating Commissioners do not agree to a disposition on the merits, the initial decision shall be of no effect, and an order will be issued in accordance with this result.

Comment: The provisions of this existing Rule 17(h) have been moved to paragraph (b) of this rule.

(ERs 17(e), 18)

Rule 27. Briefs to the Commission.

(ER 17(e))

(a) *Time for filing briefs.* At the time the Commission grants or orders review of an initial decision made by a hearing officer or by any other person pursuant to delegated authority, or promptly after receipt by the Commission of an index to the record of a determination of a self-regulatory organization filed pursuant to Rule 58, the Commission shall issue a briefing schedule order. The order shall specify the party or parties to file opening briefs and establish the dates by which briefs shall be filed. Normally, this briefing schedule order should be issued within 15 days of the last day permitted for filing a brief in opposition to a petition for review or, for filing a record index pursuant to Rule 58. Unless otherwise ordered, opening briefs shall be filed within 40 days of the date of the briefing schedule order. Opposition briefs shall be filed within 30 days after the date opening briefs are due. Reply briefs shall be filed within 14 days after the date opposition briefs are due. No further briefs may be filed except with leave of the Commission. Any petition for review or any application for review not perfected by timely filing of such briefs may be dismissed pursuant to Rule 3.

Comment: The proposed rule applies to any brief filed with the Commission on review of an initial decision by a hearing officer, by any other person pursuant to delegated authority or by a self-regulatory organization.

The proposed rule requires, at the time the Commission grants or orders review, or promptly after receipt of an index to the record of a determination of a self-regulatory organization filed pursuant to Rule 58, that the Commission issue a briefing schedule order specifying the party or parties to file opening briefs and the dates briefs shall be due. In litigation before a federal court of appeals pursuant to the Federal Rules of Appellate Procedure, no such order is required. The appellant files the first brief pursuant to a briefing schedule established by rule. *See* Rules 28, 31, Fed. R. App. Proc. Unlike a court of appeals, however, the Commission can order review on its own initiative. In such cases, there would be no appellant. Moreover, by local rule a federal court may issue separate orders confirming or modifying the presumptive schedule established by the Federal Rules of Appellate Procedure. The proposed rule adopts this bifurcated approach. The proposed rule establishes a presumptive briefing schedule. However, a briefing schedule order is required in every case, and that order may modify the briefing schedule on a case-by-case basis.

Under the proposed rule, the first brief on the merits would usually be due 40 days after the date of the scheduling order. The proposed rules allot time prior to issuance of the scheduling order for filing of a petition for review and opposition thereto or, in the case of an appeal from a self-regulatory organization decision, for filing of a notice pursuant to Exchange Act Rule 19d–1, an application for review and index. Accordingly, in the case of an appeal from an initial decision of a hearing officer, the first brief on the merits ordinarily would be due no sooner than 85 days after issuance of an initial decision. In the case of an appeal from a self-regulatory organization, the first brief on the merits ordinarily would be due no sooner than 95 days after the filing of a Rule 19d–1 notice, which is due "promptly" after the decision of the self-regulatory organization. *See* Exchange Act Rule 19d–1.

In the case of an appeal from a decision by delegated authority by a person other than a hearing officer, the first brief would be due much earlier. By its terms, the proposed rule would apply to such cases. By contrast, the existing rule does not. Briefing schedules in such cases are simply handled on an *ad hoc* basis at present. Appeals in such cases are rare, however. When they do occur, they tend to involve time sensitive matters that require expedited consideration. Under Proposed Rule 30, a petition for review is due only 10 days after the decision. The briefing schedule order, as appropriate, could require expedited briefing. Otherwise, the first brief would be due 50 days after the decision.

Comment is requested as to whether the time allowed for filing of briefs under proposed Rule 27 should be increased to 45 days for the opening brief, 35 days for a brief in opposition and 21 days for a reply brief.

The proposed rule links the issuance of the briefing schedule order to the end of the period during which a petition for review or an index of the record of a self-regulatory organization proceeding could be filed. The period for issuance of the briefing schedule order should not be linked to the actual filing of a petition or index since there may be sequential requests for review by different persons. Even in cases in which there is a single respondent, a non-party "aggrieved" by a decision might seek review. *See* Proposed Rule 26(a).

The proposed rule incorporates from Exchange Act Rule 19d–3, which governs the filing of briefs in appeals from actions of a self-regulatory organization, a provision that the failure to file a brief may be grounds for dismissal.

(ER 18)

(b) *Additional requirements.* Briefs filed with the Commission with respect to the review of an initial decision made by a hearing officer, or any other person pursuant to delegated authority, or by a self-regulatory organization, shall be confined to the particular matters at issue. Each exception to the findings or conclusions being reviewed shall be stated succinctly. Exceptions shall be supported by citation to the relevant portions of the record, including references to the specific pages relied upon, and by concise argument including citation of such statutes, decisions and other authorities as may be relevant. If the exception relates to the admission or exclusion of evidence, the substance of the evidence admitted or excluded shall be set forth in the brief or in an appendix thereto. Reply briefs shall be confined to matters in opposition briefs of other parties. Briefs which fail to comply with the requirements of this rule shall be subject to sanctions as provided in Rule 3(b).

Comment: The Task Force was informed that in some cases briefs fail to cite to the record. This failure can cause considerable delay, particularly where the record is long, because the Commission must search the entire record to determine where a particular exception or argument may be supported by the evidence. The cross reference to Proposed Rule 3(b) was included particularly for the benefit of *pro se* respondents.

(ER 21)

Rule 28. Hearing Before the Commission; Leave to Adduce Additional Evidence; Petitions for Rehearing.

(a) *Oral argument.* Except as to determinations whether to accept a matter for interlocutory review or to order review of a decision made pursuant to delegated authority, any party may, upon written motion, request oral argument before the Commission on any matter to be decided by the Commission. Requests for oral argument shall be made by separate motion accompanying the initial brief on the merits. Where it deems it appropriate to do so, the Commission will consider an application on the basis of the papers filed by the parties, without oral argument, provided, however, that motions for oral argument with respect to whether to affirm all or part of an initial decision made by a hearing officer shall be granted unless exceptional circumstances make oral argument impractical or inadvisable. The Commission shall issue an order as to whether oral argument is to be heard, and if so, the time and place therefor. Normally, the grant or denial of a motion for oral argument should be made by the Commission within 21 days of the date for the filing of the last brief called for by the briefing schedule. The time fixed for oral argument shall

be changed only by written order of the Commission, for good cause shown. The order shall state at whose request the change is made and the reasons for any such change.

Comment: The existing rule requires a written request for oral argument but does not specify how it is to be made. From time to time a party will insert a request for oral argument in a footnote, or in the text of a lengthy brief, and the Commission may not have timely notice that oral argument has been requested. The proposed rule therefore requires that a request for oral argument be set forth in a separate motion. Some federal courts faced with the same issue have promulgated a local rule requiring that requests for oral argument be made in a particular portion of a party's brief. The Task Force considered the federal court approach and believes that it has merit, particularly in the context of a rule setting forth with some specificity the content and order of required sections of each brief. *See, e.g.*, Rule 28, Fed. R. App. Proc.

The Task Force concluded, however, that a separate motion would be more readily identifiable and therefore more easily entered into a case tracking system by the clerks who receive Commission filings. The Task Force has recommended that the Commission improve the existing case tracking system. Once an upgraded case tracking system has been developed the importance of this assessment may change. A final rule might therefore require that a request for oral argument be made as a specific part of the brief.

The third sentence of the proposed rule, which sets forth standards for whether requests for oral argument will be granted, is based on Existing Rule 21(a) and Exchange Act Rule 19d–3(f). The proviso that the Commission ordinarily will hear argument in cases on appeal from an initial decision by a hearing officer reflects the Commission's practice, which is to grant requests for oral argument when the matter involves an appeal from an initial decision of a hearing officer. Requests for oral argument in other circumstances are rarely granted. Fifty-five initial decisions decided after October 1, 1981 were appealed to the Commission and decided as of September 30, 1992. In 29 of these cases an oral argument was requested. The Commission granted all but one of the oral argument requests. *See In the Matter of Military Robot Corporation*, Adm. Pro. File No. 3–6493 (December 17, 1985) (Order Denying Oral Argument). During the same period from October 1, 1981 through September 30, 1992, the Commission did not grant oral argument in any of the approximately 185 cases in which an opinion was issued on appeal of a decision of a self-regulatory organization. In one case a joint argument was allowed with respect to both a decision of a self-regulatory organization and an initial decision. *See In the Matter of Gallagher & Co.*, Adm. Pro. File Nos. 3–6907 and 3–6953 (May 29, 1991).

The Commission's reasons for the existing practice with respect to oral arguments has not been articulated in any orders or other public statements. The practice of granting oral argument only in cases arising from Commission hearings does not appear to be based on the severity of the sanction in those cases. In some cases the sanction imposed by a self-regulatory organization may be greater than the sanction imposed by the initial decision of a hearing officer. Rather, the Commission's practice appears to reflect the view that cases involving decisions by self-regulatory organizations do not warrant multiple opportunities for the parties to appear before an appellate tribunal. Persons subject to self-regulatory organization regulation generally have an opportunity prior to any appeal to the Commission for several levels of hearing. It is not necessary that there also be an opportunity for oral argument before the Commission. Similarly, on review of the Commission's decision, a respondent will not necessarily be afforded an opportunity to appear before the court of appeals. *See* Rule 34, Fed. R. App. Proc.

Comment is requested as to whether the Commission's practice with respect to granting requests for oral argument should be changed to limit the opportunity for oral argument on appeals from decisions of administrative law judges to the most significant cases. Comment is also requested as to whether the Commission should change its standards for granting oral argument in self-regulatory organization appeals to allow argument in the most significant cases. For example, the Commission might establish a standard which would make available time for oral argument in cases in which fines exceed certain dollar limits, in which a member or associated person with no prior disciplinary record is permanently barred from membership, or in which the decisional process as to an important matter of law would be significantly aided by oral argument.

The Secretary has been delegated authority to set the time and place of oral arguments. *See* 17 CFR 200.30–7(a)(1). In practice, that authority is exercised only in close consultation with the members of the Commission. In some cases reviewed by the Task Force there was considerable delay in scheduling oral argument. The proposed rule includes a guideline that motions for oral argument should be decided within 21 days of the filing of the last brief called for by the briefing schedule. In its report on the administrative process, the Task Force has recommended that if steps in the adjudicatory process, such as the scheduling and holding of oral argument, do not take place within fixed periods that the matter which is delayed be put on the Commission's calendar for a status conference or other action. If implemented, this process should assure that oral arguments are timely scheduled. Once an argument is scheduled, it should be postponed only for good cause shown. The proposed rule requires that the Commission issue a written order if the time of an argument is to be changed. To effectuate the purposes of such a requirement, the order should be approved by the Commission itself, not by the staff pursuant to delegated authority.

(b) *Time allowed.* Unless otherwise directed by the Commission, not more than one half-hour will be allowed for oral argument for each side. The Commission may, in its discretion, determine that several persons have a common interest, and that the interests represented will be considered a single side for purposes of allotting time for oral argument. Time will be divided equally among persons on a single side, provided, however, that by mutual agreement they may reallocate their time amongst themselves. A request for allowance of additional time must be made by motion filed reasonably in advance of the date fixed for argument.

Comment: The provision in the existing rule with respect to postponements was moved to paragraph (a). The proposed rule deletes the provision that the Commission has the authority to extend or shorten time because this authority is set forth in Proposed Rule 17.

The term "side" is used in the proposed rule to indicate that the time allowed by the rule is afforded to opposing interests rather than to individual parties. *See* Rule 34(b), Fed. R. App. P. If multiple appellants or appellees have a common interest, they may constitute only a single side.

(c) *Participation of commissioners.* A member of the Commission who was not present at the oral argument may participate in the decision of the proceeding, provided that he or she has reviewed the transcript of such argument prior to such participation. The decision shall state whether the required review was made.

(d) *Petition for rehearing.* A petition for rehearing by the Commission shall be filed within 10 days after entry of the order complained of, or within such time as the Commission may prescribe upon request of the party if made within the foregoing 10 day period. The petition for rehearing shall clearly state the specific matters upon which rehearing is sought.

(e) *Leave to adduce additional evidence.* A party may file a motion for leave to adduce additional evidence at any time prior to issuance of a decision by the Commission. Such motion shall show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously. Upon such motion, or upon its own motion, the Commission may hear additional evidence, may remand the proceeding to a self-regulatory organization or may remand or refer the proceeding to a hearing officer for the taking of additional evidence.

Comment: The proposed Rules of Practice would apply to self-regulatory organization proceedings as well as proceedings initiated before the Commission. Consistent with this broad scope, provisions relating to self-regulatory organization proceedings would

be deleted from Exchange Act rules and integrated into the Rules of Practice. *See* Comment, Proposed Rule 1(a). To this end, Proposed Rule 28(e) would modify Existing Rule 21(d) to provide for the remand of a case to a self-regulatory organization.

Exchange Act Rule 19d–3(e) currently provides that the Commission may "direct that the record under review be supplemented * * *." Under this standard the Commission has remanded cases to a self-regulatory organization to allow additional evidence. *See Jerome U. Burke*, Adm. Pro. File No. 3–7326 (Feb. 26, 1991) (Order Granting Motion to Remand); *David Arm*, Adm. Pro. File No. 3–6575 (Apr. 1, 1987) (Order Remanding Proceedings). The proposed standard for allowing additional evidence is based on the standards of Existing Rule 21(d) of the Rules of Practice and Exchange Act Rule 19d–3(e), which requires that additional evidence be "material." The proposed rule would eliminate the separate standard of "relevancy," which applies to a motion, *sua sponte*, by the Commission to adduce additional evidence under Rule 19d–3(e).

(ERs 20, 21(c))

Rule 29. Record Before the Commission; Basis for Determinations; Contents; Certification.

The Commission shall determine each matter on the basis of the record. Normally, the Commission should issue its opinion within nine months of the date of the briefing schedule order required in each case pursuant to Rule 27(a).

Comment: The requirement that the Commission determine each matter based on the record is taken from Existing Rule 21(c). Consistent with the recommendations of the Task Force to establish guidelines for the completion of all the major phases of the adjudicatory process, the rule also specifies a normative time limit as to when the Commission should issue its decision. The guideline is a goal for the average case, not a limit to be applied to any particular case. In some proceedings, more than nine months from the issuance of the briefing order will be necessary. The guideline imposes no affirmative obligations on the Commission and confers on respondents or other persons no right to a decision within a particular time.

(ER 20)

(a) *Contents of record.* The record in every proceeding for final decision before the Commission shall include:

(1) The order instituting proceedings, any notice of hearing and any amendments to them;

(2) Any applications, submissions, pleadings and moving papers, and any amendments, motions, objections, and exceptions to or regarding them;

(3) Any stipulations, proofs of service, transcripts of testimony, evidence, including any exhibits received into evidence, and any final environmental impact statement (including any supplement thereto) prepared in connection with the proceedings, as well as any public comments received thereon and any Commission responses to such comments;

(4) Any written communications accepted by the hearing officer pursuant to Rule 13;

(5) With respect to a request to disqualify a hearing officer or to allow the hearing officer's withdrawal under Rule 15(d), any affidavits or testimony taken and the decision made in connection with the request;

(6) Any proposed findings and conclusions;

(7) Any initial decisions and orders; and

(8) Any petitions for review.

Comment: Under the proposed rule, subparagraphs have been arranged chronologically in the order in which their components might be present in a typical administrative proceeding. The substantive provisions of existing subparagraphs (1)(vi) – (x) and (xiv) have been redrafted and combined into new subparagraphs. Subparagraph (xiii) has been split into new subparagraphs (7) and (8) and modified. Subparagraphs (iv) and (x) would be deleted from the proposed rule because, with the widespread availability of photocopying equipment, they are unnecessary.

Subparagraph (2) was deleted because it was not followed in practice. The proposed rules would still require the hearing officer to certify the contents of the record. See paragraph (b), below, and Proposed Rule 25(c) (ER 16(f)). Subparagraph (3) was deleted because, with the widespread availability of photocopying, documents received into evidence should be physically introduced as an exhibit, unless extraordinary circumstances make it inappropriate to do so.

(b) *Transmittal of items part of the record.* The hearing officer may, at any time, transmit to the Director of the Office of Filings, Information and Consumer Services motions, briefs, original exhibits or any other materials filed with or accepted into evidence by the hearing officer. The hearing officer shall maintain a written record of all items so transmitted. Promptly after the close of the hearing, the hearing officer shall transmit to the Director of the Office of Filings, Information and Consumer Services a final list of the filings, exhibits or other materials which are part of the record in the proceeding. The hearing officer shall transmit to the Director the originals of any filings, exhibits or other materials which were filed with or accepted into evidence by the hearing officer and have not been previously transmitted to the Director by the hearing officer.

Comment: The Task Force recommended that new procedures be developed for the filing and safekeeping of administrative proceedings case records. The Director of the Office of Filings, Information and Consumer Services ("OFICS") is the Commission's records custodian. Because exhibits and other filings are accepted into the record by the hearing officer during the course of the hearing, the hearing officer must forward copies of these materials to the Director in order for OFICS to maintain the docket, prepare an index, as required by Proposed Rule 25(c) (ER 16(f)) and certify the record as required by paragraph (c), below. The record handling requirements of the proposed rule clarify and streamline the existing requirements. The substance of the last sentence of the existing rule is incorporated in paragraph (c), below.

(c) *Transmittal of record to Commission.* Within 15 days after the last date set for filing briefs to the Commission, or at such other time as the Commission may direct after receipt of a petition or application for review, and prior to any oral argument before the Commission, the Director of the Office of Filings, Information and Consumer Services shall certify the entire record to the Commission.

Comment: Proposed paragraph (c) is based on the last sentence of Existing Rule 20(a)(4). Under the existing rule the record is to be certified to the Commission "promptly." Under the proposed rule, a specific time for certification of the record, 15 days, is specified. The existing rule also excludes from the documents to be physically transmitted documents which comprise part of the Commission's official records. Under the proposed rule all documents would be transmitted. Because of the availability of photocopying, certified copies of official documents should be available and be a part of the record.

(d) *Retention of documents not admitted in evidence; substitution of copies.* (1) Documents offered in evidence during the course of a hearing but excluded by the hearing officer, and documents marked for identification but not offered as exhibits, shall not be considered as a part of the record, but any such document shall be retained in the custody of the Commission.

(2) With the consent of the parties a copy may be substituted for a document that is retained pursuant to the provisions of this paragraph.

(e) *Correction of transcript.* Prior to the filing of the first posthearing brief, a party may move that the hearing officer correct the transcript, provided, however, that other than with leave of the hearing officer, proposed corrections should be submitted within 60 days of the day of the proceeding from which the transcript was made. Proposed corrections of the transcript may be submitted to the hearing officer by

stipulation of the parties, or by a motion by any party. Upon notice to all parties to the proceeding, the hearing officer may, by order, specify corrections of the transcript.

Comment: The existing rule requires corrections to be submitted on a "timely" basis, but gives no guidance as to what that means. The proposed rule limits motions for correction of the transcript to a 60-day period after the transcript was made. Requests for correction of the transcript should be by motion. Specification of corrections should be made by order. Since orders are served on all parties and are part of the record, the separate provision for these requirements in the existing rules is deleted from the proposed rule.

(f) *Scandalous or impertinent matter.* Any scandalous or impertinent matter contained in any brief or pleading or in connection with any oral presentation in a proceeding may be stricken on order of the Commission or the hearing officer.

(ER 26)

Rule 30. Review by the Commission of Determinations at a Delegated Level.

(a) *Scope of rule.* This rule is applicable only to review of determinations made pursuant to authority delegated in Subpart A, Organization and Program Management, 17 CFR 200.1 *et seq.* This rule does not apply to determinations made by a duty officer or by a hearing officer pursuant to these rules. Review of determinations made by a duty officer is governed by the provisions of 17 CFR 200.42(c). Review of determinations made by a hearing officer is governed by Rules 18 and 26.

Comment: Commission review of determinations made pursuant to delegated authority is required and governed by Exchange Act Section 4A. The Commission has delegated decision-making to hearing officers, division directors and other senior staff, and to a single commissioner, acting as duty officer. Because of the differing nature of matters delegated to hearing officers, senior staff or a duty officer, the Commission's rules provide different mechanisms for review of determinations depending upon who made the decision. Both the existing and the proposed Rules of Practice address only those determinations made pursuant to delegated authority by division directors and other senior staff. Review of decisions by a duty officer is governed by 17 CFR 200.42(c).

(b) *Petition for review; procedure.* A party or any person aggrieved by a determination made by delegated authority may seek review of the decision by filing a written notice of intention to petition for review within five days after actual notice to the party of the determination complained of or service of notice of the determination pursuant to Rule 32, whichever is earlier. The notice shall identify the petitioner, the determination complained of, and shall be accompanied by a notice of appearance pursuant to Rule 2(d). Within five days after such notice has been communicated, the person seeking review shall file a petition for review containing a clear and concise statement of the issues to be reviewed and the reasons review is appropriate. The petition shall include exceptions to any findings of fact or conclusions of law made, together with supporting reasons for such exceptions based on appropriate citations to such documentary record as may exist. These reasons may be stated in summary form.

Comment: Decisions pursuant to delegated authority by senior staff often involve matters which are highly time-sensitive. Generally the record for such a determination consists of documents only and is not extensive. The review process under both the existing and proposed rules is therefore simple and requires a prompt decision by a party as to whether review will be sought.

Notwithstanding the need for prompt action, under the existing rule there is an unrealistically short period to initiate the process for petitioning for review of a decision made pursuant to delegated authority. A party has either one day after actual notice of an adverse determination or five days after mailing of the notice (whether or not the notice arrives), whichever is shorter. Under the proposed rule, a party or other aggrieved person may file a notice of intent to petition for review within five days after actual notice of the decision, or within five days after service of a written decision pursuant to Rule 32, whichever is earlier.

Notice of a decision pursuant to delegated authority may be conveyed by any means, including a telephone call. While a decision should also be served pursuant to Proposed Rule 32, receipt of service is not necessary in order to trigger the five-day period to initiate review. The proposed rule also adds a cross-reference to the requirement of Rule 2 to file a notice of appearance at the time the notice of intention to petition for review is filed. The proposed rule further adds a description of what information should be included in the petition for review. The required information is essentially the same as that required for a petition for review of a hearing officer's initial decision. *See* Proposed Rule 26(c).

(c) *Review by the commission on its own initiative.* The Commission may, on its own initiative, order review of any determination at a delegated level at any time provided, however, that where there are one or more parties to the matter, review by the Commission on its own initiative shall not be ordered more than ten days after the determination. The vote of one member of the Commission, conveyed to the Secretary, shall be sufficient to bring a matter before the Commission for review.

Comment: Existing Rule 26(d) was adopted in 1963 to implement the authority granted to the Commission by Congress in 1962 to delegate decision making to, among others, subordinate employees. *See* Securities Act Release No. 4588 (Mar. 8, 1963) (adopting release). *See* generally Public Law No. 87–592, 76 Stat. 394 (codified, as amended, in section 4A of the Exchange Act). The text of the rule has remained unchanged since its adoption.

The existing rule provides that the Commission may order review of any determination at a delegated level "at any time." When a decision pursuant to delegated authority involves a party, however, some time limit is necessary, so that decisions achieve finality. The existing rule therefore further provides that "any review by the Commission on its own initiative will be ordered within five days where there are parties to or intervenors in the matter." The Commission's ability, as well as its need to review delegated decisions by subordinate employees other than hearing officers is more limited in practice than the language of the rule may suggest. First, because of the large number of decisions made pursuant to delegated authority, the Commission is not informed in most instances when such a decision is made. To give Commissioners notice of each such decision would be inefficient and impractical. Absent notice of a decision, the Commission is not able to initiate review *sua sponte*. Second, there are few matters of consequence decided by delegated authority as to which there would not be a party or intervenors.

In practice, the authority to review decisions on the Commission's own initiative is very rarely used. When the staff has a controversial issue to decide which it could address pursuant to delegated authority, it will ordinarily consult with the Commissioners individually, or will submit the matter to the Commission for formal action. Under the proposed rule the Commission would have 10 days from the determination, instead of five, to review a matter on its own initiative. A 10-day period provides a more realistic period of time for an unusual matter to be reported to and acted on by the Commission. Comment is requested as to whether the period for Commission review should be retained at five days or extended to 15 days. Comment is also requested as to whether the time limit on Commission review of delegated action should apply to all matters, whether or not there are parties.

The proposed rule incorporates the provisions of section 4A that the vote of a single commissioner shall be sufficient to bring a matter before the Commission for review.

(d) *Standards for grant of review.* The Commission shall review any decision made by delegated authority which it would be required to review pursuant to Rule 26(f) if the decision were the initial decision of a hearing officer.

Comment: The proposed rule cross-references the standards for granting review which are set forth at Proposed Rule 26(f). The standards are established by section 4A(b) of the Exchange Act.

(e) *Effect of delegated determination; stays, etc.* Any determination pursuant to delegated authority shall have immediate effect and be deemed the action of the Commission. Upon communication to the Secretary of a notice of intention to petition for review as provided in paragraph (b) hereof, or of the vote of a Commissioner that a matter be reviewed, as provided in paragraph (c) hereof, the determination pursuant to delegated authority (except a determination to grant a stay of action by the Commission or a self-regulatory organization) shall thereafter be stayed until the Commission orders otherwise. An order directing review on the Commission's own initiative or granting a petition for review of a determination made by delegated authority will set forth the time within which any party or other person may file a statement in support of or in opposition to the determination whether a stay should be granted or continued and whether oral argument will be heard. As against any person who shall have acted in reliance upon any determination at a delegated level, any stay or any modification or reversal by the Commission of such determination shall be effective only from the time such person receives actual notice of such stay, modification or reversal.

Comment: Under the existing rule a request for review of a decision taken by delegated authority stays the decision for which review is sought. The proposed rule makes clear that the vote of a Commissioner that a matter be reviewed has the same effect.

A decision to grant a stay may be made by the General Counsel pursuant to delegated authority. *See, e.g.*, 17 CFR 200.30–14(5). Requests for stays of a decision by a self-regulatory organization arise with some regularity from persons seeking review of the decision. Under the existing rule, a stay can be overturned by the self-regulatory organization if it simply files a petition for review of the decision to enter the stay. This anomaly has been eliminated in the proposed rule.

(ER 22)

Rule 31. Filing Formalities.

(a) *Length and form of briefs.* All briefs filed with the Commission or with a hearing officer containing more than 10 pages shall include a table of contents and a table of cases (alphabetically arranged), statutes, and other authorities cited, with references to the pages of the brief wherein they are cited. Opening and opposition briefs shall not exceed 50 pages and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, table of cases, and any addendum, except with leave of the Commission or a hearing officer.

Comment: Under both the existing and proposed rules there is a single standard for the length of briefs in proceedings before the Commission and hearing officers. Under Rule 28(g) of the Federal Rules of Appellate Procedure, the longest brief filed without special permission of the court is 50 pages. The Task Force concluded that other than with leave of the Commission matters briefed to the Commission did not warrant more than 50 pages. It may not be appropriate to apply this same limit to briefs submitted to a hearing officer. As does the Commission, a hearing officer has the authority to extend the limits for briefs in particular cases. The page limit prescribed by rule should be sufficient, however, to discourage such requests. Given that briefs before a hearing officer may encompass proposed findings of fact and conclusions of law, *see* Proposed Rule 25(a), comment is requested as to whether the page limit for briefs prior to an initial decision should be 60, 75 or 100 pages.

(b) *Paper, spacing, type.* All papers filed under these rules shall be typewritten or printed, such that, in the opinion of the Commission, copies suitable for computer scanning or microfilming can be produced therefrom. All papers shall be plainly legible and shall be on one grade of unglazed white paper measuring no larger than 8½ x 11 inches. To the extent that the reduction of larger documents would render them illegible, such documents may be filed on paper larger than 8½ x 11 inches in size. All papers should have left hand margins at least 1½ inches wide, shall be bound on the left-hand side, and shall be double-spaced, with single spaced, indented quotations, and, if printed, they shall be in either 10 or 12-point type.

(c) *Signatures.* All papers must be dated and signed as provided in Rule 10.

Comment: Signature requirements are set forth in Proposed Rule 10.

(d) *Title page.* All papers filed must include at the head thereof, or on a title page, the name of the Commission, the title of the proceeding, the names of the parties, the subject of the particular paper or pleading, and the file number assigned to the proceeding.

Comment: Existing Rule 22(i) was deleted because of the availability of overnight mail, airmail, and courier services.

(ERs 22(h), (k), 23(d))

Rule 32. Orders, Rulings and Decisions.

(ER 23(d))

(a) *Service.* In every proceeding, copies of rulings by the Commission or a hearing officer on all written motions, and all other decisions or orders of the Commission or a hearing officer (including those pursuant to delegated authority) shall be served pursuant to one of the methods set forth in Rule 5(b), by the Secretary or other duly designated officer of the Commission on all parties and other participants.

Comment: Under Proposed Rule 5 the obligation of a party or other participant to serve copies of its filings arises only in proceedings where an order instituting proceedings has been entered or an application for review of a determination by a self-regulatory organization has been filed. Proceedings such as applications for registration being conducted by delegated authority at a staff level do not require the formalities of a service rule. By contrast, the Commission is obligated to serve a copy of any ruling or decision it makes on all parties and non-party participants, regardless of the type or phase of the proceeding.

(ER 22(h))

(b) *Signature on orders.* All orders of the Commission shall be signed by the Secretary or such other person duly authorized by the Commission.

Comment: This paragraph is based on Existing Rule 22(h).

(ER 22(k))

(c) *Availability of orders for inspection.* An order shall be available for inspection by the public from and after the date of the entry, unless it is a nonpublic order. A nonpublic order shall be available for inspection from and after the date of entry by any person entitled to inspect it.

Comment: This paragraph of Proposed Rule 32 is based on Existing Rule 22(k). The portions of the existing rule that would be deleted are included in Proposed Rule 6.

(ER 25)

Rule 33. Applications for Confidential Treatment of Certain Matters; Transcripts of Private Hearings.

(a) *Applications for confidential treatment.* Any person may file an application with the Commission, or with the hearing officer if one is assigned, requesting confidential treatment of material pursuant to the provisions of Clause 30 of Schedule A of the Securities Act of 1933 and Rule 406 thereunder, section 24(b)(2) of the Securities Exchange Act of 1934 and

Rule 24b–2 thereunder, section 22(b) of the Public Utility Holding Company Act of 1935 and Rule 104 thereunder, section 45(a) of the Investment Company Act of 1940 and Rule 45a–1 thereunder, or section 210(a) of the Investment Advisers Act of 1940, or any other applicable statute or rule. The application shall be accompanied by a sealed copy of the materials as to which confidential treatment is sought.

Comment: The last two sentences of the existing rule would be moved to paragraph (b) of this rule. Under Proposed Rule 5(a) motions requesting confidential treatment may be filed *ex parte*. Ordinarily, if there is more than one party to a proceeding, the Commission or hearing officer should require some notice of the filing to other parties. An application for confidential treatment can describe generally the material to be protected, without revealing confidential details. Any brief in support of the application and the material as to which confidential treatment would be sought would accompany, but not be a part of the application. Comment is requested as to whether the filing of an application for confidential treatment should be permitted *ex parte*.

(b) *Procedure for supplying additional information in confidential treatment cases.* In any case in which an application for confidential treatment is made, the Commission, in its discretion, or the hearing officer in his or her discretion, may require the person desiring the confidential treatment to furnish in writing additional information with respect to the grounds for its objection to public disclosure. Failure to supply the information so requested within 14 days from the date of receipt by the registrant of a notice of the information required shall be deemed a waiver of the objection to public disclosure of that portion of the information to which the additional information relates, unless the Commission or the hearing officer shall otherwise order for good cause shown at or before the expiration of such 14-day period.

Comment: The provisions of this paragraph are based on the last two sentences of Existing Rule 25(a). The proposed rule modifies the existing rules to permit the Commission or the hearing officer to request additional information as to any request for confidential treatment, not only those scheduled for hearing.

(c) *Confidentiality of materials pending decision.* (1) Upon request of the person making an application for confidential treatment, motions and other filings relating to the application shall be placed under seal upon filing. All motions, filings, orders, transcripts and other papers concerning confidential treatment, shall, unless otherwise ordered by the Commission, be for the confidential use only of the hearing officer, the Commission, the parties and counsel. Materials containing information as to which confidential treatment is sought shall be made available to the public only in accordance with orders of the Commission, and/or the applicable provisions of Rule 406 under the Securities Act of 1933, Rule 24b–2 under the Securities Exchange Act of 1934, Rule 104 under the Public Utility Holding Company Act of 1935, section 45 of the Investment Company Act of 1940 and Rule 45a–1 under that Act, or section 210(a) of the Investment Advisers Act of 1940, the Freedom of Information Act or any other applicable statutes.

Comment: The provisions of this paragraph are based on Existing Rule 25(b). The existing provisions were modified to make clear that all parties or other participants in a proceeding concerning an application for confidential treatment have an obligation to keep the subject matter of the application confidential pending its final determination. The proposed rule has been revised to reflect that availability of materials to the public may be subject to the requirements of the Freedom of Information Act as well as other applicable statutes.

(2) If an initial decision is to be issued in connection with a proceeding where confidential treatment is granted, each page of such decision shall contain a statement that such decision is nonpublic.

(3) Any order of the Commission sustaining or denying an application for confidential treatment shall be made available to the public. Any finding or opinion issued by a hearing officer or by the Commission in any proceeding relating to confidential treatment shall be made public at such time as the material filed confidentially is made available to the public.

(d) *Purchase of transcripts of private hearings.* Transcripts of private hearings will be supplied to the parties at the prescribed rates.

(ERs 27, 28)

Rule 34. Adjudications Not Required To Be Determined on the Record After Notice and Opportunity for Hearing.

(a) *Scope of the rule.* This rule applies to every case of adjudication (as defined in 5 U.S.C. 551) pursuant to any statute which the Commission administers, where adjudication is not required to be determined on the record after notice and opportunity for hearing and which the Commission has not chosen to determine on the record after notice and opportunity for hearing.

(ER 27)

(b) *Procedure.* In every case of adjudication under this rule, the Commission shall:

(1) Give prompt notice of any adverse action or final disposition to any person who has requested the Commission to make (or not to make) any such adjudication; and

(2) Furnish to any such person a written statement of reasons therefor. Additional procedures may be specified in rules relating to specific types of such adjudications; where any such rule provides for the publication of a Commission order, notice of the action or disposition shall be deemed to be given by such publication.

(c) *Contents of the record.* In any case of adjudication described in paragraph (a) above, if the Commission provides notice and opportunity for the submission of written comments by parties to the adjudication or, as the case may be, by other interested persons, written comments received on or before the closing date for comments, unless accorded confidential treatment pursuant to statute or rule of the Commission, become a part of the public record of the adjudication. The Commission, in its discretion, may accept and include in the public record written comments filed with the Commission after the closing date.

Comment: Existing Rule 27 and Existing Rule 28 both concern adjudications not required to be determined on the record after notice and opportunity for a hearing. These two rules have been combined into Proposed Rule 34. The proposed rule specifies certain procedures for proceedings which are not required by the Administrative Procedure Act to be "on the record" adjudications, and for which the Commission does not, by order, direct other procedures to be used. For example, while most enforcement matters, even those not required to be "on the record," are determined after an "on the record" type hearing before an administrative law judge pursuant to an order instituting proceedings, regulatory matters not required to be "on the record" are determined less formally, and would be subject to the requirements of this rule.

(ER 29)

Rule 35. Applications by Barred Individuals for Consent To Associate with Registered Brokers, Dealers, Municipal Securities Dealers, Government Securities Brokers, Government Securities Dealers, Investment Advisers, Investment Companies or Transfer Agents.

Comment: The preliminary note in Existing Rule 35 follows the text of Proposed Rule 35.

(a) *Scope of rule.* Applications for Commission consent to associate, or to

change the terms and conditions of association, with a registered broker, dealer, municipal securities dealer, government securities broker, government securities dealer, investment adviser, investment company or transfer agent may be made pursuant to this rule where a Commission order bars the individual from association with a registered entity and:

(1) Such barred individual seeks to become associated with an entity that is not a member of a self-regulatory organization; or

(2) The order contains a proviso that application may be made to the Commission after a specified period of time.

(b) *Form of application.* Each application shall be supported by an affidavit, manually signed by the applicant, which addresses the factors set forth in paragraph (d) of this rule. One original and four copies of the application shall be filed pursuant to Rule 5. Each application shall include as exhibits:

(1) A copy of the Commission order imposing the bar;

(2) An undertaking by the applicant to notify immediately the Commission in writing if any information submitted in support of the application, while pending, becomes materially false or misleading;

(3) A copy of a completed Form U-4, where the applicant's proposed association is with a broker-dealer or municipal securities dealer;

(4) A copy of a completed Form MSD-4, where the applicant's proposed association is with a bank municipal securities dealer;

(5) The information required by Form ADV with respect to the applicant, where the applicant's proposed association is with an investment adviser; and

(6) A written statement by the proposed employer that describes:

(i) The terms and conditions of employment and supervision to be exercised over such applicant and, where applicable, by such applicant;

(ii) The qualifications, experience, and disciplinary records of the proposed supervisor(s) of the applicant;

(iii) The compliance and disciplinary history, during the two years preceding the filing of the application, of the office in which the applicant will be employed; and

(iv) The names of any other associated persons in the same office who have previously been barred by the Commission, and whether they are to be supervised by the applicant.

(c) *Required showing.* The applicant shall make a showing satisfactory to the Commission that the proposed association would be consistent with the public interest.

(d) *Factors to be addressed.* The affidavit required by paragraph (b) shall address each of the following:

(1) The time period which has elapsed since the imposition of the bar;

(2) Any restitution or similar action taken by the applicant to recompense any person injured by the misconduct that resulted in the bar;

(3) The applicant's compliance with the order imposing the bar;

(4) The applicant's employment during the period subsequent to imposition of the bar;

(5) The capacity or position in which the applicant proposes to be associated;

(6) The manner and extent of supervision to be exercised over such applicant and, where applicable, by such applicant;

(7) Any relevant courses, seminars, examinations or other actions completed by the applicant subsequent to imposition of the bar to prepare for his or her return to the securities business; and

(8) Any other information material to the application.

(e) *Notification to applicant and written statement.* In the event an adverse recommendation is proposed by the staff with respect to an application made pursuant to this rule, the applicant shall be so advised and provided with a written statement of the reasons for such recommendation. The applicant shall then have 30 days to submit a written statement in response.

(f) *Concurrent applications.* The Commission will not consider any application submitted pursuant to this rule if any other application for consent to associate concerning the same applicant is pending before any self-regulatory organization.

Note: This rule governs applications by certain persons, barred by Commission order from association with brokers, dealers, municipal securities dealers, government securities brokers, government securities dealers, investment advisers, investment companies or transfer agents, for consent to become so associated. Applications made pursuant to this rule must show that the proposed association would be consistent with the public interest. In addition to the information specifically required by the rule, applications should be supplemented, where appropriate, by written statements of individuals (other than the applicant) who are competent to attest to the applicant's character, employment performance, and other relevant information. Intentional misstatements or omissions of fact may constitute criminal violations of 18 U.S.C. 1001 *et seq.* and other provisions of law.

The nature of the supervision that an applicant will receive or exercise as an associated person with a registered entity is an important matter bearing upon the public interest. In meeting the burden of showing that the proposed association is consistent with the public interest, the application and supporting documentation must demonstrate that the proposed supervision, procedures, or terms and conditions of employment, are reasonably designed to prevent a recurrence of the conduct that led to imposition of the bar. As an associated person, the applicant will be limited to association in a specified capacity with a particular registered entity and may also be subject to specific terms and conditions.

Normally, the applicant's burden of demonstrating that the proposed association is consistent with the public interest will be difficult to meet where the applicant is to be supervised by, or is to supervise, another barred individual. In addition, where an applicant wishes to become the sole proprietor of a registered entity and, thus, is seeking Commission consent notwithstanding an absence of supervision, the applicant's burden will be difficult to meet.

In addition to the factors set forth in paragraph (d) of this rule, the Commission will consider the nature of the findings that resulted in the bar when making its determination as to whether the proposed association is consistent with the public interest. In this regard, attention is directed to Rule 5(e) of the Commission's Rules on Informal and Other Procedures. 17 CFR 202.5(e). Among other things, Rule 5(e) sets forth the Commission's policy "not to permit a * * * respondent (in an administrative proceeding) to consent to * * * (an) order that imposes a sanction while denying the allegations in the * * * order for proceedings." Consistent with the rationale underlying that policy, and in order to avoid the appearance that an application made pursuant to this rule was granted on the basis of such denial, the Commission will not consider any application that attempts to reargue or collaterally attack the findings that resulted in the Commission's bar order.

(ER 23(e))

Rule 36. Receipt of Petitions for Review Pursuant to 28 U.S.C. 2112(a)(1)

Commission receipt pursuant to 28 U.S.C. 2112(a)(1) of copies of petitions for judicial review of Commission orders where petitions for review are filed in two or more courts of appeals with respect to the same order. The Commission officer and office designated to receive, pursuant to 28 U.S.C. 2112(a)(1), copies of petitions for review of Commission orders, from the persons instituting the review proceedings in a court of appeals, are the Secretary and the Office of the Secretary at the Commission's Headquarters in Washington, DC. 10 copies of the petition shall be submitted. Each copy shall state on its

face that it is being submitted to the Commission pursuant to 28 U.S.C. 2112 by the person or persons who filed the petition in the court of appeals.

(ER 4)

Rule 37. Issuance, Amendment and Repeal of Rules of General Application.

(a) *By petition.* Any person desiring the issuance, amendment or repeal of a rule of general application may file a petition therefor with the Secretary. Such petition shall include a statement setting forth the text or the substance of any proposed rule or amendment desired or specifying the rule the repeal of which is desired, and stating the nature of his or her interest and his or her reasons for seeking the issuance, amendment or repeal of the rule. The Secretary shall acknowledge, in writing, receipt of the petition and refer it to the appropriate division or office for consideration and recommendation. Such recommendations shall be transmitted with the petition to the Commission for such action as the Commission deems appropriate. The Secretary shall notify the petitioner of the action taken by the Commission.

(b) *Notice of proposed issuance, amendment or repeal of rules.* Except where the Commission finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, whenever the Commission proposes to issue, amend, or repeal any rule or regulation of general application other than an interpretive rule, general statement of policy, or a rule of agency organization, procedure, or practice, or any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts, there shall first be published in the **Federal Register** a notice of the proposed action. Such notice shall include:

(1) A statement of the time, place, and nature of the rulemaking proceeding, with particular reference to the manner in which interested persons shall be afforded the opportunity to participate in such proceeding;

(2) Reference to the authority under which the rule is proposed; and

(3) The terms or substance of the proposed rule or a description of the subjects and issues involved.

Rules Relating to Temporary Sanctions

(ER None)

Rule 38. Expedited Consideration of Proceedings.

In every proceeding in which an application for a temporary sanction is pending, or a temporary sanction or order suspending temporarily the effectiveness of an exemption from registration pursuant to Regulations A, B, E or F under the Securities Act, 17 CFR 230.261, 230.336, 230.610 and 230.656, is in effect, or an order suspending temporarily the privilege of appearing before the Commission under Rule 2(e)(3) is in effect, every hearing shall be held and every decision shall be rendered at the earliest possible time, consistent with the Commission's or the hearing officer's other responsibilities.

Comment: Proposed Rule 38 requires the expeditious conduct of all proceedings in which a temporary sanction or temporary suspension of an exemption from registration pursuant to Securities Act Regulations A, B, E or F, or a temporary suspension from practice before the Commission under Existing Rule 2(e)(3) ("temporary suspensions") is sought or pending, including proceedings to determine whether to make a temporary sanction or suspension permanent. The term "temporary sanction" is defined in Proposed Rule 1(c) to mean a temporary cease-and-desist order or a temporary suspension of the registration of a broker, dealer, municipal securities dealer, government securities broker, government securities dealer or transfer agent. Temporary suspensions involve summary proceedings which differ significantly from proceedings to suspend the registration of a registered entity or to issue a temporary cease-and-desist order. Accordingly, they were not included in the definition of temporary sanction.

The proposed rule requires that "every hearing shall be held and every decision shall be rendered at the earliest possible time, consistent with the Commission's or the hearing officer's other responsibilities." This standard is derived from two sources. First, by statute, when a temporary cease-and-desist order is entered ex parte and the respondent timely seeks Commission review of the decision, the Commission must hold a hearing and render its decision "at the earliest possible time." See, e.g., Exchange Act section 21C(d)(1), 15 U.S.C. 78u–3(d)(1). See also Proposed Rule 43(c) (implementing Exchange Act section 21C(d)(1)). Second, Existing Rule 2(e)(3)(iii) of the Rules of Practice contains an essentially identical standard. That rule requires that proceedings in connection with Commission review of temporary suspensions of persons appearing or practicing before the Commission "be expedited in every way, consistent with the Commission's other responsibilities."

Applications for temporary sanctions generally arise as a result of exigent circumstances. Expedited consideration of the decision whether to enter a temporary sanction is necessary both to protect the public from harm by promptly restraining improper ongoing or threatened activities and to protect the rights of respondents, who may be adversely affected merely by an application for a temporary sanction even if the sanction is ultimately denied. *See Barry v. Barchi*, 443 U.S. 55, 73 (1979) (Brennan, J., concurring in part) (even a temporary sanction can do "irreparabl[e] damage"). After a temporary sanction is entered, fairness to the public—especially those persons harmed by violative conduct—and to the respondent, further dictates expediting additional proceedings to determine quickly whether a permanent sanction and other appropriate relief are warranted.

(ER None)

Rule 39. Applications for a Temporary Suspension of a Registered Entity or for a Temporary Cease-and-Desist Order.

(a) *How made.* A request for entry of a temporary suspension of a registered entity or a temporary cease-and-desist order shall be made by application filed by the Division of Enforcement. The application shall consist of a proposed order to show cause whether a temporary sanction should be imposed and, if a proceeding for a permanent sanction has not already been commenced, a proposed order instituting proceedings to determine whether a permanent sanction should be imposed. The application shall be filed with the Secretary, not a hearing officer. If the Secretary is unavailable, the application may be filed with the duty officer.

(b) *Accompanying documents.* The application shall be accompanied by a declaration of facts signed by a person with knowledge of the facts contained therein, a memorandum of points and authorities, and a proposed order imposing a temporary sanction.

(c) *Waiver of filing of accompanying documents.* Upon motion by the Division of Enforcement, the Commission, in its discretion, may waive the filing of any or all of the documents that are required to accompany the application pursuant to paragraph (b), provided that, if the Commission waives the filing of a written declaration of facts, the Division of Enforcement shall make an oral declaration of the facts supporting the issuance of a temporary sanction.

(d) *Record of proceedings.* After an application has been filed, proceedings in which a party appears in person before the Commission, particularly *ex parte* presentations made by the Division of Enforcement, should be recorded, transcribed or otherwise memorialized to the extent that circumstances permit.

Comment: Proposed Rule 39 requires a request for a temporary cease-and-desist order or a temporary suspension be made by application, not motion, to emphasize that the time limitation governing the filing of an opposition to a motion does not apply. The rule also specifies various documents to be filed together with the application.

By statute, the Commission may suspend temporarily the registration of a broker, dealer, municipal securities dealer, government securities dealer or transfer agent, only pending the completion of an ongoing proceeding to determine whether to revoke the registration. See Exchange Act sections 15(b)(5), 15 U.S.C. 78o(b)(5); 15B(c)(3), 15 U.S.C. 78o–4(c)(3); 15C(c)(1)(B), 15 U.S.C. 78o–5(c)(1)(B); and 17A(c)(4); 15 U.S.C. 78q–1(c)(4). Similarly, a temporary cease-and-desist order may be issued only pending a proceeding to determine whether to issue a permanent sanction. *See, e.g.*, Exchange Act section 21C(c)(1), 15 U.S.C. 78u–3(c)(1). In either type of proceeding, if an order instituting proceedings has not already been issued, a proposed order is required so that one can be issued simultaneously with the order imposing or scheduling a hearing with respect to a temporary sanction.

The rule requires that the application for a temporary cease-and-desist order or a temporary suspension of a registered entity be made in writing and supported by a declaration of facts and a memorandum of points and authorities. These requirements are patterned after those in Rule 65(b) of the Federal Rules of Civil Procedure for temporary restraining orders. The rule requires a declaration of facts and a memorandum of points and authorities in order to provide the Commission with a clearly articulated record on which to base the temporary suspension or temporary cease-and-desist order. A declaration may be made by a staff member or any other person.

For the sake of efficiency, the proposed rule requires advance preparation of a proposed order to show cause why sanctions should not be issued and a proposed order imposing sanctions. The order to show cause would be issued if a hearing is held prior to imposing sanctions. Should the Commission decide after a hearing, or in the case of a temporary cease-and-desist order, even without a hearing, that a situation warrants a temporary sanction, the order imposing sanctions can be signed promptly, with such modifications as may be appropriate.

The proposed rule also specifies that required documents are to be filed with the Secretary. The Secretary would promptly forward such documents to each Commissioner. Unlike other filings which could be made with a hearing officer (if one had been assigned pursuant to Proposed Rule 5(e)), a request for a temporary suspension or a temporary cease-and-desist order must be filed with the Secretary even when it arises in an ongoing proceeding.

Proposed Rule 39 incorporates provisions granting the Commission flexibility to assure that immediate action can be taken to impose a temporary sanction if warranted. In order to accommodate emergencies arising outside regular business hours, the proposed rule provides that if the Secretary is unavailable, an application for a temporary suspension order or a temporary cease-and-desist order can be made directly to the duty officer. In addition, upon oral or written motion by the Division of Enforcement, Proposed Rule 39 provides that the Commission can waive the requirement to file a written declaration of facts, a memorandum of points and authorities, and a proposed order imposing a temporary sanction. The waiver may be complete (in which case no accompanying documents must be filed) or partial.

The Task Force believes that a written declaration of facts should be filed in virtually every case. The sole exception to this practice might be where there are such extraordinary, exigent circumstances that the Director or an Associate Director of the Division of Enforcement informs the Commission that any delay in the entry of an order would be contrary to the public interest. The proposed rule, however, commits the decision whether to waive the filing of any or all accompanying documents solely to the Commission's discretion.

The Task Force requests comment as to whether the standard for granting a waiver should require a specific finding of need, for example, allowing a waiver "when, in the Commission's opinion, the preparation of these papers would be impracticable or would cause undue delay." Comment is also requested as to whether, when a waiver is granted, the rule should require that the temporary order include the reason for the waiver.

It was suggested to the Task Force that the preparation of a declaration or other accompanying documents would unduly complicate requests for issuance of a temporary order. The Task Force requests comment as to whether the requirement to file a declaration and/or other accompanying documents should be modified so that such documents are required only if the Commission determines that they are necessary in a particular case.

Paragraph (d) requires that proceedings be recorded to the extent circumstances permit. This requirement is triggered only after proceedings are formally instituted and an application for temporary relief has been filed. If an application for a temporary sanction is heard by the Commission in a proceeding at which the Division of Enforcement makes a presentation during regular business hours, the proceeding ordinarily would be recorded and a transcript would be prepared by the Secretary. If an application is heard by the duty officer, particularly on an evening or weekend, it may not be feasible to record the proceedings. When the respondent is present at a proceeding, the lack of a recording is not as great a source of concern. However, if the respondent is not present, particular effort should be made to have the proceedings recorded, transcribed or otherwise memorialized to the extent circumstances permit. Minutes taken by the Secretary or another person would satisfy this requirement.

The lack of a recording or transcription, even where there has been an *ex parte* presentation, will not affect the validity of the proceedings, although the respondent would ordinarily be entitled to minutes or a recording if available. A nonpublic Commission meeting at which the Commission deliberates with respect to a filed application ordinarily is recorded. Such meetings, however, are not "proceedings before the Commission in which a party appears" in person and are therefore outside the scope of this rule. The contents of such meetings are privileged and confidential and ordinarily would not be available to the parties.

(ER None)

Rule 40. Notice and Opportunity To Be Heard on an Application for a Temporary Sanction.

(a) *Notice.* Notice to a respondent of an application for a temporary sanction shall be given by serving the application pursuant to Rule 5(b) or by any means calculated to give actual notice, including telephone or facsimile transmission.

(b) *Hearing.* A hearing on an application for a temporary sanction shall be held before the Commission or a hearing officer. One or more of the parties may participate by telephone or other remote means. In the event the hearing is held before the Commission or a panel of Commissioners, the Chairman shall preside or designate a Commissioner to preside. The person presiding shall rule on the admissibility of evidence and other procedural matters, including but not limited to those enumerated in paragraph (c) of this rule, provided, however, that each Commissioner present shall be afforded a reasonable opportunity to ask questions of the witnesses or counsel. If the Chairman is absent or unavailable at the time of hearing and no other Commissioner has been designated to preside, the duty officer on the day the hearing begins shall preside or designate a presiding Commissioner.

(c) *Evidence.* The form of evidence to be offered, the amount of evidence that may be offered, the time allowed for argument, and the time allowed, if any, for the submission of briefs, proposed findings and conclusions, and exceptions to the decisions or recommendations, if any, of a hearing officer, shall be determined solely in the Commission's discretion.

Comment: Hearings held pursuant to the Commission's authority to impose a temporary sanction are not required to be formal, "on the record" adjudications within the meaning of the Administrative Procedure Act, 5 U.S.C. 554, 556–57. *Chemical Waste Management, Inc.* v. *EPA*, 873 F.2d 1477, 1481–82 (D.C. Cir. 1989) (no presumption that a statutory "hearing" requirement compels the agency to undertake a formal "hearing on the record"). A full, trial-type evidentiary hearing will not ordinarily be held because of the exigent nature of the proceedings, the temporary nature of any sanction, and the opportunity for immediate post-sanction review, either by a federal district court or by the full Commission if a hearing officer issues an initial decision. *See Boddie* v. *Connecticut*, 401 U.S. 371, 378

(1971) ("The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.").

In the past, requests by the staff for a temporary suspension of a broker or dealer pursuant to Exchange Act section 15(b)(5), 15 U.S.C. 78o(b)(5), were heard by an administrative law judge. Although a hearing on an application for a temporary sanction could still be delegated to an administrative law judge under the proposed rule, the Task Force recommends that applications for temporary sanctions be heard by the Commission or a single Commissioner acting as the duty officer.

Proposed Rule 40(a) provides that notice of a hearing on a temporary sanction shall be given by any means calculated to give actual notice. Written notice or service pursuant to Proposed Rule 5(b) is not required.

Proposed Rule 40(b) provides that a hearing may be conducted with one or more parties participating by telephone or other remote means, such as a video link. Because of the emergency nature of cases in which temporary sanctions are sought, respondents, their counsel and the participating Commission staff may not be in Washington, DC, where the Commission ordinarily meets. The proposed rule anticipates that cases arising out of investigations in the Commission's Regional Offices most distant from Washington will result in hearings where a person may not be able to be physically present.

Paragraph (b) also establishes a procedure for conducting hearings before one or more Commissioners. If the Chairman is present, he or she shall preside. In the absence of the Chairman, a Commissioner designated by the Chairman shall preside. Authorizing the Chairman to designate someone to preside provides the greatest flexibility to permit the Commissioner with the most appropriate experience to preside if that person is not the Chairman or the Chairman cannot be present.

Proposed Rule 40(c) makes clear that the hearing does not have to be a formal, trial-type proceeding. The amount of process due will vary based on the facts and circumstances of each case. *See Boddie,* 401 U.S. at 378. The Commission may limit the form of evidence (for example, whether live, by affidavit, deposition or video recording), the duration of the hearing (for example, by restricting the time for argument) or posthearing procedures. Relevant factors in making these determinations may include, among others, the risk of harm to investors or the public, the interest of the respondent in not being subject erroneously to sanctions, the nature of the alleged or threatened violations, the potential effect of a sanction on the respondent and the likely duration of the sanction before opportunity for further hearings.

The interests of investors and the public must be balanced against those of the respondent. On the one hand, all other things being equal, the greater the risk of harm to the public, the less reason to delay a decision on a temporary sanction in order to permit a more formal or protracted hearing. On the other hand, every case will have some element of apparent risk to the public. The extent of this risk must be measured against the reliability of evidence that a violation occurred or may occur and the effect of a temporary sanction on the respondent. The less certain or self-evident the evidence of wrongdoing, the greater the respondent's interest in additional process. Also, the greater the effect of a sanction, the more process may be due. In some cases, even a temporary sanction may effectively determine a respondent's ultimate fate from a practical or business standpoint. In other cases, a temporary sanction may only limit certain activities of an individual while allowing other activities to continue unimpeded.

The nature of the violations—an intricate net capital issue, or a "garden variety" fraud concerning the imminent violation of a limitation on the closing of a "best efforts, all or none" offering—will also influence the extent of evidence needed and the form the evidence might take. *See, e.g., Mathews* v. *Eldridge,* 424 U.S. 319, 343–44 (1976); *Fuentes* v. *Shevin,* 407 U.S. 67, 87 n.18 (1972).

Further, the hearing should not be viewed in isolation. In all cases, after a Commission hearing, respondents have immediate access to a U.S. district court to seek review of the Commission's sanction order followed by a prompt full blown trial on the merits of a permanent sanction. These factors tend to support the fairness of an informal hearing process when swift action appears necessary. Other factors also may be relevant. Just as a court must set the amount of time allowed for a trial in light of its total caseload or deadlines in other cases, so must the Commission balance the need to conclude expeditiously a case involving temporary sanctions against its other responsibilities.

In summary, the scope of the hearing will depend on the particular circumstances of each case. *See Eldridge,* 424 U.S. at 348 ("All that is necessary is that the procedures be tailored, in light of the decision to be made, 'to the capacities and circumstances of those who are to be heard,' * * * to insure that they are given a meaningful opportunity to present their case." (citation omitted)).

(ER None)

Rule 41. Preparation and Review of an Initial Decision Whether to Impose a Temporary Sanction.

(a) *Preparation of an initial decision.* Where a hearing officer is to prepare an initial decision with respect to whether to issue a temporary sanction, the Secretary shall serve the record in the proceedings upon the hearing officer the day after either the conclusion of the hearing or the filing of the last brief called for by the hearing officer, whichever is later. The hearing officer shall file his or her initial decision with the Secretary at the earliest possible time, normally within three days after service of the record.

Comment: While the Task Force recommends that applications for temporary sanctions be heard by the Commission or the duty officer, the Commission could also assign a matter to a hearing officer. For example, the Commission could make such an assignment when an application for a temporary sanction has arisen during the course of a proceeding already assigned to a hearing officer. When a matter is assigned to a hearing officer, however, a temporary sanction imposed by the hearing officer would not take effect until the decision either is affirmed by the Commission or becomes a final decision of the Commission by the passage of time. *See* Proposed Rule 24(c).

The proposed rule provides for expedited service of the record and expedited preparation of an initial decision.

(b) *Review of an initial decision.* Any party may seek review of an initial decision which imposes or denies, in whole or in part, a temporary sanction, by filing a petition for review, together with a supporting brief, within five days after receipt of the initial decision. Unless otherwise ordered, an opposition brief shall be filed within five days after receipt of the original brief, and a reply brief may be filed within three days of receipt of the opposition brief.

Comment: The rule provides for expedited review of an initial decision whether to impose a temporary sanction. The petition for review is accompanied by briefs. Where there is a cross appeal, both parties will file an opening brief, and the Commission will issue an order establishing a schedule for opposition and reply briefs.

(ER None)

Rule 42. Issuance of a Temporary Cease-and-Desist Order After Notice and Opportunity for Hearing.

(a) *Requirement for notice and opportunity for hearing.* A temporary cease-and-desist order shall be entered only after notice and opportunity for a hearing unless the requirements of Rule 43 are met.

(b) *Basis for issuance.* A temporary cease-and-desist order shall be issued only if the Commission determines, based on specific facts shown by written or oral declaration pursuant to Rule 39, that a violation, threatened violation or continuation of a violation specified in an order instituting proceedings for a permanent cease-and-desist order is likely to result in significant dissipation or conversion of assets, significant harm to investors or substantial harm to the public interest (including losses to the Securities Investor Protection Corporation) prior to completion of proceedings on the permanent cease-and-desist order.

Comment: Proposed Rule 42 incorporates the statutory criteria for issuance of a temporary cease-and-desist order when the order is preceded by notice and an opportunity to be heard. Proposed Rule 42(b)

requires a written or oral declaration setting forth facts that establish that there is a threat of harm that the Commission determines meets the statutory standard for imposition of a temporary cease-and-desist order. *See, e.g.*, Exchange Act section 21C(c)(1).

(c) *Content, scope and form of order.* Every temporary cease-and-desist order granted shall:

(1) Describe the basis for its issuance, including a description of the violation, dissipation or conversion of assets or harm likely to result without the issuance of an order;

(2) Describe in reasonable detail, and not by reference to the order instituting proceedings or any other document, the act or acts the respondent is to take or refrain from taking;

(3) Be indorsed with the date and hour of issuance; and

(4) Be issued forthwith and entered of record.

Comment: Proposed Rule 42(c) requires that the temporary cease-and-desist order describe the basis for the order and the acts that the respondent is to take or refrain from taking to comply with the order. These requirements, which are modeled on Rule 65(d) of the Federal Rules of Civil Procedure, are meant to ensure that a respondent will have adequate notice of the constraints placed upon him or her by the order and to provide the predicate notice for enforcement of the order if the respondent fails to comply with it.

Proposed Rule 42(c) also requires that a temporary cease-and-desist order be indorsed with the date and hour of issuance. A similar provision is included in Rule 65(b) of the Federal Rules of Civil Procedure. *See generally* Charles A. Wright & Arthur R. Miller, 11 *Federal Practice and Procedure* sections 2952, 2953 (1973 & supp. 1992). Although temporary cease-and-desist orders, unlike temporary restraining orders, are not time limited, we propose requiring this indorsement in order to minimize potential disputes over when an order was entered and when the applicable period for seeking review has lapsed.

(d) *Effective upon service.* A temporary cease-and-desist order is effective upon service upon the respondent. The order is binding upon the respondents named in the order, their officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Comment: According to statute, a temporary cease-and-desist order becomes effective upon service upon the respondent. *See, e.g.*, Exchange Act section 21C(c)(1). Respondents may not do indirectly through agents or other persons that which they are prohibited from doing directly. The second sentence of Proposed Rule 43(d), drawn from Rule 65(d) of the Federal Rules of Civil Procedure, makes clear that an order is binding not only on the respondents who are named in the order and properly served but also upon their officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) *Service: How made.* Service of a temporary cease-and-desist order shall be made pursuant to Rule 5(b), or by any other reasonable means which gives actual notice of the terms of the order, including notice delivered by telephone or facsimile transmission to the respondent or the respondent's attorney. The person who serves the order shall promptly file a declaration of service stating the time and means of service; provided, however, failure to file such a declaration shall have no effect on the validity of the service.

Comment: Paragraph (e) provides for the filing of a declaration of service to assure that the method and time of service is made part of the record.

(f) *Commission review.* At any time after the respondent has been served with a temporary cease-and-desist order, the respondent may apply to the Commission to have the order set aside, limited or suspended.

Comment: Paragraph (f) repeats the statutory provisions permitting respondents to seek a modification of a temporary order at any time. Such modifications should be sought only if changed circumstances warrant a change in the order. *See, e.g.*, Exchange Act section 21C(d)(1).

(ER None)

Rule 43. Ex Parte Issuance of a Temporary Cease-and-Desist Order.

In addition to the requirements for issuance of a temporary cease-and-desist order set forth in Rule 42, the following requirements shall apply if a temporary cease-and-desist order is to be entered without prior notice and opportunity for hearing:

(a) *Basis for issuance without prior notice and opportunity for hearing.* A temporary cease-and-desist order may be issued without notice and opportunity for hearing only if the Commission determines, based on specific facts shown by written or oral declaration pursuant to Rule 39, that notice and hearing prior to entry of an order would be impracticable or contrary to the public interest.

Comment: Ordinarily, entry of a temporary cease-and-desist order must be preceded by notice and opportunity for hearing. The Commission may enter a temporary cease-and-desist order without prior notice and opportunity for hearing only if the Commission, based on specific facts shown by written or oral declaration, makes the statutorily required determination that notice and opportunity for hearing would be impracticable or contrary to the public interest. *See, e.g.*, Exchange Act section 21C(c)(1).

(b) *Content of the order.* An *ex parte* temporary cease-and-desist order shall state specifically why notice and hearing would have been impracticable or contrary to the public interest.

Comment: Proposed Rule 43(b) requires that an *ex parte* temporary cease-and-desist order state the reasons why it was granted without notice and hearing. The Commission should state the reasons for *ex parte* action in order to comply fully with the statutory scheme authorizing the issuance of cease-and-desist orders. *See generally* Securities Act section 8A; Exchange Act section 21C; Investment Advisers Act section 203(k); and Investment Company Act section 9(f); *see also SEC* v. *Sloan*, 436 U.S. 103, 117–118 (1978) (noting that when reviewing an administrative ruling, a court will consider among other things "the thoroughness evident in its consideration" and "the validity of its reasoning"); *Yong* v. *Regional Manpower Adm'r*, 509 F.2d 243, 246 (9th Cir. 1975) (stating that an administrative record should reveal a foundation for decision).

(c) *Availability of hearing before the commission.* If a respondent has been served with a temporary cease-and-desist order entered without a prior Commission hearing, the respondent may, within 10 days after the date on which the order was served, move to have the order set aside, limited or suspended and request a hearing on the motion. The Commission shall hold a hearing and render a decision on the motion at the earliest possible time. Normally such a hearing should be held within 48 hours of a request for hearing, unless the respondent requests a longer period.

Comment: Proposed Rule 43(c) restates the statutory standards with respect to opportunity for a hearing after service of a temporary cease-and-desist order entered *ex parte*. *See, e.g.*, Exchange Act section 21C(d)(1). The requirement that a hearing be held and a decision rendered "at the earliest possible time" is not elaborated upon in the legislative history. The proposed rule establishes a normative guideline that a hearing be held within 48 hours of a respondent's request for a hearing, unless the respondent requests a longer time period. The standards of the proposed rule are similar to the provisions for a speedy hearing under Rule 65(b) of the Federal Rules of Civil Procedure. Rule 65(b) specifies that a party who is subject to a TRO obtained without notice may, on two days notice to the adverse party, or such shorter time as permitted by the court, appear and move for dissolution of the TRO. The court will hear and determine the motion "as expeditiously as the ends of justice require."

The requirement in Proposed Rule 43 to hold a hearing or render a decision "at the

earliest possible time" must be interpreted consistently with the requirements of constitutional due process. The Due Process Clause of the Fifth Amendment requires that if a person is subject to an *ex parte* deprivation of property, he or she shall be provided a "prompt" opportunity for hearing thereafter. *FDIC* v. *Mallen*, 486 U.S. 230, 241–42 (1988); *Barry* v. *Barchi*, 443 U.S. 55, 65–66 (1979) (hearing must be provided "at a meaningful time") (citation omitted); *Cf. Cleveland Board of Educ.* v. *Loudermill*, 470 U.S. 532, 547 (1985). While the hearing must be held and a decision rendered promptly, judicial decisions should be made in a "considered and deliberate manner," and without excessive or undue haste. *Mallen*, 486 U.S. at 244. The Commission must allow an appropriate amount of time for each party to prepare its case prior to hearing and must allow time for each Commissioner to review all evidence or other submissions and, as necessary, to engage in joint deliberation. *See Id.* at 243–244. What would be "possible" in terms of the earliest time for hearing or resolution of a case would depend, therefore, on the specific facts of each case and the Commission's other responsibilities.

(ER 19)

Rule 44. Whether a Temporary Sanction Should be Made Permanent: Provisions Relating to an Initial Decision.

Unless otherwise ordered, if a temporary sanction is in effect, the following time limits shall apply to preparation and review of an initial decision as to whether the temporary sanction should be made permanent:

(a) *Proposed findings and briefs.* Proposed findings and conclusions and briefs in support thereof shall be filed five days after the close of the hearing.

Comment: Existing Rule 19 requires expedited review of an initial decision of a hearing officer as to whether a temporary suspension of a broker-dealer's registration should be made permanent. Proposed Rule 44 would apply to all proceedings in which a temporary sanction is in effect pending preparation and review of an initial decision as to whether a permanent sanction should be ordered.

(b) *Service of record; filing of decision.* In proceedings in which an initial decision by a hearing officer is to be prepared, the record in the proceedings shall be served by the Secretary upon the hearing officer two days after the date for the filing of the last brief called for by the hearing officer. The initial decision shall be filed with the Secretary at the earliest possible time, normally within 15 days after service of the record.

(c) *Petition for review.* Any person who seeks Commission review of an initial decision shall file a petition for review pursuant to Rule 26, provided, however, that the petition must be filed within 10 days after service of the initial decision. A statement in opposition to a petition for review shall be filed within five days after service of the petition for review.

(d) *Briefs.* If the Commission determines to grant or order review, it shall issue a briefing schedule order pursuant to Rule 27(a). Unless other periods are specified, opening briefs shall be filed within 15 days of the order granting or ordering review, and opposition briefs shall be filed within 10 days after opening briefs are filed. Reply briefs shall be filed within five days after opposition briefs are filed.

Comment: Existing Rule 19(e) has no counterpart in the proposed rule because it is inconsistent with a Commissioner's right, pursuant to Exchange Act section 4A, to call for review of a decision by subordinate officials if he or she does not agree with that decision.

(ER None)

Rule 45. Duration of a Temporary Suspension of a Registered Entity or a Temporary Cease-and-Desist Order.

(a) *Duration.* A temporary suspension of a registered entity or a temporary cease-and-desist order not otherwise limited in its duration shall expire:

(1) 15 days after service upon the Division of Enforcement of an initial decision declining to make permanent a temporary sanction then in effect;

(2) 180 days, or such other time as specified by the Commission, after the Commission grants a petition for review or orders review on its own initiative with respect to an initial decision making permanent, in whole or in part, a temporary sanction then in effect; or

(3) 180 days, or such other time as specified by the Commission, after the close of the hearing with respect to a determination whether to make a temporary sanction permanent in cases when no initial decision is to be prepared.

(b) *Extension.* The Commission may, at any time, by order, without notice and opportunity to be heard, extend the duration of an order temporarily suspending a registered entity or a temporary cease-and-desist order beyond the limits set forth in the order or by operation of paragraphs (a)(2) and (a)(3) of this rule. Any extension order made without the consent of all respondents to which it applies shall state the duration of the extension and the reason why the extension is necessary under the criteria specified in Rule 42(b). A respondent who objects to an extension order shall file a motion for reconsideration with the Commission, setting forth the reasons why the temporary sanction should not remain in effect pending a final Commission decision.

Comment: *Reasons for the Rule*: Proposed Rule 45 establishes a mechanism for the Commission to evaluate the need to maintain a temporary sanction while the Commission reviews a case after issuance of an initial decision by a hearing officer, or if the Commission itself has heard the case on whether to make a temporary sanction permanent, then after the Commission hearing. The proposed rule is intended to set flexible guidelines for the duration of a temporary sanction, pending Commission deliberations with respect to whether the sanction should become permanent.

By statute, a temporary cease-and-desist order and a temporary suspension of a registered entity do not have to have a fixed duration. *See, e.g.*, Exchange Act Section 21C(c)(1) ("[U]nless set aside, limited, or suspended by the Commission or a court of competent jurisdiction, [a temporary order] shall remain effective and enforceable pending the completion of the proceedings."). A temporary sanction may not, however, continue in effect indefinitely. *See FDIC v. Mallen*, 486 U.S. 230, 242 (1988) (there is a point at which an unjustified delay in completing a post-deprivation proceeding "'would become a constitutional violation'") (*quoting Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 547 (1985)); *Gonzalez v. Freeman*, 334 F.2d 570, 579 n.19 (D.C. Cir. 1964) ("How long a 'temporary' suspension could be sustained would depend upon the need and other circumstances."). *Cf. Aquavella v. Richardson*, 437 F.2d 397, 404–05 (2d. Cir. 1971) (failure of agency to take final action for 18 months after preliminary suspension is reviewable as final agency action).

Exchange Act section 23(d) specifically requires the Commission to establish regulations providing for the "expeditious conduct of hearings *and rendering of decisions*" in cease-and-desist order cases. (emphasis added). Although Proposed Rule 45's specific time limits are not statutorily required, they would implement the statutory requirement that the Commission adopt regulations providing for the expeditious rendering of decisions. The Task Force believes that its other proposed revisions to the Rules of Practice, if adopted, would lead to expeditious rendering of decisions generally. Once a temporary order has been issued, however, there is a risk that subsequent agency consideration would not be treated as urgent. The Task Force concluded that, given the mandate in section 23(d), a rule establishing a strong, but not absolute, presumption limiting the duration of a temporary sanction while the Commission considers what action to take after a hearing on whether to enter a permanent order would be an appropriate means of addressing the potential for unjustified delay in reaching a decision on a permanent sanction. *See generally Securities Law Enforcement Remedies Act of 1990*, H.R. Rep. No. 616, 101st Cong., 2d Sess. 25–27 (1990); *The Securities Law Enforcement Act of 1990*, S. Rep. No. 337, 101st Cong., 2d Sess. 20–21 (1990).

Some limitation on the duration of a temporary order is particularly appropriate if a hearing officer determines after a full hearing on the merits that no permanent sanction is warranted. Temporary sanctions pending a final determination may not be imposed constitutionally without some form of check—in this case the check would be the initial hearing before the Commission—to assure that a sanction is not imposed without sufficient justification. *See Mallen*, 486 U.S. at 244–45; *Barry v. Barchi*, 443 U.S. 55, 66 (1979). But once a hearing officer, who had the opportunity to review not just some but all of the evidence concluded that the temporary sanction was not justified on a permanent basis, confidence in the correctness of the check would necessarily be affected to some degree; such a decision clearly should affect the balancing of factors that determines whether an administratively imposed sanction unconstitutionally remains in effect. *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) (two of the factors governing constitutional analysis of the timing and nature of a hearing and decision are length and/or finality of deprivation and likelihood of governmental error).

The Task Force considered the suggestion that any proposal to limit the duration of a temporary order could create a potential loophole allowing a malefactor to attempt further wrongdoing if the Commission inadvertently allows a deadline to pass. On balance, we do not believe that this potential danger is sufficiently significant to outweigh the benefits of a limitation on temporary orders.

Specifics of the Rule: Proposed Rule 45 establishes presumptive time limits on the amount of time a temporary order should remain in effect pending a decision by the Commission whether to make the order permanent. If there were a hearing before a hearing officer, and the hearing officer issued an initial decision that no permanent sanction was appropriate, the Commission would have 15 days to determine whether to extend or modify the temporary sanction pending review of the initial decision; without such supervision or modification the temporary sanction will expire pursuant to Proposed Rule 45(a)(1). If the hearing officer were to order that the temporary sanction be made permanent, in whole or in part, the respondent would have 21 days, pursuant to Proposed Rule 24(b), to file a petition for review. Pursuant to section 4A(b) of the Exchange Act, a statutory right of review exists for cease-and-desist proceedings. Under Proposed Rule 45, the Commission would have 180 days from the filing of the petition for review to consider the initial decision. This period would allow approximately 90 days for briefing and 90 days for oral argument, if any, and issuance of an opinion.

Proposed Rule 42(f) provides that a respondent may move to have a temporary order set aside, limited or suspended by the Commission at any time. Accordingly, notwithstanding the presumption that an order will continue, a respondent may seek to have the order modified pending Commission review.

Under some circumstances, the Commission, instead of a hearing officer, may conduct the hearing on a permanent cease-and-desist order. *See* Proposed Rule 15. In such a case, Proposed Rule 45(a)(3) provides for a 180-day period after the end of a hearing during which a temporary order would remain in effect pending a Commission decision whether to enter a permanent order. Under the proposed rule, the Commission need not wait the full 180 days before issuing its decision. Similarly, if the record were not lengthy, or the hearing officer had ruled against a respondent on the need for a permanent sanction or for other reasons, the Commission could expedite its review and enter its decision in less than 180 days. This flexible mechanism reflects the fact that due process with respect to the timely completion of administrative proceedings while a temporary order is pending requires the balancing of several factors and that the weight of these factors may bear reassessment.

The presumptive period specified in the proposed rule is not absolute. The Commission may either extend or reduce the period. The window for Commission decision would open only after completion of the hearing before the Commission or the issuance of an initial decision by a hearing officer. Accordingly, the duration of a temporary sanction cannot be predicted in advance. It varies depending upon the length of the hearing and the time taken to issue an initial decision, if one were prepared, as well as any other time limitation placed on the order by the Commission, if any, pending Commission review. Therefore, a respondent cannot claim a settled expectation as to when a temporary sanction will terminate.

The Task Force considered whether the extension of a temporary sanction would be an appealable order. As noted, the specific procedures contained in Proposed Rule 45 are not required by statute. The Commission should therefore have a large degree of discretion to attach such conditions to those procedures as it sees fit, including the right to extend the 180-day presumptive period for review. *See Mallen*, 486 U.S. at 243 (where statute allows a "permissive standard for continuing a suspension," the agency may, when in doubt, presumably "give greater weight to the public interest and leave the suspension in place"). In effect, extension of whatever window is established is no different from the denial of a request by a respondent to stay or modify the temporary order at any other stage of the proceeding. The Task Force has concluded that extension of an existing temporary sanction would not meet the literal language triggering the special appeal provisions of Exchange Act section 21C(d)(2), nor would it constitute a final order subject to appeal under section 25(a) of that Act.

Questions were also raised within the Task Force as to whether the purposes of Proposed Rule 45 are met since the rule sets forth no limit on the time allowed for the hearing on whether permanent sanctions were necessary. The Task Force considered whether a rule would be necessary to limit the amount of time for a hearing before a hearing officer or the Commission when a temporary sanction is pending. The Task Force concluded that a fixed deadline for the conduct of a hearing is not appropriate, even when a temporary order is pending, because the number of respondents, the number of witnesses and other factors vary so greatly from case to case. Moreover, a respondent's own preparation and trial strategy have a significant impact on the pace of a hearing. Also, based on the historical data compiled by the Task Force, we believe that the proposed revisions to the Rules of Practice are sufficient to give assurance that a hearing before a hearing officer will be conducted with appropriate speed.

If a sanction is to remain in effect for more than 180 days after an initial decision the proposed rule requires the Commission affirmatively to provide for a longer period. The Commission may provide for a temporary sanction to remain in effect for more than 180 days by so ordering when it takes up the case after a hearing officer's decision or a hearing, or it may extend an order anytime during the 180-day window.

For example, where there is a particularly large record and a hearing officer has issued an initial decision that a temporary sanction should be made permanent, the Commission may determine that 180 days is not enough time to complete its review and that the temporary sanction must be kept in place for an additional period of time. An extension beyond 180 days, or any other period specified at the time an order for review is issued, may also become necessary where conditions still warrant a temporary sanction and the Commission cannot act within the 180-day period because of the lack of a quorum, appointment of new Commissioners who need time to familiarize themselves with the record, intervening litigation, or because the requirement of other business prevents Commission action prior to the original deadline.

Proposed Rule 45 would grant no substantive rights; it would simply create a mechanism to guide the timing and circumstances of Commission review. The Task Force believes an order extending the duration of a temporary sanction should not be immediately appealable to the courts because it would be essentially a non-final, procedural order, which would not determine any rights anew. Moreover, in the event a respondent does object to the extension, the proposed rule would provide for an administrative remedy—the filing of a motion to stay or to dissolve the temporary sanction.

The Task Force also concluded that although substantial, the 180-day period for continuance of a temporary order after an initial decision adverse to a respondent would be appropriate because it would encompass the time for briefing and argument, as well as for preparation of a decision. The fairness of the temporary suspension itself should not be an issue demanding an especially expedited review. The respondent would already have been able to challenge the temporary sanction in federal district court, and subsequent to a court challenge, would have been free to apply to the Commission to modify or vacate the order at any time if changed conditions so warranted.

Comment is requested as to whether Proposed Rule 45 should be triggered only if

an initial decision finds that no permanent sanction was necessary. Alternatively, should such a ruling by the hearing officer trigger a period less than 180 days for Commission review?

(17 CFR 202.8)

Rule 46. Summary Suspensions Pursuant to Securities Exchange Act Section 12(k)(1)(A).

(a) Any person adversely affected by a suspension pursuant to Section 12(k)(1)(A) of the Securities Exchange Act who desires to show that such suspension is not necessary in the public interest or for the protection of investors may file a sworn petition with the Secretary, requesting that the suspension be terminated. The petition shall set forth the reasons why the petitioner believes that the suspension of trading should not continue and state with particularity the facts upon which the petitioner relies.

(b) The Commission, in its discretion, may schedule a hearing on the matter, request additional written submissions, or decide the matter on the facts presented in the petition and any other relevant facts known to the Commission.

(c) Failure by the petitioner to cooperate with the making of an examination by the Commission, or obstruction or refusal by the petitioner to permit the making of an examination by the Commission, shall be grounds to deny the petition.

Comment: The rules governing petitions with respect to Securities Exchange Act section 12(k)(1)(A) suspensions are currently a part of the Commission's informal and other procedures. See 17 CFR 202.8. Orders suspending trading in particular securities pursuant to section 12(k)(1)(A) are directed towards a security; they do not name a person or entity as a respondent. Accordingly, the Commission established a special mechanism to allow persons adversely affected by a suspension to petition for relief.

The usual purpose of a suspension is to alert the investing public that there is insufficient public information about the issuer upon which an informed investment judgment can be made or that the market for the securities may be reacting to manipulative forces or deceptive practices. Consequently the primary issues normally to be considered by the Commission in determining whether or not a 10-day suspension should be instituted are whether or not there is sufficient public information upon which to base an informed investment decision or whether the market for the security appears to reflect manipulative or deceptive activities. *See generally SEC v. Sloan*, 436 U.S. 103 (1978)(section 12(k) authorizes a single 10-day period as the maximum time for a suspension for any single set of circumstances).

Rules Relating to Disgorgement and Penalty Payments

(ER None)

Rule 47. Interest on Sums Disgorged.

Prejudgment interest shall be paid on any sum required to be paid pursuant to an order of disgorgement. The disgorgement order shall specify the proposed sum to be disgorged and the date of the violation or violations which form the basis for the disgorgement calculation. Interest shall be computed from the first day of the month following the date of the violation through the last day of the month preceding the month in which payment is made. The rate of interest shall be the underpayment rate of interest established under section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. 6621(a)(2), and shall be compounded quarterly. The amount of prejudgment interest owed as of the date of the order shall be stated in the order. The order shall further state that interest shall accrue on all amounts owed until they are paid.

Comment: Congress has authorized the Commission to order disgorgement, "including reasonable interest," in any proceeding in which a cease-and-desist order is sought and in any proceeding in which the Commission could impose a civil monetary penalty. *See, e.g.*, Exchange Act Section 21B(e), (monetary penalty proceedings); Exchange Act Section 21C(e), (cease-and-desist proceedings). To implement this authority, the Commission is authorized "to adopt rules, regulations, and orders concerning payments to investors, rates of interest, periods of accrual, and such other matters as it deems appropriate." Exchange Act Section 21B(e); Exchange Act Section 21C(e).

The Task Force based the proposed rule on the Commission's current practice in calculating prejudgment interest in settled cases. Under that practice, partial payments are ignored and interest is compounded quarterly. It was suggested to the Task Force that by rule the amount of disgorgement and prejudgment interest owed should be offset against the amount of taxes a respondent had paid on ill-gotten gains. The rationale for this suggestion was that the respondent did not have the use of funds used to pay taxes. In fact, respondents often have the use of such funds for many months, until taxes, if any, are paid. Comment is requested on whether the proposed method of computation should require payment from the date of a violation to the date of payment, without giving credit for partial months, whether amounts owed should be compounded daily and whether there is any other widely available index which would be more appropriate to establish the rate of interest.

(ER None)

Rule 48. Prompt Payment of Disgorgement and Penalties.

(a) *Timing of Payments.* Unless provided otherwise, amounts due pursuant to an order by the Commission requiring the payment of disgorgement and/or penalties shall be paid no later than five days after service of the order. Amounts due pursuant to an order by a hearing officer shall be paid on the first day after the order becomes final pursuant to Rule 24.

Comment: An order requiring disgorgement does not fulfill its remedial, equitable purposes so long as a wrongdoer retains the use of funds improperly obtained. Prompt payment of disgorgement is essential to make the remedy effective and to discourage or prevent the dissipation of assets. Based upon the Commission's experience in civil actions, the collection of disgorgement and penalties becomes increasingly more difficult the longer it is delayed. Moreover, in the absence of prompt, uniform deadlines limited staff resources are diverted to negotiating and monitoring individual deadlines in each case. Accordingly, the proposed rule would establish presumptive deadlines for the prompt payment of disgorgement or penalties.

Administrative proceedings do not have a mechanism for execution of a money judgment. If disgorgement or penalties are not paid as required, the Commission must either seek an order from a district court to enforce its administrative order or refer the matter to the Department of Justice for collection. The Task Force believes that the proposed deadlines will facilitate the staff's making timely and successful requests for judicial enforcement of any unpaid disgorgement or penalty order.

In addition to efforts to collect any unpaid amounts due pursuant to an order requiring disgorgement and/or penalties, the Commission could provide for collateral consequences in its orders if amounts owed are not paid and payment has not been waived. For example, for associated persons of a registered entity, failure to pay required disgorgement or penalties could be made grounds for a suspension or for the denial of a request to reassociate after expiration of a bar. Termination of a suspension could also be made conditional upon payment of sums owed. Comment is requested as to whether these, or any other collateral consequences, should flow, either by order or rule, from a failure to make required disgorgement or penalty payments.

The proposed rule provides that amounts due pursuant to an order by a hearing officer would be due on the first day after the order becomes final. Proposed Rule 24(b) provides at least a 21-day period before a hearing officer's order would become final if no review were sought, so that a respondent effectively would have 21 days notice prior to payment being required. If a respondent sought review of the order, the Commission would have to deny the petition for review

or affirm the initial decision prior to its becoming effective.

In the case of an order by the Commission, the proposed rule provides a presumption that payments would be required five days after service of the order. Pursuant to Proposed Rule 6(a), weekends and federal legal holidays do not count toward the five-day period. While a respondent would not have advance knowledge of when the Commission would issue a final order on review of an initial decision, the five-day requirement would provide sufficient time for a respondent in the ordinary case to either make payment or file a motion requesting a modification or stay of the order in the event payment could not be made.

The time periods specified in Proposed Rule 48(a) would be only presumptive. A shorter or longer period could be imposed by an order. In some circumstances a period of only one day for payment might be justified.

Comment is requested as to whether the presumptive five-day period should be shorter or should be extended to 10 days, 21 days or longer.

(b) *Stays.* A stay of any order requiring the payment of disgorgement and/or penalties may be sought at any time pursuant to Rule 16.

(ER None)

Rule 49. Submission of a Plan of Disgorgement.

The Commission or the hearing officer may order any party to submit a plan for the distribution of disgorgement at any time after an order requiring disgorgement has been entered. Normally, if a plan will be required, it should be submitted no later than 45 days after funds or other assets are placed in an escrow account or otherwise set aside by the respondent pursuant to the order of disgorgement.

Comment: The proposed rules for disgorgement are based on the Commission's experience in civil actions involving disgorgement. In most civil actions, the court orders the Commission to submit a proposed plan of disgorgement, which the court later approves, modifies or disapproves after notice and a hearing. At the hearing, other parties to the action may present their objections to the court. Other persons also may seek to intervene or object. Ordinarily, the Commission seeks to avoid disputes over the plan and attempts, when preparing the plan, to consult with other parties and any other persons who have notified the staff or the court of an interest in the disposition of disgorgement.

Normally, a similar procedure should be followed in administrative proceedings. Because the development of a disgorgement plan may be a significant undertaking, it will not be required in most proceedings until money to be disgorged has been transferred from the control of the respondent. The Commission and the hearing officer would retain the authority to require the submission of a plan at an earlier time if deemed appropriate. Normally, the Division of Enforcement would be asked to draft a proposed plan, however, any other party could be asked to submit a plan.

(ER None)

Rule 50. Contents of Plan of Disgorgement; Provisions for Payment.

(a) *Required plan elements.* Unless otherwise ordered, a plan for the administration of a disgorgement fund shall include the following elements:

(1) Procedures for the receipt of additional funds or other assets, including specification of an account where funds will be held and the instruments in which the funds may be invested;

(2) Specification of categories of persons potentially eligible to receive proceeds from the fund;

(3) A means of providing notice to such persons of the existence of the fund and their potential eligibility to receive proceeds of the fund;

(4) Procedures for making and approving claims, procedures for handling disputed claims and a cut-off date for the making of claims;

(5) A date for the termination of the fund, including provision for the disposition of any assets not otherwise distributed;

(6) A provision for the administration of the fund, including selection, compensation and, as necessary, indemnification of a fund administrator to oversee the fund, process claims, prepare accountings, file tax returns and, subject to the approval of the Commission, make distributions from the fund to investors; and

(7) Such other provisions as the Commission or the hearing officer, if one has been appointed, may require.

Comment: This paragraph includes the basic elements that have been found necessary in court supervised disgorgement plans. Comment is requested as to whether additional elements should be included in a plan developed for administrative proceedings or whether some proposed elements are unnecessary.

(b) *Payment to registry of the Court or Court-appointed receiver.* A plan of disgorgement may provide for payment of assets to be disgorged into a court registry or to a court-appointed receiver in any case pending in federal or state court based upon a complaint against the respondent alleging violations arising from the same or substantially similar facts as those alleged in the Commission's order instituting proceedings.

Comment: The Commission's practice in court proceedings has been to consent to the payment of disgorgement funds obtained in a Commission action into a fund for the benefit of persons suing a violator in a private civil action. *See SEC* v. *Levin*, No. 3-92CV-399D (N.D. Tex. Mar. 2, 1992) (settlement directed payment of disgorgement into court registry); *SEC* v. *Boesky*, No. 86-CIV-2299, slip op. (S.D.N.Y. Nov. 14, 1986) (settlement directed payment of disgorgement to escrow agent). Where appropriate, this practice may be utilized in administrative proceedings.

(c) *Payment to the United States Treasury under certain circumstances.* When, in the opinion of the Commission, the cost of administering a plan of disgorgement relative to the value of the available disgorgement assets and the number of potential claimants would not justify distribution of the disgorgement assets to injured investors, the plan may provide that the assets shall be paid directly to the general fund of the United States Treasury.

Comment: This paragraph provides that when the cost of administering a plan of disgorgement would consume all or most of the value of the disgorgement pool, the assets may instead be turned over to the general fund of the United States Treasury. Although return of ill-gotten gains to injured investors is often an appropriate disposition of disgorged assets, the purpose of disgorgement is to deprive a wrongdoer of his or her ill-gotten gains—not to make injured investors whole. *See, e.g., SEC* v. *First City Financial Corp.*, 890 F.2d 1215, 1230, 1232 n.24 (D.C. Cir. 1989) (the primary purpose of disgorgement is not to compensate investors); *SEC* v. *Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988); *SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307 (2d Cir.), *cert. denied*, 404 U.S. 1005 (1971); *Securities Law Enforcement Remedies Act of 1990*, H.R. Rep. No. 616, 101st Cong., 2d Sess. at 22 (1990). The Commission has the authority to provide for the return of ill-gotten gains to investors, however, there is no requirement to do so. *See, e.g.*, Exchange Act sections 21B(e) and 21C(e) ("The Commission is authorized to adopt rules, regulations, and orders * * * concerning payments to investors * * *"). Returning funds to the United States Treasury when the expense of locating or making distributions to injured investors is prohibitive would be consistent with treatment by the courts in similar situations. *SEC* v. *Marcus Schloss & Co.*, 714 F. Supp. 100 (S.D.N.Y. 1989); *SEC* v. *Courtois* (1985 Transfer Binder) Fed. Sec. L. Rep. (CCH) ¶ 92,000 (S.D.N.Y. 1985); *SEC* v. *Lund*, 570 F. Supp. 1397, 1404-1405 (C.D. Cal. 1983).

(ER None)

Rule 51. Notice of Proposed Plan of Disgorgement and Opportunity for Comment by Non-Parties.

Notice of the proposed plan of disgorgement shall be published in the SEC Daily News Digest, the SEC Docket, and in such other publications as the Commission or the hearing officer may require. The notice shall specify how

copies of the proposed plan may be obtained and shall state that persons desiring to comment on the proposed plan may submit their views, in writing, to the Secretary.

Comment: Publication of notice that a proposed plan has been submitted is required in order to provide potential claimants or other persons with an opportunity to make known their views prior to adoption of the plan. In addition to submitting written comments, persons would be permitted to seek leave to take part in the proceeding pursuant to the provisions of Proposed Rule 13.

(ER None)

Rule 52. Order Approving, Modifying or Disapproving a Plan of Disgorgement.

At any time more than 30 days after publication of notice of a proposed plan of disgorgement, the hearing officer, if one is assigned, or the Commission shall, by order, approve, modify or disapprove the proposed plan. Normally this order should be entered within 30 days after the end of the period allowed for comments on the proposed plan.

Comment: After submission of comments, if any, the plan promptly should be approved, modified or disapproved. The Commission or the hearing officer may hold a hearing on the proposed plan or may rule on the plan based only on written submissions.

(ER None)

Rule 53. Administration of a Plan of Disgorgement.

(a) *Appointment of Administrator.* The Commission shall have discretion to appoint any person, including a Commission employee, as administrator of a plan of disgorgement and to delegate to that person responsibility for administering the plan. The Commission may require or permit a respondent to administer or assist in administering a plan of disgorgement, subject to such terms and conditions as the Commission deems appropriate to ensure the proper distribution of funds.

Comment: Where the number of potential claimants to a fund is small, and the identity of the claimants is known in advance (for example, when an investment adviser fraudulently diverts funds from a small number of particular accounts), the plan of disgorgement may be relatively uncomplicated and may not require extensive resources to administer. In such a case, the administrative law judge or a staff member may most effectively administer the plan of disgorgement.

As in court actions, however, if the amount of disgorgement is large or there are many potential claimants, administration of a disgorgement plan may involve extensive time and resources and may be accomplished most efficiently and most appropriately by selecting an administrator with appropriate expertise in handling disgorgement-type proceedings, who would, as necessary, retain an accounting firm, a law firm, or other entity to assist in administering the disgorgement plan.

In court proceedings, the Commission usually recommends one individual or submits a short list of individuals to the court as possible administrators and the court actually appoints the administrator. In administrative proceedings, however, the Commission would be directly responsible for appointing the administrator.

The method used to select an administrator must comply with any applicable Federal law regarding the selection of independent contractors in such circumstances and should promote public confidence that the selection was made on an impartial basis. An administrator could be selected on a case-by-case basis as in court proceedings. An alternative, which could permit the Commission to benefit from economies of scale, would be to select an administrator to work on all disgorgement plans over a particular period of time. Another alternative would be to issue criteria required of an administrator and allow interested persons who meet these criteria to place their names on a roster from which administrators in a particular case could be chosen.

In some proceedings, particularly those in which a settlement has been reached, the respondent may be required or allowed to assist in administering a disgorgement plan. *See, e.g., In the Matter of Donaldson, Lufkin & Jenrette Sec. Corp.* Admin. Proc., File No. 3-7329, Exchange Act Release No. 27889, 45 SEC Docket 1826, 1834 (1990). Particularly in such self-administered disgorgement plans, the Commission may require affidavits, an accountant's certification, or other safeguards to assure that funds have been distributed only in accordance with the plan. The rule does not specify a method for selecting an administrator. At least until the Commission gains experience in this area, the Commission will consider different approaches and base its decisions on the facts of individual cases. Comment is requested as to what criteria or what process the Commission should use in selecting administrators.

(b) *Administrator to post bond.* If the administrator is not a Commission employee, the administrator shall be required to obtain a bond in the manner prescribed by 11 U.S.C. 322, in an amount to be approved by the Commission. The cost of the bond may be paid for as a cost of administration. The Commission may waive posting of a bond for good cause.

(c) *Administrator's fees.* If the administrator is not a Commission employee, he or she may be paid a reasonable fee for his or her services. The administrator shall submit an application for fees to the Commission, which must approve the payment of any fees to the administrator.

(d) *Source of funds.* Fees and other expenses of administering the plan of disgorgement shall be paid first from the interest earned on disgorged funds, and if the interest is not sufficient, then from the corpus.

(e) *Accountings.* During the first 10 days of each calendar quarter or as otherwise directed by the Commission, the administrator shall file with the Secretary an accounting of all monies earned or received and all monies spent in connection with the administration of the plan of disgorgement. A final accounting shall be submitted for Commission approval when administration of the plan of disgorgement is completed.

Comment: Monies or assets paid as disgorgement would be placed into a segregated account established for the purpose of holding funds until they could be disbursed to investors who suffered losses as a result of violative conduct; no funds should be transferred to the Commission itself. *See* 31 U.S.C. 3302(b). The Commission has established an account for this purpose at the Department of the Treasury. In addition, the Commission could approve the transfer of funds from a respondent to an escrow or similar-type account at a financial institution.

Funds paid pursuant to a disgorgement order would not belong to the Commission. Therefore, internal control and audit procedures mandated by statute for the Commission's own funds would not be applicable to the disgorgement account and ordinarily would not encompass funds in a disgorgement account. However, the Commission would have a responsibility to ensure that the funds are safeguarded and that they are disbursed only as provided for by the order of disgorgement. Paragraphs (b), (c), (d) and (e) of Proposed Rule 53 would establish basic guidelines for the handling of disgorgement funds which, absent special circumstances, should be followed in all cases.

Proposed Rule 53(b) requires the administrator to obtain a surety bond. This is standard practice when a trustee is appointed in a SIPC liquidation or bankruptcy proceeding. *See* 15 U.S.C. 78eee(b)(3); 11 U.S.C. 322. Paragraph (c) provides authority for the payment of fees and expenses, including a reasonable fee to the administrator, if the administrator is not a Commission employee. Payments of the administrator's fees would have to be based on an application by the administrator and approved by the Commission itself.

The broad authority granted to the Commission to adopt rules, regulations and orders concerning matters appropriate to implement disgorgement permits the Commission to pay for fees and expenses associated with administering a plan of disgorgement by using appropriated funds, interest on disgorged funds or the disgorged funds themselves. *See, e.g.,* Exchange Act section 21B(e), 15 U.S.C. 78u-2(e). Paragraph (d) provides, however, that fees and expenses be paid first out of interest earned on

disgorged funds, and if the interest were insufficient, then out of the corpus of the funds. Except to the extent a Commission employee was appointed administrator, appropriated funds would not be used to defray the costs of administering a plan of disgorgement. Subject to any statutory restrictions on the amount or use of appropriated funds in a given fiscal year, we believe the Commission has the authority to issue an order in a specific case allowing the use of appropriated funds to pay for the expenses of a disgorgement.

The routine use of appropriated funds to pay the fees and expenses of administering a plan of disgorgement is inappropriate for three reasons. First, use of appropriated funds to pay fees and expenses that would otherwise be paid from disgorged assets represents a subsidy by taxpayers generally to injured investors who would thereby receive larger distributions. Such a subsidy is not available in disgorgement cases brought in court. To the extent feasible, injured investors who obtain relief in one forum should not be favored over injured investors in another forum.

Second, use of appropriated funds to subsidize returns to injured investors would have the anomalous effect of decreasing available funds to investigate and pursue remedial actions against other wrongdoers. The more successful the Commission became in obtaining disgorgement and the larger or more complex the disgorgement pools became, the less staff the Commission would have available to devote to new enforcement matters.

Third, as noted in the comment to Proposed Rule 50(c), the purpose of disgorgement is not to make injured investors whole, it is to deprive a wrongdoer of his or her ill-gotten gains. *See* comment to Proposed Rule 50(c) *supra*. Use of appropriated funds to pay the costs of administering a disgorgement plan is not required to fulfill the purposes of the disgorgement remedy provided by the federal securities laws. *See, e.g.*, Exchange Act sections 21B(e) and 21C(e). If there are not enough funds to administer a plan of disgorgement, the disgorged funds can simply be turned over to the general fund of the United States Treasury. *See* Proposed Rule 50(c).

Proposed Rule 53(e) requires that the administrator submit an accounting every 90 days. Requiring periodic, public accounting is a basic safeguard for assuring that disgorged funds are husbanded to the greatest extent possible until distributions are authorized.

(ER None)

Rule 54. Right to Challenge an Order of Disgorgement

No person shall have standing to challenge an order of disgorgement, or an order approving, disapproving, or modifying a plan of disgorgement, or any determination relating to a plan of disgorgement based upon that person's eligibility or potential eligibility to participate in a disgorgement fund or based upon any private right of action such person may have against any person who is also a respondent in a Commission administrative proceeding.

Comment: The primary purpose of disgorgement is to deprive a wrongdoer of his ill-gotten gains—not to compensate investors or other creditors. *See* comment to Proposed Rule 50(c) *supra*. Accordingly, in civil injunctive actions brought by the Commission, disgorged money is not always returned to investors. For example, where it is not practical to locate persons who have been harmed, disgorgement has been ordered paid into the general fund of the U.S. Treasury. *See SEC* v. *Marcus Schloss & Co.*, 714 F. Supp. 100, 103 (S.D.N.Y. 1989); *SEC* v. *Courtois*, (1985 Transfer Binder) Fed. Sec. L. Rep. (CCH) ¶92,000, at 90,959 (S.D.N.Y. 1985); *SEC* v. *Lund*, 570 F. Supp. 1397, 1404–1405 (C.D. Cal. 1983). In insider trading cases, courts have required that disgorgement be made available to persons other than investors, including printers and their clients. See *SEC* v. *Materia*, (1983–84 Transfer Binder) Fed. Sec. L. Rep. (CCH) ¶99,583, at 97,284–85 (S.D.N.Y. 1983), *aff'd on other grounds*, 745 F.2d 197 (2d Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985). *See generally* Louis Loss, *Fundamentals of Securities Regulation* 1007 (2d ed. 1988) (discussing discretion exercised by courts in designating recipients of disgorged funds).

The legislative history of the Remedies Act makes clear that Congress intended that the primary purpose of disgorgement in Commission administrative proceedings is to deprive violators of ill-gotten gains and thus serve as a deterrent to violations, rather than to compensate injured investors. *The Securities Law Enforcement Act of 1990*, S. Rep. No. 337, 101st Cong., 2d Sess. 16 (1990) ("The Committee believes * * * that the Commission should have the express authority to order disgorgement in its administrative proceedings in order to ensure that respondents in administrative proceedings do not retain ill-gotten gains. In contrast to an award of damages in a private action, which is designed to compensate an injured plaintiff, disgorgement forces a defendant to give up the amount by which he was unjustly enriched.").

Accordingly, persons who may have a private right of action against a respondent named in a Commission administrative proceeding should not be granted standing in the Commission's administrative proceeding to challenge a plan of disgorgement because they are dissatisfied with their potential eligibility to receive funds from the disgorgement pool. Investors have a separate right to bring a private action against a securities law violator who has injured them. *But cf. Elkind* v. *Liggett & Meyers, Inc.*, 635 F.2d 156 (2d Cir. 1980) (suggesting in the insider trading context that a defrauded investor is entitled to seek disgorgement from a violator of section 10(b) and Rule 10b–5 thereunder); *SEC* v. *Certain Unknown Purchasers of the Common Stock of and Call Options for Santa Fe Int'l Corp.*, 817 F.2d 1018, 1021 & n.1 (2d Cir. 1987) ("For purposes of standing, it is sufficient to note that (an investor) asserts an interest that may be affected by the trial court's judgment."). Where the Commission has obtained disgorgement from a defendant who is involved in private litigation on the same substantive offenses, the Commission, where appropriate, has consented to the payment of disgorgement into a fund for the benefit of persons proving injury. The proposed rules allow this practice to be continued when disgorgement is obtained in administrative proceedings. *See* Proposed Rule 50(b).

(ER None)

Rule 55. Inability to Pay Disgorgement or Penalties.

(a) *Generally*. In any proceeding in which an order requiring disgorgement or an order imposing penalties may be entered by the Commission, a respondent may present evidence of an inability to pay disgorgement or a penalty. Whether or not the respondent presents such evidence, the Commission may, in its discretion, or if a hearing officer is assigned, the hearing officer may, in his or her discretion, consider evidence concerning ability to pay in determining whether disgorgement or a penalty is in the public interest.

Comment: The Remedies Act provides that a respondent may present evidence of ability to pay a penalty, and that the Commission may, in its discretion, consider such evidence. *See, e.g.*, Exchange Act section 21B(d), 15 U.S.C. 78u–2(d). The standards in Proposed Rule 55 reflect existing practice in settled cases.

A respondent's ability to pay becomes a significant issue not only in most court proceedings and administrative actions in which a penalty is ordered, but also when disgorgement is ordered. Although the Remedies Act is silent with respect to inability to pay disgorgement, as a practical matter, the Commission does not have a different process for considering assertions of an inability to pay disgorgement; the Commission is willing to consider evidence of ability to pay as a factor in determining whether a respondent should be required to pay disgorgement or penalties.

(b) *Financial disclosure statement*. Any respondent against whom the Commission or a hearing officer has entered or may enter an order imposing disgorgement or penalties who intends to assert or does assert an inability to pay such disgorgement or penalties may be required to file a sworn financial disclosure statement and to keep the statement current. The financial statement shall show the respondent's assets, liabilities, income or other funds received and expenses or other payments, from the date of the first violation alleged against that respondent in the order instituting proceedings to the date of the order requiring the disclosure statement to be filed. By order, the hearing officer or Commission may prescribe a particular form to be

used and may specify such other time periods for which disclosure is required, or may require such other information as deemed necessary to evaluate a claim of inability to pay.

Comment: Proposed Rule 55(b) provides that any respondent who has asserted, or intends to assert, an inability to pay disgorgement or penalties may be ordered to file a financial disclosure statement. Absent up-to-date, comprehensive information as to income, expenses, assets and liabilities, the Commission cannot fairly evaluate a respondent's asserted inability to pay. The provision that respondents may be required to file a financial disclosure statement is necessary to implement the Commission's authority to order disgorgement. *See, e.g.*, Exchange Act section 21C(e). In addition, the Commission has broad authority as an adjudicatory body to require persons making claims to submit evidence in support of those claims.

In the Commission's experience, not all respondents can be relied upon to be entirely candid about their financial position when asserting an inability to pay disgorgement or penalties. The Commission has adopted the practice in cases brought administratively and in court of requiring persons who assert an inability to pay disgorgement or penalties to file sworn, verifiable financial disclosure statements before it will consider inability to pay as a basis for waiving disgorgement or penalties in connection with a settlement. The Commission has established a similar approach with respect to persons making application for an award under the Commission's regulation with respect to the Equal Access to Justice Act, 5 U.S.C. 504. See 17 CFR 201.42 (1992) (requiring filing of net worth statement). Proposed Rule 55(b) provides the Commission or a hearing officer with a mechanism to require such financial disclosure in cases that do not settle, without requiring an undue expenditure of time to hear live witnesses concerning what is essentially documentary evidence.

The proposed rule applies to a respondent who "intends to assert" or who "does assert" an inability to pay. By making Proposed Rule 55 applicable to respondents who intend to assert an inability to pay, a hearing officer can ascertain at a prehearing conference whether a respondent intends to assert an inability to pay and may require the respondent to file a financial statement before the hearing begins. In addition, Proposed Rule 26(d) requires the filing of a financial disclosure statement with the respondent's opening brief if a petition for review raises an issue as to ability to pay.

The Task Force has developed a proposed financial disclosure statement (see Rule 55f) that may, in the discretion of the hearing officer or the Commission, be utilized by a respondent required to provide financial information. The Task Force modeled the proposed form on the form currently used by the Division of Enforcement to obtain information in connection with offers of settlement. A respondent may seek to have all or part of a financial disclosure statement kept confidential. *See* paragraph (c) Confidentiality, below.

Comment is requested as to what alternatives, if any, could further the Commission's interest in having current financial information when considering a respondent's assertion of inability to pay.

(c) *Confidentiality.* Any person submitting financial information pursuant to a request under this rule or Rule 26(d), may request that the Commission afford this information confidential treatment pursuant to Rule 33 (§ 201.33) and/or 17 CFR 200.83, which sets forth procedures related to requests for confidential treatment pursuant to the Freedom of Information Act, 5 U.S.C. 552. No party receiving information for which confidential treatment has been requested may transfer or convey the information to any person or entity not a party to the proceeding or counsel to a party, without the prior permission of the Commission or a hearing officer.

Comment: The proposed rule provides that a respondent may request confidential treatment of a financial disclosure statement at any time. Notwithstanding any such request, the financial disclosure statement must be served upon the interested division. *See* Proposed Rule 55(d).

The public's right to review financial disclosure statements submitted in connection with a respondent's claim of inability to pay should be balanced against the respondent's legitimate interest in protecting confidential or personal information from premature or unnecessary disclosure. Information required by a financial disclosure statement may be of a particularly personal or confidential nature. For example, it may reveal expenses related to treating the mental disorder of a child or other family member. On the other hand, the public must have access to financial disclosure information in order to assess the appropriateness of the Commission's decision whether or not to waive payment of disgorgement or penalties for a respondent who asserts an inability to pay.

The appropriate balance may shift during the course of a hearing. The Task Force considered whether evidence with respect to disgorgement or penalties should be presented only after a finding of liability had been made. The Task Force concluded that to have completely separate liability and penalty phases in a hearing would be inefficient. The Task Force assumes that barring a sudden change in financial circumstances during the course of a hearing, a respondent should be required to raise a potential claim of inability to pay in connection with prehearing submissions or conferences. Early submission of a financial disclosure form would allow the hearing officer to better assess the length of the hearing, and would permit Enforcement to prepare cross-examination or to seek verification of the information submitted.

However, prior to even a preliminary assessment of liability or entry of the financial statement as an exhibit, a respondent would have a stronger case for the confidentiality of personal financial information than after the respondent sought to introduce evidence of inability to pay. Providing for confidential treatment of some information until a preliminary finding of liability would protect a respondent's privacy interests to the extent that the Division failed in its case in chief, or the case settled.

The Task Force has developed a proposed financial disclosure statement (see Rule 55f) that may, in the discretion of the hearing officer or the Commission, be utilized by a respondent required to provide financial information. The proposed financial disclosure statement is in two parts. Part I requires summary information with respect to assets, liabilities, income and expenses. Part II requires detailed information regarding these same items, including verifying documentation, such as tax returns and the identification of bank, brokerage and credit accounts. Information in Part I is unlikely to warrant confidential treatment if a claim of inability to pay is raised at hearing. Information in Part II, such as account identifying information, medical payments and other highly personal information is more likely to warrant some level of confidentiality. Each request for confidentiality must be decided based on the procedural status of the case, what information already has been disclosed, and upon the individual facts and circumstances underlying the request.

Comment is requested as to whether any additional guidelines for confidential treatment of financial disclosure statements should be included in the rule, and if so, what those guidelines should be.

(d) *Service.* Notwithstanding any request under paragraph (c) for confidential treatment concerning a financial disclosure statement, copies of the statement shall be served on the interested division. Notice that a financial disclosure statement and request for confidential treatment, if any, have been filed shall be served on all other parties.

Comment: Proposed Rule 5 generally provides that materials as to which confidential treatment is requested do not need to be served on other parties. That policy is designed to protect business secrets or other information that may be filed, particularly in proceedings dealing with regulatory matters. Proposed Rule 55(d) creates an exception to that general policy because even highly personal financial information must be subject to possible challenge by the Division of Enforcement when a respondent claims an inability to pay. Notice that a disclosure statement has been filed must be provided to other respondents, who may seek all or part of the information submitted. Summary information such as that in Part I of the model form routinely should be provided to other respondents even if not made a part of the public record. If information of the kind included in Part II is not publicly disclosed, it should be disclosed to other respondents only upon a showing of specific need.

(e) *Sanction for failure to file required financial information.* Any claim of inability to pay either disgorgement or a penalty that is not perfected by the filing of a financial disclosure statement that a respondent has been ordered to file or is required to file by rule, may, in the discretion of the Commission or of the hearing officer, if one is assigned, be deemed to have been waived. No other sanctions shall be imposed for a failure to file such a statement.

Comment: Under Proposed Rule 3, sanctions for a failure to make a required filing, including a financial statement, could include entry of an adverse finding on the question of liability. Paragraph (e) limits any sanction for failure to file a financial statement to a waiver of a claim of inability to pay.

Rule 55f. Financial Information Disclosure Statement Form.

(a) Rules 26(d) and 55 of the Rules of Practice provide that under certain circumstances a respondent who asserts or intends to assert an inability to pay disgorgement or penalties may be required to disclose certain financial information. Unless otherwise ordered, this form may be used by individuals required to supply such information.

(b) The respondent filing this form is required to notify the Commission of any material change in the answer to any question on this form.

(c) A respondent making financial information disclosures on this form, or as otherwise ordered, may request that the Commission afford the information submitted confidential treatment pursuant to Rule 33 of the Commission's Rules of Practice and under the Commission's Freedom of Information Act, 5 U.S.C. 552 ("FOIA") procedures, see 17 CFR 200.83. A request for confidential treatment allows the requestor an opportunity to justify the need for confidentiality. A request for confidential treatment does not, however, guarantee confidentiality.

(d) Notwithstanding any request for confidential treatment of a financial disclosure statement, copies of the statement must be served on the interested division and will be included in the record of the proceeding. See Rule 55(d). If confidential treatment is sought, notice that a financial disclosure statement and request for confidential treatment have been filed shall be served on all other parties.

(e) No party receiving information for which confidential treatment has been requested may transfer or convey the information to any person or entity not a party to the proceeding without the prior permission of the Commission or a hearing officer.

(f) Any person may obtain a copy of this form by written request to the Securities and Exchange Commission; 450 Fifth Street NW., Washington, DC 20549.

Note: This form has been printed below after proposed Exchange Act Rule 19d–3.

Rules Related to Review of Self-Regulatory Organization Determinations

(The following four rules are intended to be read in conjunction with revised Securities Exchange Act Rules 19d–2 and 19d–3)

(17 CFR 240.19d–3(b))

Rule 56. Applications for Commission Review of Determinations by Self-Regulatory Organizations, Pursuant to Securities Exchange Act Section 19(d)(2).

Any person who is aggrieved by a determination by a self-regulatory organization with respect to any final disciplinary sanction, denial or conditioning of membership, association or participation, or prohibition or limitation with respect to access to services offered by a self-regulatory organization or a member thereof may file an application for review. Such application shall be filed with the Commission within 30 days after notice of the determination was filed pursuant to section 19(d)(1) of the Securities Exchange Act and received by the aggrieved person applying for review. The application shall be served on the self-regulatory organization pursuant to Rule 5. The application shall be in summary form, shall include a statement of the determination complained of and shall be accompanied by the notice of appearance required by Rule 2 and the proof of service required by Rule 5.

Comment: Securities Exchange Act section 19(d)(2) requires the Commission to review certain determinations by self-regulatory organizations upon application by any aggrieved person. The formula for specifying the period during which review may be applied for—30 days from receipt of the notice required by section 19(d)(1)—is the minimum allowed by statute. The cross-references to Proposed Rule 2 (the requirement to file a notice of appearance) and Proposed Rule 5 (the requirement to file a proof of service) were included particularly for the benefit of persons appearing *pro se*.

Comment is requested as to whether the application for review should require additional information concerning the objections to the SRO's decision. *See* comment to Proposed Rule 26(a).

(ER None)

Rule 57. Review by the Commission on Its Own Initiative.

The Commission may, on its own initiative, order review of any determination by a self-regulatory organization with respect to any final disciplinary sanction, denial or conditioning of membership, association or participation, or prohibition or limitation with respect to access to services offered by a self-regulatory organization or a member thereof within 40 days after notice thereof was filed pursuant to Securities Exchange Act section 19(d)(1).

Comment: Securities Exchange Act section 19(d)(2) specifies that the Commission may order review of the determination of a self-regulatory organization on its own motion. The proposed rule is modeled on Proposed Rule 26(d) (ER 17(c)) which deals with Commission review on its own initiative of an initial decision by a hearing officer. Under Proposed Rule 56, a respondent has 30 days after receipt of notice of a final determination by a self-regulatory organization to file an application for review. Proposed Rule 57 allows the Commission 40 days to determine whether to order review on its own initiative. The time limit for Commission review is tied to the Commission's receipt of the notice required by Exchange section 19(d)(1), not receipt of the notice by the respondent since the Commission would have no practical way of knowing that date. In practice, the Commission has only rarely exercised its authority to review a self-regulatory organization's determination *sua sponte*. In light of the Commission's practice, the rule does not include provisions comparable to those in Proposed Rule 26 for obtaining early notification that the Commission will not order review.

(17 CFR 240.19d–3(b))

Rule 58. Certification of the Record; Service of the Index.

Ten days after receipt of the application or the Commission order for review, the self-regulatory organization shall certify and file with the Commission one copy of the record upon which the action complained of was taken, and shall file with the Commission three copies of an index to such record, and shall serve upon each party one copy of the index.

Comment: Existing Securities Exchange Act Rule 19d–3(b) specifies that after an application for review is filed with the Commission, the Secretary will then serve the self-regulatory organization. The self-regulatory organization is then required to certify the record and file copies of the index with the Commission; the Secretary must serve a copy on the respondent. Under the proposed rule, the parties would be responsible for serving each other at the initial stage, as they are throughout the remainder of the proceeding. This change

simplifies procedures, and eliminates unnecessary delay. It was suggested that having the Commission serve the application for review and the index eliminates potential disputes about whether these documents were filed or served. However, there is no reason why there should be fewer problems with service simply because the Commission mails or sends a document. Moreover, the most critical document—the notice under section 19(d)(1) which triggers the entire review process—is served without involvement of the Commission.

The rule was drafted with the expectation that to the extent that any self-regulatory organization does not already do so, it will, in the future, include in its written decision, or in an attachment to the section 19d-1 notice sent to each respondent, a clear and simple statement of the procedures for seeking review, including the Commission's address, and the address of the appropriate office of the self-regulatory organization to which a copy of an application for review or other papers should be directed.

Comment is requested as to the appropriateness of the proposed change in procedure. Comment is also requested as to whether the service of the application for review by the respondent and the service of the index by the self-regulatory organization should have to be made by a means which will obtain a signed receipt.

(17 CFR 240.19d-3(c)-(g))

Rule 59. Briefs to the Commission; oral argument; leave to adduce additional evidence.

Briefs shall be filed pursuant to the schedule set forth in Rule 27. Requests for oral argument must accompany each party's initial brief on the merits, and must be made in accordance with Rule 28(a). Requests for leave to adduce additional evidence must be made in accordance with Rule 28(d).

Comment: Existing Securities Exchange Act Rule 19d-3 included provisions with respect to filing of briefs, requests for oral argument, requests for leave to adduce additional evidence and the applicability of the Rules of Practice to the review of determinations by self-regulatory organizations. Those topics are already included in other proposed rules. The cross-references to the specific rules were included particularly for the benefit of *pro se* respondents. As a result of the proposed changes to the Rules of Practice, the Task Force has rewritten Exchange Act Rule 19d-3.

Proposed Revisions to Securities Exchange Act Rules 19d-2 and 19d-3

Exchange Act Rule 19d-2 Applications for Stays of Disciplinary Sanctions or Summary Suspensions by a Self-Regulatory Organization.

If any self-regulatory organization imposes any final disciplinary sanction pursuant to section 6(b)(6), 15A(b)(7) or 17A(b)(3)(G) of the Securities Exchange Act, or summarily suspends or limits or prohibits access pursuant to section 6(d)(3), 15A(h)(3) or 17A(b)(5)(C) of the Securities Exchange Act, any person aggrieved thereby for which the Commission is the appropriate regulatory agency may file with the Secretary, a written motion for a stay of imposition of such action pursuant to Rule 16 of the Commission's Rules of Practice (17 CFR 201.16).

Comment: Exchange Act section 19(d)(2) requires that for "appropriate cases" the Commission establish procedures for expedited consideration of a request for a stay of certain determinations by self-regulatory organizations. Proposed Rule 16 of the Rules of Practice deals generally with the procedures for seeking a stay, and includes provisions for expedited consideration of appropriate cases.

Exchange Act Rule 19d-3 Applications for Review of Final Disciplinary Sanctions, Denials of Membership, Participation or Association, or Prohibitions or Limitations of Access to Services Imposed by Self-Regulatory Organizations.

Applications to the Commission for review of any final disciplinary sanction, denial or conditioning of membership, association or participation, or prohibition or limitation with respect to access to services offered by a self-regulatory organization or a member thereof by any such organization shall be made pursuant to Rule 56 of the Commission's Rules of Practice (17 CFR 201.56).

Comment: Provisions for review of self-regulatory organization determinations have been included in the Rules of Practice either as part of rules generally applicable to all proceedings before the Commission, or by specific rules addressed to applications for review of self-regulatory organization determinations. *See* Proposed Rule 59 and accompanying comment.

Under Existing Rule 19d-3, the Rules of Practice apply to proceedings for review of self-regulatory organization determinations to the extent that they are not inconsistent with Rule 19d-3. Certain inconsistencies between procedures for review of self-regulatory organization determinations and review of proceedings before a hearing officer were simply the result of historical development, and served no regulatory or policy goals. Frequently, these inconsistencies were a source of confusion and delay. Where appropriate, these inconsistencies have been eliminated.

In addition to the inconsistencies, there were many gaps. Many of the Rules of Practice were written in terms of proceedings arising before the Commission. As a result, there was confusion as to the extent to which such rules were to apply to proceedings arising from self-regulatory organizations.

[The Financial Information Disclosure Statement Form follows on the next page]

[The Topical index (including timetable) appears following the Financial Form]

Model Financial Information Disclosure Statement Form

Instructions: The Commission's Rules of Practice provide that under certain circumstances a respondent who asserts or intends to assert an inability to pay disgorgement or penalties may be required to disclose certain financial information. *See* Rules 26(d) and 55. Unless otherwise ordered, this form may be used by individuals required to supply such information. Partnerships, corporations or other entities should submit a financial statement, including an income statement, balance sheet and federal tax returns for each year from the year of the earliest violation alleged against the entity in the order instituting proceedings to the present.

The respondent filing this form is required promptly to notify the Commission of any material change in the answer to any question on this form.

A respondent making financial information disclosures on this form, or in another manner pursuant to the requirements of Rule 26(d) or Rule 55, may request that the Commission afford the information submitted confidential treatment pursuant to Rule 33 of the Commission's Rules of Practice and under the Commission's Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") procedures, *see* 17 CFR 200.83. A request for confidential treatment allows the requester an opportunity to justify the need for confidentiality. A request for confidential treatment does not, however, guarantee confidentiality.

Notwithstanding any request for confidential treatment of a financial disclosure statement, copies of the statement must be served on the interested division and will be included in the record of the proceeding. *See* Rule 55(d). If confidential treatment is sought, notice that a financial disclosure statement and request for confidential treatment have been filed shall be served on all other parties.

No party receiving information for which confidential treatment has been requested may transfer or convey the information to any person or entity not a party to the proceeding without the prior permission of the Commission or a hearing officer.

1/93 This form was prepared by the Task Force on Administrative Proceedings. It has not been approved for use by the Commission or by OMB.

BILLING CODE 8010-01-P

United States of America
Before the
Securities and Exchange Commission

In the Matter of _____	))))))	Administrative Proceeding File No. 3-_____

Part I: Summary Financial Disclosure Statement

Full Name: _____
Last First Middle

A. Net Worth

1. Assets: (from Part II.B.) _____
2. Liabilities: (from Part II.C.) _____
3. Net Worth: (from Part II.D.) _____

B. Income and Payments Received

1. Gross income reported on most recent federal tax filing: _____
2. Last 12 calendar months (from Part II.E.): _____*

* If this amount, divided by 12, does not equal your current monthly income, please explain the discrepancy on an attached sheet.

C. Expenses

1. Last 12 calendar months (from Part II.F.): _____*

* If this amount, divided by 12, does not equal your current monthly expenses, please explain the discrepancy on an attached sheet.

United States of America
Before the
Securities and Exchange Commission

In the Matter of _____	))))))	Administrative Proceeding File No. 3-_____

Part II: Detailed Financial Disclosure Information

Full Name: _____
Last First Middle

If confidential treatment has been requested pursuant to Rule 33 of the Rules of Practice, please check the box below.

☐ CONFIDENTIAL TREATMENT REQUESTED. Disclosure of this document is prohibited unless specifically authorized below. This document should be placed in a nonpublic file.

For Use Only by the Secretary of the Commission:

☐ By order of _____ (date) the Commission authorized this file to be placed in a public file.

_____
(Signature of Secretary)

Last Name: _____

A. Scope of Information Requested:

Requests for information about you include a request for the same information about your spouse (unless you are legally separated and living apart), minor children and any other dependents.

B. Assets:

List all assets owned by you, directly or indirectly, and all assets which are subject to your enjoyment or control, regardless of whether legal title or ownership is held in your name.

1. Cash _____
2. Listed Securities _____
3. Surrender Value of Insurance _____
4. Loans, Notes, Accounts Receivable Due to You _____
5. Real Estate _____
6. Furniture _____
7. Jewelry, Art, Rugs, Silver Collectibles, Other Valuables _____
8. Automobiles _____
9. Unlisted Securities _____
10. Partnership Interest (non-securities) _____
11. Net Value of Ownership Interest in Business _____
12. IRA, Keogh, 401(k), Annuity or Pension Accounts _____
13. Other (Itemize):

    _____ _____

    _____ _____

14. **Total Assets** _____

C. Liabilities:

List all your liabilities including, but not limited to, the items listed below.

1. Mortgages _____
2. Auto Loans _____
3. Credit Card Debt _____
4. Margin Loans _____
5. Insurance Policy Loans _____
6. Installment Loans _____
7. Other Loans, Notes or Accounts Payable _____
8. Accrued Real Estate Taxes _____
9. Judgments/Settlements Owed _____
10. Other (Itemize):

    _____ _____

    _____ _____

11. **Total Liabilities** _____

Last Name: _____

D. Net Worth
(Assets Less Liabilities) _____

E. Income/Payments Received

List all income or other payments received from any source in the last 12 months by you, or by any other person or entity if you have any right, power or authority to control or enjoy the use of the money or property received by such other person or entity. Identify the source, the recipient and the amount of payment, including but not limited to the items listed below.

Description/Purpose	Source	Amount
1. Salary/Wages		
2. Commissions/Advances		
3. Bonuses		
4. Dividends		
5. Interest		
6. Distributions of Capital		
7. Annuity, Pension Payments		
8. Rents/Royalties (net)		
9. Sales of Assets (net)		
10. Repayment of Loans		
11. Alimony/Child Support		
12. Gifts over $1000		
13. Payments by Others on Your Behalf (see Item I, below)		
14. Other (itemize):		

15. **Total Income/Receipts** _____

16. If you anticipate unusual income in the coming 12 months, please explain.

Last Name: _____

F. Expenses/Disbursements

List all your expenditures for the past 12 months, including but not limited to the items listed below. Identify the purpose and the amount of each expenditure.

Description	Amount
1. Mortgage/Rent	_____
2. Food	_____
3. Utilities	_____
4. Payments on Loans	_____
5. Real Estate Taxes	_____
6. Insurance Premiums	_____
7. Medical Expenses	_____
8. Automobile Expenses	_____
9. Alimony/Child Support	_____
10. Income Taxes (federal, state and local)	_____
11. Other Expenses (itemize):	
_____	_____
_____	_____
_____	_____
_____	_____
12. **Total Expenses/Disbursements**	_____

13. If you anticipate unusual expenses in the coming 12 months, please describe them.

G. Asset Schedules

1. For each asset or class of assets included in Section II.B(5-13) with a fair market value greater than $2000, describe the asset(s), state the form of ownership (e.g., individual, joint, beneficial interest), provide a fair market value, and explain how fair market value was determined (e.g., appraisal, comparison, estimate, etc.).

2. List all securities or commodities brokerage accounts and accounts at banks or other financial institutions in your name, under your control, in which you have or had a beneficial interest, or to which you are or were a signatory since the date of the first violation alleged against you. For each

Last Name: _____

account, specify the location of the account, account number, balance and balance date. Please identify all accounts, regardless of their location.

3. List all 401(k) plans, pension plans, Keogh plans, individual retirement accounts, profit sharing plans, thrift plans, life insurance policies or annuities in which you have an interest, vested or otherwise. For each account, specify the account name, the location of the account, account number, balance and balance date. For each account state whether you are permitted to borrow against or make withdrawals from the account.

4. Identify the location and account number of all your safe deposit boxes. Include any boxes in which you have property or papers, whether or not you are the account holder.

5. Identify all patents, trademarks, service marks, royalty agreements, licenses, or other general intangibles in which you have an interest.

H. Liability Schedules

1. For each liability greater than $2,000 listed in Section II.C., indicate the creditor, the account number, if any, the date incurred, the original amount of the liability, the length of the obligation, the interest rate, the collateral or security, if any, the outstanding balance, and the name(s) and address(es) of any other obligee(s). State whether you are related to or have a personal or social relationship with the creditor, its management or owners.

2. List all credit cards and lines of credit in your name or to which you are a signatory, including the name of the credit issuer, account number, credit limit, and amount of indebtedness.

3. List all contingent liabilities. Include any notes on which you are a co-maker, guarantor or endorser and all pending lawsuits in which you are named as a defendant.

I. Schedules of Income, Receipts and Disbursements

1. Disbursements by Others on Your Behalf. List any payments or disbursements having a value of $1000 or greater, made by any other person or entity to a third party on your behalf since the date of the first violation alleged against you. Include the amount of the disbursement and the name and address of the person or entity who made the disbursement. If no such disbursements have been made, please so state.

2. Fringe Benefits. List any fringe benefits, such as the lease of an automobile, currently provided by your employer.

3. Asset Transfers by You. List any assets or property with a cost or fair market value of $2000 or more, which you transferred or otherwise disposed of since the date of the first violation alleged against you. State the value of the asset, the consideration received, and your relationship with the transferee. If no such transfers have been made, please so state.

4. Additional Deposits by You. Identify any financial institution accounts (other than those identified in item G.2. above) in which you have deposited more than $2000 since the date of the first violation alleged against you. If no such deposits have been made, please so state.

5. Trusts and Inheritances Already Vested. Describe any vested interest in a trust or will pursuant to which you are receiving or would receive a devise, bequest, other inheritance or distribution.

Last Name: _____

6. Current and Prior Business Relations. List any sole proprietorships, joint ventures, corporations or other business enterprises in which you are now or have been a principal, a holder of 10 percent or more of the issued stock, an officer, director, manager or chief operating officer at any time since the date of the first violation alleged against you.

J. Personal Information

Current residence: _____
street unit

_____
city state zip code

Current phone number(s): home: ( ) -
business: ( ) -
car: ( ) -
other: ( ) -

Social security number: - -

List any other names (including a maiden name) you have used.

If currently married please state your spouse's name, age and social security number, whether or not he or she resides with you and the date of your marriage.

If you have been previously married please state the name of your former spouse(s) and the date of your marriage(s). If the date of a marriage was after the date of the first violation alleged against you, include your former spouse's social security number and last known address.

Identify all dependents. For each, please state his or her age, social security number and whether or not he or she resides with you.

Identify any other members of your household. For each, please state his or her age and relationship to you.

K. Attachments:

1. Attach any federal tax returns filed by you (including personal, trust, or business returns) for the year of the first violation alleged against you and all subsequent years.

2. Attach any federal gift tax returns filed by you for the year of the first violation alleged against you and all subsequent years.

3. Attach any financial statement which you prepared for any purpose (e.g., a financial statement provided to a bank to secure a loan) in the year of the first violation alleged against you and all subsequent years.

4. If you are a trustee, executor or administrator, attach a copy of the instrument appointing you as such.

Last Name: _____

5. List of Attachments Submitted With This Form:

Please list all financial statements, tax returns and other materials submitted with this form. Do not submit originals. Make sure all copies are legible. Illegible copies do not satisfy the requirements for filing your financial disclosure information.

L. Declarations and Signature

I _____ hereby declare under penalty of perjury, that I have examined the information given in this statement and attached hereto and, to the best of my knowledge and belief, it is true, correct, and complete. I further declare that I have no assets, owned either directly or indirectly, or income of any nature other than as shown in, or attached to, this statement. I understand that any material misstatements or omissions made by me herein or in any attachments hereto may constitute criminal violations, punishable under 18 U.S.C. 1001 or other statutes.

The Securities and Exchange Commission and any of its staff is authorized to obtain any such information from credit bureaus, financial institutions or any other source as may be needed to verify the statements made on this form.

The statements herein and attached hereto represent my financial condition as of _____ (date).

_____ (signature) _____ (date)

Sworn before me this ____ day of _____, 199__.

[Seal]

_____
Notary Public

My commission expires on _____(date)

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Topical Index Including Timetable Relating to the Rules Of Practice

This index sets forth a general outline of many of the significant steps of an administrative proceeding under the Commission's Rules of Practice. It does not constitute part of the Rules and has no legal effect. It has been prepared for the convenience of the reader and is not intended as a substitute for review of the Rules. The generalizations contained in this index are qualified in their entirety by the text of the Rules themselves, which are hereby incorporated by reference.

The Commission or the hearing officer, for good cause shown, may extend or shorten any time limits for any filing and may postpone or adjourn any hearing.

Amicus Participation

Any amicus curiae shall file its brief (along with a motion for leave to participate as amicus curiae or written consent of all parties, if required) within the time allowed the party whose position the amicus will support, unless all parties otherwise consent or the hearing officer (for cause shown) shall grant leave for later filing. (Rule 13(d)).

Answers

In any order instituting proceedings, the Commission may direct that any respondent file an answer to such order. Any party not so ordered may also elect to file an answer. A party directed to file an answer shall do so within 20 days after service upon such party of the order instituting proceedings. Any person granted leave to participate may be required to file an answer within a reasonable time, as determined by the hearing officer. Where amendments to the matters of fact and law at issue in the proceedings are authorized, the parties may be required to answer the amended matters to be considered within a reasonable time, as determined by the Commission or hearing officer. (Rule 9(a),(b)).

Appeal

See "Initial Decision-Petition for Review," "Interlocutory Review of Hearing Officer's Rulings," "Petition for Rehearing," "Review by the Commission of Determinations at a Delegated Level (other than by a Duty Officer or a Hearing Officer)," "Review by the Commission of Initial Decisions by Hearing Officers," and "Self-Regulatory Organization Determinations-Applications for Commission Review."

Appearance

A person may appear before the Commission or a hearing officer on his or her own behalf; any person admitted to the practice of law before the U.S. Supreme Court or the highest court of any state may represent any person or party before the Commission; a member of a partnership may represent such partnership; and a bona fide officer of a corporation, trust, or association may represent such corporation, trust, or association. (Rule 2(a),(b)). See "Notice of Appearance."

Briefs to the Commission

At the time the Commission grants or orders review of a decision or upon receipt of an index to the record in a self-regulatory organization determination, the Commission shall issue a briefing schedule order. Such order shall specify the parties to file opening briefs and the dates by which such briefs shall be filed. Normally, the briefing schedule order should be issued within 15 days of either (i) the last day permitted for filing a brief in opposition to a petition for review or (ii) the last day permitted for filing an index to the record in a self-regulatory organization proceeding. Unless otherwise ordered, opening briefs shall be filed within 40 days of the date of the briefing schedule order. Opposition briefs shall be filed within 30 days after the date opening briefs are due. Reply briefs shall be filed within 14 days after the date opposition briefs are due. No further briefs may be filed except with leave of the Commission. (Rule 27(a)).

Business Hours; Business Days

The Headquarters of the Commission, at 450 Fifth Street, NW., Washington, DC 20549, is open each day, from 9 a.m. to 5:30 p.m., Eastern Standard Time or Eastern Daylight-savings Time, whichever is currently in effect in the District of Columbia, except Saturdays, Sundays, and federal legal holidays. Federal legal holidays consist of New Year's Day, Martin Luther King, Jr.'s Birthday, Presidents Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday in the District of Columbia by the President or the Congress of the United States. Each day on which the Commission is open is a "Business Day." (Rule 7).

Certification of Record to the Commission

Administrative Proceedings

At the close of the hearing, the hearing officer shall transmit to the Commission's Director of the Office of Filings, Information and Consumer Services ("OFICS Director") a list of all filings, exhibits or other materials which are part of the record, as well as originals of all such documents. Within 15 days after the last date set for filing briefs to the Commission or at such other time as the Commission may direct after receipt of a petition or application for review (but, in any event, prior to any oral argument), the OFICS Director shall certify the entire record to the Commission. (Rule 29(b),(c)).

Self-Regulatory Organization

Ten days after receipt of the application or Commission order for review, the self-regulatory organization shall certify and file with the Commission one copy of the record and three copies of an index to such record and shall serve upon each party one copy of that index. (Rule 58).

Commission Decisions

Normally, the Commission should issue its opinion within nine months of the date of the briefing schedule order required to be issued in each case. (Rule 29). Normally, if a sanction has taken effect, a decision as to whether or not to grant a stay should be issued within five days of the date set for filing of the opposition to a motion for a stay. If the sanction has not taken effect, the decision as to granting or denying a stay should be issued within 30 days. (Rule 16(e)). Normally, interlocutory review of a hearing officer's decision should be completed within 30 days of the date set for filing of the final brief on the matter submitted for interlocutory review. (Rule 18(b)).

Commission Review of Decisions on its Own Initiative

See "Review by the Commission of Determinations at a delegated Level (Other than by a Duty Officer or a Hearing Officer" and "Review by the Commission of Initial Decisions of Hearing Officers."

Computation of Time

In computing any period of time under the Rules, the day of the act, event, or default after which the period begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, a Sunday, or a federal legal holiday (as

defined in the Rules), in which event the period runs until the end of the next day which is neither a Saturday, a Sunday, nor a federal legal holiday. Intermediate Saturdays, Sundays, and federal legal holidays shall be excluded from the computation when the period is seven days or less, not including any additional time allowed for service by mail. If on the last day on which a filing is permitted to be made, weather or other conditions have made the Secretary's office at the Commission or other designated filing location inaccessible, the filing deadline shall be extended to the end of the next day on which such location is accessible and which is neither a Saturday, a Sunday, nor a federal legal holiday. (Rule 6(a)).

Confidential Treatment

Any person may file an application requesting confidential treatment of material pursuant to the provisions of the Securities Act, the Exchange Act, the Public Utility Holding Company Act, the Investment Company Act, the Investment Advisers Act, the rules under any of the foregoing, or any other applicable statute or rule. The application shall be accompanied by a sealed copy of the materials as to which confidential treatment is sought. The Commission may require the person making such application to furnish in writing additional information with respect to the grounds for such application. Failure to supply such requested information within 14 days from the person's receipt of the request shall be deemed a waiver of the person's objections to public disclosure, unless the Commission shall otherwise order, for good cause shown, at or before the expiration of the 14-day period. Upon request of the person making the confidential treatment request, motions and other filings relating to the request shall be placed under seal upon filing. (Rule 33(a),(b),(c)).

Copying Costs

The respondent shall be responsible for the costs of copying documents turned over by the interested division of the Commission. (Rule 20(d)). See "Documents and Witnesses' Statements."

Copies of Papers To Be Filed

One original and three copies of all papers shall be filed with the Commission or the hearing officer. (Rule 5(f)). See "Service."

Date of Entry

The date of the entry of an order by the Commission shall be (i) the date of the adoption of an order by then Commission, as reflected in the caption of the order or (ii) in cases where the Commission staff takes action pursuant to delegated authority, the date when the action is taken, as reflected in the caption of the order. (Rule 6(c)). See "Computation of Time."

Defaults; Motion To Set Aside Defaults

If a party fails to file an answer, or if a person named in an order instituting proceedings against whom findings may be made or sanctions imposed fails to appear at a hearing or prehearing conference, or such person fails to file a notice of appearance when ordered to do so, the hearing officer or the Commission may deem the allegations against such person to be true and enter an order making findings, by default, against such person. (Rules 3(c), 9(e), 9(f)). Any motion to set aside a default shall be made within a reasonable time. (Rule 9(g)).

Depositions—Oral and Written

Notice

Any party desiring to take a deposition shall make a written motion setting forth the reasons why the deposition should be taken, the matters to be covered and the proposed time and place for taking the deposition. See "Depositions on Written Questions."

Grounds

The Commission or the hearing officer, in its discretion, may issue an order that the deposition be taken upon a finding that the prospective witness is likely to give material testimony, that it is likely the prospective witness will not be able to attend the hearing, and that the taking of the deposition will serve the interests of justice. (Rule 22(b), 23).

Filing

Testimony taken in depositions shall be reduced to writing, subscribed by the witness and certified by the deposition officer. The original deposition and any exhibits thereto shall be forwarded under seal to the hearing officer or, if none is assigned, to the Secretary of the Commission. Copies of the depositions and exhibits shall be forwarded to each party. (Rule 22(f)).

Depositions on Written Questions

Depositions may be taken and submitted on written questions upon any party's motion. Within 10 days after the motion and written questions are served, a party may file objections, if any, to such written questions and may serve cross-questions upon any or all other parties. (Rule 23).

Discovery

See "Documents and Witnesses' Statements."

Disgorgement

Plan of Disgorgement

The Commission or the hearing officer may order any party to submit a plan for the distribution of disgorgement funds at anytime after an order requiring disgorgement has been entered. Normally, if a plan will be required, it should be submitted no later than 45 days after funds or other assets are placed in an escrow account or otherwise set aside. (Rule 49).

Order Approving, Modifying or Disapproving the Plan

At any time more than 30 days after publication of notice of the proposed plan of disgorgement, the hearing officer, if one is assigned, or the Commission, shall, by order, approve, modify or disapprove the proposed plan. Normally, this order should be entered within 30 days after the end of the period allowed for comments on the proposed plan. (Rule 52).

Prompt Payment

Unless provided otherwise by order of a hearing officer or the Commission, disgorgement shall be paid no later than five days after service of the disgorgement order. Amounts due pursuant to an order by a hearing officer shall be paid on the first day after the order becomes final. (Rule 48(a)).

Dispositive Motions

Any party may make a motion for an order that would dispose of the proceeding, in whole or in part. Motions made prior to the hearing shall be filed no later than 30 days prior to the commencement of the hearing or at such earlier time in advance of the final prehearing conference as the hearing officer may order. For purposes of ruling on a dispositive motion prior to the conclusion of the interested division's case, the facts of the pleadings of the party against whom the motion is made shall be taken as true (except as modified by stipulation entered into by that party). The hearing officer shall promptly grant or deny the motion or defer decision until after the interested division concludes its case. (Rule 16(b)).

Documents and Witnesses' Statements

In enforcement proceedings, the interested division shall make available to the other parties for inspection and copying all non-privileged, relevant documents that are not work-product; provided, however, the interested

division may withhold any document it believes would result in a breach of personal privacy, confidentiality or where turnover otherwise would not be in the interests of justice. The hearing officer shall review the withheld material to determine whether it should be produced. The interested division also shall make available to any party any statement of a person called or to be called as a witness by the interested division that would be required to be produced pursuant to the Jencks Act. (Rules 20(a), 21(a)). See "Failure to Produce."

Evidence

The hearing officer shall receive relevant and material evidence and exclude all irrelevant, immaterial or unduly repetitious evidence. (Rule 19(a)).

Ex Parte Temporary Cease-and-Desist Orders

A temporary-cease-and-desist order may be issued without notice and opportunity for hearing only if the Commission determines that notice and a hearing prior to entry of an order would be impracticable and contrary to the public interest. A respondent served with an *ex parte* temporary cease-and-desist order may, within 10 days after the date on which the order was served, move to have the order set aside, limited, or suspended and request a hearing. The Commission shall hold a hearing and render a decision on the respondent's motion at the earliest possible time. Normally, such a hearing should be held within 48 hours of a request for hearing, unless the respondent requests a longer period. (Rule 43(a),(c)).

Extensions and Enlargements of Time; Adjournment

The Commission or the hearing officer (for good cause shown) may extend or shorten any time limits for any filing of any papers or documents and may postpone or adjourn any hearing. In considering requests for postponement, adjournment or extensions, the hearing officer or the Commission shall consider the length of the proceeding to date; the number of postponements, adjournments or extensions already granted; the stage of the proceedings when the request is made; and any other matters as justice may require. Postponements or adjournments should normally not exceed 21 days although longer periods are permissible if the reasons for such postponement or adjournment are set forth in the written order. (Rule 17).

Failure To Appear

Any person who is named in an order instituting proceedings as a person against whom findings may be made or against whom sanctions may be imposed that fails to appear at a hearing or prehearing conference or fails to file a notice of appearance when ordered to do so may be deemed in default and the proceedings may be determined against such person, upon consideration of the allegations, which may be deemed to be true. (Rules 3(c), 9(f)).

Failure To File Answer

If a party fails to file an answer within the time provided, such person shall be deemed in default and the proceedings may be determined against such person upon consideration of the allegations, which may be deemed to be true. (Rules 3(b), 9(e)).

Failure To Produce

If a document or statement required to be turned over to a respondent is not turned over by the interested division of the Commission, no rehearing or redecision of a matter already heard or decided shall be required unless respondent shall establish that the failure to produce the document or statement was not harmless error. (Rules 20(b), 21(b)).

Filings—Deficient Filings and Failure To File

The Commission or the hearing officer may reject, in whole or in part, any filing which fails to comply with the Rules or any order. In the event a required filing is not made or is rejected, in whole or in part, and such failure or deficiency is not cured within the time period authorized, the party failing to make the filing may be deemed in default, and the proceedings may be dismissed or determined against such party on the basis of the record then existing, including the order instituting proceedings, the allegations of which may be deemed to be true. (Rule 3(b)).

Filing With the Commission or Hearing Officer

All papers required to be served by a person shall be filed with the Commission, addressed to the Secretary of the Commission, or the hearing officer, as the case may be, before service on any other person or promptly thereafter. An original and three copies of all papers shall be filed with the Commission or the hearing officer. (Rule 5(d), (e), (f)).

Final Decision

Unless a party or other person entitled to seek review of an initial decision timely files a petition for review, or the Commission on its own initiative orders review, an initial decision shall become the final decision of the Commission. The Commission shall issue an order that the decision has become final, but even if the order of finality is not issued, the initial decision automatically becomes final with the passage of time. (Rule 24(c), (d)).

Hearings—Time and Place

Each party shall be given advance notice, reasonable in light of the circumstances, of the date, time and location of the hearing in such party's proceedings; provided, however, that in a proceeding in which a temporary *ex parte* sanction is sought, the Commission may direct that notice of the hearing shall be delayed. The time and place for any hearing shall be fixed with due regard for the public interest and the convenience and necessity of the parties, the participants or their representatives. (Rule 8(c)).

Holidays

See "Business Hours, Business Days."

Initial Decision

Normally, the hearing officer should file the initial decision with the Secretary of the Commission within 75 days of the filing of the last brief specified in the post-hearing briefing schedule, or, if no post-hearing briefs are filed, within 75 days of the close of the hearing. (Rule 25(d)).

Petition for Review

An initial decision shall include a statement of the time within which a petition for review of the initial decision may be filed. The time allowed to file a petition for review shall not exceed 21 days after service of the initial decision upon the parties except for good cause shown. (Rule 24(b),(c)). A brief in opposition to a petition for review and/or a petition for summary affirmance in opposition to a petition for review may be filed within five days of service of the petition upon the party filing such opposition or petition for summary affirmance (Rule 26(c)). Within 15 days after the filing of such brief in opposition and/or a petition for summary affirmance, the Commission shall issue: (i) An order determining whether to grant the petition for review and (ii) if the petition for review is granted, a briefing schedule order. (Rule 27(a)). See "Final Decision."

Interlocutory Review of Hearing Officer's Rulings

In the absence of extraordinary circumstances, the Commission will not

review a ruling of the hearing officer prior to considering a final order with respect to the entire proceeding. A hearing officer shall not certify a ruling for interlocutory review by the Commission unless a party requests such review within five days of the hearing officer's ruling and the hearing officer certifies in writing the grounds for such review. Normally, interlocutory review should be completed within 30 days of the date set for filing the final brief on the matter being reviewed. (Rule 18(a),(b)).

Interrogatories

See "Depositions—Oral and Written" and "Depositions on Written Questions."

Leave to Adduce Additional Evidence

Any party may file a written motion for leave to adduce additional evidence, stating with particularity why such evidence is material and the reasonable grounds for failure to adduce such evidence previously. Upon such motion or upon its own motion, the Commission may hear additional evidence, may remand the proceeding to a self-regulatory organization or may remand or refer the proceeding to a hearing officer for the taking of additional evidence. (Rule 28(e)). See "Motions."

Leave to Participate

Any person seeking leave to participate shall file a motion for leave to participate not later than 20 days prior to the date fixed for the commencement of the hearing. (Rule 13(c)).

Length and Form of Briefs

All briefs filed with the Commission or with a hearing officer containing more than ten pages shall include a table of contents and a table of cases, statutes and other authorities cited. Except with leave of the Commission or hearing officer, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages. (Rule 31).

Mail

Service by mail is complete upon mailing. Service by mail adds three days to the period computed from time of service. (Rules 5(b), 6(b)). See "Service."

Motions

Unless made during the hearing itself, a motion, including any supporting material, affidavits or other exhibits, shall be in writing. Opposition briefs or affidavits in opposition to motions shall be filed within 10 days after service of the motion. Reply briefs shall be filed within five days after service of the opposition brief or affidavit. (Rule 16(a)).

Notice of Appearance

When an individual person first appears on his or her own behalf before the Commission or a hearing officer in a proceeding arising out of an order instituting proceedings or seeking review of a self-regulatory organization determination, he or she shall file a written notice with the Commission or state on the record a current address and telephone number where he or she may be reached during business hours. When an attorney appears before the Commission or a hearing officer in a representative capacity in a proceeding, he or she shall file a written notice of such appearance, which shall state the name of the proceeding in which he or she is appearing, his or her name, current address and business telephone number and the name and current address of the person or persons on whose behalf he or she appears. (Rule 2(d)).

Oral Argument

Except as to determinations whether to (i) accept a matter for interlocutory review or (ii) order review of a hearing officer's initial decision, any party may make a separate written motion accompanying the initial brief on the merits requesting oral argument. Normally, the grant or denial of a request for oral argument should be made by the Commission within 21 days of the date for the filing of the last brief called for by the briefing schedule. (Rule 28(a)). A motion of an amicus curiae to participate in oral argument will be granted only for extraordinary reasons. (Rule 13(d)).

Order Instituting Proceedings

Whenever the Commission issues an order instituting proceedings, appropriate notice shall be given by the Commission to each party (or his authorized representative) to the proceedings. (Rule 8(a)).

Amendments

Motions for amendments to the matters of fact and law to be considered may be granted by the hearing officer at any time prior to the filing of an initial decision or, if no initial decision is to be filed, prior to the time fixed for the filing of final briefs with the Commission. An amendment to the matters of fact and law to be considered may be granted by the Commission at any time. (Rule 8(e)).

Penalties—Prompt Payment

Unless otherwise provided, amounts due pursuant to an order by the Commission requiring the payment of penalties shall be paid no later than five days after service of the order upon the party required to pay such penalty. Amounts due pursuant to an order by a hearing officer shall be paid on the first day after the order becomes final. (Rule 48(a)).

Petition for Rehearing

Any petition requesting rehearing by the Commission shall be filed (i) within 10 days after entry of the order complained of or (ii) within such time as the Commission may prescribe upon request of a party, if such request is made within the foregoing 10 day period. The petition for rehearing shall clearly state the specific matters upon which rehearing is sought. (Rule 28(d)).

Petition for Review

See "Initial Decision—Petition for Review."

Prehearing Conferences

The hearing officer may direct, or any party may request, that counsel, any party, or any other participant, meet with the hearing officer for a prehearing conference or conferences. Except where the emergency nature of a proceeding would make a prehearing conference clearly inappropriate, a final prehearing conference should be held. Any final prehearing conference should be held as close to the time of the hearing as reasonable under the circumstances. At the conclusion of any conference or promptly thereafter, the hearing officer shall enter a ruling or order which recites the agreements reached and any procedural determinations made by the hearing officer. (Rule 12(a),(c)).

Prehearing Submissions

The hearing officer, at a prehearing conference, may, on his own motion or at the request of a party or participant, order any party, including the interested division of the Commission, to furnish to the hearing officer and the other parties and participants information prior to the hearing, including a summary of such party's case or defense, its legal theories, copies and a list of documents to be introduced at the hearing by such party and a list of names, occupations, addresses and expected testimony of witnesses to be called on its behalf at the hearing. (Rule 12(b)).

Production of Relevant Investigative Documents in Enforcement Proceedings

See "Documents and Witnesses' Statements."

Proposed Findings, Conclusions and Supporting Briefs

At the end of each hearing and before an initial decision is made, the hearing officer shall give the parties a reasonable opportunity to submit in writing proposed findings and conclusions, together with, or as part of, their briefs. The hearing officer shall prescribe the period within which proposed findings and conclusions and supporting briefs are to be filed and shall direct such filings to be simultaneous or successive; provided, however, the first filing should normally be made no more than 30 days after the close of the hearing. Normally, the total period within which all such proposed findings and conclusions and supporting briefs and any counter-statements of proposed findings and conclusions and reply briefs are to be filed should be no more than 90 days after the close of the hearing. Exceptions to the time periods specified above may be made so long as the reasons therefor are set forth in the hearing officer's order. (Rule 25(a),(b)).

Publication of Notice of Hearing

Unless otherwise ordered by the Commission, notice of any public hearing shall be given general circulation by release to the public, by publication in the SEC News Digest and, where directed, by publication in the **Federal Register**. (Rule 8(d)).

Responsive Pleadings

See "Answers," "Motions."

Review by the Commission of Determinations at a Delegated Level (Other Than by a Duty Officer or a Hearing Officer)

Any person who seeks review of a determination made at a delegated level (other than by a duty officer or a hearing officer) shall file with the Commission a written notice of intention to petition for review within five days after actual notice of the determination complained of. Within five days after such notice has been communicated, the person seeking review shall file a petition for review with the Commission. The Commission may at any time, on its own initiative, order review of any determination made at a delegated level; provided, however, that where there are parties to the matter, review by the Commission on its own initiative shall not be ordered more than 10 days after the determination. (Rule 30).

Review by the Commission of Initial Decisions by Hearing Officers

Any party or person who would have been entitled to judicial review of a final order if entered by the Commission may, within such time as prescribed by the hearing officer, file a petition for Commission review of the initial decision. Statements in opposition to a petition for review and/or a petition for summary affirmance may be filed within five days of service of the petition upon the party opposing the petition. Any party may petition for summary affirmance in opposition to a petition for review of any issues which such party believes do not warrant consideration by the Commission. The Commission may, on its own initiative, order review of all or part of any initial decision by a hearing officer within 15 days after the end of the period in which a brief in opposition to a petition for review and/or a petition for summary affirmance may be filed. Normally, the Commission shall issue within 15 days after the filing of a statement in opposition and/or a petition for summary affirmance: (i) An order determining whether to grant the petition for review and (ii) if the petition for review is granted, a briefing schedule order. See "Initial Decision-Petition for Review." (Rule 26(a),(c),(e)).

Scheduling

See "Briefs to the Commission."

Self-Regulatory Organization Determinations—Applications for Commission Review

Any person who is aggrieved by a determination by a self-regulatory organization may file an application for review within 30 days after notice of such determination was filed with the Commission and received by the aggrieved person applying for review. (Rule 56). The Commission, on its own initiative, may order review of a self-regulatory organization determination within 40 days after notice of such determination was filed with the Commission. (Rule 57).

Service

Every notice, motion, brief or other paper in any proceeding where an order instituting proceedings or application for review of a self-regulatory organization determination has been granted shall be served upon each of the parties and any other participants to the proceedings; provided, however, that no service shall be required of *ex parte* motions, requests for confidential treatment of information or requests for issuance of a subpoena. Service shall be made upon counsel if a person is represented by counsel who has filed a notice of appearance; provided, however, a copy of any paper served may also be served upon the person represented. (Rule 5).

By Mail

Whenever a person has the right to, or is required to, do some act after service of a paper and service is made by mail, three days shall be added to the prescribed period which is computed from such service. Service by mail is complete upon mailing. (Rules 5(b), 6(b)).

Means of Service

Service shall be made by delivering a copy of the paper to be served upon counsel or, if not represented, the person or party required to be served by any of the following means: (1) Personal or hand delivery, including leaving a copy of the paper with a responsible individual at the office or in a conspicuous place; (2) commercial courier or overnight delivery service that obtains a receipt or proof of delivery; or (3) first-class, registered, certified or Express Mail. (Rule 5(b)).

Proof of Service

Proof of service shall be made by filing an affidavit of service simultaneously with the filing of the required number of copies of the paper with the Commission. (Rule 5(c)).

Stop Order Proceedings

Any notice of a proceeding relating to the issuance of a stop order suspending the effectiveness of a registration statement pursuant to section 8(d) of the Securities Act shall be sent to or served on the issuer; or in the case of a foreign government, to or on the underwriter; or in the case of a foreign or territorial person, to its duly authorized United States representative named in the registration statement. (Rule 8(f)).

Service of Order Instituting Proceedings

Service of an order instituting proceedings may be given by personal delivery, commercial carrier or overnight delivery with proof of delivery or first class, registered, Express or certified mail; provided, however, that with respect to proceedings under section 8 or 10 of the Securities Act or section 305 or 307 of the Trust Indenture Act, service shall be by personal service or confirmed telegraphic notice; provided, further, that in proceedings under the Investment Company Act and the Investment Advisers Act, service shall be given by personal service upon each party or by registered mail, certified

mail, or confirmed telegraphic notice to the party's last known business address. (Rule 8(b)).

Settlements

Persons who are notified that proceedings may or will be instituted against them, or a party to a proceeding already instituted may, at any time, propose in writing offers of settlement. (Rule 11(a)).

Stays

A motion seeking a stay of effectiveness of an order of the Commission pending judicial review shall be made to the Commission prior to or at the same time as the filing of a petition for review in the appropriate court; provided, however, a motion seeking a stay of effectiveness of a final disciplinary sanction, summary suspension, prohibition or limitation of access by a self-regulatory organization in connection with an application pursuant to section 19(d)(2) of the Exchange Act or any other motion for stay not covered by the first clause hereof may be made to the Commission at any time. (Rule 2(e)(5)).

Opposition briefs to a motion for a stay shall be filed (i) within five days of actual notice of the motion for a stay if the sanction complained of is not yet in effect, or (ii) within two days, if the sanction complained of took effect or will take effect within four days of the order imposing the sanction. When a sanction or action has already taken effect and respondent has promptly sought relief upon notice of the sanction, a decision on a stay motion shall be expedited. Normally, if a sanction has taken effect, a decision as to whether or not to grant a stay should be issued within five days of the date set for filing of the opposition to a motion for a stay. (Rule 16(e)).

Subpoenas

Subpoenas requiring the attendance and testimony of witnesses or the production of documentary or other tangible evidence at a designated time and place may be made in writing or on the record to the hearing officer at any time. Any person to whom a subpoena is directed may, prior to the time specified therein for compliance, but in no event more than 10 days after the date of service of such subpoenas, apply in writing to quash or modify such subpoena. The person on whose behalf the subpoena was issued may, within five days of service of the application, file a brief in opposition to the application to quash or modify the subpoena. (Rule 19 (c), (d)).

Summary Affirmance

The Commission may summarily affirm an initial decision based upon the petition for review and any responses thereto, without further briefing, if it finds that no issue raised in the petition for review warrants the Commission's further consideration. (Rule 26(g)).

Summary Trading Suspensions

Any person adversely affected by a suspension pursuant to section 12(k)(l)(a) of the Exchange Act may file a petition with the secretary of the Commission requesting that the suspension be terminated. The Commission may, in its discretion, schedule a hearing on the matter or decide the matter on the facts presented in the petition. (Rule 46 (a), (b)).

Sworn Testimony

Any witness at a hearing shall testify under oath or affirmation, administered by the hearing officer. (Rule 19(a)).

Temporary Suspension of a Professional Practice

The Commission, without preliminary hearing, may by order temporarily suspend any attorney, accountant, engineer or other professional or expert from appearing before it. An order of temporary suspension shall become effective upon service upon the respondent. Any person temporarily suspended may, within 30 days after service upon him or her of the temporary suspension order, petition the Commission to lift the temporary suspension. If no petition has been received by the Commission within 30 days after service of the order, the suspension shall become permanent. (Rule 2(e)(3)).

Reinstatement

An application for reinstatement of a person permanently suspended or disqualified may be made at any time. The Commission may, in its discretion, afford the applicant a hearing; provided, however, the suspension or disqualification shall continue unless the Commission reinstates the applicant for good cause shown. Any person who has been suspended from appearing or practicing before the Commission because of a suspension or disbarment from any Federal or state court, a felony conviction or misdemeanor involving moral turpitude may file an application for reinstatement at any time and shall be afforded an opportunity for hearing. (Rule 2(e)(5)).

Temporary Sanctions: Cease-and-Desist Orders and Suspension of Registration

Temporary sanctions are defined as a temporary cease-and-desist order or a temporary suspension of the registration of a broker, dealer, municipal securities dealer, government securities broker, or government securities dealer or transfer agent. An application for a temporary sanction shall be filed by the Division of Enforcement with the Secretary of the Commission. (Rule 39(a)).

Duration

A temporary suspension of a registered entity or a temporary cease-and-desist order not otherwise limited in its duration shall expire: (i) 15 days after service upon the Division of Enforcement of an initial decision declining to make permanent a temporary sanction; (ii) 180 days, or such other time specified by the Commission, after the Commission grants a petition for review; or (iii) 180 days, or such other time as specified by the Commission, after the close of the hearing with respect to a determination whether to make a temporary sanction permanent. The duration of an order may be extended at any time with the consent of the persons named in the order. The Commission may at any time, by order, without notice or opportunity to be heard, extend the duration of an order; provided, that, if made without respondents' consent, reasons for such extension shall be stated in the order. (Rule 45 (a), (b)).

Transcripts

Transcripts of private hearings may be purchased by parties at prescribed rates. (Rule 33(d)).

Witness Fees

Witnesses summoned before the Commission and witnesses whose depositions are taken shall be paid the same fees and mileage paid to witnesses in the United States Courts. Witness fees and mileage shall be paid by the party at whose instance the witnesses appear. (Rule 19(e)).

III. Initial Regulatory Flexibility Analysis

This initial regulatory flexibility analysis, which has been prepared in accordance with section 3(a) of the Regulatory Flexibility Act, 5 U.S.C. 603(a), relates to the Securities and Exchange Commission's proposed Rules of Practice (the "proposed Rules") which would replace the current Rules of Practice (the "Rules" or the "existing Rules"), 17 CFR part 201, subpart A (17 CFR 201.1–29 (1993)). The Rules govern proceedings, excluding investigations

and rulemaking, before the Commission under the Securities Act of 1933 ("Securities Act"), the Securities Exchange Act of 1934 ("Exchange Act"), the Public Utility Holding Company Act ("PUHCA") of 1935, the Trust Indenture Act ("Trust Indenture Act") of 1939, the Investment Company Act ("Investment Company Act") of 1940 and the Investment Advisers Act ("Advisers Act") of 1940.

A. Reasons for the Proposed Action

In February 1993, the Task Force on Administrative Proceedings issued its final Report in which it recommended a comprehensive revision to the Commission's Rules of Practice.[3] The Rules, first adopted in 1935, have not been comprehensively revised by the Commission since 1960. Although the Commission has subsequently amended the Rules, many important developments have occurred in the interim which merit this comprehensive revision.

The Commission is proposing to revise its Rules of Practice in order to accomplish a number of objectives: (1) To improve the organization, clarity and internal consistency of the Rules; (2) to increase efficiency in the administrative process; (3) to promote transparency—insuring that the Rules accurately reflect Commission practice; and (4) to comply with the statutory requirement that the Commission "establish regulations providing for the expeditious conduct of hearings and rendering of decisions" in cease-and-desist proceedings under the federal securities laws. 15 U.S.C. 78w(d).

Organization, Clarity and Internal Consistency

To improve the organization, clarity and internal consistency of the Rules, the Commission proposes a number of changes. First, as an organizational matter, the Commission has decided to reorder the Rules so that they follow, as closely as possible, the chronological flow of events from service and filing of papers to institution of a hearing before a hearing officer to review by the Commission. Second, rules regarding temporary sanctions, such as a temporary suspension of a registered entity, a suspension pursuant to Exchange Act section 12(k)(1)(A) or a temporary cease-and-desist order, appear separately from those rules applicable in all proceedings. Third, rules regarding disgorgement and penalty payments are also separated out from general procedural rules and appear after the temporary sanction rules. Finally, rules related to the review of self-regulatory organization determinations, currently found in the Exchange Act rules, have been relocated to the Rules of Practice.

The proposed Rules also contain an "unofficial timetable" outlining many of the significant steps in the administrative process and indicating the time period for each step.[4] Organized alphabetically, the timetable also furnishes securities practitioners and pro se litigants alike with a quick entry point into the specific provisions of the Rules as well as cross-references to related provisions. Two cross-reference tables have been provided to help identify the location of the existing Rules within the proposed Rules and vice versa.

Efficiency

A number of rule changes will increase the efficiency of the administrative process. Existing Rule 11(e), for example, states that "an application or motion which requires a ruling which would dispose of the proceeding in whole or in part shall be made to the hearing officer *after the conclusion of the division's case or after the conclusion of the hearing.*" (emphasis added) This rule may require respondents and the Commission to go through "the time and expense of a hearing on issues where prehearing procedures permit agreement as to the facts, and where no hearing is necessary." *Report of the Task Force*, at 174. Because a hearing officer may obtain additional or different information than was available to the Commission when it instituted the proceedings, certain issues may be resolvable at an earlier stage.

Another example of a rule change designed to improve efficiency can be found in proposed Rule 19(c) concerning subpoenas. Under existing Rule 14(b)(1), subpoenas are returnable only at the time and place of hearing. Although parties often agree to exchange documents in advance, when the Rule is adhered to hearings may be delayed while each side reviews the other side's document production and arranges for copies to be introduced into evidence. Proposed Rule 19(c)(1) permits subpoenas *duces tecum* to be returnable in advance of the hearing.

Transparency

Although a number of minor changes have been proposed to improve the Rules' transparency, Proposed Rule 20, a completely new rule, is the most prominent rule specifically designed to attain this goal. Proposed Rule 20 codifies the practice, in most Enforcement proceedings, to voluntarily turn over to respondents relevant investigative documents prior to the commencement of a hearing. As the Task Force noted in its report, notwithstanding the fact that the staff is not required to do so under the current Rules, many proceedings involve such document turn over because the some staff believes that doing so is appropriate under the Commission's obligations under existing Rule 11–1. Additionally, some staff members believe "that the practice promotes a fairer, more efficient hearing." Task Force Report at 191. In addition, Proposed Rule 20 will ensure that the scope of production of relevant investigative documents, which varies significantly in different offices, will be uniform.

Compliance With Statutory Requirements

The Commission is proposing new Rules 38 through 45 in order to comply with the statutory requirement that the Commission "establish regulations providing for the expeditious conduct of hearings and rendering of decisions" in cease-and-desist proceedings under the federal securities laws. 15 U.S.C. 78w(d).

B. Legal Basis

The proposed Rules would be promulgated pursuant to the Commission's authority to adopt rules and regulations as may be necessary or appropriate to implement the provisions of the federal securities laws. See section 19 of the Securities Act, 15 U.S.C. 77s; section 23 of the Exchange Act, 15 U.S.C. 78w; section 20 of the PUHCA, 15 U.S.C. 79t; section 319 of the Trust Indenture Act, 15 U.S.C. 77sss; sections 38 and 40 of the Investment Company Act, 15 U.S.C. 80a–37 and 80a–39; and section 211 of the Investment Advisers Act, 15 U.S.C. 80b–11. Rules 38 through 45 governing the issuance of temporary cease-and-desist orders would also be promulgated pursuant to section 23(d) of the Exchange Act, 15 U.S.C. 78w(d).

C. Small Businesses and Entities Subject to the Rules

The proposed Rules would affect all parties appearing in an administrative proceeding before the Commission or a

[3] "Fair and Efficient Administrative Proceedings," the Report of the Task Force on Administrative Proceedings of the U.S. Securities and Exchange Commission (Feb. 1993) (hereafter Task Force Report).

[4] The Commission or the hearing officer, for good cause shown, may extend or shorten any time limits for any filing and may postpone or adjourn any hearing.

hearing officer. Neither the existing Rules of Practice nor the proposed Rules are specifically designed to effect small entities or businesses. With the exception of the rules governing temporary cease-and-desist orders, the Commission has no basis to determine the number of small businesses which would be making use of, or be subject to, the proposed Rules.[5]

The temporary cease-and-desist order rules are applicable only to a broker, dealer, investment company, investment advisor, transfer agent, municipal securities dealer, government securities broker, government securities dealer, or a respondent who is, or was, at the time of the alleged misconduct, an associated person of, or a person seeking to become associated with one of the foregoing. See, e.g., 15 U.S.C. 78u-3(c)(2). The federal securities laws provide definitions for when one of these entities is considered a "small business" or "small entity" subject to the Regulatory Flexibility Act.

When used with reference to a broker or dealer, "small business" means that the broker or dealer had total capital of less than $500,000 on the date in the prior fiscal year as of which audited financial statements were prepared pursuant to 17 CFR 240.17a-5(d), or if not required to file such statements, on the last business day of the preceding fiscal year, and is not affiliated with any person that is not a small business.[6]

According to the Office of Economic Analysis, as of December 30, 1992, there were 5,783 broker-dealers that met the definition of "small business."

For purposes of the Investment Company Act, a "small business" is an investment company "with net assets of $50 million or less at the end of its most recent fiscal year." 17 CFR 270.0-10. According to the Division of Investment Management, as of April 30, 1993, of the approximately 4,100 registered small investment companies, approximately 1,200 met the definition of "small business."

For purposes of the Investment Advisers Act, a "small business" is an investment adviser who:

(1) Manages assets with a total value of $50 million or less, in discretionary or non-discretionary accounts, as of the end of its most recent fiscal year and does not render other advisory services;[7] or (2) solely, or in addition to managing assets of $50 million or less, renders other advisory services, and the assets related to its advisory business do not exceed in value $50,000 as of the end of its most recent fiscal year.[8]

According to the Division of Investment Management, as of April 30, 1993, of the approximately 18,400 investment advisers registered with the Commission, approximately 16,200 met the definition of "small business." Of the 16,200 small advisers, approximately 7,200 have discretionary or non-discretionary accounts under management.

When used the term "small business" refers to a transfer agent, the transfer agent must have:

(1) Received less than 500 items for transfer and less than 500 items for processing during the proceeding six months (or in the same time it has been in business, if shorter); (2) maintained master shareholder files that in the aggregate contained less than 1,000 shareholder accounts or was the named transfer agent for less than 1,000 shareholder accounts at all times during the preceding fiscal year (or in the same time it has been in business, if shorter); and (3) is not affiliated with any person (other than a natural person) that is not a small business or small organization * * *.[9]

According to the division of Market Regulation, there are approximately 1800 transfer agents of which 1000 would meet the definition for "small business."

D. Overlapping or Conflicting Federal Regulations

The proposed Rules of Procedure and their accompanying additional changes would not overlap or conflict with any federal regulations.

E. Significant Alternatives

Pursuant to section 3(c) of the Regulatory Flexibility Act, 5 U.S.C. 603(c), the following types of alternatives were considered:

(1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(2) The clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small entities;

(3) The use of performance rather than design standards; and

(4) An exemption from coverage of the rules, or any part thereof, for such small entities.

The Commission has designed its proposed Rules of Practice to accommodate *pro se* litigants and other small entity participants. The Commission considered as a significant alternative to the Proposed Rules different or simplified timetables for small entities or *pro se* litigants. Such timetables would have included longer periods for the filing of respondent answers, motions, objections, petitions for review or briefs to the Commission. Such alternatives, however, based solely on the size of the respondent and no other criteria, would not be consistent with the Commission's program for the fair and efficient administration of justice under the Rules of Practice. Similarly, exemption from the proposed Rules, or any portion thereof, was considered inconsistent with the Commission's role in administering and enforcing the federal securities laws. Finally, adoption of performance standards rather than design standards would not be consistent with the goals of the federal securities laws as they relate to investor protection and the efficient administration of justice.

F. Solicitation of Comments

The Commission encourages the submission of written comments with respect to any aspect of this initial regulatory flexibility analysis. Such comments will be considered in the preparation of the final regulatory flexibility analysis. Persons wishing to make written comments should submit them to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 5th Street NW., Washington, DC 20549. Comment letters should refer to File No. S7-40-92. All comments received will be available for public inspection and copying at the Commission's Public Reference Room at the same address.

IV. Statutory Basis for Rules

These amendments to the Rules of Practice and related rules are being proposed pursuant to: 15 U.S.C. 77f, 77g, 77h, 77h-1, 77j, 77s, 77u, 78c(b), 78d-1, 78d-2, 78*l*, 78m, 78n, 78*o*(d), 78*o*-3, 78s, 78u-3, 78v, 78w, 79c, 79s, 79t, 79z-5a, 77sss, 77ttt, 80a-8, 80a-9, 80a-37, 80a-38, 80a-39, 80a-40, 80a-41, 80a-44, 80b-3, 80b-9, 80b-11, and 80b-12. Section 201.36 is also issued under 28 U.S.C. 2112(a). Sections 201.131 to 201.160 are also issued under

[5] For purposes of the Regulatory Flexibility Act, the term "small business" is defined by Rule 157 of the Securities Act, 17 CFR 230.157, as "an issuer whose total assets on the last day of its most recent fiscal year were $5,000,000 or less and that is engaged or proposing to engage in" a public offering of securities not exceeding $5,000,000. (The Trust Indenture Act Rule 0-7 contains an identical definition of small business. 17 CFR 260.0-7). If an investment company is an issuer for purposes of the Securities Act, "small business" means "an investment company with net assets of $50 million or less at the end of its most recent fiscal year." 17 CFR 230.157(b) and 240.0-10(b).

[6] 17 CFR 240.0-10(c).

[7] Other advisory services are those services refetred to in form ADV, Part II, Item 1A (3)-(9). 17 CFR 275.0-7(b).

[8] 17 CFR 275.0-7.

[9] 17 CFR 240.0-10(h).

5 U.S.C. 504(c)(1). Sections 201.261 to 201.268 are also issued under 15 U.S.C. 78u–1.

List of Subjects in 17 CFR Parts 201, 202, 229, and 240

Accountants, Administrative practice and procedure, Brokers, Insider trading—bounty payments, Cease-and-desist orders, Confidential business information, Confidential treatment requests, Disgorgement payments, Equal Access to Justice Act, Fraud, Lawyers, Penalty payments, Reporting and recordkeeping requirements, Securities, Self-regulatory organizations, Temporary cease-and-desist orders, Temporary suspension of a registered entity.

Text of the Proposed Rules of Practice

For the reasons set out in the preamble, title 17, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 201—RULES OF PRACTICE

1. The authority citation for part 201 is removed.

Subpart C—Procedures Pertaining to the Payment of Bounties Pursuant to Subsection 21A(e) of the Securities Exchange Act of 1934

2. The authority citation for Subpart C of part 201 is revised to read as follows:

Authority: 15 U.S.C. 78u–1 and 78w.

§§ 201.61–201.68 [Redesignated as §§ 201.261–201.268]

3. Sections 201.61 through 201.68 are redesignated as §§ 201.261 through 201.268.

§ 201.264 [Amended]

4. In newly redesignated § 201.264, the reference to "Rule 65 of this subpart" is corrected to read "§ 201.265".

Subpart B—Regulations Pertaining to the Equal Access to Justice Act

5. The authority section for Subpart B of part 201 is revised to read as follows:

Authority: 15 U.S.C. 77s, 78w, 78x, 79t, 77sss, 80a–37 and 80b–11; 5 U.S.C. 504(c)(1).

§§ 201.31–201.60 [Redesignated as §§ 201.131–201.160]

6. Sections 201.31 through 201.60 are redesignated as §§ 201.131 through 201.160.

§ 201.132 [Amended]

7. In newly redesignated § 201.132: the reference to "§ 201.33" is corrected to read "§ 201.133".

§ 201.133 [Amended]

8. In newly redesignated § 201.133: the reference in paragraph (a) to "17 CFR 201.60" is corrected to read "17 CFR 201.160".

§ 201.142 [Amended]

9. In newly redesignated § 201.142: the references to "§ 201.34(f)" in paragraph (a) and "201.25" in paragraph (b) are corrected to read "§ 201.134(f)" and "201.33" respectively.

§ 201.152 [Amended]

10. In newly redesignated 201.152: the reference in paragraph (c) to "§ 201.55" is corrected to read "§ 201.155".

§ 201.153 [Amended]

11. In newly redesignated § 201.153: the reference to "§ 201.55" is corrected to read "§ 201.155".

§ 201.154 [Amended]

12. In newly redesignated § 201.154: the reference to "§ 201.8" is corrected to read "§ 201.11".

§ 201.157 [Amended]

13. In newly redesignated § 201.157: the reference to "§ 201.17" is corrected to read "§ 201.26 and § 201.27".

14. Subpart A of part 201 is revised to read as follows:

Subpart A—Rules of Practice

Sec.
201.1 Scope, Rules of Construction and Definitions.
201.2 Appearance and Practice Before the Commission.
201.3 Sanctions.
201.4 Authority of Hearing Officer.
201.5 Service and Filing of Papers.
201.6 Computation of Time.
201.7 Business Hours.
201.8 Notice of Proceedings and Hearings.
201.9 Answers; Defaults.
201.10 Signature; Requirement and Effect Generally.
201.11 Settlements.
201.12 Prehearing Conferences; Submissions; Specification of Procedures.
201.13 Parties, Limited Participants and Amicus Curiae.
201.14 Consolidation.
201.15 Hearings.
201.16 Motions; Objections to Evidence; Exceptions to Rulings; Stays.
201.17 Extensions of Time and Adjournments.
201.18 Interlocutory Review.
201.19 Evidence; Subpoenas.
201.20 Production of Relevant Investigative Documents in Enforcement Proceedings.
201.21 Production of Witnesses' Statements in Enforcement Proceedings.
201.22 Depositions Upon Oral Examination.
201.23 Depositions Upon Written Questions.
201.24 Content, Effect and Finality of Initial Decision.
201.25 Proposed Findings, Conclusions and Supporting Briefs Filed with the Hearing Officer.
201.26 Review by the Commission of Initial Decisions by Hearing Officers.
201.27 Briefs to the Commission.
201.28 Hearing Before the Commission; Leave to Adduce Additional Evidence; Petitions for Rehearing.
201.29 Record Before the Commission; Basis for Determinations; Contents; Certification.
201.30 Review by the Commission of Determinations at a Delegated Level.
201.31 Filing Formalities.
201.32 Orders, Rulings and Decisions.
201.33 Applications for Confidential Treatment of Certain Matters; Transcripts of Private Hearings.
201.34 Adjudications Not Required to be Determined on the Record After Notice and Opportunity for Hearing.
201.35 Applications by Barred Individuals for Consent to Associate with Registered Brokers, Dealers, Municipal Securities Dealers, Government Securities Brokers, Government Securities Dealers, Investment Advisers, Investment Companies or Transfer Agents.
201.36 Receipt of Petitions For Review Pursuant to 28 U.S.C. § 2112(a)(1).
201.37 Issuance, Amendment and Repeal of Rules of General Application.

Rules Relating to Temporary Sanctions

201.38 Expedited Consideration of Proceedings.
201.39 Applications for a Temporary Suspension of a Registered Entity or for a Temporary Cease-and-Desist Order.
201.40 Notice and Opportunity to be Heard on an Application for a Temporary Sanction.
201.41 Preparation and Review of an Initial Decision Whether to Impose a Temporary Sanction.
201.42 Issuance of a Temporary Cease-and-Desist Order After Notice and Opportunity for Hearing.
201.43 *Ex Parte* Issuance of a Temporary Cease-and-Desist Order.
201.44 Whether a Temporary Sanction Should be Made Permanent; Provisions Relating to an Initial Decision.
201.45 Duration of a Temporary Suspension of a Registered Entity or a Temporary Cease-and-Desist Order.
201.46 Summary Suspensions Pursuant to Securities Exchange Act Section 12(k)(1)(A).

Rules Relating to Disgorgement and Penalty Payments

201.47 Interest on Sums Disgorged.
201.48 Prompt Payment of Disgorgement and Penalties.
201.49 Submission of a Plan of Disgorgement.
201.50 Contents of Plan of Disgorgement; Provisions for Payment.
201.51 Notice of Proposed Plan of Disgorgement and Opportunity for Comment by Non-Parties.
201.52 Order Approving, Modifying or Disapproving a Plan of Disgorgement.

201.53 Administration of a Plan of Disgorgement.
201.54 Right to Challenge an Order of Disgorgement.
201.55 Inability to Pay Disgorgement or Penalties.

Form

201.55f Financial Information Disclosure Statement Form.

Rules Related to Review of Self-Regulatory Organization Determinations

201.56 Applications for Commission Review of Determinations by Self-Regulatory Organizations, Pursuant to Securities Exchange Act Section 19(d)(2).
201.57 Review by the Commission on Its Own Initiative.
201.58 Certification of the Record; Service of the Index.
201.59 Briefs to the Commission; Oral Argument; Leave to Adduce Additional Evidence.
Cross-Reference Table 1: Existing Rules to Proposed Rules
Cross-Reference Table 2: Proposed Rules to Existing Rules

Subpart A—Rules of Practice

Authority: 15 U.S.C. 77f, 77g, 77h, 77h–1, 77j, 77s, 77u, 78c(b), 78d–1, 78d–2, 78*l*, 78m, 78n, 78*o*(d), 78*o*–3, 78s, 78u–3, 78v, 78w, 79c, 79s, 79t, 79z–5a, 77sss, 77ttt, 80a–8, 80a–9, 80a–37, 80a–38, 80a–39, 80a–40, 80a–41, 80a–44, 80b–3, 80b–9, 80b–11, and 80b–12 unless otherwise noted.

Section 201.36 is also issued under 28 U.S.C. 2112(a).

Notes to Subpart A (the Rules of Practice)

1. *Numbering:* Generally, the rules of practice follow the chronological flow of events from institution, hearing before a hearing officer, and Commission review. Separate provisions with respect to temporary sanctions (including temporary cease-and-desist proceedings), disgorgement, and review of self-regulatory organization determinations follow the rest of the rules.

2. *Headings:* Each rule and each major section of a rule have descriptive headings which are intended to guide a reader in searching for information on particular requirements.

3. *Topical index including timetable:* A topical index has been provided to assist persons consulting the Rules of Practice. The index is structured alphabetically by subject matter and contains cross-references to rule numbers. The index is provided as a guide only. Its contents are not dispositive and do not form any portion of the rules.

[**Note:** The contents of subpart A, the Rules of Practice, appear above in the **SUPPLEMENTARY INFORMATION** section. The Rules have not been repeated here as a cost and paper saving measure. The tables follow Subpart A.]

Cross-Reference Table 1.—Existing Rules to Proposed Rules

Existing rules (17 CFR 201.1–29)	Proposed rules
1	1.
2(a)–(e)	2.
2(d)	5.
2(e)(3)(i)(*b*)	5.
2(f)	3(a).
2(g)	2(f).
2(h)	5.
3 [Reserved]	None.
4	37.
5	7.
6(a)	8(a).
6(b)	5, 8(b)–(c).
6(c)–(d)	8(d)–(e).
6(e)	3(c), 9(e)–(f).
6(f)	8(f).
7(a)–(e)	9.
7(f)	10.
8(a)	11.
8(b)–(d)	12.
9	13.
10	14.
11(a)–(c)	15(a)–(d).
11(c)–(d)	4.
11(e)	16(a)–(c).
11(f)	15(e).
11–1	21.
12(a)	18(a).
12(b)–(c)	16.
12(d)	9(g).
13	17.
14(a)	19(a).
14(b)(1)	19(c)(1).
14(b)(2)	19(d).
14(b)(3)	5.
14(b)(3)(i)–(iii)	19(c)(4).
14(c)	19(e).
14(d)	19(b).
15(a)–(f)	22(b)–(h).
15(g)	23.
16(a)–(b)	24(a)–(b).
16(c) [Reserved]	None.
16(d)–(f)	25(a)–(c).
16(g)	4.
17(a)	26(a).
17(b)	26(c).
17(c)–(d)	26(e)–(g).
17(e)	27(a).
17(f)	24(c)–(d).
17(g)	26(h).
17(h)	26(b).
18	27(b).
19	44.
20	29.
21(a)–(b), (d)–(f)	28.
21(c)	29.
22(a)	5(e).
22(b) [Reserved]	None.
22(c)	5(f).
22(d)–(g)	31.
22(h)	32(b).
22(i)	None.
22(j)	6(a).
22(k)	6(c), 32(c).
23(a)	5(a).
23(b)	5(b), 6(b).
23(c)	5(c).
23(d)	32(a).

Cross-Reference Table 1.—Existing Rules to Proposed Rules—Continued

Existing rules (17 CFR 201.1–29)	Proposed rules
23(e)	36.
24	17 CFR 229.703.
25	33.
26	30.
27	34(b).
28(a)	34(a).
28(b)	34(c).
29	35.
17 CFR 202.8	46.

Cross-Reference Table 2.—Proposed Rules to Existing Rules

Proposed rules	Existing rules (17 CFR 201.1–29)
1	1.
2	2(a)–(e).
2(f)	2(g).
3(a)	2(f).
3(b)	None.
3(c)	6(e).
4	11(c)–(d), 16(g).
5	2(d), 2(e)(3)(i)(*b*), 2(h), 6(b), 14(*b*)(3).
5(a)	23(a).
5(b)	23(b).
5(c)	23(c).
5(e)	22(a).
5(f)	22(c).
6(a)	22(j).
6(b)	23(b).
6(c)	22(k).
7	5.
8(a)	6(a).
8(b)–(c)	6(b).
8(d)–(e)	6(c)–(d).
8(f)	6(f).
9(a)–(e)	7(a)–(e).
9(f)	6(e).
9(g)	12(d).
10	7(f).
11	8(a).
12	8(b)–(d).
13	9.
14	10.
15(a)–(d)	11(a)–(c).
15(e)	11(f).
16(a)–(d)	11(e), 12(b), 12(c).
16(e)	12(c).
17	13.
18(a)	12(a).
18(b)	None.
19(a)	14(a).
19(b)	14(d).
19(c)	14(b)(1).
19(c)(4)	14(b)(3)(i)–(iii).
19(d)	14(b)(2).
19(e)	14(c).
20	None.
21	11–1.
22(a)	None.
22(b)–(c)	15(a).
22(d)–(h)	15(b)–(f).
23	15(g).
24(a)	16(b).
24(b)	16(a).
24(c)–(d)	17(f).

CROSS-REFERENCE TABLE 2.—PROPOSED RULES TO EXISTING RULES—Continued

Proposed rules	Existing rules (17 CFR 201.1–29)
25(a)–(d)	16(d)–(f).
26(a)	17(a).
26(b)	17(h).
26(c)	17(b).
26(d)	None.
26(e)–(g)	17(c)–(d).
26(h)	17(g).
27(a)	17(e).
27(b)	18.
28	21(a)–(b), (d)–(f).
29	20, 21(c).
30	26.
31	22(d)–(g).
32(a)	23(d).
32(b)	22(h).
32(c)	22(k).
33	25.
34(a)	28(a).
34(b)	27.
34(c)	28(b).
35	29.
36	23(e).
37	4.
38–43	None.
44	19.
45	None.
46	17 CFR 202.8.
47–55	None.
56	17 CFR 240.19d–3(b).
57	None.
58	17 CFR 240.19d–3(b).
59	17 CFR 240.19d–3(c)–(g).
17 CFR 229.703	24.

PART 202—INFORMAL AND OTHER PROCEDURES

15–16. The general authority citation for part 202 continues to read as follows:

Authority: 15 U.S.C. 77s, 77t, 78d–1, 78u, 78w, 78ll(d), 79r, 79t, 77sss, 77uuu, 80a–37, 80a–41, 80b–9, and 80b–11, unless otherwise noted.

* * * * *

§ 202.8 [Removed and Reserved]

17. Section 202.8 is removed and reserved:

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

1. The general authority citation for part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l*, 78m, 78n, 78*o*, 78w, 78*ll*(d), 79(e), 79(n), 79(t), 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, unless otherwise noted.

* * * * *

2. Section 229.703 is added to read as follows:

§ 229.703 (Item 703) Incorporation by Reference.

Where rules, regulations, or instructions to forms of the Commission permit incorporation by reference, a document may be so incorporated by reference to the specific document and to the prior filing or submission in which such document was physically filed or submitted. Except where a registration or issuer is expressly required to incorporate a document or documents by reference, reference may not be made to any document which incorporate another document by reference if the pertinent portion of the document containing the information or financial statements to be incorporated by reference includes an incorporation by reference to another document. No document on file with the Commission for more than five years may be incorporated by reference except:

(a) Documents contained in registration statements which may be incorporated by reference as long as the registrant has a reporting requirement with the Commission; and

(b) Documents that the registration specifically identifies by physical location and by SEC file number reference, provided such materials have not been disposed of by the Commission pursuant to its Records Control Schedule (17 CFR 200.80f).

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

18. The authority citation for part 240 is revised to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78i, 78j, 78*l*, 78m, 78n, 78*o*, 78*o*–3, 78p, 78s, 78w, 78x, 78*ll*(d), 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

19. Sections 240.19d–2 and 19d–3 are revised to read as follows:

§ 240.19d–2 Applications for stays of disciplinary sanctions or summary suspensions by a self-regulatory organization.

If any self-regulatory organization imposes any final disciplinary sanction pursuant to section 6(b)(6), 15A(b)(7) or 17A(b)(3)(G) of the Act (15 U.S.C. 78f(b)(6), 78*o*–3(b)(7) or 78q–1(b)(3)(G)), or summarily suspends or limits or prohibits access pursuant to section 6(d)(3), 15A(h)(3) or 17A(b)(5)(C) of the Act (15 U.S.C. 78f(d)(3), 78*o*–3(h)(3) or 78q–1(b)(5)(C)), any person aggrieved thereby for which the Commission is the appropriate regulatory agency may file with the Secretary, a written motion for a stay of imposition of such action pursuant to Rule 16 of the Commission's Rules of Practice, 17 CFR 201.16.

§ 240.19d–3 Applications for review of final disciplinary sanctions, denials of membership, participation or association, or prohibitions or limitations of access to services imposed by self-regulatory organizations.

Applications to the Commission for review of any final disciplinary sanction, denial or conditioning of membership, association or participation, or prohibition or limitation with respect to access to services offered by a self-regulatory organization or a member thereof by any such organization shall be made pursuant to Rule 56 of the Commission's Rules of Practice, 17 CFR 201.56.

Dated: November 5, 1993.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93–27971 Filed 11–19–93; 8:45 am]

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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "PLUS" (Public Laws Update Service) on 202-523-6641. The text of laws is not published in the **Federal Register** but may be ordered in individual pamphlet form (referred to as "slip laws") from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202-512-2470).

H.R. 175/P.L. 103-142

To amend title 18, United States Code, to authorize the Federal Bureau of Investigation to obtain certain telephone subscriber information. (Nov. 17, 1993; 107 Stat. 1491; 2 pages)

H.R. 1345/P.L. 103-143

To designate the Federal building located at 280 South First Street in San Jose, California, as the "Robert F. Peckham United States Courthouse and Federal Building". (Nov. 17, 1993; 107 Stat. 1493; 1 page)

S. 836/P.L. 103-144

El Camino Real de Tierra Adentro Study Act of 1993 (Nov. 17, 1993; 107 Stat. 1494; 2 pages)

S. 983/P.L. 103-145

El Camino Real Para Los Texas Study Act of 1993 (Nov. 17, 1993; 107 Stat. 1496; 2 pages)

S.J. Res. 131/P.L. 103-146

Designating the week beginning November 14, 1993, and the week beginning November 13, 1994, each as "Geography Awareness Week". (Nov. 17, 1993; 107 Stat. 1498; 2 pages)

S.J. Res. 139/P.L. 103-147

To designate the third Sunday in November of 1993 as "National Children's Day". (Nov. 17, 1993; 107 Stat. 1500; 2 pages)

S.J. Res. 142/P.L. 103-148

Designating the week beginning November 7, 1993, and the week beginning November 6, 1994, each as "National Women Veterans Recognition Week". (Nov. 17, 1993; 107 Stat. 1502; 1 page)

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CFR CHECKLIST

This checklist, prepared by the Office of the Federal Register, is published weekly. It is arranged in the order of CFR titles, stock numbers, prices, and revision dates.

An asterisk (*) precedes each entry that has been issued since last week and which is now available for sale at the Government Printing Office.

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Title	Stock Number	Price	Revision Date
1, 2 (2 Reserved)	(869-019-00001-1)	$15.00	Jan. 1, 1993
3 (1992 Compilation and Parts 100 and 101)	(869-019-00002-0)	17.00	[1] Jan. 1, 1993
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190-259	(869-017-00146-5)	16.00	July 1, 1992
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300-399	(869-017-00148-1)	15.00	July 1, 1992
400-424	(869-017-00149-0)	26.00	July 1, 1992
425-699	(869-017-00150-3)	26.00	July 1, 1992
700-789	(869-017-00151-1)	23.00	July 1, 1992
790-End	(869-017-00152-0)	25.00	July 1, 1992
41 Chapters:			
1, 1-1 to 1-10		13.00	[3] July 1, 1984
1, 1-11 to Appendix, 2 (2 Reserved)		13.00	[3] July 1, 1984
3-6		14.00	[3] July 1, 1984
7		6.00	[3] July 1, 1984
8		4.50	[3] July 1, 1984
9		13.00	[3] July 1, 1984
10-17		9.50	[3] July 1, 1984
18, Vol. I, Parts 1-5		13.00	[3] July 1, 1984
18, Vol. II, Parts 6-19		13.00	[3] July 1, 1984
18, Vol. III, Parts 20-52		13.00	[3] July 1, 1984
19-100		13.00	[3] July 1, 1984
1-100	(869-019-00156-5)	10.00	July 1, 1993
101	(869-019-00157-3)	30.00	July 1, 1993
102-200	(869-019-00158-1)	11.00	[6] July 1, 1991
201-End	(869-019-00159-0)	12.00	July 1, 1993
42 Parts:			
1-399	(869-017-00157-1)	23.00	Oct. 1, 1992
400-429	(869-017-00158-9)	23.00	Oct. 1, 1992
430-End	(869-017-00159-7)	31.00	Oct. 1, 1992
43 Parts:			
1-999	(869-017-00160-1)	22.00	Oct. 1, 1992
1000-3999	(869-017-00161-9)	30.00	Oct. 1, 1992
4000-End	(869-017-00162-7)	13.00	Oct. 1, 1992
44	(869-017-00163-5)	26.00	Oct. 1, 1992
45 Parts:			
1-199	(869-017-00164-3)	20.00	Oct. 1, 1992
200-499	(869-017-00165-1)	14.00	Oct. 1, 1992
500-1199	(869-017-00166-0)	30.00	Oct. 1, 1992
1200-End	(869-017-00167-8)	20.00	Oct. 1, 1992
46 Parts:			
1-40	(869-017-00168-6)	17.00	Oct. 1, 1992
41-69	(869-017-00169-4)	16.00	Oct. 1, 1992
70-89	(869-017-00170-8)	8.00	Oct. 1, 1992
90-139	(869-017-00171-6)	14.00	Oct. 1, 1992
140-155	(869-017-00172-4)	12.00	Oct. 1, 1992
156-165	(869-017-00173-2)	14.00	[7] Oct. 1, 1991
166-199	(869-017-00174-1)	17.00	Oct. 1, 1992
200-499	(869-017-00175-9)	22.00	Oct. 1, 1992
500-End	(869-017-00176-7)	14.00	Oct. 1, 1992
47 Parts:			
0-19	(869-017-00177-5)	22.00	Oct. 1, 1992
20-39	(869-017-00178-3)	22.00	Oct. 1, 1992
40-69	(869-017-00179-1)	12.00	Oct. 1, 1992
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80-End	(869-017-00181-3)	24.00	Oct. 1, 1992
48 Chapters:			
1 (Parts 1-51)	(869-017-00182-1)	34.00	Oct. 1, 1992
1 (Parts 52-99)	(869-017-00183-0)	22.00	Oct. 1, 1992
2 (Parts 201-251)	(869-017-00184-8)	15.00	Oct. 1, 1992
2 (Parts 252-299)	(869-017-00185-6)	12.00	Oct. 1, 1992
3-6	(869-017-00186-4)	22.00	Oct. 1, 1992
7-14	(869-017-00187-2)	30.00	Oct. 1, 1992
15-28	(869-017-00188-1)	26.00	Oct. 1, 1992
29-End	(869-017-00189-9)	16.00	Oct. 1, 1992
49 Parts:			
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100-177	(869-017-00191-1)	27.00	Oct. 1, 1992
178-199	(869-017-00192-9)	19.00	Oct. 1, 1992
200-399	(869-017-00193-7)	27.00	Oct. 1, 1992
400-999	(869-017-00194-5)	31.00	Oct. 1, 1992
1000-1199	(869-017-00195-3)	19.00	Oct. 1, 1992
1200-End	(869-017-00196-1)	21.00	Oct. 1, 1992
50 Parts:			
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600-End	(869-017-00199-6)	20.00	Oct. 1, 1992
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[1] Because Title 3 is an annual compilation, this volume and all previous volumes should be retained as a permanent reference source.

[2] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[3] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

[4] No amendments to this volume were promulgated during the period Apr. 1, 1990 to Mar. 31, 1993. The CFR volume issued April 1, 1990, should be retained.

[5] No amendments to this volume were promulgated during the period Apr. 1, 1991 to Mar. 31, 1993. The CFR volume issued April 1, 1991, should be retained.

[6] No amendments to this volume were promulgated during the period July 1, 1991 to June 30, 1993. The CFR volume issued July 1, 1991, should be retained.

[7] No amendments to this volume were promulgated during the period October 1, 1991 to September 30, 1992. The CFR volume issued October 1, 1991, should be retained.